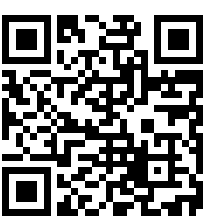

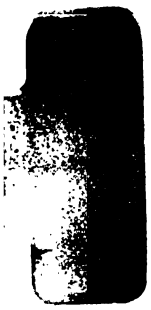

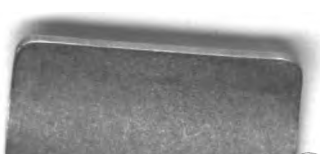

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MINNESOTA
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THE CASE OF THE APPAM[1]

On February 1st a German prize crew brought the British steamer Appam into Newport News and asked for her internment. The British government at once put in a claim for the restoration of the vessel on the ground that the ship could not be granted an asylum in an American port without a violation of neutrality. The British owners of the ship likewise brought suit in the Federal District Court to recover possession of the ship and cargo. The German government protested to the Department of State against the institution of judicial proceedings against the ship. The Appam, it was contended, was a legitimate prize and as such was entitled to enter and to remain as long as she pleased in an American port. The Secretary of State, however, took the position that the Appam did not fall within the express provisions of the Prussian treaty and that she was entitled to those privileges only which were generally granted to prizes, "namely, to enter neutral ports only in case of stress of weather, want of fuel and provisions or necessity of repairs, but to leave as soon as the cause of their entry has been removed." Mr. Lansing accordingly declined to interfere with the proceedings before the court. The question of the court's jurisdiction, he maintained, "was one for judicial ascertainment and not for executive determination." Meanwhile the District Court proceeded with the hearing of the case.

1. (1916) 234 Fed. Rep. p. 389.

The judgment of Judge Waddill is a sweeping refutation of the whole German contention:

> The court's conclusion is that the manner of bringing the Appam into the waters of the United States, as well as her presence in those waters, constitutes a violation of the neutrality of the United States; that she came in without bidding or permission; that she is here in violation of law; that she is unable to leave for lack of a crew, which she cannot provide or augment without further violation of neutrality; that in her present condition, she is without lawful right to be and remain in these waters; that she, as between her captors and owners, to all practical intents and purposes, must be treated as abandoned and stranded upon our shores; and that her owners are entitled to restitution of their property, which this court should award, irrespective of the prize court proceedings of the court of the imperial government of the German Empire; and it will be so ordered.

The case raises a number of most interesting questions in international law: (1) As to right of entrance and asylum for German prizes in American ports under the Prussian treaties. By Art. 19 of the treaty of 1799,[2] renewed in part by Art. 12 of the treaty of 1828, it was provided that "the vessels of war, public and private of both parties, shall carry freely wheresoever they please, the vessels and effects taken from their enemies * * * nor shall such prizes be arrested, searched or put under legal process when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions." In construing this article, the Court follows closely the views of the Secretary of State in laying down that in the light of contemporary interpretation of similar clauses in other treaties,[3] "prizes cannot be brought into the waters of the United States for the purpose of laying up by a prize master but can only be brought in by the capturing vessel herself, or a war vessel acting as convoy to such prize and then not for an indefinite period, but for the temporary causes recognized by international law."

But in restricting the enjoyment of the hospitality of the port to prizes under escort only, the Court, it is submitted, is observing the letter rather than the spirit of the treaty.[4] During the wars of the 18th century it was the recognized custom for warships to place prize crews on board captured vessels and send them into

2. Malloy, Treaties, Conventions, etc. vol. 2, p. 1492.
3. Moore, Digest of Int. Law. vol. 7, p. 935-6.
4. 16 Columbia Law Rev. Nov. 1916, p. 587.

neutral ports for sequestration. From the standpoint of the principles of neutrality it did not make a particle of difference whether the prize came in under convoy of the captor or in charge of a prize crew. The Prussian treaty, it is reasonable to assume, was made with a view to preserve this well understood right and should be interpreted in accordance with the international practice of that day. And such in fact has been the construction which the United States courts have placed upon the corresponding article of the treaty of Amity and Commerce with France in 1778.[5] In *Salderondo v. The Nostra Signora del Carmino,*[6] the captured ship was brought in by a prize crew and yet the Court ruled that the 17th article of the treaty was conclusive in excluding the jurisdiction of the Court. The decision in *Reid v. The Vere*[7] was to a similar effect. In neither of these cases was it even suggested that the presence of the capturing ship was essential to the enjoyment of the right of sequestration. The Court assumed without question that the protection of the treaty was intended to operate as much to the advantage of the prize crew as to the original captor.

The Court is on somewhat stronger ground, it would seem, in maintaining that the treaty does not grant the right to a permanent asylum in American ports. The restricted interpretation of the Court on this point is not only warranted by the express language of the treaty itself, but is also supported by the opinion of President Jefferson and of other public officials.[8] It is interesting to observe, moreover, that in the two above cited cases, the captors expressly pleaded that the prizes were only temporarily in the waters of the United States in the course of their voyage to the home port for adjudication. There is, in fact, an essential difference in principle between a temporary sojourn and a permanent deposit of a prize in a neutral port. For the neutral to grant the former is a mere act of courtesy such as is extended to all public ships. But to permit the latter is essentially an unneutral act; it is equivalent in effect to a use of the territory as a base of hostile operations since it not only preserves the prize from the danger of recapture, but it relieves the belligerent of the burden of taking the prize to a home port for adjudication.[9]

5. Ibid.
6. (1794) Bee 43, 21 Fed. Cas. No. 12,247.
7. (1795) Bee 66, 20 Fed. Cas. No. 11,670.
8. Moore, Digest of Int. Law. vol. 7, p. 935-6.
9. "There is high authority for the position that a prize may be carried

But apart from the treaty, the further question arises: What are the rights of the Appam under general international law? Has she a right to enter and find a refuge in the waters of the United States? Upon this point the Court declares:

> The generally accepted doctrine now is that enlightened nations do not allow the use of their ports as asylum or permanent rendezvous of prizes of other nations captured during war. To do so would tend to involve the neutral powers in conflict with nations with whom they are at peace; and to extend the use of their ports to all belligerents alike, would not relieve the objection, as the opposing vessels so using them might quickly cause conflict in neutral territory. The policy of the United States has been, and is, consistently opposed to such use of their waters and harbors; and the history and origin of their neutrality laws, and the circumstances of their passage, clearly indicate a purpose to prohibit the use of their ports for the laying up of belligerent prizes.

In support of this position, the Court appeals to the provisions of the Hague Convention of 1907[10] in regard to prizes and to the frequent declarations of American officials and international jurists, as affording conclusive evidence of the non-existence of a right of asylum according to international law.

But the judgment of the Court, it is again submitted, is open to serious question both from the standpoint of law and practice. The provisions of the Hague Convention on this point have no direct application to the case.[11] By Art. 28 it is expressly provided that the convention shall not apply except as between con-

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into a neutral port and there sold, but considerations of expediency should lead the neutral sovereign to exercise his undoubted right of prohibiting such sale. It would be a breach of neutrality to permit a port to be made a cruising station for a belligerent or a depot for his spoils and prisoners." Wirt, Att. Gen. 1828, 2 Att. Gen. Op. 86. Moore, Digest of Int. Law, vol. 7, p. 936.

10. Art. 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions. It must leave as soon as the circumstances which justified its entry are at an end. If it does not the neutral power must order it to leave at once. Should it fail to obey the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew. Art. 22. A neutral power must similarly release a prize brought into one of its ports under circumstances other than those referred to in Art. 21. Art. 23. A neutral power may allow prizes to enter its ports and roadsteads whether under convoy or not when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports. If the prize is convoyed by a war ship, the prize crew may go on board the convoying ship. If the prize is not under convoy, the prize crew are left at liberty.

11. The Senate rejected Art. 23 on the recommendation of the American delegation to the Hague.

tracting parties and then only if all belligerents are parties to the convention. The Senate of the United States ratified Arts. 21 and 22 of the convention but as England was not a party to the convention, it is manifest that she has no legal claim against the United States, save in so far as the Convention may be declaratory of the general principles of international law.

What, then, is the general rule of law in respect to the exclusion of prizes. Upon this point it may be said that the practice of nations has varied. During the Napoleonic wars, the British navy frequently carried its prizes into neutral ports and the legality of such acts was clearly recognized.[12] The practice was continued during the Crimean war though subject to stricter limitations in favor of all neutral states.[13] The British naval regulations of 1888 also provide that prizes may be carried into neutral ports subject to the consent of the neutral nation.[14] The more recent policy of the English government, however, has been to deny a right of asylum in neutral territory. This policy has been followed during the Franco-Prussian, Spanish-American, and Russo-Japanese wars.[15]

The practice of the United States has been far from consistent. During the eighteenth and nineteenth centuries the United States government permitted prizes to be brought into American ports and sold even prior to condemnation.[16] This permission, however, was looked upon as a favor, not as a right, save in the case of express treaty obligations.[17] In later years, however, there has been a marked tendency to follow the example of England in the matter of exclusion, but it is only in exceptional cases that the government has absolutely refused the privilege of entrance.[18] The majority of American jurists have recognized the legality of the practice of admitting prizes though they have generally deplored its continuance.[19] The United States courts

12. The Flad Oyen, (1799) 1 C. Rob. 135. The Henrick and Maria, (1799) 4 C. Rob. 43. The Peacock, (1802) 4 C. Rob. 185.
13. The Polka, (1854) Spinks Prize Rep. 447.
14. Manual of Naval Prize Law. p. 85.
15. Naval War College, Int. Law Situations, 1905, p. 68.
16. Consul of Spain v. Consul of Great Britain, (1808) Bee 263, 6 Fed. Cas. No. 3138.
17. Moore, Digest of Int. Law, vol. 7, p. 936. 16 Columbia Law Rev. Nov. 1916. p. 587.
18. Naval War College, Int. Law Situations, 1908, p. 75. Moore, Digest of Int. Law, vol. 7, p. 938.
19. Naval War College, Int. Law Situations, 1908, p. 63.

have laid down the same general principle of the qualified right of admission.[20]

The general neutral practice, says Dana, has been tending toward refusing the privilege of entrance of prizes except in cases of necessity.[21] The practice of nations in the Spanish-American and Russo-Japanese wars tends to confirm Mr. Dana's conclusions. The declarations of neutrality in these wars are practically unanimous in forbidding the entrance of prizes into neutral ports except in cases of stress of weather or lack of provisions.[22] Brazil, Denmark, France, Great Britain, Italy, Japan, Holland, Portugal, China, and Sweden all issued proclamations to this effect. Similar proclamations were issued by most of the neutral nations at the outbreak of the present war. But the United States is the great outstanding exception to the rule. In its proclamation of neutrality no mention whatever is made of the question of prizes.[23] The Executive of the United States evidently did not consider its ratification of the Hague Convention as furnishing the measure of its legal responsibility in the matter of prizes.

In view of these historical precedents, it seems safe to conclude that the views of the District Court are considerably in advance of the generally accepted principles of international law. The doctrine laid down by the Court is undoubtedly gaining in favor, but it has not yet received the confirmation of all members of the family of nations.[24] In the absence of a general declaration of the United States to the contrary, it would seem that the German captors were entitled to assume that they had the right to bring in their prize for sequestration.[25]

Closely associated with the question of the admission of prizes

20. Jecker v. Montgomery, (1851) 13 Howard, 498.
21. Naval War College, Int. Law Situations, 1908, p. 67.
22. Ibid. p. 70.
23. Supplement to the Amer. Jour. Int. Law, vol. 9, p. 110.
24. The question of the admission of prizes, is at present essentially a political issue. It is a question of the conflicting interests of England and of certain of the larger continental states. Thanks to her vast imperial domain, England is able to find convenient ports into which to bring her prizes. She has a great naval advantage of which she is anxious to make full use. But the other nations are not so favorably situated; they are forced to look to neutral ports as a temporary refuge for their prizes. Under these circumstances it is exceedingly difficult to reach any general agreement upon the question. From the standpoint of international law, the exclusion of prizes would undoubtedly be a great gain, but from the standpoint of naval expediency, it would appear to be a dangerous principle for the United States government to adopt.
25. The right of asylum, Attorney General Cushing declared, "is presumed where it has not been previously denied." Cushing, Atty. Gen. 1855, 7 Att. Gen. Op. 122.

is the further question of the right of a belligerent court to pass judgment upon a vessel within the jurisdiction of a neutral country. In opposition to the German contention that title to the prize was acquired by right of capture, the Court laid down that the title did not pass until a decision had been reached by the courts of the captor condemning the vessel as lawful prize and that such decision could not legally take place in the captor's country while the prize was lying in a foreign port. But however advantageous the principle here asserted may be in theory, the decision of the Court, it may safely be asserted, has gone very much further than any previous adjudications of the courts. The general attitude of the American as also of the English courts[26] has been strongly opposed to the exercise of jurisdiction over war prizes in foreign ports. Nevertheless, they have clearly recognized the validity of such jurisdiction on more than one occasion. In the case of *Jecker v. Montgomery,*[27] the Court held that although it was the duty of the American captor to bring his prize to a home port for adjudication, there might nevertheless be valid reasons for carrying it into neutral waters. And in *Arabella v. Madeira,*[28] Justice Story declared that according to both English and American precedents, the courts of a belligerent country could render judgment concerning a captured ship lying in a neutral port. The legality of the practice has likewise been affirmed by leading authors on international law, though many of them deprecate the practice.[29] In view of these decisions, it is difficult to accept the opinion of the court in respect to the invalidity of the proceedings before the German prize court upon the Appam. The decisions of a prize court would undoubtedly take on a much higher and more authoritative character if the judgment of Judge Waddill should prevail, but meantime it must be confessed that the United States courts alone can scarcely lay down a principle which will bind foreign governments and courts in opposition to the general practice of nations.

The final question arises as to the jurisdiction of the United States courts over the prize. As the entrance of the Appam into a United States port to escape capture constituted in the opinion of the court, a violation of neutrality, there could be no doubt

26. The Henrick and Maria, (1799) 4 C. Rob. 43.
27. (1851) 13 Howard, 498.
28. 2 Gallison, 368, 1 Fed. Cas. No. 501.
See also The Invincible, (1814) 2 Gallison, 29, 39. Hudson v. Guestier, (1808) 4 Cranch, 293.
29. Naval War College, Int. Law Situations, 1908, p. 62.

as to the right of a United States court to vindicate the neutrality of the country by entertaining an action for the restoration of the ship to the original owners. The opinion of the court upon this point is based on various alleged precedents, none of which seem to be particularly in point with the exception of the case of *Queen v. The Chesapeake.*[30] In this case a British colonial prize court laid down that "for a belligerent to bring an uncondemned prize into a neutral port to avoid recapture is an offense so grave against a neutral state that it *ipso facto* subjects that prize to forfeiture."

The judgment of the Court in that case goes much further than any decision of an American court. In the case of *Hopner v. Appleby,*[31] the Court held that the courts of a neutral nation have no right to decide upon the lawfulness or unlawfulness of a capture made by one belligerent from another except in the case of a violation of neutrality by capture of the prize in its territorial waters or by fitting out of the capturing ship in one of its ports. And there are many other decisions to a similar effect.[32] The United States courts have hitherto never gone so far as to assert that the mere entrance of a prize into an American port would violate the neutrality of the United States and hence afford just ground for the exercise of jurisdiction on the part of the American courts. The Appam, as Mr. James Brown Scott has pointed out,[33] did not come in as a trespasser but in assertion of a right under the Prussian-American treaty. So long as the Department of State had not ruled to the contrary, the prize master was justified in believing that he enjoyed the right of entrance and sequestration. The Department of State, moreover, not only permitted the Appam to enter without question, but distinctly informed the British ambassador that her entrance did not constitute a violation of American neutrality. In view of these circumstances, it is difficult to see how the mere fact of entrance could give rise to an assertion of jurisdiction on the part of a United States court.[34] A continued sojourn after official notice to depart would doubtless constitute a violation of neutrality

30. (1864) 5 Nova Scotia Reports, 797.

31. (1828) 5 Mason, 71, 75.

32. The Mary Ford, (1798) 3 Dallas, 188, 198. The Josefa Segunda, 5 Wheaton, (1820) 338, 357. Hudson v. Guestier, (1808) 4 Cranch, 293.

33. Scott, The Case of the Appam. 10 Amer. Jour. Int. Law, 809.

34. In Hudson v. Guestier the Supreme Court declared that "a vessel captured as prize of war is then while lying in the port of a neutral still in the possession of the sovereign of the captor and that possession cannot

sufficient to warrant the intervention of the courts, but the occasion for such action has not yet arisen.[35]

In short, the decision of Judge Waddill on the matter of neutral rights and obligations would appear to be considerably in advance of the accepted principles of international law. He has been making rather than applying the law of nations. The principles he has laid down are excellent in themselves and some of them will doubtless be incorporated into the body of international law in the not distant future. But it is scarcely possible for a neutral court or government to modify the rules of international law to the disadvantage of one or the other of the parties during the course of a world-wide war. Inasmuch, therefore, as the interpretation of the Prussian treaty is in doubt, and the entrance of prizes into neutral ports is not expressly forbidden by international law, it would seem to have been the wiser policy for the court to have released the Appam until such time at least as the United States government should deny to it the further right of asylum.[36]

At the same time, it must be admitted that this government has gotten itself into an embarrassing situation by allowing its treaties and neutrality laws to fall so far behind the more enlightened practices of other nations. The government at Washington cannot well assert its full legal rights against all the belligerents unless it is prepared to live up to the strictest obligations of neutrality as set forth in the writings of its own international jurists, the general orders of the Navy Department,[37] the resolutions of the Senate and the general precepts of the Court. It is sincerely to be hoped that the decision of the District Court in the case of the Appam may awaken Congress to a realization of the need for a thorough revision of the neutrality laws if the country is to avoid further complications with foreign states. The Courts should not be obliged to assume the difficult task of bringing the neutrality laws of the United States up to date.

C. D. ALLIN.

University of Minnesota.

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be rightfully divested." 4 Cranch, 293.

35. Scott, The Case of the Appam. 10 Amer. Jour. Int. Law, 809.

36. 16 Columbia Law Review, Nov. 1916, p. 588.

37. General Order 492 issued by the Navy Department in 1898, states, Art. 20: Prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port in which a prize court may be sitting.

THE RULES OF THE CONFLICT OF LAWS APPLICABLE TO BILLS AND NOTES

A Study in Comparative Law

Much uncertainty exists in this country concerning the rules of the Conflict of Laws applicable to Bills and Notes. In England the law on the subject was codified by the Bills of Exchange Act. The Negotiable Instruments Law fails to lay down rules for the Conflict of Laws and thus leaves the matter as it was before. Through the unification of the law of Bills and Notes, which has resulted from the adoption of the Negotiable Instruments Law by practically all of the states of this country, the conflicts that will arise with respect to such instruments in the future will result, in the main, where the rules of the Negotiable Instruments Law of this country come into collision with those of a foreign nation. Though there are some important differences between the Negotiable Instruments Law and the English Bills of Exchange Act it may be said that there exists, on the whole, quasi-uniformity in the law of Bills and Notes of the English speaking countries. Wide divergencies continue to exist, however, between the Anglo-American system and that of other countries, which is embodied now in the Convention of the Hague, of June, 1912. As the prospect that these differences will disappear in the course of the next half century is quite remote, a study of the rules of Private International Law which should govern where the rules of the Anglo-American system come into conflict with those of the Convention of the Hague is not without practical interest. In view of the many uncertainties in our law a codification of the rules of the Conflict of Laws on the subject would be highly desirable so that a greater uniformity of decision might be obtained in this regard. Such a codification should be undertaken, if possible, with a full knowledge of the best thought on the subject in other countries. It is the object of the present article to make such a preliminary investigation in the hope that it may throw some light upon the actual problems which will demand solution in any attempted codification of the Conflict of Laws relating to Bills and Notes. The ends of

this article will be subserved best if the comparative study be limited to those continental countries which have given, on the whole, most thought to the study of the subject under consideration. These are, beyond question, France, Germany, and Italy. The discussion of the law of other foreign countries, excepting that of England, would tend to obscure the main issues without adding anything especially new or helpful.

I. Capacity

Neither the Negotiable Instruments Law, nor the Bills of Exchange Act, nor the Hague Convention has attempted to lay down a uniform municipal rule governing capacity. In England and the United States the ordinary rules relating to capacity apply also to bills and notes.[1] On the continent there were formerly many special restrictions affecting the capacity of parties to obligate themselves by means of bills and notes, and in a few countries some of these restrictions still subsist.[2] The principal conflicts that may arise will relate to the capacity of married women and infants. What should be the rule in the Conflict of Laws governing their capacity to bind themselves by bill or note?

1. *English law:* The Bills of Exchange Act[3] does not answer the above question. The general rule governing commercial contracts therefore applies. What the English law on the subject is cannot be stated with certainty. There appears to be only a single case throwing direct light upon the subject, that of *Male v. Roberts.*[4] In that case an action was brought in England to recover a sum of money advanced in Scotland to an infant who appears to have been domiciled in England. Lord Eldon, at Nisi Prius, held that the defense of infancy depended upon the lex loci contractus, the law of Scotland. At the time the decision was rendered, the English law seemingly favored the view, both with respect to ordinary commercial contracts and contracts of

1. For a comparative statement of the municipal law relating to capacity, see Weiss, Traité de Droit International Privé, 2nd ed., IV., pp. 439-440; Ottolenghi, La Cambiale nel Diritto Internazionale, pp. 43-44; Diena, Trattato di Diritto Commerciale Internazionale, III, pp. 42-44.
2. So, for example, officers in the active army in Austria. See, Jettel, Handbuch des internationalen Privat-und Strafrechts, p. 117.
3. Section 72 (2) lays down the rule that the "interpretation" of the drawing, indorsement, acceptance or acceptance supra protest of a bill is determined by the law of the place where such contract is made. But this term is not comprehensive enough to include "capacity." See, Lafleur, The Conflict of Laws in the Province of Quebec, p. 184.
4. (1800) 3 Esp. 163.

marriage, that the law of the place where a contract was entered into determined the capacity of the parties.[5] A noticeable change in the English cases appears during the latter half of the nineteenth century, indicating a decided tendency to adopt the continental view, which regards the question of capacity as belonging to the personal law and as subject, therefore, to the lex domicilii or the lex patriae.[6] In the case of *Sottomayor v. De Barros*[7] the Court of Appeal per Cotton, J. says: "As in other contracts, so in that of marriage, personal capacity must depend on the law of the domicile." And this rule is said to be "a well recognized principle." In *Cooper v. Cooper*[8] the Lord Chancellor, Lord Halsbury, makes the categorical statement that "The capacity to contract is regulated by the law of domicile." These statements were mere dicta, as both cases related to marriage. Foote[9] feels, nevertheless, that the dictum of the Court of Appeal in *Sottomayor v. De Barros* "has unsettled the whole subject, if, indeed, it has not gone further, and established the right of the lex domicilii to decide all questions of capacity for every purpose."

The recent cases of *Ogden v. Ogden*[10] and *Chetti v. Chetti*[11] seem to support the lex loci contractus, but these cases, likewise, involve capacity for marriage and it is not clear that the statements were intended to apply to ordinary mercantile contracts.

5. Lord Stowell expressed this view forcibly in Dalrymple v. Dalrymple, (1811) 2 Hagg. Cons. 54, a case involving capacity for marriage, in the following words: "It is an indispensable rule of law, as exercised in all civilized countries, that a man who contracts in a country, engages for a competent knowledge of the law of contracts in that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself, and not attempt to throw them upon the other party, who has engaged under a proper knowledge and sense of the obligation which the law would impose upon him by virtue of that engagement."

In another case (Ruding v. Smith, 1821, 2 Hagg. Cons. 371) Lord Stowell expressly guarded himself as being understood as favoring the lex domicilii. "I do not mean to say," he says, "that Huber is correct in laying down as universally true, that 'personales qualitates, alieni in certo loco jure impressas, ubique circumferri, et personam comitari,' that a man, being of age in his own country, is of age in every other country, be the law of majority in that country what it may."

6. In 1860 Sir Creswell still laid down the old rule regarding capacity for marriage, stating in general terms that the capacity to contract is subject to the lex loci contractus. Simonin v. Mallac, 1860, 2 Sw. & Tr. 67; 29 L. J. Mat. 97; 6 Jur. (N. S.) 561; 2 L. T. 327.

7. (1877) 3 P. D. (C. A.) 1, at p. 5; 44 L. J. P. 23; 3 P. D. 1; 37 L. T. 415; 26 W. R. 455.

8. (1888) 13 App. Cas. H. L. Sc. 88, at p. 99; 59 L. J. 1.

9. Foote, Private International Jurisprudence, 4th ed., pp. 338-339.

10. (1908) P. (C. A.) 46; 77 L. J. P. 34; 97 L. T. 827; 24 T. L. R. 94.

11. (1909) P. 67. 78 L. J. P. 23; 99 L. T. 885; 55 S. J. 163; 25 T. L. R. 146.

The absence of recent decisions on the question of commercial capacity and the uncertain pronouncements on the subject by the English courts in connection with marriage contracts make it impossible to state what the English law actually is. Westlake[12] is of the opinion that the net result of the English decisions supports the view that the law of domicile governs the capacity to contract, except that in marriage contracts, the lex loci celebrationis must also be satisfied. Dicey[13] concludes, on the other hand, that the rule laid down by Lord Eldon in *Male v. Roberts* remains unaffected by the later English cases, and that the capacity to enter commercial contracts is probably to be determined by the law of the country where the contract was made.

2. *American Law:* The American law is in a somewhat less uncertain state than the English. As the commercial life of the nation grew, the lex domicilii was found inconvenient, and was discarded as inconsistent with our conditions, at least as regards married women.[14] The prevailing rule thus became the lex loci contractus.[15] A remnant of the lex domicilii is found in those decisions which hold that the courts of the domicile of an infant[16]

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12. Private International Law, 5th ed., pp. 43, 46-48.
13. Conflict of Laws, 2nd ed., Rule 149, exception 1, p. 538.
14. "We do not think the continental rule applicable to our situation and condition. A state has the undoubted right to define the capacity or incapacity of its inhabitants, be they residents or temporary visitors; and in this country where travel is so common, and business has so little regard for state lines, it is more just, as well as more convenient, to have regard to the laws of the state of contract as a uniform rule operating on all contracts, and which the contracting parties may be presumed to have had in contemplation when making their contracts than to require them, at their peril, to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all." Deemer, J., in Nichols & Shepard Co. v. Marshall, (1899) 108 Iowa, 518, 79 N. W. 282.
15. Nichols & Shepard Co. v. Marshall, (1899) 108 Iowa 518, 79 N. W. 282; International Harvester Co. v. McAdams, (1910) 142 Wis. 114. 124 N. W. 1042; Thompson v. Taylor, (1901) 66 N. J. Law 253; 49 Atl. 544; 54 L. R. A. 585; 88 Am. St. Rep. 485; Bell v. Packard, (1879) 69 Me. 105; 31 Am. Rep. 251; Milliken v. Pratt, (1877) 125 Mass. 374; 28 Am. Rep. 241.

Story preferred already the lex loci contractus in his famous work on the Conflict of Laws and contributed largely to the adoption of the rule in this country. In Section 102 of his treatise he says, "Secondly,: As to acts done, and rights acquired and contracts made in other countries (than the place of domicile), touching property therein the law of the country where the acts are done, the rights are acquired, or the contracts are made, will generally govern in respect to the capacity, state, and condition of persons."

16. International Text Book Co. v. Connelly, (1912) 206 N. Y. 188; 99 N. E. 722. The court in this case, per Vann, J., said, "We think that the

or a married woman[17] may decline to enforce their contracts entered into in a foreign state and valid under the law of such state, when their enforcement would contravene the established policy of the forum having for its object the protection of infants and married women.

The same rule applies where the contract is made by correspondence.[18] The law of the place of payment, or the law of the state with reference to which the parties may have intended to contract, is of no consequence.[19]

Whether the above rules apply to infants' contracts can not be stated definitely. *Thompson v. Ketcham*[20] appears to be the only case involving the question. This case was decided, however, upon its second appeal to the Supreme Court of New York, on a question of evidence. On the first appeal the plea of infancy was held to be controlled by the law of the place of performance, and it seems that Chancellor Kent, who wrote the

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facts stated show that the contract wherever made was to be performed by both parties substantially in this state and that it should be governed by its laws. Our courts will not enforce the contract of an infant against him, even if technically it was completed by acceptance in another state, when his promise was not only made here but entire performance by one party and substantial performance by the other was to be made here. Otherwise it would be easy to deprive an infant of the protection which our law affords him on grounds of public policy."

17. First National Bank v. Shaw, (1902) 109 Tenn. 237; 70 S. W. 807; 59 L. R. A. 498; 97 Am. St. Rep. 840; Armstrong v. Best, (1893) 112 N. C. 59; 17 S. E. 14; 25 L. R. A. 188; 34 Am. St. Rep. 473.

18. Milliken v. Pratt, (1877) 125 Mass. 374; 28 Am. Rep. 241; Thompson v. Taylor, (1901) 66 N. J. L. 253; 49 Atl. 544; 54 L. R. A. 585; 88 Am. St. Rep. 485.

19. Cockburn v. Kingsley, (1913) 25 Colo. App. 89; 135 Pac. 1112; Garrigue v. Kellar, (1905) 164 Ind. 676; 74 N. E. 523; 69 L. R. A. 870; 108 Am. St. Rep. 324; Campbell v. Crampton, 18 Blatchf. 150; Hager v. Nat. German American Bank, (1898) 105 Ga. 116; 31 S. E. 141; but see Mayer v. Roach, (1909) 77 N. J. L. 681; 75 Atl. 235; Basilea & Calandra v. Spagnuola, (1910) 80 N. J. L. 88; 77 Atl. 531.

20. (1809) 4 Johns. 285; (1811) 8 Johns. 189.

In this case suit was brought in New York upon a note executed in Jamaica, the defense being infancy. The judge charged the jury that as the contract was made in Jamaica, it must be governed by the laws of that island, and as there was no proof that the laws of Jamaica protect infants against such contracts, the plaintiff was entitled to recover. The jury accordingly found a verdict for the plaintiff. The Supreme Court reversed the judgment on the ground that the testimony in the case showed the note to be payable in New York on the arrival of the parties there, so that the law of New York would govern. "For, it is a well settled rule," said the learned Court, "that where a contract is made in reference to another country in which it is to be executed, it must be governed by the laws of the place where it is to have its effect." (4 Johns, at p. 288). When the case came again before the Supreme Court the parol testimony that the payment of the note was to be made in New York was held inadmissible. The defendant not having proved the law of Jamaica, judgment was rendered in favor of the plaintiff.

opinion of the court, when the case came before it the second time, concurred in that view.[21]

The suggestion has been made that, inasmuch as infants' contracts are not void, but voidable only, the defense of infancy being in the nature of a privilege granted to the infant, these cases do not involve a question of capacity in any true sense, but the *obligation* of the contract, which, in accordance with the general weight of authority in this country, is controlled by the law of the place of performance.[22] There is no decision, however, which sanctions such a distinction. The question is actually regarded by the English and American courts as one relating to capacity.

Where the question concerns not so much the consequences of infancy as the fact of infancy itself, the lex domicilii enters as a third factor to complicate the problem. Assuming that the lex loci contractus governs the consequences of the plea of infancy, does the same law decide also whether or not a person is of age? Where a party has reached the age of majority under the local law, the defense that he is still a minor under the lex domicilii would probably be denied. It is more doubtful whether, in the converse case, that is, where the party is a major under the law of his domicile, but is still a minor under the law of the place of contracting, the defense of infancy could be set up. There are dicta, but no square decisions, to the effect that the law of the place where the contract was entered into should control.[23]

3. *French Law.*[24] The capacity of French subjects is determined by French law irrespective of the place where the bill or

21. "The lex loci is to govern, unless the parties had in view a different place, *by the terms of the contract.* Si partes alium in contrahendo locum respexerint. This is the language of Huber. Lord Mansfield, in Robinson v. Bland, (2 Burr. 1077) says, 'The law of the place can never be the rule where the transaction is entered into with an *express* view to the law of another country, and that was the case with the contract in that cause.'" Kent. Ch. J., 8 Johns., at p. 193.

22. Parmele, in Wharton's Treatise on the Conflict of Laws, 3d ed., p. 911; also in note 26 L. R. A. (N. S.), at page 769. But see Minor, Conflict of Laws, p. 149, note.

23. See Andrews v. His Creditors, (1838) 11 La. 464; Phoenix Mut. Life Ins. Co. v. Simons, 52 Mo. App. 357; Huey's Appeal, (1854) 1 Grant's Cas. 51. See also Wharton, 3d ed., pp. 264-265.

A number of cases which rejected the lex domicilii as determining the status of a party as a major involved the question of the party's capacity to sue (Gilbreath v. Bunce, (1877) 65 Mo. 349) or to control a judgment (Harris v. Berry, (1884) 82 Ky. 137) and not ordinary commercial capacity.

24. Since the days of the statutists the view has generally prevailed on

note is executed or payable.[25] The personal (national) law is applied also to foreigners. A party can not avail himself of his foreign personal law if he has fraudulently concealed the same, or if its application would contravene the public policy of France.[26] The courts have tended to disregard the foreign personal law in favor of the lex loci contractus, also, when the interests of a Frenchman, who had exercised due care, would be prejudiced by its application.[27]

4. *German Law:* The German law is found in Article 84 of the German Exchange Law of 1849, which reads as follows:

"The capacity of a foreigner to incur liabilities under exchange law is to be decided according to the law of the state to which he belongs. Nevertheless, a foreigner, incapable of contracting by exchange law according to the law of his own country, is liable within the Empire (Inland), if he incur such liabilities, in so far as he is so capable according to inland law."[28]

This rule has now become the general rule governing the Conflict of Laws, for Article 7 of the Law of Introduction of the Civil Code provides:

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the continent that the personal law, formerly the lex domicilii, to-day more commonly the law of nationality (lex patriae), should determine both the status and the contractual capacity of parties.

For a discussion of the views of the early jurists, see Lainé, Introduction au Droit International Privé, II pp. 116-198; Burge, Commentaries on Colonial and Foreign Laws, new ed., pp. 471-474; Story, Conflict of Laws, 8th ed., pp. 69-84.

In the event of a change of domicile the more general opinion favored the law of the actual domicile at the time of contracting and not that of the domicile of origin. See Lainé, II, pp. 199-217. So also the modern authors. See Savigny, Private International Law, Guthrie's translation, p. 355; v. Bar's Private International Law, Gillespie's translation, pp. 317-318.

25. Code Civil, Art. 3.

26. Weiss, Traité de Droit International Privé, 2d ed., IV, p. 442.

27. Cass. Jan. 16, 1861 (D. 1861, 1, 193), App. Bordeaux, Apr. 11, 1906 (33 Clunet 1119); App. Lyon, Apr. 30, 1907 (35 Clunet 141). See also, Vincent et Penaud, Dictionnaire de Droit International Privé, pp. 339-340, Weiss, IV, pp. 442-443, note; Lyon-Caen et Renault, Traité de Droit Commercial, 4th ed., IV, pp. 542-543, note.

28. The same provision is found in the Hungarian Law of 1876 (Art. 95); the Scandinavian Law of 1880 (Art. 84); the Swiss Law of Obligations of 1881 (Art. 822); the Commercial Code of Servia (Art. 168); the Russian Law on Bills and Notes (Art. 82), and the law of Brazil of 1908 (Art. 42). See, Weiss, IV, p. 443.

The exception to the application of the personal law was adopted in Germany only after a long debate at the Conference of Leipzig, on grounds of commercial convenience, by a vote of 10 to 9. It was aimed primarily at the special incapacities relating to bills and notes which existed in many of the continental states. The wording of the exception in favor of the lex loci contractus was couched, however, in such broad terms as to cover all kinds of incapacity, general or special. See, Staub, Kommentar zur allgemeinen deutschen Wechselordnung, 3d ed., Art. 84; Meili, Internationales Civil- und Handelsrecht, II, pp. 327-329.

"The business capacity of a person (Geschäftsfähigkeit) is adjudged according to the laws of the state to which he belongs.

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"If a foreigner enters into a legal transaction in this country as to which he is not competent, or is restricted in his capacity, he is as to such transactions to be regarded as competent in so far as he, under the German laws, would be competent to act. This provision does not apply to transactions relative to family rights and to rights of inheritance, as well as to transactions disposing of real estate in a foreign country."[29]

The above concession in favor of the lex loci contractus is restricted to transactions entered into in Germany.[30] Whenever the contract is executed in a foreign country, the national law of the party in question will control without qualification. This is true though the law of such country should make a similar concession in favor of the lex loci contractus as the German law.[31] Where the national law has adopted the lex domicilii as the rule governing capacity, and the domicile of the party is in Germany, German law will be held to control.[32]

5. *Italian Law:* According to Article 6 of the Preliminary Dispositions of the Civil Code, "The status and the capacity of persons and the family relations are regulated by the law of the state of which they are subjects."

Article 58 of the Commercial Code provides, however, that "The form and the essential requisites of commercial obligations * * * are regulated respectively by the laws and usages of the place where the obligations are created * * *"

An express reservation is made by Article 58 in favor of the application of Article 9 of the Preliminary Dispositions of the Civil Code, according to which the national law will govern when both parties have the same nationality.

The Italian authors are divided on the question whether the "essential requisites of commercial obligations" are to be under-

29. A similar provision exists in regard to capacity to sue or to be sued. Such capacity exists if it is conferred by the national law or by German law. Sec. 55, German Code of Civil Procedure; Barazetti, Das Internationale Privatrecht im bürgerlichen Gesetzbuche für das deutsche Reich, p. 43.

30. The place of performance is immaterial, RG, Oct. 16, 1885, (Clunet, Journal de Droit International Privé, 1887, p. 630).

31. v. Bar, p. 669; Niemeyer, das internationale Privatrecht des bürgerlichen Gesetzbuchs, pp. 125-126.

32. Art. 27, Law of Introduction, Civil Code.

stood as including capacity.[33] In the opinion of some,[34] the article refers only to the general objective requirements for bills and notes specified in Article 251 of the Commercial Code, and not to capacity. "According to the opinion that has finally prevailed," says Diena,[35] "the essential requisites of commercial obligations, to which Article 58 alludes, are all those contemplated by Article 1104 of the Civil Code, among which is included the capacity to contract." The lex loci contractus will determine not only the capacity of foreigners in Italy, but also that of Italian subjects in foreign countries.[36]

From the preceding comparative study it is seen that none of the countries, the law of which has been studied, applies, without qualification, the personal law of the parties (the lex domicilii or the lex patriae) in the determination of the capacity of parties to enter commercial contracts.[37] This is most noteworthy in view of the strong stand by continental Europe in support of the doctrine that the personal law should govern the capacity of parties in general. Individual authors, in the theoretical atmosphere of their study, have expressed the view that the principle of the lex patriae should not yield in any respect, on grounds of expediency, to the lex loci contractus.[38] But whenever they were confronted with the actual needs of business life, they have not hesitated to make such concessions. This appears most distinctly from the resolutions adopted by international associations, conferences, and congresses. The Association for the Reform and Codification of International Law, at its session at Antwerp in 1877,[39] the Congress of Commercial Law held at Antwerp in

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33. The views of the different writers are stated by Diena, Trattato di Diritto Commerciale Internazionale, I, pp. 14-15, note; Ottolenghi, La Cambiale nel Diritto Internazionale, pp. 28-43.
34. See Ottolenghi, pp. 37-38.
35. I, p. 138.
36. Diena, III, p. 53.
37. Contra: Quebec, where the lex domicilii is applied, even though the party would have capacity under the law of Quebec, where the contract was entered into. Jones v. Dickinson, R. J. R., 7 Quebec S. C. 313; Lafleur, Conflict of Laws in the Province of Quebec, p. 147.
38. Audinet, Principes élémentaires du Droit International Privé, 2d ed., pp. 607-609, Despagnet, Précis de Droit International Privé, 5th ed., p. 986; Ottolenghi, p. 16; Surville et Arthuys, Cours élémentaire de Droit International Privé, 5th ed., pp. 669-670.
39. Revue de Droit International, 1877, p. 411.
The resolution adopted was as follows: "La capacité d'un étranger en matière de lettre de change est en général réglée d'après son statut personnel.
"Toutefois l'étranger, lorsqu'il contracte des engagements se rattachant

1885,[40] and in Brussels in 1888,[41] and the Institute of International Law at its session at Brussels in 1885,[42] have all indorsed the lex loci contractus as an alternative rule to the law of nationality whenever a party, who is incompetent under his foreign personal law, has capacity to contract under the law of the state where the contract was made.

Article 74 of the Convention of the Hague for the Unification of Bills and Notes of 1912 expresses the same view. It provides:

"The capacity of a person to bind himself by a bill of exchange shall be determined by his national law. If such national law declares the law of another state to be applicable, such latter law shall be applied.

"A person who lacks capacity under the law indicated in the preceding paragraph, shall nevertheless be validly bound, if he has entered into the obligation within the territory of a state according to the law of which he would have been competent."[43]

The Institute of International Law, at its session in Lausanne in 1888,[44] recommended a somewhat narrower rule with regard to the application of the lex loci contractus, which would allow the lex loci to impose liability only in the event that the incompetent misled the other party or "grave circumstances" existed, the appreciation of which was to be left to the courts.

Several members of the Institute of International Law have suggested still other compromise systems. At the meeting of the Institute at Lausanne, Westlake[45] proposed the lex loci contractus in substitution for the lex patriae when the party who was incompetent under his national law, was twenty-one years of age, and the other contracting party was ignorant of such incapacity. Von Bar[46] was of the opinion that the lex loci contractus should take the place of the lex patriae when the person dealing with the party who is incompetent acted in good faith. In his text book on Private International Law, v. Bar expressed his view in the following form:

"It is immaterial whether or not a person has capacity to bind himself by bill, be that incapacity a result of a general incapacity

aux lettres de change dans un pays autre que le sien, est régi par les lois de ce pays, sans pouvoir invoquer sa loi nationale."

40. Clunet, 1885, p. 629.
41. Weiss IV, p. 444.
42. Annuaire de l' Institut de Droit International Privé, VIII, p. 97.
43. See Senate Document No. 162, 63d Congress, 1st Session, p. 64.
44. Annuaire, X, pp. 103-104.
45. Annuaire, X, p. 102.
46. Annuaire, X, p. 96.

to contract or not, if by the law of the place where the bill is issued the debtor had this capacity, and the person who sues on the bill or some predecessor of his in title was in good faith when he acquired the bill. Good faith is presumed."[47]

Goldschmid submitted that the contract should be sustained, notwithstanding an incapacity under the personal law, if it complied with the law governing the validity of the contract in other respects.[48]

In addition to the above there may be mentioned the view recently expressed by Professor Jitta, one of the most distinguished writers on the subject of the Conflict of Laws. In his opinion the capacity to contract by bill or note should be governed by the law of what he terms "the fiduciary place of issue," by which he means the law of the place of issue mentioned in the bill or note, and, in the absence of such an indication, that of the party's domicile, or, in case of a person exercising a trade or profession, the law of the state in which he has his place of business or office.[49]

As the question before us has nothing to do with the performance of the contract, the lex loci solutionis can apply only on one of two theories, either that it represents the *seat* of the obligation, or that it expresses the probable intention of the parties. That neither of these positions is tenable as regards the formal and essential requisites of bills and notes will be shown in another part of this article. The same is true also with respect to capacity. In this place the bare statement must suffice that the intention theory as such is inapplicable to capacity. Before there can be a legal intent, there must be capacity to form such intent, and such capacity, in the very nature of things, can be conferred only by law. This is admitted by the decisions of the courts of all countries, excepting a few dicta in this country,[50] and by all text writers. There remain thus for our consideration, the lex loci contractus and the lex domicilii.

The objection to the strict application of the personal law in commercial contracts has been well expressed in the following words by Burge:

"The obstacles to commercial intercourse between the sub-

47. v. Bar, p. 668, note.
48. See Annuaire, X, pp. 80-81.
49. Jitta, La Substance des Obligations dans le Droit International Privé, II, p. 53.
50. See, Mayer v. Roach, (1909) 77 N. J. L. 681, 75 Atl. 235; Basilea & Calandra v. Spagnuola, (1910) 80 N. J. L. 88, 77 Atl. 531.

jects of foreign states would be almost insurmountable, if a party must pause to ascertain, not by the means within his reach, but by recourse to the law of the domicile of the person with whom he was dealing, whether the latter had attained the age of majority, and, consequently, whether he is competent to enter into a valid and binding contract."[51]

As between the unqualified lex domicilii and that of the lex loci contractus, the balance of convenience would clearly favor the latter. The real question at issue is whether a compromise system between the personal law (lex domicilii or lex patriae) and the lex loci contractus, in the form in which it obtains in France or Germany, or in one of the other forms suggested above, is not preferable to that of the lex loci contractus pure and simple, which is the rule in the United States and Italy.

Supporters of the compromise system believe that the personal law should not be discarded in its entirety and that the needs of commerce can be sufficiently met by certain concessions to the law of the place where the contract was entered into. Little argument is needed to show that neither the French nor the German system can be approved. The French courts have been inclined, when the contract was made in France, to protect French subjects acting with due care, against the incapacity of the other contracting party existing under the lex patriae. The objection to this qualification of the personal law is the distinction made between citizens and foreigners.[52] If the security of commerce demands that an incapacity existing under foreign law shall not be set up, it includes citizens and foreigners alike. The German law is equally arbitrary. It applies the lex loci to transactions entered into in Germany when it will bind the party who is incompetent under his personal law, but does not recognize that a German subject, who has made a contract abroad, can be held under like conditions. The giving of such a privileged position to citizens is in violation of the principle of equality, which is fundamental in the Conflict of Laws.

The recommendation of the Institute of International Law adopted at its session at Lausanne, is open to the serious objection of indefiniteness, for the lex loci contractus is to apply when "grave circumstances" exist, the appreciation of which is to be left to the courts. Such a qualification as this is entirely too vague to serve the purpose of commercial security.

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51. Burge, II, p. 477.
52. The Supreme Court of Louisiana expressed similar views in Saul v.

The compromise system that has the weightiest support[53] allows the application of the lex loci contractus whenever it will sustain the contract of a party who is incompetent under his personal law.

Of the individual views above mentioned, those of Westlake and v. Bar do not differ essentially from the compromise view just stated. Both would require for the application of the local law, that the party dealing with the incompetent shall have been ignorant of the latter's incompetency (Westlake) or have acted in good faith (v. Bar), Westlake requiring in addition that the incompetent be twenty-one years of age. Meili regards the rule suggested by v. Bar as the best, and as satisfying all "rational commercial needs."[54] Goldschmid[55] properly remarks, however, that the condition of good faith opens the door wide to difficult questions of fact and that because of this, such a rule forms too vaccilating a basis for the security of international relations. The same objections may be raised also against Westlake's proposition.

Goldschmid's view differs from that of the majority before mentioned in his substitution of the law governing the contract for that of the lex loci contractus. In a state or country which has adopted the lex loci solutionis for the determination of the validity of contracts, a person who is competent under such law would be bound under this rule notwithstanding the fact that he is incompetent under the lex domicilii and the lex loci contractus.

For practical purposes it may be said, then, that there are only two leading views involving a compromise between the personal law and the lex loci contractus: (1) The majority view, which sustains the contract, as far as capacity is concerned, if it satisfies either the personal law or that of the place of contracting; and, (2) Goldschmid's view, which regards the contract as valid if it complies with the requirements of the personal law or with those governing the contract in other respects. Widely differing from these, is the view entertained by Jitta, according to which the law of the place of issue mentioned in the instrument is to govern, and only in the absence of such an indication, the law of

His Creditors, (1827) 17 Mart. 596.

53. It will be recalled that it was recommended by the Association for the Reform and Codification of Law (1887); by the Congresses of Commercial Law of Antwerp (1885) and of Brussels (1888); by the Institute of International Law (1885); and by the Convention of the Hague (1912).

54. Internationales Civil- und Handelsrecht, II, p. 326.

55. Annuaire, X, p. 91.

the domicile, or, in the case of a merchant or a professional man, the law of the state in which he has his place of business or office.

What are the merits of these views as compared with the American and Italian rule, which supports the lex loci contractus? In behalf of the lex loci contractus the following words of Justice Gray, from his opinion in *Milliken v. Pratt,*[56] may be quoted:

"In the great majority of cases, especially in this country, where it is so common to travel, or to transact business through agents, or to correspond by letter, from one state to another, it is more just, as well as more convenient, to have regard to the law of the place of the contract, as a uniform rule operating on all contracts of the same kind, and which the contracting parties must be presumed to have in contemplation when making their contracts, than to require them at their peril to know the domicile of those with whom they deal, and to ascertain the law of that domicile, however remote, which in many cases could not be done without such delay as would greatly cripple the power of contracting abroad at all."

A similar view is expressed by Burge:[57]

"But if the principle be correct that the lex loci contractus ought to determine the validity of a contract when that validity depends on the capacity of the contracting party, it must be uniformly applied, whether the law prevailing in the domicile be that which capacitates or incapacitates. For it would not be reasonable that two different laws should be applied to one and the same contract, and that the liability of one of the parties should be decided by the lex loci contractus and that of the other by the lex loci domicilii."

In connection with the foregoing quotations it must be borne in mind that Justice Gray and Burge discussed the question as a pure judicial question, and did not express any view upon it from the standpoint of legislation. Story calls attention to the difference between the two view points. Commenting upon a statement in *Saul v. His Creditors,*[58] he says:

56. (1877) 125 Mass. 374, at p. 382; 28 Am. Rep. 241.

57. Colonial and Foreign Law, II, p. 483.

58. The passage referred to was the following:

"But reverse the facts of this case, and suppose, as is the truth, that our law placed the age of majority at twenty-one; that twenty-five was the period at which a man ceased to be a minor in the country where he resided; and that, at the age of twenty-four he came into this state, and entered into contracts;—would it be permitted that he should, in our courts, and to the demand of one of our citizens, plead, as a protection against his engagements, the laws of a foreign country, of which the people of Louisiana had no knowledge, and would we tell them that ignorance of foreign laws, in relation to a contract made here, was to prevent them

"The case first put seems founded upon a principle entirely repugnant to that upon which the second rests. In the former case, the law of the place of the domicile of the party is allowed to prevail, in respect to a contract made in another country. In the latter case, the law of the place where the contract is made, is allowed to govern without any reference whatsoever to the law of the domicile of the party. Such a course of decision certainly may be adopted by a government if it shall so choose. But then it would seem to stand upon mere arbitrary legislation and positive law, and not upon principle. The difficulty is in seeing how a court, without any such positive legislation, could arrive at both conclusions. General reasoning would lead us to the opinion that both cases ought to be decided in the same way, that is, either by the law of the domicile of the party, or by that of the place where the contract is actually made. Many foreign jurists maintain the former opinion, some the latter."[59]

As a judicial question it might naturally be felt that an alternative rule in the form of the foregoing compromise systems could not be adopted by our courts without the aid of positive legislation and that a choice had to be made between the lex domicilii and the lex loci contractus. In one or two instances, it is true, English and American courts have sanctioned an alternative rule either actually or in effect. For example, the English case of *In re Hellmann's Will*[60] held that a legacy under an English will might be paid to a German legatee on his attaining full age according to English law or according to the law of Germany, whichever first happened. The American courts, in their eagerness to uphold contracts against the defence of usury, have allowed the parties to contract with reference to the law of the place of execution or with reference to that of the place of performance or even with reference to the law of a third state with which the contract was connected.[61] But these cases represent outstanding exceptions in the Conflict of Laws to the general attitude of Anglo-American courts, which declined to sanction a rule in the alternative even in the matter of the formal requirements of instruments,[62] in regard to which the maxim locus actum in a permissive sense had been recognized on the continent for

enforcing it, though the agreement was binding by those of their own state? Most assuredly we would not." Saul v. His Creditors, (1827) 17 Mart., at pp. 597-598.

59. Story, Conflict of Laws, 8th ed., pp. 96-97.

60. L. R. 2 Eq. 363; 14 W. R. 682.

61. Miller v. Tiffany, (1863) 1 Wall. 298; 17 Law ed. 540; Arnold v. Potter, (1867) 22 Ia. 194; Green v. Northwestern Trust Co., (1914) 128 Minn. 30, 150 N. W. 229; Scott v. Perlee, (1863) 39 Ohio St. 63.

62. See Stanley v. Bernes, (1830) 3 Hagg. 373; Moultrie v. Hunt, (1861) 23 N. Y. 394.

centuries. This maxim has since been adopted by statute in England as regards wills disposing of personalty, and in many jurisdictions of this country as regards wills and deeds. A will of personal property is valid under these statutes if it satisfies, as regards formal execution, the law of the testator's domicile or that of the place of execution, and a will devising realty, or a deed of land, if it conforms to the law of the situs or to the lex loci contractus. In like manner it might be provided by statute that a legal transaction, or, to narrow the question to the subject under consideration, a commercial contract, shall be valid, as regards capacity, if it meets the requirements of the law of the place of execution or those of another state, be that law the lex domicilii or the lex loci solutionis. But is there a sufficient reason for the adoption of such an alternative rule in this instance?

Field, in his Outlines of an International Code, recommends the lex loci contractus as the rule governing capacity to contract. In Sec. 542 he states:

"The civil capacities and incapacities of an individual in reference to a transaction between living persons, except so far as it affects immovable property, * * * are governed by the law of the place where the transaction is had, whatever may be his national character or domicile."

In answer to the continental writers who dwell upon the inconvenience which would result from a fluctuating rule of capacity upon every accidental change of the person or of his movable property, he says:

"The inconvenience of a fluctuating rule is an inconvenience to the individual only, requiring him to ascertain and conform to the law of the place where he may be. It is the most convenient form for facilitating commercial transactions and the administration of justice."[63]

These words were written before the Institute of International Law and the international commercial congresses above mentioned had indorsed the view upholding commercial contracts with respect to capacity, if they satisfied either the personal law or the law of the place where the contract was made. It is especially interesting to note, therefore, that Field had reached the same result in an independent way, as regards foreign infants. With respect to them he suggested the following exception:

"543. No transaction had by a foreigner, being one between living persons, is voidable on the ground of his infancy, except

63. p. 380.

so far as it may affect immovables, if either the law of his domicile, or the law of the place where the transaction is had, sustains his capacity."

In considering the relative merits of the compromise systems which have been put forward on the continent, and those of the lex loci contractus, the difference in the point of view between the continental and American law must be clearly borne in mind. On the continent the established rule governing capacity, on principle, is the personal law (the lex patriae or the lex domicilii). The only question as regards the capacity to execute bills and notes, therefore, is whether the personal law should not yield on grounds of commercial convenience, at least in part, to the law of the place where the contract is made. The problem assumes quite a different aspect in the United States, where the simplicity and convenience of the lex loci contractus as the governing law have seemed so manifest as to overshadow completely the claims of the lex domicilii.[64] Although a uniform law would raise the question in a somewhat different form by reason of the fact that it is concerned with international and not with inter-state relations,[65] the burden of proving the desirability of a modification of the present law which shall sustain a bill or note, as regards capacity, in the event the party in question is incompetent under the lex loci contractus but has capacity under the lex domicilii, would be upon the person proposing such a change.

All partisans of the lex domicilii having been compelled, on grounds of commercial convenience, to admit the necessity of the application of the lex loci contractus, as regards capacity to enter commercial contracts, when such law is unfavorable to a party, the question naturally arising is why the same law, rather than the lex domicilii, should not govern also when it is favorable to such party. The main argument advanced by continental writers in support of the lex domicilii in the matter of capacity is the following,—that rules of law which are concerned with capacity to act have for their object

64. Notwithstanding the fact that the majority of an infant for the purpose of receiving his property from his guardian is determined by the lex domicilii. Woodward v. Woodward, (1889), 87 Tenn. 644; 11 S. W. 892.

65. The Negotiable Instruments Law has unified the law of bills and notes in this country to all intents and purposes. Only a few jurisdictions have modified the proposed uniform law in some particulars.

the protection of the parties against loss by their own acts. "This care for the person must be a permanent one," says v. Bar,[66] "if it is to have effect; it extends, therefore, to all persons who permanently belong to the state, i. e., who are domiciled there." In other words, it is because of the uniform and permanent protection which the parties need and which the lex domicilii, ex hypothesi, is best able to afford that its claim to a preference over any other law is based. But if the lex domicilii must yield to the lex loci contractus in all commercial contracts in the interest of commercial security, it fails to afford the very protection which its adoption was intended to give. Under these circumstances no theoretical basis remains for its application. For it must be remembered that the lex loci contractus is put forward by most of the advocates of the compromise view as an alternative rule entitled to extra-territorial recognition and not merely as an exception to the lex domicilii, based upon the public policy of the state where the contract is made, and hence having only an intra-territorial effect. Having adopted the lex loci contractus as the governing rule when it will sustain the contract, the logic of the situation and sound principle demand that it control also when its application will defeat the contract.[67]

In the absence of a willingness on the part of the American law to accept the lex domicilii as the law governing both status and capacity, its introduction as an alternative rule with the lex loci in the matter of commercial capacity can be justified only on grounds of expediency based on a desire to sustain contracts. What does sound policy require in this regard? The statutes relating to the formal execution of wills and deeds fall short of giving any support to the proposition under discussion, for neither the English nor the American statutes include contracts. Even if it were conceded, for the sake of argument, that the reasons or policy which led to the adoption of these statutes apply with equal force to contracts, it would not follow that they would embrace capacity as well. There is a fundamental distinction between capacity and

66. Private International Law, Gillespie's translation, p. 306.
67. "There is, no doubt, much to be said for a thorough-going application of the lex loci actus to rule capacity to undertake these obligations, such as prevails in the jurisprudence of England and in that of the United States, although it does not suit the circumstances of the Continent of Europe, and may, as intercourse goes on increasing, soon bring disadvantages even to England and to the United States." v. Bar, p 665.

formalities and a policy applicable to the one may have no bearing upon the other. Before the statutes referred to were passed, a will of personal property, not executed in the form prescribed by the law of the testator's domicile at the time of death, was void, even though it conformed to the law of the testator's domicile at the time of execution and to the law of the place of execution.[68] A will or deed disposing of realty was null and void unless it satisfied the law of the state in which the property was situated.[69] Following the continental practice, many American legislators felt that the validity of a will or deed, as regards formal execution, should be recognized also if the testator or grantor had followed the requirements of the law of the state in which the will or deed was executed. The rule locus regit actum, which was thus sanctioned, sprang from and rests upon a desire to facilitate international intercourse.[70] Its sole object is to free the parties from the embarrassments which may follow if they must clothe their legal transactions at their peril in a form prescribed by a law to which they have no ready access at the time.

The situation is quite different, as regards capacity. The question here is whether a party who is incompetent under the lex loci contractus, which applies upon principle, shall be bound nevertheless if he is competent to contract under the law of his domicile or the law of some other state that is deemed to govern the validity of contracts in other respects. Before an answer can be given, the question must be considered in its broader aspects. It raises many grave problems involving the basic theory of the rules of Private International Law. If a rule in the alternative is proper in the matter of commercial capacity because of its tendency to give stability to international transactions, why should not the same policy require its extension to capacity in general? And if the rule is expedient in matters relating to capacity and form, why should it not be applied also to the other essential requirements of contracts and, indeed, to those of all other legal transactions? Heretofore it was taken for granted in the science of Private International Law, that a unitary rule governing each legal relationship would best answer the

68. Stanley v. Bernes, (1830) 3 Hagg, 373; Moultrie v. Hunt, (1861) 23 N. Y. 394.

69. Succession of Hasling, (1905) 114 La. 294; 38 So. 174.

70. See Lainé, II, pp. 116-198.

needs of an international community. The maxim locus regit actum, in matters of formal requirements, constituted the only exception, and, according to some writers,[71] even this rule had lost its original permissive character and become a unitary and mandatory rule. Must it be conceded to-day that the aim of the science of the Conflict of Laws to discover unitary rules for the solution of the problems arising from the diversity of legal systems has so far failed of accomplishing its object that international justice would be promoted if the validity of legal transactions in general, as regards capacity, form and legality, were sustained upon principles of the broadest liberality?

The writer of this article is not ready to give a final answer to this question, affecting as it does the very basis of the rules in the Conflict of Laws. He is of opinion that the adoption of alternative rules in matters affecting the validity of legal transactions would afford, at least in some instances, more satisfactory results than it is possible to attain as long as a unitary rule must be found. Abundant proof of this fact is furnished by the cases and in the juristic literature dealing with the essential validity or legality of contracts. The vast bulk of the case law, as well as the almost total concensus of opinion of continental and English writers on the subject of the Conflict of Laws hold that a contract is valid if it meets the requirements of the law with reference to which the parties must be deemed to have contracted.[72] In most of the decided cases the law of the state that would sustain the contract was found to be the applicatory law and not infrequently a presumption was raised that the parties contracted with reference to such law.[73] With the recognition of the propriety of alternative rules in the Conflict of Laws, such cases, which now rest upon an unsatisfactory basis, would present no difficulties whatever. Neither the territorial theory, which underlies the doctrine of the lex loci contractus, nor the intention theory, which is now dominant so far as it applies to contracts, leads to satisfactory results, as the

71. See Buzzati, L'Autoritá delle Leggi Straniere Relative alla Forma degli Atti Civili, pp. 142 et seq.
72. For the law of the English courts, of the Federal courts, and of the State courts, see article by Professor Beale in 23 Harvard Law Review, pp. 1, 79, 194, 260.
73. See, for example, Pritchard v. Norton, (1882) 106 U. S. 124; 1 Sup. Ct. 102; 27 Law Ed. 104.

actual state of our law sufficiently attests. A rule to the effect that the validity of a contract, as regards capacity, form, and legality, should be recognized if it satisfies the lex loci contractus or the law of some other state with which the contract has an intimate relation, might, with proper limitations, furnish a more secure basis for international transactions than has existed heretofore.

As for bills and notes, an alternative rule cannot be applied to matters of form or legality for the reason that the obligations created by such instruments depend upon, and are therefore inseparable from, its formal and essential requirements, as will be shown below, and an alternative rule cannot possibly control the obligations of contracts. Limited, however, to capacity, a rule which would sustain a bill or note, or a particular contract thereon, if it satisfied either the lex loci contractus or the lex domicilii, would not only be practicable, but would possess certain advantages over the unitary rule of the lex locus contractus. From the standpoint of municipal law it would promote the negotiability of such instruments by giving to the contracts of the different parties another chance of validity. From the broader viewpoint of international law such a rule would make it possible for the English law, which has tended to accept the lex domicilii, to agree with the American law, and would bring the Anglo-American law, so far as it can be done, into harmony with the best thought on the subject in continental Europe.

Nor would the rule suggested constitute an injustice to the party obligated. True, he cannot escape liability under it unless he lacks capacity under both the lex domicilii and the lex loci contractus, but the justice or injustice of a rule cannot be determined from the viewpoint of a party who is desirous of avoiding his obligations. A person who is domiciled in one state but wishes to transact business in another cannot in good conscience complain of a rule which enables him to do so more effectively by increasing his capacity to contract.

As against the advantages before mentioned there must be offset, however, certain disadvantages which inhere in every alternative rule. The lex loci contractus as such has simplicity and certainty in its favor. These important qualities would be lost by the adoption of the lex domicilii as an alternative rule, for the latter might raise the issue of domicile in

every case in which a party is incompetent under the law of the place where the contract is made. The increased litigation which would result would constitute a serious draw-back which can be overcome only by strong grounds of expediency speaking for the lex domicilii. Such grounds do not exist. The international advantages, referred to above, cannot actually weigh heavily in the framing of a Uniform Law for the United States. Moreover, international uniformity is unattainable as long as the continental countries adhere to the law of nationality, instead of the law of domicile, and as for England, it may accept the doctrine of *Male v. Roberts,* the lex loci contractus, as the rule governing commercial contracts and thus agree with the law of this country without the introduction of the lex domicilii. The only advantage that would arise from the adoption of the lex domicilii in the form suggested is its tendency to promote the negotiability of bills and notes. This advantage, it is submitted, is not strong enough to overcome the serious disadvantages to which attention has been called above. The burden of proving the desirability of departing from the established law being on the party advocating the change, it is apparent that no sufficient case has been made out. The conclusion reached is, that the Uniform Law should adopt the lex loci contractus as the law governing capacity to incur liability by bill or note.

If, contrary to the conclusion just stated, the policy of sustaining contracts is deemed to outweigh the expense and inconvenience of increased litigation, so that the principle of an alternative rule as regards capacity, stands approved, the question, brought to prominence by Goldschmid before the Institute of International Law, would be whether the law governing the contract in general should not be accepted as the alternative rule, rather than the lex domicilii. Goldschmid assumed that the law of the place of performance would govern the contract in general (apart from capacity and form), and such is still the German law[74] and the prevailing rule in this country.[75] Why should a party, who is incompetent under the lex loci contractus, not be regarded in jurisdictions following the above rule as competent to contract if he pos-

74. See RG July 4, 1904 (15 Niemeyer 285); RG Apr. 26, 1907 (18 Niemeyer 177).
75. See article by Professor Beale in 23 Harvard Law Review, pp. 1, 79, 194, 260.

sesses such capacity under the law of the place of performance? This question cannot be answered until the rule governing the validity and obligation of bills and notes has been discussed. If the conclusion is there reached that the lex loci contractus, and not the lex loci solutionis, should control, no ground will be left upon which Goldschmid's proposition can stand. The only other law that could possibly control the contract would be the personal law, on the theory that the parties must be deemed to have contracted with reference to such law. This would make Goldschmid's rule coincide with the one discussed above. But if the Uniform Law should follow the weight of authority in this country and accept the lex loci solutionis as the law determining the validity and obligation of contracts, Goldschmid's suggestion would have great force. The problem would then be whether the lex loci solutionis should supplant the lex domicilii as the alternative rule with the lex loci contractus, or whether the Uniform Law should go still further in its liberality and support a bill and note, if capacity exists under the lex loci contractus, the lex domicilii, or the lex loci solutionis?

Whether the lex loci contractus be adopted as an absolute rule or in one of the alternative forms suggested, its meaning remains to be determined. On the continent it signifies generally, the law of the place where the signature is attached.[76] In England and the United States, inasmuch as the contract is not complete until the delivery of the instrument, it is the place of delivery.[77] But what if, on the continent, the place mentioned in the instrument is not the place where the signature was actually affixed, and if, in the United States, such place is not the actual place of delivery? Continental law is not settled on this point.[78] In this country the place from which a bill or note or an indorsement is dated, is deemed

76. Audinet, pp. 609-610; Surville et Arthuys, p. 671; Lyon-Caen et Renault, IV, p. 545; v. Bar, p. 671; Grünhut, Wechselrecht, II, p. 572, note 14.

77. B. E. A. s. 21; N. I. L. s. 16.

78. In favor of the actual place where the signature was affixed Diena, III, p. 52; Meili, II, p. 327; Grünhut, Wechselrecht, p. 570, note 6. If the date was allowed to control, even as to holders in due course, it would enable a party who is incompetent to confer capacity upon himself by the simple expedient of dating the instrument or contract from a place, according to the law of which he is competent. To allow him to do so is regarded by the above authors as opposed to public policy.

Other authors are of opinion that the holder in due course should be protected if the party has capacity according to the law of the place from which it is dated. See v. Bar, p. 688.

prima facie the place of delivery.[79] With respect to a holder in due course this presumption is conclusive.[80] Where the indorsement does not indicate the place at which it is presumptively made, i. e., delivered, but the original instrument contains such an indication, the indorsement will be deemed made at that place,[81] and if a party has capacity under such law, he will be estopped as to a holder in due course, to show that he had no capacity under the law of the state where the indorsement was made in fact.[82]

The law of the "fiduciary place of issue", proposed by Jitta as the governing rule, according to which the place mentioned in the bill, note, or indorsement, controls, and, in the absence of such an indication, the law of the party's domicile, or, in the case of a person exercising a trade or profession, the law of the state in which he has his place of business or office, though it bears a slight resemblance to the American law above set forth, differs from it too profoundly to be of any practical value in the framing of a uniform law for the United States. The rules of the American law should be retained.

(To be continued.)

ERNEST G. LORENZEN.

University of Minnesota.

79. Lennig v. Ralston, (1854) 23 Pa. 137; Second National Bank v. Smoot, 2 MacArthur (D. C.) (1876) 371; Parks v. Evans, (1879) 5 Houst. (Del.) 576.
80. Towne v. Rice, (1877) 122 Mass. 67; Quaker City Nat. Bank v. Showacre, (1885) 26 W. Va. 48; Chemical Nat. Bank v. Kellogg, (1905) 183 N. Y. 92; 75 N. E. 1103; 2 L. R. A. (N. S.) 299; 111 Am. St. Rep. 717.
81. N. I. L. s. 46.
82. Chemical Nat. Bank. v. Kellogg, (1905) 183 N. Y. 92; 75 N. E. 1103; 2 L. R. A. (N. S.) 299; 111 Am. St. Rep. 717.

RIGHTS IN SOIL AND MINERALS UNDER WATER.

This article deals with the ownership of the soil underlying public bodies of water, and with rights in minerals thereunder. It is not the purpose of the article to discuss abstract theories of right, but rather to review the decisions of the courts, pertinent to the subject, which have already been made. In many states there are no such decisions. Some states have no minerals, some have no lakes or rivers, some that have minerals and lakes and rivers have not their minerals in proximity to bodies of water.

As on other subjects, the law on this subject starts with the common law of England. The decisions there are not numerous. England has minerals, but few lakes or large rivers. Her minerals in some instances underlie the bed of the ocean, but not the bed of lakes or streams. Scotland and Ireland have lakes and some minerals, but not in many cases are minerals found in the region of lakes or streams. In fact there is perhaps no case which squarely determines the right of a riparian owner to minerals underlying fresh water lakes or non-tidal streams in the British Isles.

It is profitable before considering decisions bearing directly on the subject of rights in minerals underlying lakes and streams to first consider the more general question of title to the soil which constitutes the bed of such waters.

In the early stages of the English common law, rights in water beds were unimportant, and not often the subject of litigation. Early decisions and the early commentaries are almost silent on the subject. But from what data we have we may gather that in early times the King acted on the theory that both the land and the water were his. He recognized no public right in the sense that his subjects had any interest to be subserved. No distinction was recognized between ownership in private or proprietary capacity and ownership in a sovereign or governmental capacity. The King conceived that he could grant anything that he owned. He granted exclusive fishery rights and he probably in some cases granted the water beds. Land under water which any one cared to use passed

into private use and probably private ownership. By and by the rights of fishing and of navigation became so important, and public sentiment in favor of the free exercise of those rights became so strong, that it became a rule of law that no exclusive rights could be granted in public waters. Public waters were those which partook of the nature of the sea, that is, water in which the tide ebbed and flowed. In time it became recognized that the Crown held all public waters and the water beds in a representative capacity for the benefit of all its subjects—a prerogative that could not be abrogated. There was no thought then that the Crown could not part with private ownership in the soil under the public waters of the kingdom. The idea was that into whatever hands the title passed, the people had a public interest and a right to use for certain public purposes, and this right a grant could in no manner prejudice or take away.[1]

In the course of time the Crown surrendered its prerogative right to Parliament, and grants of water rights came to be made by that body or under its authority.[2] But the law remained otherwise the same. The law of England now is that the title to the soil under all public or tidal waters, including tidal rivers, is in the Crown;[3] that the title is held subject to the public right of navigation and fishery; that it may be granted but the grantee "can never do anything to interfere with the navigation; and if a grant were made for the purpose of enabling the grantee to do that which would interfere with navigation, that would be a void grant, because it would be a grant which the Crown could not make, having regard to the fact that it held the land for the benefit of the public, that is, subject to the public right of navigation."[4] As well stated in *People v. New York & S. I. F. Co.*,[5] "The King by virtue of his proprietary interest, could grant the soil, so that it should become private property, but his grant was subject to the para-

1. 1 Farnham, Waters and Water Rights, § 36; Commonwealth v. Alger, (1851) 7 Cush. (Mass.) 53, 65; Hale, De Jure Maris, Pt. 1, Chs. 4-6.
2. 1 Farnham, Waters & Water Rights, § 41.
3. The Royal Fishery of the Banne, (1674) Davis's Reps. 55, 56; Bulstrode v. Hall, (1659) 1 Sid. 148; Lord Adv. v. Hamilton, (1852) 1 Macq. (Scot.) 46; King v. Smith, (1780) 2 Doug. 441; Malcomson v. O'Dea, (1862-63) 10 H. L. Cas. 593; Moore Hist. & L. of Foreshore and Seashore, 248.
4. Atty. Gen. v. Tomline, (1880) L. R. 14 Ch. Div. 58; 1 Farnham, Waters & Water Rights, Sec. 36.
5. (1877) 68 N. Y. 71, 76.

mount right of public use of navigable waters, which he could neither destroy nor abridge."[6]

As to inland lakes and rivers above the ebb and flow of the tide, it is settled by the common law of England that the underlying soil belongs to the riparian proprietor.[7] Yet if the stream is navigable this ownership is subject to the public right of navigation. In *Blount v. Layard*,[8] Bowen, J., in speaking of the River Thames, says: "We are dealing with the Thames, which is not a tidal river at the place in question. But, on the other hand, it is a navigable river, that is, all the Queen's subjects have the right of passing and repassing on it, and it is what is called in the old books a 'King stream,' by which is meant, not that the soil must belong to the King, but that it is a highway, and that the King is the natural guardian and conservator of the commodious and convenient passage of the river by his subjects."

In the United States we start with a somewhat anomalous situation. When the thirteen original states established their independence, each state became the owner of the unappropriated land within its borders, and continued to own it, subject only to surrender since made to the Federal government. The right of the United States to public lands originated in voluntary surrender made by several of the states of their waste and unappropriated lands to the United States under a resolution of the Congress of the Federation of September 6, 1780, recommending such surrender and cession to aid in paying the public debt incurred by the Revolution, the object being to convert the land into money for the payment of the debt. Where foreign governments ceded territory to the United States, the unappropriated land therein passed to the United States, and new states formed therefrom never had title thereto. It was early held that when cession was made by the states to the United States, the navigable waters and the soil under them were not ceded to the United States, nor were they granted to the United States by the adoption of the United States constitution, but they were reserved to the states respectively. And it was also early held that new states formed

6. See also Hardin v. Jordan, (1890) 140 U. S. 371, 11 S. C. R. 808.
7. Hale, De Jure Maris, Pt. 1, Ch. 1; Hindson v. Ashby, (1896) L. R. 1 Ch. Div. 78; Orr Ewing v. Colquhoun, (1877) L. R. 2 App. Cas. 839; Scott v. Napier, (1869) 7 Ct. of Sess. Cas. 35; Bristow v. Cormican, (1878) L. R. 3 App. Cas. 641.
8. (1891) 2 Ch. 681 (note), 65 L. T. 175.

after the constitution was adopted, have the same right in the soil underlying public waters within their borders as the original states.[9]

At the outset, then, the people of each state held the absolute right to all their navigable waters and the soil under them;[10] and when the United States government issues its patent to public land bordering upon public water, the land under the water does not pass to the riparian proprietor by force of the grant, because the United States does not own it; but if the riparian proprietor acquires the underlying soil at all it is by the gratuitous favor of the state which does own it, but which is no party to the patent or grant.[11] Accordingly the question of the respective rights of the public and of the riparian proprietor in the soil under public water within a state is a question, not of Federal but of state cognizance.[12] It was said in the case just cited that it is for the several states themselves to determine this question, and, "If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." Very few states have determined this question by legislative action. In most cases the courts have been obliged to determine the respective rights of the state and of the riparian owner without legislative guidance.

In this country, as in England, waters are classified as navigable and non-navigable, but the ebb and flow of the tide has not always been accepted as the test of navigability in the United States. There are many great navigable rivers into which the tide never flows. At an early day Chief Justice Taney, speaking of this matter, said, "If a distinction is made on that account, it is merely arbitrary, without any foundation in reason, and, indeed, would seem to be inconsistent with it;"[13] yet this test has been in a good many cases adopted.[14] In some states the distinction has been repudiated

9. Pollard's Lessee v. Hagan, (1845) 3 How. 212; Mumford v. Wardell, (1867) 6 Wall, 423, 436; St. Anthony Falls Water Power Co. v. Water Comm'rs, (1897) 168 U. S. 349, 658-9, 18 S. C. R. 157.
10. Mumford v. Wardell, supra.
11. Barney v. Koekuk, (1876) 94 U. S. (4 Otto) 324; Hardin v. Shedd, (1902) 190 U. S. 508, 519, 23 S. C. R. 685.
12. Barney v. Keokuk, supra.
13. The Propeller Genesee Chief v. Fitzhugh, (1850) 12 How. 443, 454.
14. Cobb v. Davenport, (1867) 32 N. J. L. 369; Fulton L. H. & P. Co. v. State of New York, (1910) 200 N. Y. 400. See Ill. Cent. R. R. Co. v. Illinois, (1892) 146 U. S. 387, 435, 13 S. C. R. 110.

and it is held that "waters which are navigable in fact are navigable in law."[15] There is no uniform test to determine what waters are navigable in fact.

In *Hodges v. Williams*,[16] it was held that the test of navigability is whether or not the water is navigable for sea-going vessels. Elsewhere it is held that in order to be classed as a navigable river the stream must be capable of practical general uses and must afford a channel for useful commerce.[17] In other states the term navigability has been broadly used to include waters not navigable in the ordinary sense of that term, and to embrace all waters public in their nature. Under this rule, though a body of water is not adapted to use for commercial navigation, still if it is suitable for such public purposes as boating for pleasure, fishing, fowling, bathing, skating, it is held to be public or navigable water.[18]

As to the title to water beds, there is much lack of uniformity of rule. Generally it is held that title to the beds of all non-navigable ponds and streams is in the riparian proprietor;[19] though on this point decision is not unanimous.[20]

When it comes to the soil underlying public or navigable fresh waters, the confusion is great. As to the Great Lakes and other large lakes, like Lake Champlain, it is agreed that the title to the underlying soil is in the state.[21] Between great lakes and mere ponds there is a point in diminishing size below which title may be conceded to be in the individual. There is another point above which all agree that the title must be in the state. Between the two are the many bodies of water which are the subject of controversy.

Some courts hold that the riparian owners own the soil under navigable fresh waters.[22] The theory of these cases

15. Schulte v. Warren, (1908) 218 Ill. 108, 118, 75 N. E. 783, 13 L. R. A. (N. S.) 745.
16. (1886) 95 N. C. 331.
17. Schulte v. Warren, supra.
18. Lamprey v. State, (1893) 52 Minn. 181, 199, 200, 53 N. W. 1139, 38 Am. St. R. 541, 18 L. R. A. 670; Grand Rapids v. Powers, (1891) 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498.
19. Rhodes v. Cissel, (1907) 82 Ark. 367, 101 S. W. 758; Foss v. Johnstone, (1910) 158 Cal. 119, 110 Pac. 294.
20. See Noyes v. Collins, (1894) 92 Ia. 566, 61 N. W. 250, 26 L. R. A. 609.
21. 1 Farnham, Waters & Water Rights, § 58; Ill. Cent. Ry. Co. v. Illinois, supra; People v. Silberwood, (1895) 110 Mich. 103, 67 N. W. 1087, 32 L. R. A. 694.
22. Donovan-Hopka-Ninneman Co. v. Hope Lbr. Mfg. Co., (1912) 194 Fed. (Idaho) 643; Johnson v. Johnson, (1910) 14 Ida. 561, 95 Pac. 499, 24 L. R. A. (N. S.) 1240; Berry v. Snider, (1867) 66 Ky. 266; Grand

generally is that the rule of the English common law as to ownership of soil under fresh water lakes and streams should be applied in the United States.

Some decisions, repudiating the common law rule as inapplicable in the United States, hold that the soil underlying navigable fresh water belongs to the state in a proprietary capacity.[23]

Some courts hold that the title to the soil underlying all public or navigable waters belongs to the state in its sovereign capacity in trust for the people.[24]

Some hold that the soil underlying navigable rivers belong to the state;[25] while that underlying navigable lakes belongs to the riparian owner.[26]

Some hold that soil underlying navigable lakes belongs to the state, and the beds of navigable rivers to the riparian owner.[27]

Some decisions hold that the soil under water susceptible of public use is owned by the riparian proprietor, but that such ownership is subject to the public use.[28]

It is a rule generally recognized that mineral under the earth belongs to the owner of the surface. In the case of non-navigable bodies of water, it is generally conceded that, since the bed of the water belongs to the riparian proprietors, minerals underlying the water bed belong to them also. In the jurisdictions where the riparian owner upon a public lake or

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Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co., (1894) 102 Mich. 227, 60 N. W. 681, 25 L. R. A. 815; Steamboat Magnolia v. Marshall, (1860) 39 Miss. 109; Fulton L. H. & P. Co. v. State of N. Y., supra.

23. Chapman v. Kimball, (1831) 9 Conn. 38; Hammond v. Shepard, (1900) 186 Ill. 235, 57 N. E. 867, 78 Am. St. Rep. 274; Carr v. Moore, (1903) 119 Ia. 152, 93 N. W. 52, 97 Am. St. Rep. 292; Pacific Elevator Co. v. Portland, (1913) 65 Ore. 349, 133 Pac. 72; Conneaut Lake Ice Co. v. Quegley, (1909) 225 Pa. 605, 74 Atl. 648; Reelfoot Lake Case, (1913) 127 Tenn. 575, 580, 158 S. W. 746; New Whatcom v. Fairhaven Land Co., (1901) 24 Wash. 493, 501 (by constitution) 64 Pac. 735, 54 L. R. A. 190.

24. Lamprey v. State, supra; Florida v. Black River Phosphate Co., (1893) 32 Fla. 82, 13 So. 640; Wilton v. Van Hessen, (1911) 249 Ill. 182, 94 N. E. 134; Roberts v. Baumgarten, (1888) 110 N. Y. 380, 18 N. E. 96; Flisrand v. Madson, (1915) 35 S. D. 457.

25. Paul v. Hazleton, (1874) 37 N. J. L. 106 (tidal).

26. Cobb v. Davenport, (1867) 32 N. J. L. 369.

27. Fuller v. Shedd, (1896) 161 Ill. 462, 483, 44 N. E. 286; Bradley v. Rice, (1836) 13 Me. 198, 201; State v. Gilmanton, (1838) 9 N. H. 461; Kanouse v. Slockblower, (1891) 48 N. J. Eq., 42, 21 Atl. 197; Fletcher v. Phelps, (1856) 28 Vt. 257; Willow River Club v. Wade, (1899) 100 Wis. 86, 97, 76 N. W. 273, 42 L. R. A. 305.

28. Fulton L. H. & P. Co., v. N. Y., supra; Willow River Club v. Wade, supra.

stream takes to the center thereof, it will doubtless be conceded that he owns any minerals that underlie the soil. In the jurisdictions where the state is held to own the bed of public waters in a proprietary capacity, there will probably be little doubt that the state owns any minerals that may be found under the bed of the water. In the jurisdictions where the state is held to be the owner of the water bed in its sovereign capacity, little more can be done than to give the substance of the few decisions that we have.

Something depends on what is meant by holding title in a sovereign capacity. The authorities are not in harmony as to what this term signifies. In England, as above stated, the soil underlying tidal rivers is held by the Crown in a sovereign capacity in the sense that it holds, not as a beneficiary, but as a trustee, subject to the paramount right of public use. But this ownership in a sovereign capacity is not there thought to be inconsistent with a holding of title in a proprietary capacity, in the sense that the property may be sold and become the private property of another, impressed with the same trust for public use.[29] Some American decisions take the same view.

In *Ill. Cent. R. R. Co. v. Illinois,*[30] Justice Field said: "The State holds the title to the lands under the navigable waters * * * in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. * * * The control of the State for the purposes of the trust can never be lost except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining," but that these lands "belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof where that can be done without substantial impairment of the interest of the public in the waters".

In *People v. Kirk,*[31] it was held that the state could by statute give the right to construct a drive along Lake Michigan and fill in the bed of the lake for that purpose, so long as it

29. See People v. N. Y. & S. I. F. Co., (1877) 68 N. Y. 71.
30. (1892) 146 U. S. 387, 13 S. C. R. 110.
31. (1896) 162 Ill. 138, 45 N. E. 830, 53 Am. St. Rep. 277.

does not substantially interfere with the right of navigation and fishing, and that such action was not a violation of the trust by which the state held the lake bed. It was said that if necessary for the best interests of the people, a portion of the bed of the lake not useful for fishery or navigation might be reclaimed and devoted to park purposes.[32]

In *State ex rel., Ellis v. Gerbing,*[33] it was said that "the title to lands under navigable waters * * * is held by the State * * * for navigation and other useful purposes afforded by the waters over such lands," * * * that, "the trust with which these lands are held by the State is governmental, and cannot be wholly alienated," that, "submerged lands, * * * may be disposed of by legislative authority, if such disposition does not impair the rights of the whole people to the use thereof for any purpose expressed or implied by law," that the use of the land under navigable waters may be granted for the purpose of aiding navigation or commerce, or encouraging new industries, and the development of natural or artificial resources, in the interest of all the people, and that "the State may grant reasonable and limited privileges for planting and propagating oysters or shell fish on land covered by waters of navigable streams; but such privileges should not unreasonably impair the rights of the whole people of the State in the use of the waters or the lands thereunder for the purposes implied by law."

In *Mowry v. City of Providence,*[34] the court said: "In the case of *Clark v. The City of Providence,*[35] * * * this court held * * * that the State or the General Assembly as the organ of the State, is the representative of the public or people as to the public right, and as such has the power to release the right, the General Assembly having in the matter the authority, not simply of the English crown, but of both crown and parliament, except so far as it has been limited by the Constitution of the State or the Constitution and Laws of the United States."

In *Pac. Elev. Co. v. Portland,*[36] it was held that a state may

32. See also Ill. Cent. R. R. Co. v. Chicago, (1898) 173 Ill. 471, 50 N. E. 1104; same case, (1900) 176 U. S. 646, 20 S. C. R. 509; Bliss v. Ward, (1902) 198 Ill. 104, 64 N. E. 705.
33. (1908) 56 Fla. 603, 47 So. 353, 22 L. R. A. (N. S.) 337.
34. (1890) 16 R. I. 422, 16 Atl. 511.
35. (1890) 16 R. I. 337, 15 Atl. 763.
36. (1913) 65 Ore. 349.

grant title to tide lands held by it in its sovereign capacity into private ownership, subject to the paramount public right of navigation and such reasonable regulations as the state may prescribe. It was said that lands totally or partially submerged are made the subject of grant by the sovereign, in order that they may be reclaimed for useful purposes.[37] The court further said, citing *Hinman v. Warren,*[38] "As the State became the owner of the tide lands, it had the power * * * to sell the same. It has, however, no authority to dispose of its tide lands in such a manner as may interfere with the free and untrammeled navigation of its rivers, bays, inlets, and the like. The grantees of the state took the land subject to every easement growing out of the right of navigation inherent in the public."

In *Oakland v. Oakland Water Front Co.,*[39] where the same view as to the nature of the state's title prevails, it was held that the state might grant the soil under the bed of the bay of San Francisco for the purpose of reclamation, where it was capable of reclamation without detriment to any public right.

In *Saunders v. N. Y. C. & H. R. R. Co.,* [40] it was said that, "while the State holds the title to lands under navigable waters in a certain sense as trustee for the public, it is competent for the supreme legislative power to authorize and regulate grants of the same for public or such other purposes as it might determine to be for the best interests of the state."

One commentator has said: "The trust theory cannot, on principle, be carried to such an extent as to prevent the state from granting the title of the soil under its waters to private individuals and permitting such use of it as is possible, consistent with the public rights".[41]

In Wisconsin, where the doctrine of ownership by the state in its sovereign capacity prevails, the right to grant the

37. Citing Taylor Sands Fishing Co. v. State Land Board, (1910) 56 Ore. 157, 161, 108 Pac. 126; Fowler v. Wood, (1906) 73 Kan. 511, 549.
38. (1877) 6 Ore. 408.
39. (1897) 118 Cal. 160, 50 Pac. 277.
40. (1895) 144 N. Y. 75, 38 N. E. 992, 26 L. R. A. 378. See also People v. Steeplechase Park Co., (1916) 113 N. E. (N. Y. Ct. of App.) 521.
41. 1 Farnham, Waters and Water Rights, § 36a, citing Weber v. Harbor Comm'rs, (1873) 18 Wall. (85 U. S.) 57; Barney v. Keokuk, (1876) 94 U. S. 324; Hoboken v. Penn. R. R. Co., (1887) 124 U. S. 656, 688, 690, 691, 8 S. C. R. 643; Shively v. Bowlby, (1893) 152 U. S. 1, 25, 14 S. C. R. 548; Gough v. Bell, (1847) 21 N. J. L. 156, 165; same case, (1850) 22 N. J. L. 441. Further, as to grants by the state, see Martin v. Waddell, (1842) 16 Pet. 367; Pollard, Lessee v. Hagan, (1845) 3 How. 212; Jones v. Oemler, (1899) 110 Ga. 202, 35 S. E. 575; Hatfield v. Grimstead, (1846)

bed of public waters is much circumscribed. In *McLennan v. Prentice,*[42] the court said: "The state has no proprietary interest in them, and cannot abdicate its trust in relation to them, and, while it may make a grant of them for public purposes, it may not make an irrepealable one, and any attempted grant of the land would be held, if not absolutely void on its face, as subject to revocation." In another case, however, it was said: "Submerged lands of * * * lakes within the boundaries of this state belong to the state in trust for public use, substantially the same as submerged lands under navigable waters by the rules of the common law."[43]

In Minnesota, where it is held that the title is in the state in its sovereign capacity, the doctrine that the state has any title which it may convey is repudiated. In *Bradshaw v. Duluth Imperial Mill Co.,*[44] it is said: "The old common law doctrine * * * that the crown has a *jus privatum,* or right of private property, in navigable waters and their shores, which it could alienate to a subject, has no place in the jurisprudence of this state. It is the settled law with us that the rights of the state in navigable waters and their beds are sovereign, and not proprietary, and are held in trust for the public as a highway, and are incapable of alienation."[45]

In other cases in Minnesota it has been held, in substance, that, while the riparian owner does not own the bed of navigable waters, yet he may wharf off beyond low water mark and occupy the bed of the water subject only to the regulations of the state;[46] that his private right of use is not limited to purposes connected with navigation, but may extend to any purpose not inconsistent with the public right;[47] that he has the exclusive right, absolute, as respects every

29 N. C. 139; Shepard's Point Land Co. v. Atlantic Hotel, (1903) 132 N. C. 517, 44 S. E. 39, 61 L. R. A. 937; Eisenbach v. Hatfield, (1891) 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; New Whatcom v. Fairhaven Land Co., (1901) 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190.

42. (1893) 85 Wis. 427, 444-5, 55 N. W. 764.

43. Village of Pewaukee v. Savoy, (1899) 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 86.

44. (1892) 52 Minn. 59, 65, 53 N. W. 1066.

45. See, also, Lamprey v. State, (1892) 52 Minn. 181, 53 N. W. 1139, 38 Am. St. R. 541, 18 L. R. A. 670. This is followed in Flisrand v. Madson, 35 S. D. 457, 470. See, also, State v. Cleveland, etc., R. Co., (1916 Ohio) 113 N. E. 677.

46. Brisbine v. St. P. &. S. C. R. Co., (1876) 23 Minn. 114, 130.

47. Hanford v. St. P. & D. R. Co., (1889) 43 Minn. 104, 111, 42 N. W. 596, 44 N. W. 1114, 7 L. R. A. 722.

one but the state, and limited only by the public interests of the state, for purposes connected with public uses—to improve, reclaim and occupy the surface of the submerged land, out to the point of navigability, for any private purpose, as he might do if it were his separate estate,[48] and that the rights which thus belong to him as riparian owner are valuable property rights of which he cannot be divested without consent, except by due process of law, and, if for public purposes, upon compensation.[49]

The cases which directly pass upon the rights of parties to mineral under public waters are few.

In the year 1858 the question arose in England as to the rights of the Queen and the Prince of Wales, as Duke of Cornwall, to the mines and minerals under the shore and sea adjoining the coasts of Cornwall. "The decision of the arbitrator was that all the mines and minerals lying under the seashore between high and low water marks, and under the estuaries, tidal rivers and other places beyond low water mark, which were within the county, belonged to the Prince as part of the soil and territorial possessions of the Duchy of Cornwall; but that the right to all mines and minerals beyond low water mark, under the tide waters adjacent to, but not part of, the county was vested in the Queen."[50]

In *Lord Advocate v. Wemyss*,[51] by way of dictum, Lord Watson said: "Whether the Crown could make an effectual grant of that solum or of any part of it to a subject appears to me to be a question not unattended with doubt; but I do not think that the Crown could, without the sanction of the legislature, lawfully convey any right or interest in it which, if exercised by the grantee, might by possibility disturb the solum or in any way interfere with the uses of navigation, or with any right in the public. The mineral strata below the bed of the sea, in so far as they are capable of being worked without causing disturbance, appear to me to stand in a different position. To that extent, I know of no principle of Scottish law which could prevent the crown from communicating the right of working to a subject, in the character either of tenant or proprietor. If that be so, it would follow that submarine

48. Id. 118.
49. Brisbine v. St. P. & S. C. R. Co., supra.
50. Gould, Waters (3rd ed.) § 10.
51. (1900) A. C. 48, 66.

materials, if expressly included, might, to the extent which I have indicated, be competently made parts and pertinents of a baronial or other Crown grant of adjacent lands."

In *Steele v. Sanchez*,[52] it was held that the Des Moines River at Ottumwa was formerly a navigable stream, and that the proprietary title to the bed of the river was in the public, that the title of the riparian owner extended only to high water mark, that he has certain rights below that point, but they are not the subject of transfer independent of the land to which they are appurtenant, and that the riparian owner has no such right in stone under the river bed as to authorize him to sell the same, and that he could not recover for stone quarried therefrom, the right to take which he undertook to sell.

In *Brandt v. McKeever*,[53] the court recognized the right of the state to grant the right to the minerals underlying the bed of the Monongahela River.

In *Taylor v. Commonwealth*,[54] it was held that the navigable waters below low water mark and the soil under them, within the territorial limits of the state, are the property of the state, to be controlled by the state in its discretion, for the benefit of the people of the state, and that an act of the Virginia legislature which so declared was but a declaration sanctioned and supported by the common law. It was said, that the right of the riparian owner is the right of access and of wharfage, the right to accretions, and the right to make reasonable use of the water; that these rights of the commonwealth and of the riparian owner must be exercised, if possible, so that the one shall not unreasonably disturb or impair the enjoyment of the other, but that a riparian owner of land upon the navigable portion of York River, who is not disturbed in the enjoyment of the stream, cannot complain of the fact that the state leases to a citizen a portion of the bed of a navigable stream for the purpose of sinking an artesian well, and using the water therefrom; that the commonwealth holds the soil underneath such navigable waters as trustee for the benefit of all her citizens, and whatever the soil contains belongs to the state, and it alone has the right to develop these hidden sources of wealth for the common benefit of all of its citizens;

52. (1887) 72 Ia. 65.
53. (1851) 18 Pa. 70.
54. (1904) 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865.

that it is not only her right, but her duty as such trustee, to render this property productive.

In *Florida v. Black River Phosphate Co.*,[55] where the doctrine of ownership by the state in its sovereign capacity prevails, it was held that the riparian owner had no right to take phosphate from the bed of a navigable river under any circumstances, except by consent of the state duly given by the law-making power, and upon such terms and conditions as it may prescribe.

In *State ex rel. Atty. Gen. v. Southern Sand & Material Co.*, [56] it was held that the state held the title to the beds of its navigable streams as a trustee for its citizens, and that the sale of sand and gravel therefrom was but a method of utilizing the common property of the state for the benefit of its citizens, and it was further held that the state might recover for sand taken from the bed of the Arkansas River for commercial purposes a price or royalty fixed by statute.

In *State v. Akers*,[57] a similar case, it was held that the state owns the sand under the Arkansas and Kansas Rivers, in trust for all the people; that any citizen may take what he needs for his own use, but the state may impose a royalty upon those taking it for commercial purposes.

In *State v. Pacific Guano Co.*,[58] it was held that the state, and not the riparian owners, owned phosphate rock underlying certain navigable streams of the state, and that the state might enjoin the removal thereof by the riparian owners, and might recover the value of that already taken by them.

In *Bradley v. S. C. & P. River Min. Co.*,[59] the United States Circuit Court recognized as valid a statute granting to certain named persons the right to dig and mine in the beds of the navigable waters of the state of South Carolina for phosphate rocks and phosphate deposits.

State v. Korrer,[60] involves some of the rights of the state and of riparian owners in the matter of the mining of iron ore which lies beneath the bed of Longyear Lake, a public body of water. The court held that the title to the soil under the

55. (1893) 32 Fla. 82, 114, 13 So. 640, 21 L. R. A. 189.
56. (1914) 113 Ark. 149, 167 S. W. 854.
57. (1914) 92 Kan. 169, 140 Pac. 637.
58. (1884) 22 S. C. 50.
59. (1877) 1 Hughes (U. S. C. C.) 72, Fed. Cas. No. 1787. See also Coosaw Mining Co. v. South Carolina, (1891) 144 U. S. 550.
60. (1914) 127 Minn. 60, 148 N. W. 617, L. R. A. 1916 C., 139.

waters below low water mark is held by the state, but in its sovereign governmental capacity; that the state has the right to conserve the integrity of its public lakes and rivers, and that the riparian owner has no right, against the protest of the state, to destroy the bed of a public lake for the private purpose of taking ore therefrom, and that the fact that the portions of the lake in controversy are, during low water, not capable of any substantial beneficial use, does not prevent the state from objecting to its diversion to a private use foreign to the public uses of the water and the soil under it. The right of the state to itself take ore from the lake bed, the power of the state to give to the riparian owner or anyone else the right to do so, the right of the riparian owner to take ore from the lake bed if it could be done without disturbing the waters or the public use thereof, and the ownership of the ore in fact taken out, were questions the court did not decide.

OSCAR HALLAM.*

Saint Paul.

*Associate Justice of the Supreme Court of Minnesota.

NEW LAWS FOR MINNESOTA CHILDREN.

One need not be especially thoughtful or observant to find himself asking Why?—when it is proposed to add to or otherwise interfere with (unless it be by judicious repeal) the multitude of statutes which we Minnesotans, following the fixed American habit, have already imposed upon our neighbors and ourselves. Laws, laws, laws! Looking at the biennial output from St. Paul, to say nothing of contributions from local municipalities, one lifts his hands in consternation. True, one may ignore and evade,—we Americans have that habit too; but in our reflective moods we are not wholly satisfied with this alternative. Sometimes conscience—or is it just our sense of humor?—asserts itself and we realize the naive inconsistency of making quick and cock-sure laws to cure or prevent all known and imaginable public ills,—and then quite forgetting to execute a large proportion of them.

When, therefore, it is proposed to laboriously revise our laws relating to children, it is to be expected that such people as read THE REVIEW will promptly inquire—"What's the need?" It will not be difficult to point out existing defects that cannot be remedied merely by better administration. But first it may be remarked that *a priori* our statutory occupation of this important field may be expected to be found far from perfect; and there is no subject of legislation concerning which the quest for perfection ought to be more earnest and sustained. We live in what has been aptly termed "the century of the child". Never before have the obligations of society to its more helpless members been so generally recognized; and of all forms of helplessness that of childhood makes the strongest and most universal appeal. Even those who are still slow to admit that they are their brothers' keepers may be readily made to see that they ought to be the joint protectors of their brothers' boys and girls, and must be if civilization is to go forward. The rapid growth of this common sense of responsibility for childhood has been a noteworthy mark of the last two decades. The young State of Minnesota was prompt to make humane provision for her

youthful offenders in a reform school, for the training of her deaf and blind and for the custody of her feeble-minded children. More than thirty years ago the State Public School at Owatonna was established for the care and education of dependent children, with a wise policy of home-finding as its chief objective. In 1893 private corporations were authorized to become guardians of homeless and neglected children, and place them out in suitable families. In 1905, we imported from Illinois, for our three most populous counties, the then novel juvenile court idea, and four years later attempted to extend it to the remainder of the state; 1907 saw the inauguration of the State Hospital for Crippled Children and 1913 brought so-called "mothers' pensions". On the whole Minnesota has been far from backward in adopting new instrumentalities for child welfare. And to that very fact is due in part the crudity of some of our legislation, since we took it over from other states before it had passed beyond the stage of experiment and become fixed in well considered form. Some of our children's institutions have become models of their kind, while we still find our children's laws crude, inconsistent and inadequate when compared with the best in other communities. No one can be long engaged nowadays in any form of work for the young without recognizing the careful and productive study which in recent years has been given to the problems of childhood; and much of the resulting wisdom has found its way to the statute books,—some in one state, some in another and some in the more progressive countries abroad. Good social legislation is not clutched out of the air; it is the precipitate of patient observation and experience. In the hands of an administrator a new idea is fluid,—he may try it out and modify, adopt or reject it according to the needs of his particular enterprise; the very essence of the legislator's task is to fix its form and content, and this done, wise changes are exceedingly difficult to secure. Hence it is not to be wondered at that while we find the general field of child welfare intensively cultivated in recent years, our Minnesota laws relating to children, however progressive in their origin, have not in well devised improvements and adaptations kept pace with the best details of legislation elsewhere or with the most efficient administration at home.

Of all varieties of laws those that fall within the class we know as "social legislation", concerned as they are not with

mere business relationships or political rights and methods but with human lives, should be most wisely and delicately adjusted to their ends. In this field mistakes both in doing and omitting may mean ruin of health, happiness or character. When the persons involved are young children, in whose keeping will be the future of family, city, state and nation, the importance of such laws is vastly increased; and surely they are of supreme moment when these children are so disadvantaged in inheritance or environment that they are entering upon the struggle of life with a heavy handicap. For such private philanthropy can do much but not all. When there are rights to protect or wrongs to prohibit, or when public funds are to be disbursed, the law must be invoked. "Such laws are difficult to frame. Often the line between the good and bad is indistinct, and while the good is very good indeed, the bad, like the little girl in the nursery rhyme, is 'horrid.' Often the subject is a new one and the statute is sure to come under the severely critical tests of an appellate court. Often in order to effect its purpose a measure must creep as near as possible to the precipice of unconstitutionality in restricting freedom of individual action:—a hair's breadth too far and the result is fatal. The questions involved are likely to be quite outside the information as well as the experience of the legislators, even when they are men of training and capacity. Private interests retain skilled counsel to draft the bills which they promote. Social legislation does not usually command like service. Besides it is likely to miss the critical attention which conflicting factions are sure to give to political, economic or fiscal measures."[1] What wonder then that our body of laws relating to children has received less than adequate consideration? "This legislature isn't interested in children", a senator said to me two years ago, and a by-standing colleague gave assent. It was not necessary to go so far to account for the inactivity to which allusion was made; unfamiliarity with the facts was a sufficient explanation.

Considerations such as the foregoing moved a group of people who are interested in children to ask the legislature of 1911 to consider the appointment of a commission to revise our children's laws. The proposal was made late in the session and received no serious attention. A bill for such a

1. Quoted from an address by the writer before the Minnesota State Conference of Charities and Corrections in 1913.

commission, to be named by the governor and to serve without compensation, passed the house at the following session. Carrying an appropriation for expense it met opposition in the senate committee on finance and was not permitted to come to a vote, even when modified to meet every objection that was openly brought against it. The friends of the measure were naturally discouraged, but a year later agitation started up again. It was felt that the need was too urgent to permit of further delay than was unavoidable. It was plain that the work could be done only by a group, approaching the delicate and difficult problems from different angles; and no qualified group would undertake it without some other warrant than their own initiative. Taking their cue from Missouri, where a commission for a like purpose had been appointed by the Governor without action by the legislature, various civic and philanthropic bodies, together with a large number of individual petitioners throughout the state, requested Governor Burnquist to appoint a commission to revise and codify the laws of the state relating to children. This he did, naming twelve persons. The Commission, which styles itself for convenience the Minnesota Child Welfare Commission, organized August 15th, was assigned an office in the State Capitol, secured a competent executive secretary and clerical assistance and began its task. It is financed by contributions of interested persons, supplemented by assistance of various sorts from several departments of the state government. It has accumulated a large amount of material bearing upon the different subjects under consideration, including statutes of other states, has corresponded with many experts and had personal conference with a few; and at this writing (December first) has held seven public hearings at which all who have so desired have had opportunity to express their views.

The members of the Commission have understood their task to be not merely to supply omissions in our children's laws and reduce them to more orderly form, but to devise new legislation embodying whatever is needed to bring this branch of our Minnesota law abreast with the best contemporary thought and experience. This is a large undertaking. How much can be accomplished in season to be presented to the legislature of 1917 remains to be seen; but some measures of

importance will be forthcoming. It is, of course, impracticable to enter into a detailed recital of the numerous matters under consideration, but a few will be selected for summary mention.

The fundamental principle involved, based upon social and political necessity, is that the state by virtue of its sovereignty is the ultimate guardian of all its subjects who need for their well-being what they are unable to supply by their own exertions. Of this class young children are the conspicuous members. Recognition of this doctrine by the courts has been abundant. "It is the unquestioned right and imperative duty of every enlightened government, in its character of *parens patriae,* to protect and provide for the comfort and well-being of such of its citizens as, by reason of infancy, defective understanding or other misfortune or infirmity, are unable to take care of themselves. The performance of this duty is justly recognized as one of the most important of governmental functions." *McLean County v. Humphreys.*[2] The natural rights of parents must give way, in appropriate cases, to this paramount function of the state. *Ex parte Crouse;*[3] *State ex rel Olson v. Brown.*[4] The principle as applied to juvenile courts was very ably developed by Judge Julian W. Mack in an address before the American Bar Association in 1909. Lawyers are familiar with its ancient application by courts of chancery, but until comparatively recent years the emphasis was upon the protection of property rights. As living conditions have been more and more complex, and as a social consciousness has gradually emerged from the intense individualism of the eighteenth and early nineteenth centuries, necessity and humanity have worked together to transfer the ictus from property to people; and now the personal rights of children are commonly recognized as within the guardian care of the state, exercised through the legislature and the courts.

To every child is due from the sovereign that claims his allegiance—

1. A fair chance to begin life sound in mind and body, and with two responsible parents.

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2. 104 Ill., 378.
3. 4 Whart. 9.
4. (1892) 50 Minn. 353, 52 N. W. 935.

2. A fair chance for development, appropriate to his natural capacity, in body, mind and morals.

3. The greatest practicable relief from permanent consequences of his own wrong-doing, and corrective restraint of his anti-social tendencies.

1. At present Minnesota does not secure to all her children a fair chance to be born sound in mind and body. There is no serious attempt to prevent the propagation of mental defectives save through the segregation of some of the insane and a fraction of the feeble-minded and epileptic. It is said by those familiar with the facts that there are probably ten thousand feeble-minded and epileptic persons in the state who, if permitted to mate, are practically certain to become the parents of several times that number of mental defectives. The capacity of our only custodial institution for these unfortunates, the School for Feeble-Minded and Colony for Epileptics at Faribault, is about sixteen hundred. Commitment is optional with parents or guardians, who are often too unwise or indifferent to take the necessary steps, and after admission detention cannot be enforced. The menace of the feeble-minded at large is so obvious, in its geometrical progression of poverty, disease, degradation, vice, crime and public expense, that one marvels at the improvidence that contents itself with less than the utmost of precautionary measures. Certainly we should have greatly enlarged facilities for segregation. But with this advance should there not be compulsory judicial commitment? A few states—Illinois, for one—have provided for this. But it is a difficult and perplexing subject. What is the minimum standard of mental normality below which segregation is needed for the protection of the subject and of children who have the right not to be begotten? What means of establishing feeble-mindedness will be accepted by the community as just and safe? Often feeble-minded girls of the higher grades become able to support themselves, with supervision, outside the school. Save for the possibility of their becoming mothers and the biological certainty that some of their offspring would be feeble-minded, they might be set at large with mutual advantage to themselves and the state. Shall they be unconditionally discharged? Or shall this be done, while they remain of child-bearing age, only in the event of their being

sterilized? If this measure is to be employed, what authorization should be accepted as sufficient?[5]

Twenty to twenty-five per cent of blind children in institutions are victims of *opthalmia neonatorum,* a disease communicated at birth and subject to a simple, sure and safe prophylaxis. Some states require by law that this preventive treatment shall be applied: should Minnesota do likewise?[6]

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5. Perhaps the reader whose pleasant path of life has never led him very near to "the warrens of the poor" will think I have overdrawn the social dangers of feeble-mindedness. I offer Exhibit A. the X family, out of many that might be selected from even my own limited field of observation:

1. Peter, husband; common laborer, well-meaning but of low intelligence.
2. Mary, wife; five times in and out of an insane hospital; never when at large able to carry any of the ordinary responsibilities of family life except bearing children.

Children: 1, 2 & 3: married and living in other cities; nothing learned about them by my investigator.

4. Hilda, oldest daughter born in U. S.; feeble-minded and epileptic. Married to John Peterson, stupid, lazy, formerly a hard drinker and syphilitic,—probably a moron. When I first knew the pair, about four years ago, there were four small children,—the oldest seven and the youngest a babe in arms. Almost by a miracle this woman was persuaded to go to the State School at Faribault, under a special dispensation permitting her to take her baby. There she remains, in physical comfort but progressive mental disintegration. The baby died of tuberculosis.
5. Christine. Married a tuberculous man; both have died of T. B., leaving 2 children. Whole family public charges for years.
6. William, oldest son born in U. S.; habitual thief in boyhood; twice in juvenile court; sent to State Training School at Red Wing, where he proved incorrigible and ran away.
7. Olof, next son; three times in juvenile court and once sent to Glen Lake Farm School, the court's detention home for delinquent boys.
8. Susan, next daughter; three times in juvenile court; finally, at 14, sent to Home School for Girls at Sauk Center. Confessed to repeated immoral relations with a married relative.
9. Hjalmar. Feeble-minded. School authorities wish him sent to Faribault, but parents will not consent.
10. Christian, 11 years old; mentally retarded; on school list for mental test, but none made yet.
11. Margaret, 10 years old; no signs of mental defect thus far.

4—a, b & c: Children of Hilda and John Peterson:

a. Robert, in a local children's home for last four years; thus far mentally all right.
b. Bertha, feeble-minded; sent to Faribault after long treatment in city hospital for venereal infection.
c. Francis, same as Bertha.

Agencies that are known to have dealt with the X family in the last ten years are as follows: State, five; county, two; city, two; private charities, five.

Does this sort of thing interest you, Messrs. Senators and Representatives?

And what are you going to do about it?

6. While this article was in preparation the State Board of Health

Hundreds of the children born in Minnesota in 1916, were ushered into life by midwives, without the attendance of a physician. Our supervision of midwives is practically *nil.* Is this fulfilling our obligation to the babies?

The misery entailed upon children by transmitted venereal disease is too familiar to require comment. Can the law assist the slow process of education and moral uplift in preventing this hideous injustice? Try your hand, my brother lawyer, at the drafting of such a law, in restraint of the marriage of the unfit, or even for the sanitary control of the diseases of vice;—and you will soon realize the difficulty of the task.

Our statute as to illegitimacy is but a slightly humanized survival of the cruel common law,—so careful of inheritable property and so careless of innocent and helpless childhood. We safeguard the county treasury, give slight redress to the mother, but practically ignore the child. We allow him but a single responsible parent, even when paternity is undisputed. Should not the state concern itself with establishing paternity? Should not the father and mother alike be charged with the care and education of their child to the full extent, and under the same coercion, as in the case of a legitimate child? Does our law of inheritance do full justice to the child born out of wedlock. If not, what changes can be made, with due care not to undermine that cornerstone of civilization, the family, and not to invite too broadly assaults by unscrupulous adventurers upon the reputation and estates of the dead?

2. Minnesota does not now reasonably secure to all her children a fair chance for development in body, mind and morals. I shall not enter into any discussion of our general educational scheme. Save with respect to the compulsory features the Commission does not deem this to be within the scope of its undertaking. Whether an unyielding school attendance law is wise opinions will differ; but that to handicapped children should be guaranteed the best equipment for life the state can provide, all will probably agree. I have called attention to the fact that appropriate training for the mentally defective is not assured. The same is true of the blind, al-

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issued regulations upon this subject. But the Attorney General has expressly refrained from passing upon their validity. Further legislation may be needed if this is to be placed beyond controversy.

though compulsory attendance of deaf or dumb children at the state school for the deaf is provided for.

Our child labor laws are confused and unrelated. They need orderly rearrangement rather than substantial change. In one respect, however, we are far below the standard set by other progressive states: we have no regulation of street-trades. This subject has been deemed of such importance as to claim the attention of the American Bar Association's Committee on Uniform Legislation. The model bill prepared by this committee should have careful attention.

Some of our statutes designed to protect the morals of the young are made inoperative by a penalty which brings the offense into the class of indictable crimes. Police laws are much more likely to be enforced when the offense created is a simple misdemeanor. This is because juries are loath to convict when the penalties are severe, and prosecution is more tardy, cumbersome and expensive in the district courts than in courts of limited jurisdiction. The promotion—so to speak—of simple misdemeanors to gross misdemeanors is a familiar legislative phenomenon. The champion of public morality has a period of brief elation, but presently he finds that he can no longer get prosecutions and convictions so readily as before, and that the net result is to make the offense he seeks to punish severely practically immune. Furnishing intoxicants to minors, procuring minors to enter saloons to obtain intoxicants, selling cigarettes to minors, selling fire-arms to persons under eighteen years of age, accepting pawned articles from minors, selling and exhibiting obscene and other injurious literature to minors and employing minors to distribute such literature—are now gross misdemeanors. How many convictions has the reader known or heard of since they attained this dignity? And is it well that these offenses against the young shall continue to go unpunished by the state?

Happily, over most children the guardianship of the state remains potential only. They are protected, nurtured and trained in the homes into which they have been born. Even where home conditions are far from ideal parental incompetence and improvidence, unless they be extreme, are commonly—and I think rightly—deemed no warrant for official interference. But there are waifs in plenty who are not born

into homes or even into families; and there are many who through the misfortune or the fault of parents are in grave danger or actual distress. If the state do not provide itself the prompt and efficient guardian of these, that indeed were folly and shame! I have spoken of the duty to provide the illegitimate child, if possible, with a responsible father. But what of the many cases where this cannot be done? Has the state no duty then? Must such children take their chance with private charity or the uncontrolled preference of mothers whose incapacity to care properly even for themselves finds conclusive proof in the very existence of the child? Among the few points on which the Commission already knows its own mind is the proposition that the state should begin at birth to exercise its guardianship over the illegitimate child; first to find him a father and compel that father to shoulder his due responsibility; and this failing, to stand vigilantly by the side of the mother, helping her if her will and judgment make for good to the child, and restraining her if for ill.

So also as to children born in wedlock but orphaned, abandoned or neglected; the state has no higher obligation than to discover and supply their need. This means, of course, delegation by law of duty and authority to persons through whom alone the functions of government can be exercised. The defects of the present situation can best be shown by concrete illustrations. An unmarried girl about to become a mother comes to Minneapolis, St. Paul or Duluth to hide herself until the ordeal is past. She goes to a private lying-in place which has no supervision except such as the health authorities see fit to provide with respect to sanitation. Her child is born. The birth may be duly reported, but the report entails no duty upon any public officer. Shall the mother nurse her babe? The state has nothing to say. When she is able to go away shall she go and leave the child behind? The state does not concern itself. Usually she goes and the child remains. She sends for a time the required payments for his care, sometimes in the hope that a way will yet open to have him with her; sometimes under an agreement by which the keeper of the place is to "find a home" for the unwelcome little one. Presently the payments cease and the child must be disposed of. The papers contain an advertisement that at such-and-such a place a beautiful blue-eyed boy may be

had for adoption. It is of some moment to the blue-eyed boy —is it not?—this determination of his future. If ever he will need the guardian care of Mother Minnesota is it not now? But Minnesota is blind and deaf. She does not know and seemingly does not care. The child is placed according to the whim or interest of his temporary custodian; and the state takes no part in the transaction.[7] My illustration is colorless; but I could supply hues of tragedy and pathos in great variety. I have had before me children who had been for years in the hands of prostitutes and drunkards, picked up and kept as one might harbor a vagrant kitten until a chance occasion brought them into court.

Another girl is more well-advised. She goes to a maternity home or hospital, organized and conducted to render aid to such as she. Or, if her confinement be elsewhere, she takes her child to an institution or association to which the law gives her the power to surrender her maternal rights. These institutions and associations are generally well conducted and do a noble work. But even though the child be safe with them, does not sound public policy demand that here too the state shall have some share in choosing the home in which the future citizen shall be prepared for life? Not a dollar of his patrimony, if he had any, could be disbursed without public supervision. Is it appropriate to leave the nurture and training of his most critical years to the unchecked discretion of even good and wise people who have no responsibility except such as lies within their own conscience? In such cases the guardianship of the state would be exercised not for interference but coöperation, and to demand its exercise is not to disparage private philanthropy any more than to require an accounting in court is a slur upon the integrity of a trustee.

Here is a waif left upon a door-step. The kind-hearted householder takes him in and keeps him. But something more than a kind heart is necessary to make the home a fit one for the particular child. Should not the state inquire? I have known a white child to be left at the door of colored people. It is no reflection upon the good man and woman

7. This is a strictly true statement of the law down to the enactment of Ch. 199, Laws 1911. That act was designed to secure some participation by the probate court, but has proven so ineffective that I have ignored it in this recital as it is ignored in practice.

who cared for him, took him into their hearts and wished to keep him as their own, to question whether it was well that this relation should continue; but in all the great state there was no one whose official duty it was to raise that question. Here is a family of orphaned children, needing from the public everything that helplessness and destitution lack. If these needs are supplied it is not at the instance of the state but of private charity, although state agencies may finally be invoked. Here are children with parents of a sort, but neglected and imperiled in body, mind and morals. Of them the same is true. Obviously there should be supplied a link between the sovereign state and the needy child. To this end it is proposed to provide for public guardians whose duty it shall be to safeguard the interests of children who are proper subjects of the state's protecting care. They may serve as legal guardians, appointed by the courts, in appropriate cases; but their peculiar function will be to take the initiative in all that should be done for the welfare of dependent, neglected and defective children, many of whom now suffer because their welfare is "nobody's business". For example, a child is born to an unmarried mother. The local public guardian will concern himself with finding the father and holding him to his lawful responsibility. At present the only motive which sets the machinery of the courts in motion is the self-interest of the mother or the prevention of expense to the county. The public guardian will emphasize a more important motive, now ignored,—the child's permanent good, and whether the father be found or not official vigilance will not be withdrawn until the future of the child is fairly secure. He will represent the state's responsibility when placing-out or adoption are in question, and when in any respect the welfare of a child is deemed to call for interference with the existing custody.

The manner in which this new recognition of an old and neglected duty of the state is to be organized for action is yet to be determined. The idea has been worked out with apparent success in several states. The problem is to secure adequate service in every locality, with proper coördination and with the least possible increase in the machinery of the state government. In these days of "economy and efficiency" the ideal must give way to the practicable. Suggested plans call for centralization in the State Board of Control, with repre-

sentatives in the several counties and perhaps some traveling agents.

Changes in the present law granting county aid or so-called "mothers' pensions" to mothers of dependent children are imperatively needed. The scheme is a novel one,—less than four years old in Minnesota and first adopted anywhere in the United States as recently as 1911; but it has met with such general approval that the permanence of its essential features is assured. Practically $100,000 will be disbursed under this law in Hennepin and Ramsey Counties in 1917. $250,000 would not be an unreasonable estimate for the entire state, and the amount will grow steadily, if not rapidly. Legislation involving so large a distribution of public funds, and fraught with such possibilities for good or ill,—timely and constructive relief or wastefulness and demoralization,—should be carefully framed at the outset and brought as speedily as may be to a perfected form. Our Minnesota act of 1913 was hastily thrown together, passed with slight consideration and left without amendment by the succeeding legislature. Other states have embodied the results of their study and experience in new and carefully devised measures. It is high time for us to do the same. This law should be properly related to other laws with which it is now inconsistent; it should have checks and safeguards that are now lacking; and if it is to remain in such form as to exclude all unmarried, divorced and deserted mothers, as at present, this should be as a deliberate conclusion after study of the questions involved, rather than a chance imitation of the law of another state. Most persons whose knowledge of the subject entitles them to an opinion believe the law should not be administered in the juvenile court. But to agree upon the more appropriate agency will not be easy.

3. Our third division of the rights of childhood relates to delinquency. Here our present law is more nearly adequate than in the fields of defectiveness, dependency and neglect. Experience shows that at least in the cities police and school officials, despairing parents and private citizens with grievances can be fairly well relied upon to bring delinquent children into court; and once in court the facilities for dealing with them are moderately good. Our law of 1905, vesting juvenile court jurisdiction in the district courts in the three

large counties of the state, followed closely the original Illinois law passed in 1899. It has stood the test of experience remarkably well. Like every piece of live legislation it has needed amendment from time to time, and changes are needed now, most of them involving details of procedure and administration. One fundamental question, at least, must have attention. After four years of successful operation of the law of 1905 in Hennepin, Ramsey, and St. Louis Counties there was a general desire to extend its benefits to the rest of the state. In 1909 juvenile court jurisdiction was given to probate courts in counties having a population of less than fifty thousand. This was deemed to be constitutional, even as to delinquents, inasmuch as the proceedings in such cases would not be criminal but an extension of the limited chancery powers already exercised by the court in the interest of minor children. So far as deemed practicable the new law followed in its details, the earlier one. It did not work well—at least not as to delinquent children. They were still dealt with in the smaller towns and rural districts by criminal courts. In 1913 amendments designed to cure this obvious defect and others were framed and passed; but still the probate court, speaking generally, has not proven a success in the exercise of its new functions. That this is not necessarily so, in spite of unavoidable drawbacks, such as the brief terms of probate judges, their lack of criminal jurisdiction over adults who contribute to juvenile delinquency and dependency, and the absence of an official probation system, is shown by the excellent work done by a few judges who have taken a real interest in this branch of their duties. Nevertheless it is a grave question whether all the district courts should not take on juvenile court jurisdiction, with aid from commissioners or referees, as in North Dakota or several other states. That the problem of juvenile delinquency is found in alarming proportions outside the largest cities, I need take no space to demonstrate. Nothing less than the best way to save the boys and girls who are beginning to go wrong, wherever they are found in the state, is good enough, and considerations of economy and convenience should give way to probable efficiency. Further, the fact should not be overlooked that the handicaps of probate courts referred to in this connection also hamper their dealings with dependent and neglected children.

Objections to this suggested shift of jurisdiction are obvious and weighty; and it may well be that with an effective centralization of responsibility for children in the Board of Control there will ensue a gradual process of education, both of courts and public opinion, which may be relied upon to bring about the most essential reforms. But reforms there must be, or the state will be recreant to one of its most solemn obligations; and for these reforms wise legislative provision is required.

But one other contemplated change affecting delinquents will be mentioned here: It is proposed to raise the maximum age of juvenile court jurisdiction from sixteen to seventeen,—the limit in nearly all the more progressive states. This seems to me to be a matter to be deduced from experience rather than reasoned out; and it is interesting to find that by a sort of unrelated progression many of our criminal laws have come to recognize the eighteenth birthday as the dividing line between childhood and youth. As a safeguard and to provide for exceptional cases discretion to transfer a technical juvenile to a criminal court, to be dealt with on the basis of full responsibility, should be clearly vested in the juvenile courts. The present law on this point is somewhat obscure.

The Commission, according to the terms of the Governor's designation, is expected not only to revise but to codify. It will revise by proposing amendments and new laws; whether it can gather all the laws relating to children from the four corners of the statutes where they are now scattered into an orderly code is doubtful. But the substance is more important than the form; and if they shall succeed in answering to the reasonable satisfaction of the citizens of Minnesota, as represented in the legislature, even a few of the important questions they are now considering, they will not have labored in vain.

EDWARD F. WAITE.[1]

Minneapolis.

[1]Judge of the Hennepin County Juvenile Court and Chairman of the Minnesota Child Welfare Commission, appointed by the Governor to revise and codify the laws of Minnesota relating to children.

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FOREWORD.

The Law School of the University of Minnesota begins, with this issue, the publication of a law review, and thereby necessarily not only invites comparison with the established legal periodicals already covering nearly the same ground, but raises the question why it is thought wise to enter so crowded a field and to undertake an apparent duplication of the work already being so admirably performed by others. As to the comparison, the REVIEW must speak for itself. Many of the reasons for its existence have been already set forth in the prospectus, with which most of its readers are doubtless familiar. Some of them may be here briefly stated.

The MINNESOTA LAW REVIEW is and will be the product of the Law School of the University. Many, and

perhaps most, of its leading articles will be written by persons not connected with the school, but the entire faculty and the ablest members of the student body will coöperate in making it what it is hoped to be. To do this, it will be necessary to survey the entire field of law, in its most recent developments. The progress of legislation, national and state, the changes being constantly wrought in the fabric of jurisprudence by judicial decisions in this country and in England, and the almost imperceptible effect of economic changes upon the development of law, will form the material with which the makers of this review must work. Law teachers, in the lecture-room, confronted with the necessity of teaching the law as it is, and the historical process by which it became what it is, usually find the time all too short to go extensively into the broader field of the law as it ought to be and as it must be if it is to meet the needs of an advancing civilization. The rule of stare decisis lies heavily not only upon the courts but upon the teachers of law; the result is a narrow and petrifying legalism which is apt to put an ineffaceable stamp upon the mind of the student before he leaves the law school. A well-conducted law review in which faculty and students collaborate ought to do something to develop the spirit of statesmanship as distinguished from a dry professionalism. It ought at the same time to contribute a little to the systematic growth of the whole law.

The law review is almost the only place where the decisions of the courts can receive calm and friendly criticism, in the light of the general science of the law. Here the binding force of precedent is less oppressive; the fear of popular opinion is removed; obiter dicta may be separated from points actually decided; aspects of the questions involved which have been overlooked on account of the pressure of business may sometimes be called to the attention even of the courts themselves; and in this way the law school as a promoter of legal science may be elevated towards the place in public estimation which it is sure ultimately to attain. The present position of the typical law school, as compared with the medical school, is discreditable to the former; its influence with the profession is not what it ought to be. The law review is one of the means by which the law school may make its influence, if it deserve to have any, felt by those who have the making and

the administering of the law. This Review therefore hopes to do something to bring the law school into closer relations with the courts and the bar, giving and receiving criticism and profiting by both, helping to make the courts more truly institutions for the administration of justice rather than for the mere mechanical application of the rules of law. Criticism of opinions is not the same thing as criticism of the courts. True criticism is not censorious, but is designed to bring out the soundness and wisdom, as well as the unsoundness and unwisdom of judicial decisions. Our pages will therefore be open to the freest discussion. All sides of every debated question will find expression, and in the jostle of opinion progress may be made toward a solution of some of the vexed questions both in substantive law and in the methods of its administration.

While the MINNESOTA LAW REVIEW will be published in the Northwest and for Northwestern readers chiefly, its design is not provincial or local. The harmonious development of the law as a whole will be its major theme. Topics of international law and general jurisprudence will have appropriate space. Nevertheless, it is recognized that each of the great sections of the country has its own peculiar legal problems, each state its own more special problems. It should be the duty of a state university to assist in the solution of these questions, in the legislature, in the courts, and in the forum of public opinion, quite as much as to render assistance to the municipalities of the state in their engineering plans, in promoting the public health, or to the farmers of the state in promoting agriculture. In this work the law review should in time become a recognized factor. To confine a university law school to the mere function of training lawyers to earn a living is to raise a doubt whether the public money is not being misspent.

Many other considerations have combined with these to induce the faculty of the University Law School to undertake this most arduous task; but these are enough to show that no other law review, nor all others combined, no matter how admirable they may be, can do our work. It will no doubt be long before this review can bear comparison with some of its contemporaries. We feel the inspiration of their example, we covet the eminence they have earned, but it is with diffi-

dence that we submit our initial work to the criticism of the profession.

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Desiring to insure freedom of discussion, the REVIEW disclaims responsibility for opinions expressed by the authors of signed articles.

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A department devoted to Current Legislation will include a summary of the legislation of general interest enacted by Congress and the legislature of Minnesota, and, so far as possible, will endeavor to indicate the trend of legislation throughout the country. —H. J. F.

ACCIDENT INSURANCE—MURDER BY BENEFICIARY—ACCIDENTAL DEATH—RECOVERY BY ESTATE.—In a suit by the beneficiary on a policy of accident insurance upon the death of the insured, the defendant, among other defenses, interposed that of murder of the insured by the beneficiary. The court held that under a general denial, the defendant could prove that the beneficiary caused the death of the assured, on the theory that in such case the death would not be accidental. *McAlpine v. The Fidelity & Casualty Co. of N. Y.*, (1916 Minn.) 158 N. W. 967.

The question of pleading decided by this case is relatively unimportant, but the doctrine underlying it is novel and of considerable importance. If the death of the insured was accidental, then the event insured against has happened, and the further question would arise as to whether the estate of the deceased may recover. Inasmuch as the suit was brought by the beneficiary, counsel failed to argue the question whether the death was accidental, and the point was, therefore, not very carefully considered by the court. The question is wholly new. No case has been found deciding or even discussing the point, but upon principle and analogy it would seem that the court should have held differently.

In considering whether the death of the insured was accidental within the meaning of an accident policy, there would seem to be no difference in principle between the case of murder of the insured by a stranger to the policy and that of murder by the beneficiary. In neither case has the insured participated in the act, and as to him, the death is accidental. When the insured is murdered by a stranger, though the death is caused intentionally and feloniously, the courts have held uniformly that it is accidental.[1] "An accident within the meaning of such an

1. *Richards v. Travelers' Insurance Co.* (1891) 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455 (struck by blackmailer); *American Accident Co. v. Carson*, (1896) 99 Ky. 441, 36 S. W. 169, 34 L. R. A. 301 (murdered); *Fidelity & Casualty Co. v. Johnson*, (1894) 72 Miss. 333, 17 So. 2, 30, L. R. A. 206 (hanged by mob); *Insurance Co. v. Bennett*, (1891) 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685. See also *Ripley v. Railway Passengers' Assurance Co.*, (1870) 20 Fed. Cas. No. 11854 (murdered by rob-

insurance policy [accident] includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event."[2] "While our preconceived notion," says the Kentucky court, "would hardly lead us to speak of an intentional killing of a person as an 'accidental' killing, yet no doubt can now remain, in view of the precedents established by all courts, that the word 'intentional' refers to the person inflicting the injury, and if as to the person injured, the injury was unforeseen, unexpected, not brought about by or through his agency * * * then the occurrence was accidental."[3] It is then objectively an accident.[4]

There seems to be no reason either in logic or in natural justice why the court should give a different interpretation to the terms of the policy merely because the beneficiary inflicts the injury, causing death, or why it should refuse to consider its accidental nature from the same standpoint as it does when a stranger causes the death of the insured, viz.: whether the act was intentional on the part of the insured. To hold such a death accidental would not mean the legal encouragement of murder, as the beneficiary would still be barred from recovery on the policy. When the action is upon a life insurance policy, it is the universal rule that on grounds of public policy, the beneficiary who has feloniously caused the death of the insured can not recover.[5] The same considerations of policy should apply with equal force when an accident insurance policy is involved.

Admitting the death in a case as above to be accidental, and the beneficiary unable to recover on the insurance policy, can the estate of the insured recover? The interest of the beneficiary of a life insurance policy is a vested one.[6] It might be argued therefore, that when the beneficiary by his felonious act has incapacitated himself, or any one claiming under him, from recovery, such vested interest could not pass to the estate of the decedent. Nevertheless, in the few cases in which

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ber). An interesting analogy is furnished by cases arising under the Workmen's Compensation Acts. Where a night watchman was murdered by another employee apparently for purposes of robbery, it was held that this was an accident. *Walther v. American Paper Co.*, (1916 N. J.) 98 Atl. 264.

2. *Railway Officials' & Employees' Accident Ass'n. v. Drummond*, (1898) 56 Neb. 235, 241, 76 N. W. 562; *Ripley v. Passengers' Assurance Co., supra.* 1 C. J. 390, note 17.

3. *American Accident Co. v. Carson, supra.*

4. 2 Biddle on Insurance, 780.

5. *Cleaver v. Mutual Reserve Fund Life Association*, [1892] 1 Q. B. 147 (grew out of the famous Maybrick Case); *N. Y. Mutual Life Insurance Co. v. Armstrong*, (1885) 117 U. S. 591 (endowment policy; insured was murdered by his assignee); *Metropolitan Life Ins. Co. v. Shane*, (1911) 98 Ark. 132, 135 S. W. 836; *Schmidt v. The Northern Life Association*, (1900) 112 Ia. 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323 (court stated that it would be contrary to good order of society to allow wife who murdered her husband to recover on the policy); *Filmore v. Metropolitan Life Ins. Co.*, (1910) 82 Ohio St. 208, 92 N. E. 26, 28 L. R. A. (N. S.) 675. The Supreme Court of Minnesota adopted this same doctrine in a very recent decision. *Sharpless v. Grand Lodge* (Minn. Dec. 1, 1916).

6. Vance on Insurance, 393. *Contra, Nims v. Ford*, (1893) 159 Mass. 575, 35 N. E. 100 (held that the interest of the beneficiary was equitable only and could not be reached by trustee process).

the question has arisen, it has been held that while neither the beneficiary nor any one claiming under him can recover, the administrator of the estate of the deceased or his sole heir may recover.[7] This rule has been adopted in Minnesota, where the principal case was decided.[8] Where the insured reserves the right to change the beneficiary, or in the case of mutual benefit certificates where the interest of the beneficiary is not considered vested, the reason for the rule that the administrator of the insured may recover is more readily apparent. But even in the case of an ordinary life insurance policy, the contract with the insurance company is a valid one; the event insured against has happened, and when, on grounds of public policy, the beneficiary is barred from recovery, it seems correct to hold that the insurance company becomes a trustee of the fund for the benefit of the estate of the insured, since it was from that estate that the premiums were paid. As well might the insurance company try to avoid all liability merely because the beneficiary for some other reason found himself unable to take the proceeds of the policy. The proviso in the accident policy for payment in case of death of the insured is very much the same as in the ordinary life insurance policy, and the same principles seem applicable.

It is submitted that in the case of an accident policy, when the death of the insured is caused through the intentional and felonious act of the beneficiary, the death is nevertheless accidental within the meaning of the policy; and that, though on grounds of public policy, the beneficiary may not recover the amount of the policy, the administrator of the estate of the decedent should recover.

NEGOTIABILITY OF A BILL OF LADING UNDER THE FEDERAL BILLS OF LADING ACT—According to the common law unaffected by statutory changes an order bill of lading is not negotiable in the same sense as a promissory note. It was felt by the courts that the bill of lading, because it does not represent money, could not be fully negotiable. The "Uniform Sales Act", which has been adopted by several states, does

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7. "Public policy prevents Florence Maybrick from asserting any title as cestui que trust of this fund, and thereby brings into operation the resulting trust in favor of the insured", Fry, L. J. in *Cleaver v. Mutual Reserve Fund Life Association, supra*, p. 160; *Metropolitan Life Insurance Co. v. Shane, supra* (administrator allowed to recover, but defendant did not object); *Schmidt v. Northern Life Association, supra* (mutual benefit certificate; recognizes resulting trust in favor of decedent's estate); *The Supreme Lodge of Knights and Ladies of Honor v. Menkhausen*, (1904) 209 Ill. 277, 70 N. E. 567, 65 L. R. A. 508, 101 Am. St. Rep. 239 (benefit certificate; held that heirs at law of insured might recover, otherwise incentive might be created for insurer to cause the beneficiary to murder insured and be relieved of all liability on the policy); *N. Y. Life Insurance Co. v. Davis*, (1899) 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305.

8. In an opinion written by the same Justice as the one in the principal case, the Minnesota Supreme Court squarely adopted the doctrine that when the beneficiary of a benefit certificate murdered the insured, such beneficiary on grounds of Public Policy could not recover, but that the action was properly brought by the sole heir at law of the deceased. *Sharpless v. Grand Lodge, supra* (where the court cited *Cleaver v. Mutual Reserve Fund Life Association, supra).*

not make an order bill of lading completely negotiable.[1] "While any person intrusted with the possession or custody of a negotiable document of title running to bearer, or indorsed in blank, or to the order of the person to whom the possession or custody has been intrusted, has been given the power of negotiating the document, irrespective of the terms of the trust or agency upon which his possession may be held, neither a thief nor a finder is within the terms of the section."[2] The Act does not, therefore, protect an innocent purchaser of a bill of lading negotiable in form, from a thief or finder. Full negotiability may have been intentionally left out in order not to jeopardize the adoption of the Act by the state legislatures. A separate act, the "Uniform Bills of Lading Act", was provided giving full negotiability to order bills of lading.[3] There is no doubt that the states which have adopted the Uniform Bills of Lading Act will hold such a bill of lading negotiable even to the extent of protecting an innocent purchaser from a thief or a finder. The Federal "Bills of Lading Act",[5] which goes into effect on January 1st, 1917, will control the law so far as interstate commerce is concerned. This Act is practically the Uniform Bills of Lading Act[6] and apparently grants the same complete negotiability. It cannot be said, however, as a matter of law, that this is the import of the Act as there have been no cases interpreting it, but from a comparison of the two it seems evident that the intention was to give a bill of lading negotiable in form, complete negotiability. Sec. 31 of the Uniform Bills of Lading Act and Sec. 30 of the Federal Act are practically the same. Sec. 37 of the Federal Act follows Sec. 38 of the Uniform Bills of Lading Act except that it is more explicit. The Uniform Bills of Lading Act states that negotiation is not impaired by "fraud, accident, mistake, duress or conversion."[7] Accident probably means loss while conversion includes theft. This section elaborates for the sake of clearness certain terms in Sec. 31 and gives an order bill of lading complete negotiability. Sec. 37 of the Federal Act provides that the negotiation is not impaired by "fraud, accident, mistake, duress, loss, theft, or conversion."[8] It may be deduced from this that the intent of Congress, was to make this absolute negotiability more definite than in the Uniform Bills of Lading

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[1]Uniform Sales Act, § 32 and 38.
[2]Williston On Sales, p. 710.
[3]Uniform Bills of Lading Act, § 31 and 38.
[4]Minnesota has not, as yet, adopted either the Uniform Sales Act or the Uniform Bills of Lading Act, but has adopted the Uniform Warehouse Receipts Act. See Minn. G. S. 1913, § 4514-4575 which provide for a limited negotiability as in the Uniform Sales Act. See § 4553.
[5]Public Act No. 239 (approved Aug. 29, 1916) 235 Fed. 793. The Act applies to "Bills of lading issued by any common carrier for the transportation of goods in any territory of the United States, or the District of Columbia, or from a place in one State to a place in a foreign country, or from a place in one State to a place in the same state through another state or foreign country."
[6]The Federal Act does not include a provision regarding the question of payment of a demand draft and acceptance of a sight draft and the definitions of each, which are found in § 41 of the Uniform Bills of Lading Act.
[7]§ 38 of Uniform Bills of Lading Act.
[8]§ 37 of Federal Bills of Lading Act.

Act so that the courts could not construe it against negotiability. The Uniform Bills of Lading Act speaks of a bill of lading as a "negotiable bill"; in the Federal Act the word "negotiable" is not used but "order bill" instead. The probable reason for this is to prevent a confusion of the negotiability of an order bill of lading with that of an ordinary promissory note. There is a difference between the two and it is advisable to keep the meanings entirely separate and distinct. The new Federal Act, therefore, is an improvement over the Uniform Bills of Lading Act. From the terms of the Act,[9] we can conclude that the intention was to give full negotiability to order bills of lading.[10]

CARRIERS LIABILITY TO BONA FIDE HOLDER OF ORDER BILL OF LADING ISSUED WITHOUT ACTUAL RECEIPT OF GOODS.—The conflict which has long existed as to whether a carrier is liable to a bona fide holder of an order bill of lading issued fraudulently or negligently by an agent of the carrier without receipt of the goods appears to be settled, so far as inter-state bills are concerned, by the Act of Congress of Aug. 29, 1916, c. 415, overturning the rule of the federal courts, supported by the great weight of authority. That rule was that such a bill of lading imposes no liability upon the carrier even to an innocent indorsee of the bill for value, and the carrier is not estopped by the statements in the bill to show that no goods were in fact received for transportation. The doctrine received the support of the Supreme Court of the United States.[1] The Supreme Court of Minnesota,[2] as well as many of the other states, felt bound to follow it. The doctrine was founded upon the theory that a bill of lading is not negotiable in the strict sense; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction the same as any other receipt; and that where an agent issues a bill of lading for goods not actually received for transportation, he is acting without the scope of his real or apparent authority. The courts of a number of states,[3] among them New York, Kansas, Nebraska, and Pennsylvania, refused to adopt the rule, and held that regardless of strict negotiability, the carrier is estopped, because the act of its agent is within the apparent scope of his authority, especially in view of the quasi-negotiability of the bill. The statutes in many of the states, including Minnesota[4] adopted

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[9] § 30 and 37 of Federal Bills of Lading Act.

[10] An interesting discussion of the effect of the new Federal Act with respect to the liability of a carrier under a bill of lading where the goods have not been received by the carrier will be found in 15 Mich. L. Rev. 38. See, also, next succeeding *Note*.

1. *Pollard v. Vinton*, (1881) 105 U. S. 7; *St. Louis, etc., Ry. Co. v. Knight*, (1886) 122 U. S. 79, 7 S. C. R. 1132; *Friedlander v. Tex. & Pac. Ry. Co.*, (1889) 130 U. S. 416, 8 S. C. R. 570.

2. *National Bank of Commerce v. Chicago, B. & N. Ry. Co.*, (1890) 44 Minn. 224, 46 N. W. 342, 20 Am. St. R. 566, 9 L. R. A. 263.

3. *Armour v. Mich. Cent. Ry. Co.*, (1875) 65 N. Y. 111; *Bank of Batavia v. New York, etc., R. Co.*, (1887) 106 N. Y. 195, 12 N. E. 433; *Wichita Savings Bank v. Atchison, T. & S. F. Ry.* (1878) 20 Kan. 519; *Sioux City & Pac. R. Co. v. First Nat. Bank*, (1880) 10 Neb. 556, 7 N. W. 311 *Brooke v. New York, Etc., R. Co.*, (1885) 108 Pa. St. 529, 1 Atl. 206.

4. G. S. Minn., 1913, Secs. 4325, 4326. These statutes were all confined in

the latter view, and settled the question so far as intra-state shipments were concerned, but the general doctrine remained controlling in inter-state business in the federal courts and elsewhere until the Act of Congress above referred to.

Sec. 20 requires the carrier who loads the goods to count or weigh the same, prohibits insertion in the bill of lading of any notice, receipt, contract, rule, regulation, or tariff indicating that the goods were loaded by the shipper, and makes it void if inserted. Sec. 21 provides that when package freight or bulk freight is loaded by the shipper and the goods are described in the bill of lading merely by a statement of marks or labels, or by a statement that the goods are of a certain kind or quantity, or in a certain condition, or when it is stated that the packages are said to contain certain goods of a certain kind or quantity in a certain condition, or that the contents or condition of the contents of packages are unknown, if true, the carrier is not made liable though the goods are not of the kind or quantity or in the condition which the marks or labels indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also, by inserting the words "shipper's weight, load and count," or other words of like import, indicate that the goods were loaded by the shipper and the description of them made by him; and if true, the carrier is not liable for damages caused by the improper loading or by the non-receipt or misdescription of the goods described in the bill; with a proviso in the case of shippers of bulk freight who maintain weighing facilities of their own.

Sec. 22 makes a bill of lading issued by a carrier or on his behalf by an agent the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading in inter-state or foreign commerce, liable to (a) the owner of goods covered by a straight bill subject to right of stoppage in transitu, or (b) the holder of an order bill, who has given value in good faith, relying upon the description, for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description in the bill at the time of its issue.

These sections are a part of important legislation designed to codify the law in regard to bills of lading, and will doubtless be followed by similar legislation in all the states.

UNCONSTITUTIONALITY OF LEGISLATIVE FIAT DEFINING PROPERTY—RIGHT TO LABOR AS PROPERTY—INJUNCTION TO PROTECT PERSONAL RIGHTS.—The adoption by the American Federation of Labor at its meeting in Baltimore, Nov. 20, 1916, of an unanimous resolution that "any injunction dealing with the relationship of employer and employee and based on the dictum that labor is property be disregarded, let the consequences be what they may," is said by the public press to have been prompted by

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their operation to intra-state shipments since the adoption of the Carmack Amendment, *Adams Ex. Co. v. Croninger,* (1912) 226 U. S. 491, 33 S. C. R. 148. Even state constitutional provisions were superseded by that amendment. *Chicago, M. & St. P. Ry. v. Latta,* (1912) 226 U. S. 519, 33 S. C. R. 157.

the decision of the Supreme Court of Massachusetts in the case of *Bogni v. Perotti.*[1] That case is an interesting illustration of the way in which legislation enacted in the supposed interests of labor organizations sometimes proves to be utterly hostile to the rights of laborers. The legislature of Massachusetts passed an act "to make lawful certain agreements between employees and employers, and to limit the issuance of injunctions in certain cases."[2] In order to prevent the interference of the courts by means of injunction the act declared that the right to labor and to make and to modify contracts to work shall no longer be a property right, so far as that question arises "in construing this act." The legislature evidently assumed that a court of equity can use the injunction to protect property rights but not personal rights, and that to paralyze the arm of the court all that was necessary was to destroy this particular kind of property by legislative decree. The sponsors of the act, therefore, in order to get rid of judicial interference, were ready to sacrifice the protection which the fundamental law throws around the only kind of property possessed by a considerable proportion of the working men; and the very tribunal which they feared and tried to deprive of its constitutional functions came to the rescue of members of their own class. The Supreme Court of Massachusetts held that the right to labor and to make contracts to work is a property right;[3] that it is beyond the power of the legislature to declare without any kind of process that a well-recognized kind of property shall no longer be property;[4] and the court enjoined the American Federation of Labor from using unlawful pressure through the intimidation of property owners to prevent the plaintiffs, a branch of the Industrial Workers of the World, from working at their trade. The intimidation was to be accomplished by threats of sympathetic strikes and otherwise, which had already caused in some instances the discharge of plaintiffs from employment. It seems, therefore, that labor as well as capital needs the protection of the courts, and that it requires protection against oppressive coercion from within as well as from without.

Incidentally, the assumption upon which the legislation was founded, that a court will not issue injunction to protect personal rights, is, as applied to the case under consideration, untenable; the true ground of injunctive relief being irreparable injury, and the absence of an adequate remedy at law. The right to the aid of equity for the protection of personal rights has been progressively recognized in recent years. In *Wong Wai v. Williamson,*[5] injunction was granted against compulsory inoculation with bubonic plague serum, and against confining Chinese residents within the limits of the city until so inoculated. In *Kirk v. Wyman,*[6] a board of health was enjoined from sending an elderly lady to the pest house, under peculiar circumstances. In *Ferbrache v. Drain-*

1. (1916). 112 N. E. 853.
2. Stat. 1914, c. 778.
3. (1908). *Adair v. U. S.,* 208 U. S. 161, 28 S. C. R. 277, 13 Ann. Cas. 764. *Coppage v. Kansas,* 236 U. S. 1, 35 S. C. R. 240, L. R. A. 1915 C. 960.
4. (1909). *Durgin v. Minot,* 203 Mass. 26, 89 N. E. 144, 24 L. R. A. (N. S.) 241, 133 Am. St. R. 276.
5. (1900). 103 Fed. 1.
6. (1909). 83 S. C., 372, 65 S. E. 387, 23 L. R. A. (N. S.) 1188.

age District,[7] injunction issued against holding an election in which voting was to be confined to a certain class of property owners in violation of a constitutional provision. In *Ex parte Warfield*,[8] a defendant in a suit for damages for partial alienation of a wife's affections was restrained from conversing with or writing to her. In *Sanders v. Rodway*,[9] and *Swift v. Swift*,[10] a husband was restrained from interfering with wife or children after a decree of separation in one case and a covenant in the other. *Truax v. Raich*,[11] was a case of injunction against the institution of criminal proceedings under an unconstitutional alien labor statute. In this case the United States Supreme Court declared that "the right to work for a living in the common occupations of the community is of the very essence of personal freedom and opportunity that it was the purpose of the Amendment [XIVth] to secure." The injunction against criminal proceedings was upheld notwithstanding the Supreme Court had held in *Re Sawyer*,[12] that the federal court's jurisdiction in equity is limited to the protection of rights of property, and that it has no jurisdiction over the prosecution of crimes or misdemeanors, the court drawing the distinction that "equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property." When the courts refuse the injunction to prevent criminal prosecutions, it is doubtless because there exists an adequate remedy at law.

It is true the rule is generally declared to be that a court of equity will not interfere to protect the rights of person, but only rights of property. The doctrine traces back to the decision of Lord Eldon, in *Gee v. Pritchard*,[13] in which the Lord Chancellor sustained the issuance of injunction to restrain the publication of the letters of the plaintiff, not because the publication of the letters would be painful to the feelings of the plaintiff, but solely because of plaintiff's property right in them, saying: "The question will be, whether the bill has stated facts of which the court can take notice, as a case of civil property, which it is bound to protect." In *Brandreth v. Lance*,[14] Chancellor Walworth refused to enjoin the publication of libelous matter, declaring that the court could not "assume jurisdiction of the case presented by the complainant's bill, or of any other case of the like nature, without infringing upon the liberty of the press, and attempting to exercise a power of preventive justice which, as the legislature has decided, cannot safely be entrusted to any tribunal consistently with the principles of free government." This principle abundantly supported the court's declination of jurisdiction, but the Chancellor, arguendo, added: "The utmost extent to which the

7. (1912). 23 Idaho 85, 128 Pac. 553, 44 L. R. A. (N. S.) 539.
8. (1899). 40 Tex. Crim. App. 413, 50 S. W. 933.
9. (1852). 16 Beav. 207.
10. (1865). 34 Beav. 266. In this case, a father who had committed a criminal assault upon his infant daughter, and had made a covenant with his wife depriving himself of the custody of the child, was enjoined from interfering with the wife's custody of the child.
11. (1915). 239 U. S. 33, 36 S. C. R. 7.
12. (1888). 124 U. S. 200, 8 S. C. R. 482.
13. (1818). 2 Swanst. 413.
14. (1839). 8 Paige 24

court of chancery has ever gone in restraining any publication by injunction has been upon the principle of protecting the rights of property." The courts have ever since consistently refused the injunction to restrain the publication of defamatory matter unconnected with injury to property. See *Dixon v. Holden*;[15] *Springhead Spinning Co. v. Riley*.[16] In the latter case, professional reputation was said to be "the means of acquiring wealth, and is the same as wealth itself." Unlawful picketing, distribution of circulars containing statements wholly false as to plaintiff's relations with his employees, and acts of intimidation, have been enjoined[17] on account of their tendency to ruin one's business, notwithstanding a constitutional provision by which every person is declared entitled to "freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of such right."[18] In the case cited *(Beck v. Railway Teamsters' Protective Union)*, the court quotes from the opinion of Ashurst J., in *Pasley v. Freeman*:[19] "Where cases are new in their *principle*, there I admit that it is necessary to have recourse to legislative interference in order to remedy the grievance; but where the case is only new in the *instance*, and the only question is upon the application of a principle recognized in the law to such new cases, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago. If it were not, we ought to blot out of our law books one-fourth part of the cases that are to be found in them."

Another class of cases in which injunction was refused is represented by *Chappell v. Stewart*,[20] in which the complainant alleged that the defendant had employed detectives to follow him and watch him whereever he should go; and that this conduct caused him great inconvenience and annoyance, interfered with his social intercourse and his business, and caused grave suspicions to be entertained about him, so as to greatly damage his financial credit; the ground of refusal being that the plaintiff had a plain and adequate remedy at law. The court quotes from Kerr on Injunctions, pp. 1 and 2: "A court of equity is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which its jurisdiction rests. A court of equity has no jurisdiction in matters merely criminal, or merely immoral, which do not affect any right of property. If a charge be of a criminal nature, or an offense against the public peace, and does not touch the enjoyment of property, the jurisdiction cannot be entertained." The statement of so broad a doctrine was unnecessary to the case, if the plaintiff really had a complete and adequate remedy at law; and if he had not, then the doctrine is barbarous, because it puts personal rights beyond the pale of law, and leaves no remedy but private vengeance, while carefully protecting rights having a pecuniary value. Realizing the antiquated and inequitable character of the rule

15. (1869). L. R. 7 Eq. 488.
16. (1868). L. R. 6 Eq. 551.
17. (1898). *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 77 N. W. 113.
18. Const. Mich., Art 4, sec. 42; Const. Minn. Art I, sec. 3.
19. (1789). 3 Term R. 51 (63); action for damages.
20. (1896). 82 Md. 323, 33 Atl. 542, 37 L. R. A. 783.

in many of its applications, the courts have been ingenious in inventing some theory of property right on which to justify equitable interference. In *Foley v. Phelps*,[21] and *Larson v. Chase*,[22] it was held that a wife or husband has a clear legal right to the remains of a deceased husband or wife, for the purpose of preservation and burial, and is therefore entitled to damages for the injury sustained by the performance of an autopsy without her consent or authority of law. Though a technical property right in a corpse is denied, it cannot be doubted that equitable interference to prevent desecration would not be refused.[23] In *Foley v. Phelps* it is said that courts of equity have frequently interfered to protect the remains of the dead, and courts of law have also afforded remedies, through formal legal actions, wherever any element of trespass to property, real or personal, was associated with the molestation of the remains of the dead.[24] In *Ex parte Warfield*,[25] the court said: "Indeed, the interposition of courts of equity by restraining orders is a matter of growth, and keeps pace with advancing civilization, and courts are continually finding new subjects for the interposition of equitable relief by writs of injunction. Formerly it seemed to be the rule that courts would only interfere where some property right or interest was involved; but now it seems the writ will be applied in an innumerable variety of cases, in which really no property right is involved. While in some of the cases the courts appear to adhere to the old rule, yet when we look at the case it is difficult to see any question of property right, but a vain endeavor on the part of the court to adhere to the old doctrine, while it reaches out for the protection of some personal right." And Dill, J., in *Vanderbilt v. Mitchell*,[26] giving the unanimous opinion of the New Jersey Court of Errors and Appeals, said: "In many cases courts have striven to uphold the equitable jurisdiction upon the ground of some property right, however slender and shadowy, and the tendency of the courts is to afford more adequate protection to personal rights, and to that end, to lay hold of slight circumstances tending to show a technical property right." In that case the complainant charged his wife with having given birth to a bastard child, the fruit of an adulterous cohabitation with another

21. (1896). 1 App. Div. 551, 37 N. Y. Suppl. 471.
22. (1891). 47 Minn. 307, 50 N. W. 238.
23. (1877). *Boyce v. Kalbough*, 47 Md. 334, 28 Am. R. 464. The court cites *Beatty v. Kurtz*, 2 Pet. 566, as holding that such a case was not for the redress of a mere private trespass: "the property dedicated to public and pious uses threatened with desecration—the sepulchres of the dead with violation—the sentiment of natural affection of the surviving kindred and friends of the deceased to be wounded, the memorials erected by piety and love removed, so as to leave no traces of the last home of their ancestors to those visiting the spot in future generations, were acts that could not be redressed by the ordinary process of law. The remedy must be sought in the protecting power of a Court of equity, operating by injunction to preserve the asylum of the dead and quiet the just and natural sensibilities of the living." See note in 3 L. R. A. (N. S.) 482.
24. See, also, *Pierce v. Proprietors*, (1872) 10 R. I. 227, where injunction was granted, compelling the restoration of the remains to the place from whence they were taken, and the cemetery association was enjoined from again removing or intermeddling with the remains.
25. Supra.
26. (1907). 72 N. J. Eq. 910.

man, which child the wife was falsely stating to be the son of the complainant; and with having named it William Godfrey Vanderbilt, and with having caused a fraudulent birth certificate to be made and recorded. The complainant prayed for an injunction restraining both mother and child from claiming under the certificate, for the child, the status, name, property, or privilege of a lawfully begotten child of complainant. The court held that it sufficiently appeared that the complainant's rights then existing and the contingent interests of himself and of other parties, were seriously menaced by the unlawful and unwarranted use of his name as the father of the child, and granted the injunction. Dill, J. said: "The equitable character of the action itself requires us to regard comparatively remote and trifling interferences with such property rights in the light of a great and immediate interference with the personal rights of the complainant, although, as we have already stated, whether this bill might not be rested on such personal basis alone, without reference to the technical protection of property, is not now decided, because the present case does present the property feature, to an extent sufficient to satisfy even the rule adopted by the court below. . . . . Should the Court of Chancery refuse relief under the circumstances stated in the bill, it would cease to be a court of equity governed by the principles of natural justice, especially where property rights may be said to be threatened and personal rights are clearly invaded."

The absurdity of classing "health, reputation, feelings of affection, reverence, pride and self-respect, as well as immunity from offensive and damaging publicity", as property rights, is strongly pointed out in a note in 37 L. R. A., 783. See an exhaustive discussion by Roscoe Pound in Harvard Law Review, "EQUITABLE RELIEF AGAINST DEFAMATION AND RIGHTS TO PERSONALITY."[27]

It would seem, therefore that even if the Massachusetts court was wrong in holding labor and the right to labor to be a property right notwithstanding the legislative decree, it was equally obliged to protect by injunction the personal right of a group of laborers to work, unless it can be said that they have an adequate remedy at law. If damages would not be an adequate compensation for deprival of the right to vote, or for the mutilation or desecration of the remains of a husband or wife, or for completing the alienation of the affections of one's wife or for wrongful inoculation with the serum of bubonic plague, or for unnecessary and therefore wrongful confinement in a pest house, could it be said that a verdict for damages against a labor organization would be a plain, adequate, and complete remedy for being unlawfully deprived of the right to earn a living?

BREACH OF STATUTORY DUTY AS NEGLIGENCE PER SE.—When one person has been injured by an act of another, and such act constituted a violation of some duty imposed upon the latter by a statute or ordinance, a question arises as to whether the fact that the act constituted a breach of a statute or ordinance is to be regarded as conclusive evidence of negligence, that is, negligence per se, prima facie evidence of negligence, mere

27. 29 Harv. Law Review 640.

evidence of negligence, or as having no bearing on the case at all. If the question be determined and a definite rule laid down as to a defendant who has committed such a breach, should the same rule be applied in determining whether a plaintiff, who has also been guilty of an illegal act having a causal connection with the injury complained of, is, because of such act, guilty of contributory negligence? There also exists the preliminary question, should an ordinance be regarded in the same light as a statute? As to this there can be little dispute. Where the power to enact ordinances has been properly delegated to a municipality, an ordinance adopted under that power becomes the word of the legislature.[1]

It may very well be that the act which caused the injury was not negligent under any standard which existed at common law, and that the only possible basis for imposing liability is the fact that the act is one which the legislature has declared illegal. It would seem therefore, that the intention of the legislature in passing the act must be the basis of all discussion of the questions. Thus, if it was the intention of the legislature to impose a liability of an exclusively public character, it would seem very clear that the individual should get no rights under the statute. It is often obvious in the case of such a statute that the intention of the legislature in passing it was to create a duty solely to the state. This can be seen readily in the case of an act requiring that automobiles be registered. It could hardly be inferred that the legislature had the plaintiff's safety in mind when it passed such an act. It has been argued that where the legislature does not expressly declare that there is to be a private remedy, it intended the statute to be of an exclusively public character. But this argument is hardly tenable where the statute is obviously intended for the protection of life, limb, or property, as ordinances regulating the speed of automobiles or providing for fire escapes.

Taking up the view that the statute should be offered either as prima facie evidence of negligence, or as mere evidence of negligence, it is submitted that neither can be correct. It must either establish negligence per se, or be considered as having no bearing on the case at all. Suppose that the statute is intended to create a liability strictly to the state, or to protect the individual against a wrong different from that which has been done him.[2] The statute, as evidence, would be irrelevant to the issue involved. Suppose on the other hand that the statute was intended to protect the individual against this very wrong. Even in that case it should not be treated as evidence. Aside from statute the standard of care is that of a reasonably prudent man under the same circumstances. To put the violation of a statute to the jury as evidence of negligence is to hold that a lawbreaker may very well be a reasonably prudent man in the way he breaks the law, "that it is for the jury to say whether in violating a law or ordinance fixing the standard of care to be observed, the law was carefully or negligently violated. The violation, thus in and of itself, would mean nothing, and one would be permitted to violate the law with impunity, provided the jury find it to have been carefully done."[3]

1. *Bott v. Pratt*, (1885) 33 Minn. 323, 23 N. W. 237, 53 Am. St. Rep. 47.
2. *Bourne v. Whitman*, (1911) 209 Mass. 155 at 172, 95 N. E. 404.
3. *Smith v. The Mine and Smelter Co.*, (1907) 32 Utah 21, 88 Pac. 683. That it is evidence of negligence, *Knupple v. Knickerbocker Ice Co.*,

It may be safely said that the majority of the courts favor the doctrine that such a statute is intended to establish a standard of care, and that a failure to comply with such standard is negligence per se or conclusive evidence of negligence.[4]

Should the ruling be different when it is the plaintiff who has violated the law? In the ordinary case, where no statutory violation is involved, the plaintiff, in order to recover, must have complied with the same standard of care that is required to absolve the defendant. It would seem, then, that this standard of care set by the statute should be applied to the plaintiff as well as to the defendant. If the plaintiff at the time of the injury was engaged in some act having causal connection with the injury, which act constituted a violation of a statute, passed for the purpose of preventing such an injury, that fact should be regarded as conclusive evidence of negligence, that is, as contributory negligence per se. Nevertheless, Minnesota has adopted a different ruling. "It is well established law in this state that such violation is not negligence per se, or conclusive evidence of negligence, but only a circumstance to be considered in connection with all the evidence in the case."[5] Not only is this rule objectionable because it allows the jury to decide that the plaintiff has been careful in his violation of a law, as was suggested when considering the rule as applicable to the defendant, but also because it deals more leniently with the plaintiff than with the defendant. On the other hand the New England courts seem to think the defendant entitled to more favorable consideration than the plaintiff. But in so holding they do not take issue with courts which reach their conclusions after considering the causal connection between the statutory breach and the injury, as do Minnesota and the majority of courts. They find a different intention of the legislature in passing the act. Formerly the matter came up in these states in the violation of the Sunday Laws by the plaintiff;[6] but, since the coming of the automobile, through violations of registration laws. These cases lay stress on the clause of the statute which provides that no resident of the state shall operate an automobile, not so registered, upon the highway. In cutting off the rights of the plaintiff they do not reason by way of the doctrines of per se negligence, but argue that the state has the right to limit or control the use of the highways whenever necessary to provide for the safety, peace, health, and general welfare of the public. They conclude that, since the legislature has declared that one who has no license shall not use his machine upon the highways, his doing so makes him a trespasser and in a sense an outlaw, who is not to be pro-

(1881) 84 N. Y. 488; *Hanlon v. The South Boston Horse Ry. Co.*, (1880) 129 Mass. 310. That it is prima facie evidence of negligence, *Jupiter Coal Mining Co. v. Mercer*, (1889) 84 Ill. Appeals 96.

4. *Osborne v. McMasters*, (1889) 40 Minn. 103, 41 N. W. 543, 12 Am. St. 698; *Joseph Schaar v. Conforth*, (1915) 128 Minn. 460, 151 N. W. 275; *Messenger v. Pate*, (1876) 42 Ia. 443; *Frontier Steam Laundry Co. v. Connolly*, (1904) 72 Neb. 767; *Indiana, Bloomington & Western Ry. Co. v. Barnhart*, (1888) 115 Ind. 399; *Kelly v. Anderson*, (1901) 15 S. D. 107; *Texas & Pacific Ry. Co. v. Brown*, 11 Texas Civil App. 503, 33 S. W. 146; *Taylor v. Stewart*, (N. C. 1916) 90 S. E. 134.

5. *Day v. Duluth St. Ry. Co.*, (1913) 121 Minn. 445, 141 N. W. 795.

6. *Bosworth v. Inhabitants of Swansey*, (1845) 10 Met. (Mass.) 363, 43 Am. Dec. 441; *Johnson v. Irasburgh*, (1874) 47 Vt. 25, 19 Am. Rep. 111.

tected against anything short of wilful injury.[7] Much of the force of this argument has been lost by reason of the refusal of the Massachusetts Court to apply the doctrine to a statute requiring every operator to have a personal license to operate his car.[8] It would seem to be the better rule that the plaintiff who has merely committed a statutory misdemeanor which was only collateral, not related to the injury as cause to effect, ought not to be placed outside the protection of the law, when it is not a case of wilful injury.[9] Aside from the Minnesota rule, and the holdings of the New England courts on these particular statutes, the courts, when considering the relation of plaintiff's violation of statute to his contributory negligence, generally apply the same principles to plaintiff as to defendant, i. e., that it is contributory negligence per se, whenever it is deemed that the purpose of the legislature was to guard the public against such injuries.[10]

LIABILITY OF THE INITIAL CARRIER UNDER THE CARMACK AMENDMENT FOR LOSSES OCCURRING ON THE LINES OF CONNECTING CARRIERS.—Whatever doubt there may have been in the minds of members of the legal profession since the adoption of the Carmack Amendment to the Hepburn Act, as to the effect of the words "caused by it"[1] in Sec. 7 of that Act, and as to the liability of the initial carrier for loss or damage to goods in the hands of connecting carriers, it may now be said with confidence, in the light of recent decisions on the point, that the Carmack Amendment has not changed or modified the common law liability of the carrier for loss or damage to goods shipped over its line, and that the initial carrier is liable as at common law for the loss of property occurring on the line of its agents, the connecting carriers, the same as if it had occurred on its own line. It will readily be seen that the importance of this interpretation of the Act lies in the fact that where a plaintiff sues the initial carrier for loss

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7. *Dudley v. Northampton St. Ry. Co.*, (1909) 202 Mass. 443, 89 N. E. 25, 23 L. R. A. (N. S.) 561; *McCarthy v. Inhabitants of the Town of Leeds*, (Me. 1916) 98 Atl. 72.

8. *Bourne v. Whitman*, (1911) 209 Mass. 155, 95 N. E. 404; 35 L. R. A. (N. S.) 701.

9. *Armstead v. Lounsberry*, (1915) 129 Minn. 34, 151 N. W. 542, L. R. A. 1915 D. 628. (The Court reviews the cases in Massachusetts holding the contrary rule.) *Crossen v. Chicago, Etc., Electric Ry. Co.*, (1911) 158 Ill. App. 42; *Lockridge v. Minneapolis & St. Louis Ry. Co.*, (1913) 161 Ia. 74.

10. *Little v. Southern Ry. Co.*, (1904) 120 Ga. 347, 47 S. E. 953, which however, overlooks the possibility that the statute may have been provided for a different purpose; *Broschart v. Tuttle* (1890) 59 Conn. 1; *Weller v. Chicago, Etc., Ry. Co.*, (1894) 120 Mo. 635, 23 S. W. 1061; *Newcomb v. Boston Protective Department*, (1888) 146 Mass. 596.

1. Carmack Amendment (Act Cong. June 29, 1906, c. 3591, § 7; U. S. Comp. Stat. 1913, § 8592) provides: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt * * * or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

or damage occurring on the line of a connecting carrier, he need not allege or prove negligence on the part of the carrier, since the common law rule of liability went beyond negligence and made the carrier liable for any loss or damage not due to the act of God or the public enemy.[2]

Prior to 1916 some doubt seems to have existed as to whether the carrier was not relieved from its common law liability as an insurer by the terms of the Carmack Amendment, due in all probability to a misunderstanding of earlier decisions. The provision of the Act that "the carrier shall be liable * * * for loss or damage *caused by it* or a succeeding carrier to whom the property may be delivered" caused the court in *Southern Pacific Co. v. Weatherford Cotton Mills*,[3] to doubt whether the Act fixed the liability of the initial carrier for all damages for which any connecting carrier would be liable under the common law rule, but the point, not being properly before the court, was not there decided. As late as 1915 we find the Supreme Court of Oklahoma expressly holding that under the Carmack Amendment the carrier is relieved from the liability of an insurer imposed by the common law, and liable only for some *negligence* on the part of the initial carrier or some connecting line over which the property is transported.[4] The decision was manifestly due to a misapprehension as to the true effect of the decision of the United States Supreme Court in the case of *Adams Express Co. v. Croninger*.[5] The language used in the Croninger case, which seems to have given rise to the uncertainty in the minds of some of the courts as to the liability of the initial carrier under the Carmack Amendment was as follows: "The suggestion that an absolute liability exists for every loss, damage, or injury, from any and every cause, would be to make such carrier an absolute insurer and liable for unavoidable loss or damage, though due to uncontrollable force. * * * To give such emphasis to the words 'any loss or damage' would be to ignore the qualifying words 'caused by it.' * * * The liability thus imposed is limited to 'any loss, injury, or damage caused by it or a succeeding carrier to whom the property may be delivered,' and plainly implies a liability for some default in its common law duty as a common carrier."

That the United States Supreme Court did not intend the meaning placed on its language by the Oklahoma Court was clearly shown by the

2. 2 Am. & Eng. Encyc. of Law, 778 et seq.; Hutchinson, Carriers, 3d ed., Sec. 265.
3. (1911). 134 S. W. 778 (Texas Civ. App.).
4. (1915). Missouri, O. & G. Ry. Co. v. French, 152 Pac. 591 (Okla.). In this case the action was brought against a connecting carrier. The trial court instructed the jury that the liability of the defendant was that of an insurer, and verdict and judgment having been rendered for plaintiff, defendant appealed, assigning as error the charge to the jury. In reversing the judgment, the Supreme Court said: "The trial judge lost sight of the interstate character of the shipment, and of the provisions of the Carmack Amendment, as construed by the Supreme Court of the United States in Adams Express Co. v. Croninger, 226 U. S. 491. It was, therefore, an error to instruct the jury that the liability of plaintiff in error was that of an insurer, because it had the right to have the question of its negligence submitted to the jury."
5. (1912). 226 U. S. 491, 33 S. C. R. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257.

United States District Court in the case of *Storm Lake Tub and Tank Factory v. Minneapolis & St. Louis Ry. Co.*,[6] where the court in reference to the Croninger case says: "Some things said in the opinion *arguendo* might indicate * * * that the liability of common carriers as at common law for the loss of property intrusted to them for carriage was also superseded (by the Carmack Amendment). Clearly it was not in the mind of the court to hold that the liability of common carriers as at common law for such loss, not traceable to any violation of the act to regulate commerce, was superseded by the Amendment." The court then says, "the purpose of this amendment * * * is to make the primary carrier liable as at common law for a loss of the property occurring upon the line of its agents, the connecting carrier or carriers, the same as if it had occurred upon its own line." The Oklahoma court seems not to have had this decision before it in deciding the case above referred to.

The Supreme Court of the United States in *Cincinnati, N. O. & T. P. Co. v. Rankin*,[7] decided in May, 1916, seems to have definitely resolved the doubt in favor of the doctrine laid down in *Storm Lake Tub & Tank Factory v. Minneapolis & St. Louis Ry. Co.*, above cited. The action was brought against the initial carrier and defendant set up as a defense that the loss was not *"caused by it"* within the meaning of the Carmack Amendment, relying on the language of the court in the Croninger case. The court speedily disposed of this defense by pointing out that in the Croninger case it was distinctly stated that the phrase *"caused by it"* plainly implied "a liability for some *default in the carrier's common law duty*." The court said flatly that the common law liability of a carrier as an insurer was not changed, as to a loss on its own line, by the provision of the Carmack Amendment referred to. In a more recent case, *Cudahy Packing Co. v. Atchison, T. & S. F. Ry. Co.*,[8] the point was squarely before the court. The action was brought against the initial carrier to recover for a loss occurring on the line of a connecting carrier to whom the goods were delivered. On the theory that the liability imposed on the initial carrier by the Carmack Amendment was for damage *caused* by it, the defendant made the point that the petition failed to state a cause of action for the reason that it contained no allegation of negligence. The court held, on the authority of the Croninger case, that the common law rule of liability was not changed by the Amendment and that defendant's contention was untenable.[9]

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6. (1913). 209 Fed. (Dist. Court, N. D. Iowa, C. D.) 895.
The sole question in this case was as to whether the action had been properly removed from the state court to the federal district court. The motion of plaintiff to remand the case to the state court was granted, it being held, that suits or actions to recover from the initial carrier, under the Carmack Amendment, damages for an injury to or loss of property received by it as a common carrier for transportation as an interstate shipment did not arise under "the act to regulate commerce" but were actions to recover from such carrier upon its common law liability as a common carrier.
7. (1916) 241 U. S. 319, 36 S. C. R. 555.
8. (1916) 193 Mo. App. 572, 187 S. W. 149.
9. "It is sufficient if plaintiff shows a delivery to the defendant in good condition, and receipt in bad condition, for that is a showing of damage caused by the carrier prima facie, and it is for the carrier to relieve itself

The true rule adopted by the courts, it may be safely said, is as was stated by the Court of Civil Appeals of Texas, "The purpose and effect of the Carmack Amendment was, not to impose upon the initial carrier a liability for its own conduct different or greater than that imposed upon it by the common law, but to impose upon it in favor of the shipper the liability to him under the common law incurred by its connecting carriers."[10]

HUSBAND AND WIFE—ACTION BY WIFE AGAINST HUSBAND—PERSONAL TORT—MARRIED WOMEN'S ACTS.—At common law neither spouse had a right of action against the other for a personal tort. Marriage, according to the common law theory, merged the identity of the husband and wife into one legal entity, and that entity was the husband.[1] From this it followed logically that neither spouse could maintain an action at law against the other. But owing to the Married Women's Acts, which allow the wife to hold separate property, to make separate contracts, and to sue and be sued on her contracts and for her torts, it is now generally held that an action to protect these property rights may be brought by the wife against the husband,[2] for these Acts further specifically give her the same rights after marriage as though she were a *feme sole.*

However, even in jurisdictions where the wife is allowed the actions mentioned either by express wording of the statutes or by necessary implication, the courts reach varying results when they attempt to construe these statutes with respect to the question of whether a right of action exists between husband and wife for torts committed against the person of one by the other. Some courts adopt the view that the statutes giving the wife the right to hold property, to contract with her husband and third parties, and to sue and be sued on her contracts and for her torts, merely extend to her the right to sue, as a remedy for the enforcement of such rights, and were not intended to extend such right of action to torts to her person.[3] A recent English case, *Hulton v. Hulton,*[4] seems to adopt

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by evidence of any lawful excuse." It was held that plaintiff need not aver or prove negligence to entitle him to recover under the Carmack Amendment. *Collins et al. v. Denver & Rio Grande Ry. Co.,* (1914) 181 Mo. App. (Kansas City Court of Appeals) 213, 167 S. W. 1178.

10. (1915) *Stevens & Russell v. St. Louis S. W. Ry. Co.,* 178 S. W. 810, 813. (See also *Kansas City Southern Ry. Co. v. Carl,* (1912) 227 U. S. 639; *Mo., Kan. & Tex. Ry. v. Harriman Bros.,* (1912) 227 U. S. 657; *Atlantic Coast Line v. Riverside Mills,* (1910) 219 U. S. 186, 31 S. C. R. 164, 31 L. R. A. (N. S.) 7; *Bowles v. Quincy, Omaha & K. C. Ry. Co.,* (1916) 187 S. W. (Mo.) 131; contra, *Burke v. Gulf, C. & S. F. Ry. Co.,* (1914) 147 N. Y. Sup. 794.

1. Schouler, Domestic Relations, 5th ed., Sec. 52; 21 Cyc. 1517; 10 Ency. of Law and Prac. 195.

2. *Larison v. Larison,* (1881) 9 Ill. App. 27; *Chestnut v. Chestnut,* (1875) 77 Ill. 346; *White v. White,* (1885) 58 Mich. 546, 25 N. W. 490; *Wood v. Wood,* (1881) 83 N. Y. 575.

3. *Peters v. Peters,* (1909) 156 Cal. 32, 103 Pac. 219, 23 L. R. A. (N. S.) 699; *Main v. Main,* (1892) 46 Ill. App. 106; *Bandfield v. Bandfield,* (1898) 117 Mich. 80, 75 N. W. 287, 40 L. R. A. (N. S.) 758; *Lillienkamp v. Rippetoe,* (1915) 133 Tenn. 57, 179 S. W. 628, L. R. A. 1916B, 881.

4. 32 T. L. R. 645, 115 L. T. R. 46; (1916) 2 K. B. 64.

a similar line of reasoning, although a different result could scarcely have been reached by the English court because the case was decided under a statute which expressly denied the husband and wife the right to sue the other for a personal tort.[5] The husband had obtained a deed of separation from the wife by fraud and after the parties had been divorced, the wife sued the husband in deceit for damages and for a rescission of the deed of separation. The court granted a decree of rescission of the deed for fraud in the inducement but held that under Sec. 12 of the Married Women's Property Act of 1882 the wife was precluded from recovering damages for the tort on the theory that this was not an action to protect her separate property. Other courts allow the wife no such right of action for the reason that these statutes create no new right, but merely a new remedy,[6] and, therefore, limit her to actions for the violation of any rights for which she and her husband could have maintained an action in their joint names at common law.[7] The wife has also been refused such a right of action on the ground that the statutes enlarging the rights of the married woman, and giving her the right to contract, and to maintain separate actions on her contracts and for torts simply give her a right of action equal to that of the husband and nothing more.[8] These courts reason that as neither the husband nor the wife had such a right at common law, it could not have been the intent of the legislators to give the wife a cause of action for an injury to her person by the husband without giving the husband a reciprocal right. It is argued that in view of the long established common law rule, and on broad grounds of public policy, no right of action should be given to the wife in such cases,[9] unless such right is either expressly provided for or can be readily implied.[10] This argument proceeds on the theory that it would be against public policy to disrupt the sanctity of the home by baring before the courts domestic troubles involving slander, libel, deceit, and assault;[11] and that it would be much better to shut out the public gaze and leave the parties to reach a peaceable settlement alone.[12] It is also pointed out that the wife is in no

5. By Sec. 12 of the Married Women's Property Act, 1882 (45 and 46 Vict., c. 75), "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*. but, except as aforesaid, no husband or wife shall be entitled to sue the other for tort * * * ."

6. *Peters v. Peters*, (1875) 42 Ia. 182; *Abbott v. Abbott*, (1877) 67 Me. 304, 24 Am. Rep. 27; *Freethy v. Freethy*, (1865) 42 Barb. (N. Y.) 641.

7. *Abbott v. Abbott, supra.*

8. *Strom v. Strom*, (1906) 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191; *Rogers v. Rogers*, (1915) 265 Mo. 200, 177 S. W. 282; *Drum v. Drum*, (1903) 69 N. J. Law 557, 55 Atl. 86; *Schultz v. Christopher*, (1911) 65 Wash. 491, 118 Pac. 629, 38 L. R. A. (N. S.) 780.

9. *Thompson v. Thompson*, (1910) 218 U. S. 611, 31 Sup. Ct. 111; *Abbott v. Abbott, supra; Longendyke v. Longendyke*, (1865) 44 Barb. (N. Y.) 366.

10. *Lillienkamp v. Rippetoe, supra.*

11. *Thompson v. Thompson, supra.*

12. *Abbott v. Abbott, supra.*

want of remedy, as the criminal courts are always willing to mete out punishment commensurate with the harm done, and that in the divorce courts alimony in a measure takes the place of damages.

Some courts rebelling against these strict constructions of the statutes and adopting a more liberal view, have given the wife a right of action against the husband for torts to her person.[13] They construe the Married Women's Acts as laying the foundation of the legal status of husband and wife, and hold that in marriage the parties retain their legal identity and that their civil rights are to be determined in accordance with such established status. The Supreme Court of Connecticut in a case[14] decided in 1914 says, "The right to contract with the husband, and to sue him for breach of such contract, and to sue him for torts, is not given to the wife by the statute. They are rights which belonged to her before marriage, and because of the new married status created by statute are not lost by the fact of marriage, as they were under the common law status." It would seem that giving the wife a cause of action against her husband for torts to her person would be no more against public policy, than it is to allow the wife to go into the criminal courts for the purpose of sending her husband to prison, or to go into the divorce courts and there lay bare their married life.[15]. These recent decisions and the dissenting opinions in some of the earlier cases show a growing inclination on the part of the courts to construe the Married Women's Acts liberally.[16] On principle this latter view seems to be the better, as it was surely not the intention of the legislatures to afford the married woman protection for her property rights against her husband and not to afford her person a similar measure of protection. However, inasmuch as this is a question vitally concerning public policy perhaps its solution might better be left to direct legislative action rather than to judicial interpretation.

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13. *Fitzpatrick v. Owens,* (Ark. 1916) 186 S. W. 832; *Brown v. Brown,* (1914) 88 Conn. 42, 89 Atl. 889, 52 L. R. A. (N. S.) 185; *Gilman v. Gilman,* (N. H. 1915) 95 Atl. 657, L. R. A. 1916B 907; *Fiedler v. Fiedler,* (1914) 42 Okla. 124, 140 Pac. 1022, 52 L. R. A. (N. S.) 189.
14. *Brown v. Brown, supra.*
15. *Brown v. Brown, supra;* dissenting opinions by Justices Harlan, Holmes, and Hughes in *Thompson v. Thompson, supra.*
16. *Thompson v. Thompson, supra.*

RECENT CASES

BANKRUPTCY—DISCHARGE—GROUNDS FOR REFUSAL—PERJURY IN OTHER PROCEEDINGS.—A bankrupt had committed perjury in a bankruptcy proceeding, though not in his own case. Held, that this was ground for refusal of his application for a discharge, under the National Bankruptcy Act of 1898. *In re Lesser,* (C. C. A., second circuit, June 6, 1916) 234 Fed. 65.

This decision overrules the heretofore settled rule that the perjury to bar the discharge of the bankrupt, must have been committed in the bankrupt's own case. *In re Blalock,* (1902) 118 Fed. 679; Collier on Bankruptcy, seventh ed., p. 276. Sec. 14b of the National Bankruptcy Act provides that the bankrupt shall be discharged unless he shall have committed an offense punishable by imprisonment as therein provided, or shall have been guilty of other enumerated offenses. Sec. 29b provides for the punishment by imprisonment of the offense of having "knowingly and fraudulently made a false oath or account in, or in relation to any proceeding in bankruptcy." Sec. 7 of the Act provides that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." The analogy of a crime to this objection to a discharge of the bankrupt has led to considerable confusion among the courts concerning the right to predicate such an objection on a false oath during the bankrupt's examination. The earlier cases were uniformly to the effect that such a false oath when made under compulsion could not be made the basis of an objection to a discharge. *In re Goldsmith,* (1900) 101 Fed. 570; *In re Marx,* (1900) 102 Fed. 676; *In re Logan,* (1900) 102 Fed. 876. However, this doctrine has since been exploded. *In re Dow,* (1900) 105 Fed. 889; *In re Goodale,* (1901) 109 Fed. 783; *In re Shear,* (1913) 201 Fed. 460. As pointed out by the court in the principal case, many of the offenses covered by Sec. 29 and punishable by imprisonment could not be committed by the bankrupt in his own proceedings. Of this class is the offense of embezzlement by a trustee of part of the bankrupt estate. Hence, it does not seem that it could have been the legislative intent to limit the operation of Sec. 14b to offense committed in the bankruptcy proceedings of the applicant for a discharge. Moreover, under Sec. 14b providing that obtaining money or property on credit on a materially false statement in writing made by him to any person for the purpose of obtaining credit from such person shall bar a discharge, it has been held that where a bankrupt as president of a corporation made a materially false statement in writing of its assets and liabilities in order to obtain money on credit from a bank, and the bankrupt benefited financially by his misrepresentations, this constituted a valid ground of objection to his individual application for a discharge in bankruptcy. *In re Bleyer,* (1913) 210 Fed. 391; *In re Dresser,* (1905) 144 Fed. 318. If this provision of Sec. 14b covers cases other than the bankrupt's own, there is no valid reason why the other provisions of this section should not have a like effect. Certainly the wording of the National Bankruptcy Act is broad enough to cover the principal case.

CARRIERS—STREET RAILWAYS—COMPANY RULE REFUSING TRANSFERS—STATUTE—A New York statute required street railways to carry passengers, who desired to make a continuous trip between two points on their lines, for a certain fare and to issue transfers. The defendant railway refused to issue transfers on a certain street, because to do so would enable plaintiff to make a round trip for one fare. In view of the fact that there was a shorter and more direct route to plaintiff's destination, it was a reasonable rule. Held, the rule could not be enforced because

never posted or brought to the attention of the public. *Hickman v. International Ry. Co.*, (1916), 160 N. Y. Supp. 994.

A passenger need not take notice of a rule of a railroad company which contravenes a statute. *Robinson v. Southern Pacific Co.* (1895), 105 Calif. 526, 38 Pac. 722. Common carriers of passengers may make rules and regulations affecting the comfort and convenience of travelers and securing the just rights of the company, provided they are within the statutes and are reasonable. The reasonableness of the rule is stated to be a question of fact, or a mixed question of law and fact for the jury. *State v. Overton* (1854), 24 N. J. Law 435. 61 Am. Dec. 671; *Day v. Owen* (1858), 5 Mich. 520, 72 Am. Dec. 62 (refusal of cabin accommodations to colored persons); *Gray v. Cincinnati Southern Ry. Co.* (C. C. U. S. 1882), 11 Fed. 683 (may provide separate car for colored women, but cannot force them to travel in the "smoker".); *Commonwealth v. Jones*, (1899) 174 Mass. 401, 54 N. E. 869. In *Kelly v. N. Y. City Ry. Co.*, (1908) 192 N. Y. 97, 103, 84 N. E. 569, Gray, J., said, "The statute should be read in the light of habitual method of the railroad transportation of passengers, which is to require one fare for a trip on its line, and another fare for the return trip."

But even though a rule is reasonable, it is not binding on the passengers when no reasonable notice of its existence has been given to the public, and the plaintiff is ignorant of the rule. *McGowan v. New York City Ry. Co.*, (1906) 99 N. Y. Supp. 835; *Illinois Central R. R. Co. v. Harper* (1903), 83 Miss. 560, 35 So. 764, 64 L. R. A. 283. See also *Trotlinger v. East Tennessee, Etc. R. R. Co.*, (1883) 79 Tenn. (11 Lea) 533. In the following cases it was held that the rule was binding even though plaintiff had no notice, a duty on the part of the passenger to know the reasonable regulations of the company being implied. *Gulf, C. & S. F. Ry. Co. v. Moody*, (Civ. App. Tex. 1895) 30 S. W. 574; *Johnson v. The Concord R. R. Corporation* (1865), 46 N. H. 213, 88 Am. Dec. 199. It does not appear from these cases that any kind of notice was given, even to the general public. If the courts intended to hold that no notice to the public is necessary, the decisions would seem to be erroneous, the holding of the principal case being more reasonable and more strongly supported by authority.

CONSTITUTIONAL LAW—RESIDENTIAL DISTRICTS—POLICE POWER—EMINENT DOMAIN.—The City Council of Minneapolis adopted an ordinance under authority of sections 1581-1585, *Minn.* G. S. 1913, which established a residential district and provided that, among other things, no stores should be erected and maintained therein. A building inspector refused a necessary permit to a property owner desirous of installing wiring in a store building which had been erected by him in the district before the adoption of the ordinance, basing his refusal on the ordinance. Held, the district court erred in denying a writ of mandamus to compel the issuance of the permit. *State ex rel. Lachtman v. Houghton*, (Minn. 1916), 158 N. W. 1017.

By this decision Minnesota accords with the decisions of other states, the reason given being that, while the police power of the state is broad, it does not justify an interference by the legislature with private rights for purely aesthetic purposes, unconnected with the safety, health, morals, or general welfare of the public. A legislative act which would permit such an interference is unconstitutional in that it deprives owners of their property without due process of law or without just compensation first paid and secured. *City of St. Louis v. Dorr*, (1898) 145 Mo. 466, 485 (confectionery store); *Willison v. Cooke*, (1913) 54 Colo. 320, 130 Pac. 828 (general store); *Byrne v. Maryland Realty Co.*, (1916) 98 Atl. 547, (duplex house); *Quintini v. Board of Aldermen*, (1886) 64 Miss. 483, 1 So. 625, 60 Am. Rep. 62 (residence). In the instant case two judges dissented on the ground that a property owner has no constitutional right to damage his neighbors' homes by devoting his lot to a use incongruous with the general use of property in the vicinity. But, it is submitted, a man may make a lawful use of his property, although his doing

so may be objectionable to his neighbors. It seems that the fact which had the greatest weight with the trial court in denying the writ, was the vicious practice said to be followed by some individuals of acquiring vacant property in choice residential districts and threatening to erect thereon objectionable buildings with a view to being paid for refraining from so doing. It is suggested that possibly these individuals could be discouraged in their practice by an application of the rather advanced doctrine that all harm intentionally done is actionable unless justified, enunciated by the Minnesota court. *Tuttle v. Buck,* (1909) 107 Minn. 145, 119 N. W. 946. The ordinance and statutes in question were merely another attempt to extend the police power to legalize an interference with private rights for aesthetic purposes, which extension will not be permitted. *Haller Sign Works v. Physical Culture Training School,* (1911) 249 Ill. 436, 94 N. E. 920; *State v. Lamb,* (N. J. 1916) 98 Atl. 459.

The court expressly reserved the question of the constitutionality of Chapter 128, Minn. Laws 1915, which would attain through the exercise of the power of eminent domain the same end as the statute which the court held unconstitutional. It has been suggested that public aesthetic ends may be effectuated by the legislature through the exercise of eminent domain. Larremore, *"Public Aesthetics,"* 20 Harv. Law Rev. 35. There are cases that so indicate. *Matter of Bushwick Ave.,* (N. Y. 1868) 48 Barb. 9; *Matter of Clinton Ave.,* (1901) 68 N. Y. Supp. 196, 57 App. Div. 166, affirmed in 167 N. Y. 624; *Attorney General v. Williams,* (1899) 174 Mass. 476, 55 N. E. 77; *United States v. Gettysburg R. Co.,* (1895) 160 U. S. 668; *Shoemaker v. U. S.,* (1892) 147 U. S. 282. But these cases do not stand unopposed. *The Farist Steel Co. v. The City of Bridgeport,* (1891) 60 Conn. 278, 22 Atl. 561, 13 L. R. A. 590.

CONTRACTS—IMPOSSIBILITY BY SUPERVENING DOMESTIC LAW.—Plaintiff gas company contracted with defendant urban district to install street lighting equipment and to maintain and furnish gas light for period of five years at a fixed price per lamp per annum, payable in quarterly instalments. After the contract had been performed satisfactorily on both sides for three years, the military authorities, acting under the Defense of the Realm Acts, prohibited street lighting in the district until further order. Plaintiff brought suit for instalments for three quarters, during one of which it had furnished a small percentage of the lighting and during the other two of which, it had furnished no lighting at all. Held, Plaintiff may recover instalments in full. *Leisten Gas Co. v. Leisten-Cum-Sizewell U. D. C.,* (1916), 2 K. B. 428, 32 T. L. R. 588.

The court reasoned that the promise to light the lamps did not go to the whole of the consideration for the promise to pay, and its breach could, under ordinary circumstances, be compensated in damages; that the latter promise is indivisible, and that defendant could have no cross action for the breach, because it is excused by supervening domestic law. Where performance of a contract, legal when made, becomes impossible by supervening domestic law, it is discharged. *Bailey v. De Crespigny,* (1869) L. R. 4 Q. B. 180; *Jameson v. Indiana, Etc. Co.,* (1891) 128 Ind. 555, 28 N. E. 76, 12 L. R. A. 652; Williston's Wald's Pollock on Contracts, 524, note 6. If only certain portions of it are so affected by the law, those portions only are discharged. *Gammon v. Blaisdell,* (1891) 45 Kan. 221, 25 Pac. 580; *Jones v. Judd,* (1850) 4 N. Y. 411. But where so material a part of the contract is discharged by impossibility that it will result in the other party getting something substantially different from what he bargained for, both parties are entirely excused. *Spalding v. Rosa,* (1877) 71 N. Y. 40, 27 Am. Rep. 7; *Bettini v. Gye,* (1876) L. R. 1 Q. B. D. 183, 188 per Blackburn, J., semble. The mere fact that the supervening law makes the contract more difficult of performance is immaterial. *Grimsdeck v. Sweetman,* (1909) 2 K. B. 740; *O'Byrne v. Henley,* (1909) 161 Ala. 620, 50 So. 83, 23 L. R. A. (N. S.) 497; *San Antonio Brewing Ass'n. v. Brents,* (1905) 39 Tex. Civ. App. 443, 88 S. W. 638; *Hecht v. Acme Coal Co.,* (1911) 19 Wyo. 10, 113 Pac. 788, 34 L. R. A. (N. S.) 773.

And where it only temporarily prevents performance, the obligations of the contract are merely suspended and not discharged. *Hadley v. Clarke,* (1799) 8 T. R. 259, 101 Eng. Reprint 1377; *School Dist. v. Howard,* 5 Neb. Unofficial 340, 98 N. W. 666. Where the law prohibits performance, no action based on the validity of the contract, either for specific performance, or for damages can be maintained. *Louisville & Nashville R. Co. v. Mottley,* (1911) 219 U. S. 467, 31 S. C. R. 265, 55 L. ed. 297; *Cowley v. Northern Pacific Ry.,* (1912) 68 Wash. 558, 123 Pac. 998. But where the party whose promise has been made impossible of performance has received the consideration for his performance, his right to retain it is questionable. If he has given no performance at all, he should be liable in quasi-contract on grounds of total failure of consideration. *Oom v. Bruce,* (1810) 12 East 225; *Watson v. Donald,* (1908) 142 Ill. App. 110; *Moore v. Williams,* (1889) 115 N. Y. 586. If he has partially performed and the consideration is divisible, the proper portion should be returned or compensated for. *Thomas v. Hartshone,* (1888) 45 N. J. Eq. 215; *Whincup v. Hughes,* (1871) L. R. 6 C. P. 78, semble. If not apportionable by the terms of the contract, the English courts refuse to allow any recovery, although there is clearly a partial failure of consideration and unjust enrichment. *Whincup v. Hughes,* supra. The American courts show a tendency to allow recovery. *Wolfe v. Howes,* (1859) 20 N. Y. 197, 75 Am. Dec. 388; *Louisville & Nashville Ry. v. Crowe,* (1913) 156 Ky. 27, 160 S. W. 259. The principal case is, therefore, clearly right in refusing to allow defendant any cross-action for damages. In refusing to allow any deduction for lighting not furnished, it is merely applying the usual English doctrine as to non-apportionment of consideration. This doctrine is highly artificial and usually results in the unjust enrichment of one party at the expense of the other.

CONTRACTS—SATISFACTION OF PARTY—JUDICIAL REVIEW.—Defendant, a corporation, through its general manager, employed plaintiff as a traveling salesman for three years, plaintiff to perform his work to the satisfaction of the defendant. Before the end of the three years defendant discharged plaintiff on the ground that his services were not satisfactory. Plaintiff sued to recover salary due from the date of his discharge to the end of his term. Held, the dissatisfaction of the employer must be reasonable, and the adequacy of the grounds for discharge is open to judicial investigation. *Hannaford v. Stevens & Co., Inc.,* (R. I. 1916) 98 Atl. 209.

The courts have divided contracts for performance to the satisfaction of the other party into two classes: those involving questions of personal taste and feeling, and those involving questions of quality, workmanship, salability, commercial value, and other like considerations. It is well settled that in contracts of the first class, the buyer or promissor is the sole judge of whether the condition of the contract has been fulfilled. *Zaleski v. Clark,* (1876) 44 Conn. 218, 26 Am. Rep. 446 (sculpture); *Bowen v. Buckner,* (Mo. 1916) 183 S. W. 704 (painting); *Pennington v. Howland,* (1898) 21 R. I. 65, 41 Atl. 891. But this dissatisfaction must be in good faith and not merely to defeat recovery when the buyer is in fact satisfied. *McCartney v. Badovinac,* (Colo. 1916) 160 Pac. 190; *Mackenzie v. Minis,* (1910), 132 Ga. 323, 63 S. E. 900, 23 L. R. A. (N. S.) 1003. There is conflict of authority as to the second class of contracts. A number of courts have taken the same view as in contracts under the first division, viz., that the promissor is the sole judge of his dissatisfaction. *Hawkins v. Daley,* (1911) 85 Conn. 16, 81 Atl. 1053; *Hay v. Hassett,* (Ia. 1916) 156 N. W. 734; *Magee v. Scott & Holston Lumber Co.,* (1899) 78 Minn. 11, 80 N. W. 781; *Plumbing Co. v. Carr,* (1903) 54 W. Va. 272, 46 S. E. 458. A majority of courts hold to the contrary rule, construing contracts of this character as requiring only such performance as would be satisfactory to a reasonable man. *Bryan Elevator Co. v. Law,* (Calif. 1916) 160 Pac. 170; *Hawkins v. Graham,* (1889) 149 Mass. 284, 21 N. E. 312, 14 Am. St. Rep. 422; *Doll v. Noble,* (1889) 116 N. Y. 230, 5 L. R. A. 554, 15 Am. St. Rep. 398. The courts have been nearly unanimous in

placing contracts like that of the principal case, a contract to employ a person so long as his work is satisfactory, in the first class, and in holding the dissatisfaction of the employer, in good faith, conclusive. *American Music Stores v. Kussel*, (1916) 232 Fed. 306; *Schmand v. Jandorf*, (1913) 175 Mich. 88, 140 N. W. 996, 44 L. R. A. (N. S.) 680. See also 9 Cyc. 618-619. Minnesota is in accord with the great weight of authority. *Frary v. American Rubber Co.*, (1893) 52 Minn. 264, 53 N. W. 1156. The decision in the principal case is certainly open to question.

CORPORATIONS—NATURE AND THEORY OF—ENEMY CHARACTER.—A corporation was organized under the laws of England in 1905. All of its stock save one share was owned by German citizens. Its directors, with one exception, were Germans resident in Germany. It sued in England during the present war to recover money which was due before the war. Held, by the House of Lords that to allow the suit would be to permit the payment of money to the King's enemies. *The Daimler Company, Ltd. v. The Continental Tyre and Rubber Co.*, 1916 II A. C. 307, 32 Times L. R. 624.

A court will not look through the corporate form to inquire into the nationality or race of the stockholders. *The Daimler Co., Ltd., v. The Continental Tyre Co.*, 1915 1 K. B. 893; *Janson v. Driefontein Consolidated Mines, Ltd.*, 1902 A. C. 484; *Salomon v. A. Solomon and Company, Ltd.*, 1897 A. C. 22; *The Gramophone and Typewriter Company, Ltd., v. Stanley*, 1908 2 K. B. 89; *Peoples' Pleasure Park Company v. Rohrbach*, (1908) 109 Va. 439, 61 S. E. 794. The House of Lords, in the instant case, cited the case of *Bank of United States v. Deveraux*, (1809) 9 U. S. (5 Cranch) 61. That case and the few that follow it are a result of the peculiar provisions of the United States Constitution which give the federal courts jurisdiction in cases between citizens of different states. For the purpose of giving jurisdiction, Chief Justice Marshall said that the court would look beyond the corporate form. The case was overruled by the case of *Louisville Railroad Company v. Letson*, (1844) 2 Howard 497, at a time when the federal courts ceased to be anxious to extend their jurisdiction over corporations. In his opinion in this last case, Judge Wayne stated that, since Chief Justice Marshall had always regretted his opinion in the former case, he did not hesitate to overrule it. The courts will disregard the fiction of the distinct entity of a corporation when it is adopted to make an illegal act seem legal. *United States v. United Shoe Machinery Co.*, (D. C. 1916) 234 Fed. 127; *State v. Creamery Package Mfg. Co.*, (1910) 110 Minn. 415, 433, 126 N. W. 126, 129; *The State ex rel. Attorney General v. The Standard Oil Co.*, (1892) 49 Ohio St. 137; *Bank et al v. Trebin*, (1898) 59 Ohio St. 316. Or where the corporation is so organized and controlled as to make it a mere instrumentality of another corporation. *Hunter v. Baker Motor Vehicle Co.*, (1915) 225 Fed. 1006; *Spokane Merchants' Ass'n. v. Clere Clothing Co.*, (Wash. 1915) 147 Pac. 414. Or the instrumentality of a partnership. *In re Rieger, Kapner & Altmark*, (1907) 157 Fed. 609. "A growing tendency is exhibited in the courts to look beyond the corporate form to the purpose of it and to the officers who are identified with that purpose," McKenna, J., in *McCaskill Co. v. U. S.*, (1909) 216 U. S. 504 (515). But the House of Lords in the principal case went further than the American courts have gone. The incorporation was to accomplish a purpose which might have been accomplished fairly and legally by the incorporators as private individuals. The act of incorporation took place nine years before the declaration of war, and the transaction out of which the case arose occurred before the war. The court refused to be bound by the technical theory of the separate entity of the corporation as distinct from its corporators, and held the nationality of the corporation to be that of the men who controlled and directed its affairs. To hold the contrary would be to allow a mere legal fiction to outweigh the palpable fact.

CRIMINAL LAW—APPEAL BY STATE—DOUBLE JEOPARDY—STATUTES.—Defendant was indicted for murder as principal, but was tried as an aider and abettor and was acquitted by the jury. The prosecuting attorney excepted to certain instructions given by the court. On appeal, the exceptions of the state were sustained. *State v. Doty,* (Ohio 1916) 113 N. E. 811.

It does not appear from the report of the instant case whether the state was granted a new trial. This decision apparently must be governed by an Ohio statute which provides that when a court superior to a trial court renders judgment adverse to the state in a criminal case, error may be prosecuted by the state. General Code of Ohio, 1910, Sec. 13764. Under the common law in England it has been assumed that the state has no right of appeal in a criminal case. 3 Coke's Inst. 214; 4 Bl. Comm. 361. By the overwhelming weight of judicial authority, in the United States, aside from statute, the state has no right of appeal whether for errors of law or on a verdict of acquittal. *U. S. v. Sanges,* (1892) 144 U. S. 310; *City of St. Paul v. Stamm,* (1908) 106 Minn. 81, 118 N. W. 154. "A person is in legal jeopardy when he is put upon trial, before a court of competent jurisdiction, upon indictment or information which is sufficient in form and substance to sustain a conviction and the jury has been charged with his deliverance." Cooley's Constitutional Limitations, seventh ed., p. 467. When the jury has passed upon the guilt or innocence of the defendant, even though the instructions of the court were erroneous, defendant has been in jeopardy. 1 Bishop on Criminal Law (eighth ed.), § 1026(2). Any statute, therefore, which provides that the state may have a new trial in a criminal case for errors of law after an acquittal by the jury, provides in effect that former jeopardy shall be no defense. The Fifth Amendment to the United States Constitution prohibits such double jeopardy, but this is binding only upon the federal courts and not upon the state courts. *Barron v. Baltimore,* (1833) 7 Pet. 243. It follows that unless the state constitution prohibits double jeopardy, the legislature is at liberty to give to the courts the power to grant a new trial upon appeal of the state after an acquittal. Ohio, in common with most of the states of the Union, has such a constitutional prohibition. Art. 1, Sec. 10, Ohio Constitution; Art. 1, Sec. 7, Constitution of Minnesota. The Connecticut Court in a vigorous opinion contended that granting a new trial for errors of law after acquittal is not really a case of double jeopardy. *State v. Lee,* (1894) 65 Conn. 265, 27 L. R. A. 298. But the Connecticut constitution provides no guaranty to a criminal against being twice put in jeopardy. Where no double jeopardy is involved, the tendency seems to be to give the state by statute the right of appeal. 34 Statutes at Large (U. S.) p. 1246; Ch. 316, Act of 1872 of Maryland; Kans. Crim. Code, § 283. But in cases where the jury has returned a verdict of acquittal, the idea that the defendant has then been in jeopardy is too firmly settled in Anglo-American law to be uprooted by judicial construction. Unless, therefore, our state constitutions are amended, it is not likely that the court in the instant case, or in cases similar to it, would construe such a statute as the one in Ohio, as giving the state a new trial after acquittal of the defendant by the jury.

HOMESTEAD—AREA—PLATTED PORTION OF CITY—MINNESOTA LAW.—Plaintiff owned a lot in Crookston, 50x150 ft. He rented to third parties a small dwelling house on the westerly twenty-five feet. On the easterly twenty-five feet he had a store, in the rear of which he and his family resided for several years. Held, plaintiff was entitled to hold as his homestead the entire lot, although he himself did not occupy all of it. *Stauning v. Crookston Mercantile Co.,* (Minn. 1916) 159 N. W. 788.

The homestead may include any quantity of land not exceeding 80 acres, in all places except platted portions of incorporated cities, villages or boroughs. In the platted portions of such incorporated places of less than 5,000 inhabitants, the limit is one-half acre, and in those of 5,000 or more, one-third acre. Minn. G. S. 1913 (6958). The land being within the

area allowed may be claimed as a homestead even though part of it be used for purposes other than for the dwelling place of the owner. The principal case illustrates this principle and represents the settled law in Minnesota. *Kelly v. Baker,* (1865) 10 Minn. 154 (124); *National Bank v. Banholzer,* (1897) 69 Minn. 24, 71 N. W. 919; (homestead contained brewery, ice house, two dwellings, etc.); *Brixius v. Reimringer,* (1907) 101 Minn. 347, 112 N. W. 273; *In re Lockey's Estate,* (1910) 112 Minn. 512, 128 N. W. 833. If the owner of the homestead make his home in all or in a part of the building situated entirely on the land, the building together with the land may be exempt as a homestead, though there be several tenants. *Umland v. Holcombe,* (1879) 26 Minn. 286, 3 N. W. 341; *Jacoby v. Parkland Distilling Co.,* (1889) 41 Minn. 227, 43 N. W. 52. There is little difficulty in determining the area of a homestead in rural districts; but when a city extends its boundaries, and in time a homestead of original rural characteristics becomes situated in an urban district, a question arises as to the reduction of the homestead to the area limited by statute. The test generally applied is that laid down in *Mintzer v. St. Paul Trust Co.,* (1891) 45 Minn. 323, 47 N. W. 973, that "a tract of land, to be within the laid out or platted portions of a city * * * must be itself laid out or platted. It must be a part and parcel of that portion of the municipality which is either laid out or platted, and not merely a tract of ground, not subdivided in any manner, but which may be surrounded in whole or in part by tracts which have been laid out or platted by other parties." Only by legislative act or the voluntary act of the owner can the homestead be platted into lots and blocks and its size thereby diminished to one-half or one-third of an acre, as the case may be. *Baldwin v. Robinson,* (1888) 39 Minn. 244, 39 N. W. 321. A legislative act extending corporate limits to include farm land will be construed liberally in favor of homestead. *Kiewert v. Anderson,* (1896) 65 Minn. 491, 67 N. W. 1031. See *In re Smith's Estate,* (1892) 51 Minn. 316, 319, 53 N. W. 711.

INSANE PERSONS—LIABILITY OF ESTATE FOR EXPENSES.—A statute provided for division of expense of maintaining indigent insane persons in state hospitals between the counties and the state in certain proportions. The state brought an action against the guardian of an insane person for maintenance. Held, the state could recover the money expended by it in support of the guardian's insane ward, on the ground that since the state was liable for part of the support, it is not a volunteer. *Commonwealth v. Evans,* (Pa. 1916) 98 Atl. 722.

Many states have statutes permitting the state to recover of estate or guardian of insane person the cost of maintaining such insane person in a state institution, and such statutes have generally been held constitutional. *Gressly v. Hamilton County,* (1907) 136 Ia. 722, 114 N. W. 191; *Kaiser v. State,* (1909) 80 Kan. 364, 102 Pac. 454; *Camden County v. Ritson,* (1903) 68 N. J. L. 666, 58 Atl. 839; *Bon Homme County v. Berndt* (1902) 15 S. D. 494, 90 N. W. 147. In the last case cited, the court said: "The state is under no legal obligation to support insane persons; hence in making provision for such support the legislature may adopt any system that it may deem wise and proper. * * * The law is uniform and applies to all parties who are alike situated, and, in our opinion, is unobjectionable from any constitutional view." In the absence of statute authorizing state to recover of estate of an insane person for his maintenance, the authorities are not agreed as to whether, at common law, the estate is liable. No recovery was allowed in the following cases: *Montgomery County v. Ristine,* (1890) 124 Ind. 242, 24 N. E. 990, 8 L. R. A. 461; *Oneida County v. Bartholomew,* (1894) 82 Hun. 80, 31 N. Y. Supp. 106; *Brown's Committee v. Western State Hospital,* (1909) 110 Va. 321, 66 S. E. 48. Contra: *Dandurand v. Kankakee County,* (1901) 96 Ill. App. 464, 63 N. E. 1011; *McNairy County v. McCoin,* (1898) 101 Tenn. 74, 45 S. W. 1070, 41 L. R. A. 862.

As a private person or private hospital could recover from the estate of such insane person for necessaries furnished for the support of such

insane person under circumstances negativing an intention to give it gratuitously (See cases cited, Williston's Ed. of Wald's Pollock on Contracts, 3d ed., p. 99), there appears to be no valid reason why the state should not also recover, when it has taken care of a person committed to a state asylum and it appears that the person or his estate is able to pay, even though there is no statute providing for such recovery. There may be reasons of policy, such as the interest of the public in the performance of a certain act, which might lead the courts to hold that the state should recover, in cases where an individual could not; but in the instant case, if the state gave the relief gratuitously and without expectation of reimbursement, no subsequent statute could create a liability against the estate of the insane person.

INSURANCE—BENEFIT CERTIFICATE—MURDER BY BENEFICIARY—RECOVERY BY SOLE HEIR.—Grand Lodge A. O. U. W. issued a benefit certificate on the life of Leaming Sharpless. The insured was murdered by Charlotta Sharpless, his wife, who was the beneficiary under the certificate. Mrs. Sharpless was duly convicted of the murder and sentenced to the penitentiary for life. Plaintiff, who is the only brother and heir of the deceased brought action to recover on the insurance policy. Held, when the beneficiary murders the insured, the insurance company is not absolved from liability on the policy and will have to pay to those who would take in the absence of a beneficiary, and that, therefore, the action by the sole heir of the deceased was properly brought. *Lewis Sharpless v. Grand Lodge,* etc., (Minn. Dec. 1, 1916).

The principles involved in this case are discussed in a note to the case of *McAlpine v. Fidelity & Casualty Co. of N. Y.,* p. 66.

INSURANCE—LIMITATION OF ACTIONS—EFFECT OF REFUSAL TO ACCEPT PREMIUMS.—The plaintiff's intestate was a member of defendant benefit association, which, in 1907, illegally raised his assessment and scaled the certificate. He refused to pay the increased assessments and was suspended in the same year. He died in 1909. *Held,* the intestate was under no obligation to make or tender payment at the rate existing before the change, since on renunciation there arose a right to elect whether to hold the insurer for damages or to wait until the policy became payable according to its tenor. Since no right of action could accrue on the certificate until the intestate died, and the action was commenced within five years thereafter, the claim was not barred by the general statute of limitations. *Gibson v. Legion of Honor,* (Ia. 1916) 159 N. W. 638.

That no cause of action arose on the certificate until the death of the insured is plain. And the courts are uniform in holding that nonpayment of assessments after a refusal of the insurer to receive such assessments does not defeat the member's right to benefits. The policy remains in force. *Benjamin v. Mutual Reserve Fund Life Assn.,* (1905) 146 Calif. 34, 79 Pac. 522; *Byram v. Sovereign Camp,* (1899) 108 Iowa 430, 79 N. W. 144, 75 Am. St. R. 265; *Langnecker v. Trustees of Grand Lodge,* (1901) 111 Wis. 279, 87 N. W. 293, 87 Am. St. Rep. 860. As to the immediate right of action of the insured, however, there is some conflict. An early New York case held that a refusal of the insurer to receive premiums gave the insured an immediate right of action. *Fischer v. The Hope Mutual Life Insurance Co.,* (1877) 69 N. Y. 161. In a later decision such a refusal was held to be no breach at all, it being suggested that the plaintiff's remedy lay in equity, and no comment being made on the earlier case. *Langan v. Supreme Council American Legion of Honor,* (1903) 174 N. Y. 266. Massachusetts, which does not recognize the doctrine of anticipatory breach, has held that such a refusal amounts to no more than notice of an intended breach at a future time, giving no immediate right of action. *Porter v. Supreme Council,* (1903) 183 Mass. 326, 67 N. E. 238. It is the more general rule, however, that it is an anticipatory breach which excuses the insured from further tender of

premiums and also gives him the option of treating the contract as terminated, suing immediately for damages, or to treat it as still in force until the benefits are payable according to its tenor. *O'Neill v. Supreme Council* (1904) 70 N. J. Law 410. The New Jersey case also has a dictum that equity would give no relief. In most jurisdictions, the insured may go into equity and force the insurer to declare the policy still in force. *Gray v. Chapter General,* (1902) 75 N. Y. Supp. 267, 70 N. Y. App. Div. 156; *Gaut v. American Legion of Honor,* (1901) 107 Tenn. 603, 64 S. W. 1070. See also *Langan v. Supreme Council,* supra. It would seem, then, that the instant case is correct. The statute of limitations might run against the immediate right of action for damages which accrued when the refusal to accept premiums took place, while it did not begin to run against the action on the certificate until that action accrued, viz., at the time of the death of the insured.

MUNICIPAL CORPORATIONS—ZOOLOGICAL GARDENS—GOVERNMENTAL FUNCTIONS.—The City of Wichita maintained a zoological garden in a public park. The plaintiff, a girl four years old, while playing therein, was severely injured by a coyote, when she placed her arm and hand upon the wire cage in which three of these animals were confined. Held, the maintenance of a zoological garden in a public park by a city is a governmental function, and the city is not liable in damages for injuries inflicted on visitors by the animals therein, which injuries are due to the negligence of the city's agents in not properly confining such animals. West, J., Dissenting. *Hibbard v. City of Wichita,* (Kan. 1916) 159 Pac. 399.

The functions of a municipality are either governmental or municipal. While cities are held liable for torts committed during the performance of a municipal function, still they are absolved from liability for similar torts committed in the execution of a governmental function. Ordinarily, those powers which are exercised for the public welfare without any compensation or special benefit accruing to the municipality, are considered governmental functions. *Harper v. City of Topeka,* (1914) 92 Kan. 11. These governmental functions constitute a legal duty imposed by the state upon its creature, the municipality, and the city is answerable to the state for the fulfillment of these duties. *Hill v. Boston,* (1877) 122 Mass. 344; 23 Am. Rep. 332. The courts generally agree that the exercise of police power is a governmental function. *Gullikson v. McDonald,* (1895) 62 Minn. 278, 64 N. W. 812. On the other hand most courts agree that the maintenance of a city water department, where private consumers are supplied, is not a municipal function, in the sense that the city is not liable for torts committed in the execution of such an undertaking. *Keever v. City of Mankato,* (1910) 113 Minn. 55, 129 N. W. 158.

The courts are divided on the question as to whether or not the maintenance of a public park is a governmental function. 4 Dillon on Mun. Corp., 5th ed., Sec. 1659. Some states hold that the maintenance of a public park by a city is a governmental function. *Harper v. City of Topeka,* (1914) 92 Kan. 11; *Clark v. Waltham,* (1880) 128 Mass. 567; *Ackeret v. City of Minneapolis,* (1915) 129 Minn. 190, 151 N. W. 976. But there are other jurisdictions which hold that the maintenance of a public park is not a governmental function and hold the city liable for torts committed by its agents, on the same basis as a private individual. *City of Denver v. Spencer,* (1905) 34 Colo. 270, 82 Pac. 590, 2 L. R. A. (N. S.) 147; *Silverman v. New York,* (1909) 114 N. Y. Sup. 59; *Barthold v. Philadelphia,* (1893) 154 Pa. 109; 26 Atl. 304.

The dissenting opinion in the principal case, though it agrees with the majority of the court that the maintenance of a public park is a governmental function, refuses to admit from the facts of the case, that the maintenance of a zoological garden was a governmental function. It proceeds on the theory that from the facts shown, the city was maintaining a nuisance rather than a benefit to the public. Though it be granted that the maintenance of a public park is a governmental function, it appears that the majority of the court in the principal case has made an unwar-

ranted extension of that doctrine by holding the maintenance of a zoological garden a governmental function. Since in the case of *Harper v. City of Topeka,* above cited, the doctrine of attractive nuisance was applied, it seems that the court in the principal case has overlooked a very inviting opportunity to apply that doctrine to the facts of the case under discussion. From a review of the earlier cases in the state of Kansas dealing with similar questions, the opinion of the dissenting judge in the principal case is more representative of the authority of that state on the question involved in this case. See *Roman v. City of Leavenworth,* (1913) 90 Kan. 379; *Murphy v. Fairmount Township,* (1913) 89 Kan. 760; *Harper v. City of Topeka,* (1914) 92 Kan. 11.

PLEADING—INCONSISTENT DEFENSES—MOTION TO ELECT.—In a suit on an accident policy, defendant pleaded both suicide of the assured and that death was caused by the beneficiary. Plaintiff moved that the defendant be compelled to elect which defense it would rely on, upon the theory that the defenses were inconsistent. The trial court refused the motion. Held, the motion was properly refused. *McAlpine v. The Fidelity and Casualty Co. of N. Y.* (1916, Minn.), 158 N. W. 967.

In the view the Supreme Court took of the case, the defenses were not affirmative, and the motion was, doubtless, properly refused. (See *note* on same case, p. 66). But the court further stated that it will not apply the rule as to inconsistent defenses when to do so would defeat a meritorious defense or work an injustice. This dictum is contra to the great weight of authority, as well as to the rule which has heretofore prevailed in Minnesota. *Phillips on Code Pleading,* Sec. 261; *Derby et al. v. Gallup* (1860) 5 Minn. 119(85). Mr. Pomeroy states that according to the overwhelming weight of judicial authority, inconsistent defenses may be joined, in the absence of express prohibition by statute. *Pomeroy, Code Remedies,* third ed. sec. 722 (1). An examination of the cases cited by Mr. Pomeroy in support of the statement, however, shows that the learned author failed to distinguish between defenses inconsistent in law and those inconsistent in fact. It is recognized that defenses inconsistent in law may be joined. *Gammon v. Ganfield* (1890) 42 Minn. 368, 44 N. W. 125; *Rees v. Storms,* (1907) 101 Minn. 381, 112 N. W. 419 (if both defenses may be true in fact); *Sutherland's Code Pleading and Practice,* sec. 671. But the defenses in the principal case were not merely based on inconsistent legal theories, as, for example, a general denial and a plea in avoidance. They were inconsistent in fact, as both could not possibly be true, and the proof of one would necessarily disprove the other. It is submitted, however, that the rule announced in the principal case should be followed. At least such should be the rule in the code states, which are presumably liberal in matters of pleading. There is no injustice done to the plaintiff in allowing the defendant to plead two or more defenses which are inconsistent, although such inconsistency be one in fact, provided a special question is submitted to the jury, which would require them to decide which defense has been proved by the defendant by a preponderance of the evidence. In the words of Dibbell, C. in the instant case, "we are not so much concerned with the development of an artistic and symmetrical system of pleading, as we are with having a practical procedure which will result in a speedy determination of disputes upon the facts."

STOPPAGE IN TRANSITU—VENDOR'S LIABILITY FOR FREIGHT.—The defendant in England sold goods to a South American company and delivered them to plaintiff to be transported to South America. Learning that the vendee was insolvent, defendant gave notice to the plaintiff, which admittedly amounted to stoppage in transitu. The plaintiff stopped the goods and kept them for defendant for a considerable length of time. Defendant did not seek to regain the goods and refused to give instructions for their disposition. Plaintiff stored the goods and brought action

for the freight. Held, the defendant is liable for the freight for the entire distance. *Booth Steamship Company, Ltd. v. Cargo Fleet Iron Company, Ltd.*, 1916 2 K. B. 570.

A vendor can not regain possession of the goods after stoppage in transitu, without discharging the lien of the carrier for the freight. *Rucker v. Donavan*, (1874) 13 Kans. 190, 19 Am. Rep. 84; *Pennsylvania Steel Co. v. Georgia Railroad & Building Co.*, (1893) 94 Ga. 636, 21 S. E. 577; *Potts v. New York, Etc., R. Co.*, (1881) 131 Mass. 455, 41 Am. Rep. 247. The instant case, however, seems to be the first to decide that the carrier can recover the freight from a vendor who has not sought to recover possession of the goods after stopping them. The court in the instant case held that the vendor can not have the benefit of the notice without assuming some of the liabilities; and, since the vendor has prevented the shipowner from making delivery, he is under the correlative obligation to the shipowner to take delivery or give directions for delivery; the court went on to say that the obligation to take delivery involves the further obligation to pay the freight and discharge the lien of the owner. The holding in this case seems to express the proper view. The consignor or vendor should not be given the right to stop the goods in transitu and prevent the carrier from collecting the freight, if he does not want to regain possession of the goods. The law should, therefore, imply with the right of stoppage in transitu the obligation to order disposition of the goods and to pay the freight.

TELEPHONES — PHYSICAL CONNECTION — EMINENT DOMAIN — POLICE POWER.—A South Dakota statute, Ch. 218, Laws of 1911, provides that if the Board of Railroad Commissioners deems it for the public welfare, they shall order the physical connection of different telephone lines and apportion the expense. The City of Milbank instituted proceedings to enforce connection of the lines of the Dakota Central Telephone Company with those of the Grant County Telephone Co., so as to make the toll lines of the former company available to subscribers of the latter. The commissioners ordered the connection to be made at the expense of the Grant County Telephone Co. Held, such enforced connection is a regulation of a public service corporation under the police power of the state and is not invalid as a taking of property without due process of law. *City of Milbank v. Dakota Central Telephone Co.* (S. D. 1916) 159 N. W. 99.

The common law rule, which would require a telephone company to afford service without discrimination, does not extend to the making of physical connection with a competing company, nor does it permit a subscriber of a competing company to insist that such connection be made. *Clinton-Dunn Telephone Co. v. Carolina Telephone & Telegraph Co.* (1912) 159 N. C. 33, 74 S. E. 636; *Home Telephone Co. v. Peoples Telephone Co.*, (1911) 125 Tenn. 270, 141 S. W. 845, 43 L. R. A. (N. S.) 550. *State ex rel. Goodwine v. Cadwallader* (1909) 172 Ind. 619, 87 N. E. 644. Some states, however, provide in their constitutions that such connection may be enforced under proper legislation. *Oklahoma Constitution*, Art. 9, Sec. 5. Several other states have statutory provisions similar to that of South Dakota. *Minnesota Laws*, 1915, Ch. 152, Sec. 10; *Laws of Wisconsin*, 1911, Ch. 546, Sec. 1; Page & A., *Gen. Code, Ohio*, Secs. 614-663. There is no doubt, in view of the decided cases, that such provisions are constitutional, but the courts are divided on the question whether this is an exercise of the right of eminent domain, or that of the general police power of the state. Wisconsin has held, in a well considered opinion, with the principal case, that it is a valid exercise of the police power. *Wisconsin Telephone Co. v. Railroad Commission* (1916) 162 Wis. 383, 156 N. W. 614. In the case of *Pacific Telephone & Telegraph Co. v. Eshelman*, (1913) 166 Cal. 640, 137 Pac. 1119, the court concluded that it was an exercise of eminent domain. The federal court assumed this to be an exercise of eminent domain. *Billings Mutual Telephone Co. v. Rocky*

Mountain Bell Telephone Co. (1907) 155 Fed. 207. The better view seems to be that it is not a taking of private property for a public use, but rather, as the court suggested in the instant case, the regulation of a public service corporation under the police power of the state. The Supreme Court of Ohio has recently held that a ruling of the Public Utilities Commission refusing the petition of a subscriber for an order compelling the connection is not unreasonable, where the public necessity does not require it. *Shafer v. Public Utilities Commission,* (Ohio 1916) 113 N. E. 809. This is consistent with the view expressed above, as the police power is not a right which the state may use arbitrarily.

THEATRES—REVOCATION OF TICKET—TORT LIABILITY.—A theatre owner sold a ticket to a patron for the wrong night; the ticket was honored and the seat occupied by the purchaser during a part of the performance, when, on the appearance of the holder of a ticket for the same seat on that night, he was ejected. In an action in tort, *Held,* though no more force than was necessary was used, the owner must respond to the aggrieved party in substantial damages. *Metts v. Charleston Theater Co.* (S. C. 1916) 89 S. E. 389.

This decision is a clear departure from the doctrine laid down in the early case of *Wood v. Leadbitter* (1845) 13 M. & W. 838 (racetrack ticket), that the purchaser of a ticket to a public exhibition gets only a license which is revocable at the will of the licensor; that the purchaser acquires no right in rem, and that where he has been forcibly prevented from entering, or has been wrongfully ejected after entering, his only remedy is by an action for damages for breach of contract. That case was followed widely in the United States: *Moore v. Washington Jockey Club,* (1912) 227 U. S. 633, 33 S. C. Rep. 401, 43 L. R. A. (N. S.) 961, note; *McCrea v. Marsh,* (1858) 12 Gray (Mass.) 211, 71 Am. Dec. 745 (theater ticket); *Horney v. Nixon,* (1905) 213 Pa. 20, 15 L. R. A. (N. S.) 1184; *Taylor v. Cohn,* (1906) 47 Ore. 538, 84 Pac. 388. The question was well settled until the case of *Hurst v. Picture Theatres,* Ltd. (1915) 1 K. B. 1, was decided. In that case the plaintiff, a purchaser of a theater ticket, was turned out of his seat with no more force than was necessary, and was allowed to recover substantial damages, in tort. Buckley, L. J., stated that "*Wood v. Leadbitter* is not a decision which can be applied in its integrity in a court which is bound to give effect to equitable considerations. It was decided upon principles which are applicable in a court of law as distinguished from a court of equity." It would seem that on general principles a person who has paid for his ticket to a theater and is quietly enjoying the performance, when ejected and humiliated without cause, should have a more substantial remedy than a mere action for breach of contract, entitling him to recover only the price of the ticket. This might be worked out on the theory that the license is irrevocable, but preferably on the theory that compensatory damages for humiliation may sometimes be given in an action for breach of contract. See *Smith v. Leo* (1895) 92 Hun (N. Y.) 242, 36 N. Y. Supp. 949.

WITNESS—EXEMPTION OF NON-RESIDENT FROM SERVICE OF CIVIL PROCESS—REASONABLE TIME.—The defendants, both of whom resided at Chicago, Ill., came to Minnesota, one as a party and witness, the other solely as a witness in an action pending in the District Court at Minneapolis. The action was dismissed at eleven o'clock in the morning. Defendants immediately purchased tickets for their return to Chicago, making reservations on a train leaving at eight o'clock that evening, on which train they departed. Another train, which ran on a regular schedule to Chicago, left eight hours earlier. During that afternoon and after this train had departed, defendants were served with process in this action. Held, defendants were exempt by reason of privilege from service, and the delay was not unreasonable. *Turner v. Rovdall et al.,* (Minn. 1916).

A non-resident, who comes into the state as a witness in a case, is exempt from service of summons in a civil action against him while

coming to court, during attendance, and for a reasonable time thereafter. *Diamond v. Earle,* (1914) 217 Mass. 499, 105 N. E. 363; *Sherman v. Gundlach,* (1887) 37 Minn. 118, 38 N. W. 549; *First National Bank of St. Paul v. Ames,* (1888) 39 Minn. 179, 39 N. W. 308; *Bunce v. Humphrey,* (1915) 214 N. Y. 21, 108 N. E. 95. This rule is not statutory. Its purpose is to aid the due administration of justice by encouraging witnesses to come into the state voluntarily to testify. *First National Bank of St. Paul v. Ames (supra).* When the party served is not a witness but either a plaintiff or defendant, there is a conflict of authority, the majority holding that the privilege should be extended to such a case. See cases collected in 42 L. R. A. (N. S.) 1101, note. A reasonable time must be allowed for the person's departure from the state. *Atchison v. Morris,* (1882 U. S. C. C.) 11 Fed. 582; *Palmer v. Rowan,* (1887) 21 Neb. 452, 32 N. W. 210. 59 Am. Rep. 844; *Person v. Grier,* (1876) 66 N. Y. 124, 23 Am. Rep. 35 (semble); *Ex parte Hall,* (1802) 1 Tyler (Vt.) 274. No definite rule has been laid down as to what is such a reasonable time. Remaining in a state over night because of a storm has been held not unreasonable. *Ex parte Hall* (supra). And to require a witness to take the first train after leaving court would be too severe a rule. *Wilbur v. Boyer,* (Pa.) 1 W. N. C. 154.

THE MINNESOTA STATE BAR ASSOCIATION.

The present Minnesota State Bar Association was organized in January, 1901. It was ostensibly a reorganization of an older association of that name, which had been moribund for several years; but in truth it was a new birth—new in personnel, plan and purpose. And it is significant of the spirit of the organizers, and of the loyalty that the Association commands from those who know it most intimately, that most of the men now alive who participated in the reorganization of 1901 are still active in the councils of the Association.

At the end of its first year, the Association had about 350 members. For some years the membership increased very slowly, but the rate of increase has gradually accelerated, and there are now some 1200 members in good standing; of whom more than 300 have joined within the past year. And while this number is hardly more than half the lawyers of Minnesota eligible for membership, it includes most of the able, experienced and influential practitioners in the State. Every district and county in the State, and every community of importance, is well represented. During the past two or three years there has been a phenomenal increase in interest and activity, and the power and influence of the Association is just beginning to be felt.

At the outset the chief function of the Association was its annual dinner. For several years the annual meeting consisted of a half-day business session, held on the opening day of the April term of the Supreme Court; the principal feature of which was an address by some lawyer of eminence imported for the occasion. This was followed by a banquet in the evening. From the beginning the banquets were uniformly successful and well attended, but it was some years before much interest was manifested in the afternoon meeting. Yet even in those days, when the social phase of its activities was disproportionately prominent, the Association did some very effective work and accomplished some real good in other directions. The 1905 Revision of the Statutes and the increase of judicial salaries in 1907 were among the more conspicuous achievements of the Association during the years of its infancy. And many of the achievements of later years; such as the adoption of the Uniform Negotiable Instruments law, the procedural reforms enacted in 1913, the Supreme Court Commissioners act and the Workmen's Compensation law were the result of movements initiated and work done during those years. In 1908 the Association ventured upon an experiment to which the officers and Governors had looked forward for many years—a three day meeting in the summer vacation. This meeting was held at Duluth and was a conspicuous success—the credit for which is largely due to the lawyers of Duluth, who then, for the first time, took their rightful place in the councils of the Association,

and who have since been one of the strongest factors in its work. Since 1908 the plan of a three day summer meeting has been consistently followed—and has been consistently successful. Meetings have been held at Mankato, St. Cloud, Minneapolis, St. Paul and Duluth, and the policy of holding at least every other meeting outside the Twin Cities has become definitely settled. The 1915 meeting was held at St. Cloud; that of 1916 at Duluth; and the meeting in 1917 will be at Minneapolis—probably late in July or early in August.

With the adoption of the plan of a three day meeting came a radical change in the character and scope of the program and a marked increase in the activities of the Association between meetings. The program now includes several addresses by lawyers of eminence, at home and abroad; the consideration of committee reports, and the discussion of subjects of interest to the profession. At the 1916 meeting there were ten or more interesting and instructive papers, and a series of debates hardly less interesting and instructive. These were listened to with closest attention. That meeting was notable for the number and character of the lawyers attending, as well as for the quality of the addresses and debates and the interest shown.

The Association publishes each year an "annual report"; now in the form of a substantially bound volume of several hundred pages, which contains, among other things, a verbatim report of the addresses and debates at the meeting and the speeches at the banquet. A copy of the annual report is supplied to every member of the Association.

Every practicing lawyer of good standing and reputation is eligible for membership in the Association, and the judges of the Supreme and District courts of the State and of the United States courts within the State are, ex-officio, honorary members. There is no initiation fee, and the dues are but $3 per year. New members are welcomed, and it is hoped the day is not far distant when every reputable lawyer of the State will have his name on the membership roll. Applications may be made to the Secretary, or to the chairman or any member of the Membership Committee, and are acted upon promptly and without undue formality.

In days past it was thought by some that the Association was an "aristocratic" organization, controlled by the lawyers of the three great cities of the State, and that admission was a matter of influence and favor. Nothing could be farther from the fact. The Association is essentially democratic in its organization and purposes, and the so-called "country lawyers" have always been most prominent and influential in its councils and its most loyal supporters. The majority of the men who have served it as President have come from outside the Twin Cities; and under the Constitution sixteen of the nineteen members of the Board of Governors, by which the affairs of the Association are administered, are each year selected from outside the three metropolitan districts.

Of course, the more serious and effective work of an organization of this character must be done through its committees. In former years the committees of the Association, taken as a whole, have been less active and industrious than might have been desired. But this

is not true of the last two or three years. During the past year more than one hundred and twenty-five different men served the Association on its various standing and special committees; and most of these committees did earnest and effective work. And the interest which has developed gives promise of still greater activity and achievement during the present year.

The committee work of the Association is only just beginning to come into its full strength; and there is plenty of room for expansion. Place can be found on committee for every high minded and public spirited lawyer who is willing to give the time and submit to the personal inconvenience which unselfish service to his profession and the public entails.

It was desired that this article contain something in the nature of a survey of the work of the past year and a statement of the plans for the future. But it is difficult to do this within the limited space permitted and much of it must be left to future articles from better pens. The only thing here possible is a brief reference to certain matters which call for action by the Legislature at the 1917 session, or which invite immediate attention and co-operation on the part of members of the Association and the bar at large.

A year ago the Ethics Committee of the Association, for the first time in its history, inaugurated a definite campaign against misconduct and improper practices on the part of members of the bar. This is a duty which is cast upon the Ethics Committee by the Constitution of the Association; but in the past no consistent or continuous work has been done along this line. The members of the Ethics Committee selected last year accepted their appointments under pledge to give active and persistent attention to the investigation and prosecution of complaints of misconduct; and that pledge has been well fulfilled. As soon as the Committee was organized, a circular letter was sent by the officers of the Association to every lawyer in the State (whether a member of the Association or not) explaining the organization and purpose of the committee and inviting the submission of complaints. Such complaints were not slow to come in, and the committee has had a busy year. Its members have devoted themselves to the work with a fidelity and disregard of personal convenience for which no praise could be too high. All complaints submitted were painstakingly considered and investigated, and in a number of cases where the charges were satisfactorily established the committee referred the complaint to the State Board of Law Examiners with a recommendation for prosecution; which, in every instance, was approved by that Board.

The law of Minnesota relating to punishment of misconduct on the part of attorneys is most peculiar. Under our statutes, the Supreme Court of the State is the only body having authority to disbar or suspend an attorney guilty of misconduct; and the State Board of Law Examiners is the only channel through which a complaint of misconduct can reach the Supreme Court. Indeed, the statute vests this authority in the Secretary of the State Board of Law Examiners, and not in the Board itself; although, in practice,

complaints are acted upon by the Board. Therefore, under existing law, the powers of the Association and its Ethics Committee are exhausted when a complaint has been referred to the Board with a recommendation for prosecution. Experience has demonstrated that this condition works badly in practice, and that a change is desirable. But relief from this condition can only be had from the Legislature, and a resolution was adopted by the Association at the 1916 meeting providing for the appointment of a special committee to confer with the Supreme Court and State Board of Law Examiners and present recommendations to the Legislature for a change in the system.

The efficiency and devotion displayed by members of the Ethics Committee of the past year led to a unanimous demand for their continuance in service; and the same gentlemen have (with some difficulty) been persuaded to serve the Association and the profession for another year. Their names, and the address of the chairman, are given in the list appended to this article. Any complaint against a Minnesota attorney, submitted to the committee or to one of its members, or to any officer of the Association, will be duly considered; whether such complaint is preferred by a lawyer or a layman; and where the preliminary investigation shows a situation which justifies further inquiry, the accused attorney will be given opportunity to appear before the committee and present his defense. If, in its opinion, the charges are substantiated, the committee will refer the case to the proper authorities with appropriate recommendations. And the Association will endeavor to see to it that the prosecution of an attorney who is found guilty of misconduct is not allowed to lapse for lack of proper attention.

Another line of work which is peculiarly within the province of the State Bar Association in that which by our Constitution is cast upon the Committee on Jurisprudence and Law Reform. Our system of law, good as it is in the main, is still full of defects and anachronisms. Some of these are the product of unwise, careless or illy-digested legislation; some, of outworn rules and traditions founded upon old judicial decisions; and some are the outgrowth of changed conditions in business and government to which our law has not yet adjusted itself. Where these defects and anachronisms involve questions political in their nature, or questions that especially concern administrative departments of the State or its municipalities, or commercial and industrial organizations, the Association should not interfere. But where defects are found in the laws governing matters of procedure, in or out of court, the transmission of property by will or inheritance, questions of title to and sales of real and personal property, rules by which ordinary every-day business is conducted, the administration of estates and trust funds, questions affecting guardians and trustees, and a thousand and one other subjects that might be mentioned, an Association representing the lawyers of the State is the only body that can and will deal intelligently and effectively with the situation.

Such defects are seldom discovered and appreciated by any but a practicing lawyer. They rarely affect the individual citizen except in an isolated case, and he learns of the difficulty only after the harm is done

and when he has no longer any apparent interest in remedying the law. Such questions are non-political, and it is seldom that an individual has an interest sufficient to move him to apply to the Legislature for correction, or the influence necessary to make his effort effective.

The individual lawyer cannot be expected to act alone. He has rarely an interest great enough to warrant him in attempting to accomplish a needed reform without assistance. And if he has the interest, he lacks the necessary influence. It is only where the request for reform of this sort comes from a body like the State Bar Association, whose disinterestedness is recognized, whose recommendations are known to be backed by knowledge, experience and conservative consideration, and whose representative character is such that its influence is not to be disregarded, that the average Legislature will hear, heed and act.

This is a great task, and one which calls for patient, persistent and continuous effort—not in one year alone, but consistently and persistently, year after year. And it is a task which can be effectively performed only if the lawyers of the State will aid the Association and its committees by submitting suggestions for correction of such defects as may come under their individual observation.

The Committee on Jurisprudence and Law Reform organized a year ago, was pledged to invite and consider all suggestions which might be submitted to it for reform along the lines indicated. And this pledge was fulfilled in admirable fashion. Frequent meetings were held, and the numerous suggestions received by the committee were painstakingly considered. A number of affirmative recommendations were made; all but one of which were approved by the Association at its annual meeting, and will be presented to the Legislature by the Committee on Legislation. Other suggestions were postponed for further consideration, and many were rejected as unwise and impractical. An important part of the business of such a committee is to winnow the wheat from the chaff; and many suggestions which come to it must necessarily be disapproved. But all suggestions are welcomed, and all are carefully and patiently considered.

The members of last year's committee have been induced to continue in service for another year. Their names, and the address of the chairman, appear in the appended list. Suggestions may be submitted to the chairman or any member of the committee, or to any officer of the Association. And any lawyer of the State who has knowledge of a defect in law or rules of practice, and who fails to bring it to the attention of this committee with a suggestion for a remedy, will fail in his duty to the profession and to the public.

One of the most important subjects which has engaged the attention of the Association for the last few years is the effort to remedy the abuses which have grown up in the business of handling personal injury and certain other tort claims. That such abuses exist, and that they are grievous and cry for reform, is well understood; although there is much difference of opinion as to what remedy should be applied. No subject has ever received such thorough consideration in committee, or has been so fully debated in the meetings of the Association. The problem has not been regarded as one-sided, nor from the point of view of a particular

interest—the existence of abuses on both sides has been frankly recognized, and the need of the poor, the ignorant, and the inexperienced for protection against the machinations of an unconscionable "claim agent" has received as much attention as the need for restraining the unholy activities of the professional "ambulance chaser" and his satellites.

At the annual meeting of the Association in 1916 three bills (in amended form) were approved, and their submission to the Legislature provided for, by a practically unanimous vote, taken after full consideration and debate. These bills differ essentially from the bills on the same subjects which were presented to the Legislature of 1915. By the first of these bills it is made ground for censure, suspension or disbarment for an attorney at law to solicit professional employment by means of a runner, solicitor, book, circular, pamphlet, or other soliciting matter or agency, or knowingly to cause or permit such solicitation in his behalf; or to engage in "persistent and repeated" personal solicitation of such employment; or to appear as attorney in a case or proceeding which he knows, or ought to know, has been so solicited. On the other hand, the same bill subjects to the same penalty an attorney at law who participates in "soliciting, securing or consummating a release or settlement of damages arising out of personal injury or death by wrongful act, when he knows, or ought to know, that the consideration therefor is grossly inadequate, or that the releasing party is mentally incompetent from any cause or that such release or settlement has been secured by fraud." It is to be noted that the bill distinguishes between personal solicitation and that conducted through a runner or solicitor, or by means of what are considered the more objectionable forms of advertising; and that personal solicitation is condemned only where it is "repeated and persistent."

The second bill provides that a release or settlement "of a claim for damages arising out of any personal injury wholly disabling the injured person from following his usual occupation for a period of more than ten days, or arising out of death by wrongful act, where such release or settlement is procured within thirty days after the injury or death, may be avoided by the claimant." The consideration paid for the release is not required to be returned as a condition precedent to suit on the claim, but shall be applied as payment upon any judgment recovered therein. It is further provided that no reference to a release so avoided shall be made in the presence of a jury at the trial of such an action. This bill is aimed at the so-called "hospital" or "bed-side" settlements against which so much bitter and just complaint has been made.

The third bill is aimed at the practice, now so general and so much condemned, of loading down the courts of Minnesota with actions by non-resident plaintiffs against non-resident defendants on causes of action arising outside of Minnesota. In effect, it limits jurisdiction to cases where one party or the other is a resident of the State or the cause of action arises within the State—except where the cause of action is upon a contract made within the State or involves real or personal property therein.

These bills will go before the Legislature when it convenes in January, and it is hoped that all public-spirited lawyers will rally to their support.

The limits of this article are such as to forbid further discussion of the numerous activities of the Association and its committees. Some of these will doubtless be dealt with in succeeding articles by other hands. It remains only to append a list of the officers of the Association, and of its committees.

STILES W. BURR.

Saint Paul.

OFFICERS

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Vice President.....
GEORGE W. BUFFINGTON, New York Life Building, Minneapolis
Secretary.....CHESTER L. CALDWELL, Germania Life Building, St. Paul
Treasurer and Assistant Secretary.....
JOHN M. BRADFORD, Capital Bank Building St. Paul
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The present officers of the Association, and ex-presidents Harrison L. Schmitt, formerly of Mankato, now of Minneapolis, and Stiles W. Burr of St. Paul, are ex-officio members of the Board of Governors.

STANDING COMMITTEES

ETHICS COMMITTEE

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Edward Lees, Winona
Robert E. Olds, St. Paul
Victor Stearns, Duluth
Burt F. Lum, Minneapolis

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Any member of the Bar having knowledge of any matter that should be brought to the attention of any of these committees is earnestly requested to communicate with the chairman of the appropriate committee or the President of the Association.

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A PROPOSED COURT OF CONCILIATION

KING John was required to covenant in the Great Charter of 1215 that he would not deny or delay justice to anyone.[1] John and his royal successors found it difficult to live up to this promise. In later times the governments of free peoples have found it scarcely less difficult. Delay in the administration of justice is a source of constant complaint on the part of all suitors in our times as well as in the time of John, and the constantly increasing expense of litigation is a never-ending source of popular discontent. Delay and expense in the litigation of important claims is unfortunate, but in the case of the petty claims of the poor, it often amounts to a practical denial of justice. The movement to establish small debtors' courts "represents an attempt to meet an insistent need and solve a most perplexing problem. It is an attempt to adjudicate causes involving small sums in such an economical manner that genuine and practical justice may result".[2] It is estimated that at least one-third of all civil controversies that come before our courts cannot stand the expense of a formal trial under our customary procedure.[3] The problem is now, and always has been, how to provide for such petty claims a mode of fair trial that will not be so costly as to be economically impracticable.

1. Sec. 40.
2. Eighth and Ninth Reports, Municipal Court of Chicago, p. 128.
3. Ibid.

Very early in the history of the English law, the recognized necessity of providing a less expensive method of determining the petty causes of the poor resulted in the establishment of the Court of Requests, apparently in the reign of Richard II. This court, known as "the poor man's court of equity", existed as a sort of branch of the court of Chancery down to the time of Elizabeth, when it disappeared.[4] Later it was succeeded by statutory courts bearing the same name and giving remedy in the same class of cases.[5] These statutory Courts of Requests were established in many of the larger cities of England, and continued in active operation down to 1846, when the re-organization of the County Court, with its more extensive jurisdiction, enabled that tribunal to take over effectively the adjudication of small claims.[6] The procedure in the small claims division of the County Court has ever since remained very simple, and although the expense is relatively high, since the court is made self-supporting, it nevertheless disposes annually of a very large number of small claims without delay and seemingly to the satisfaction of the petty claimants.[7]

By royal edicts of 1795 and 1797 there were established in Denmark and Norway, then a dependency of Denmark, courts of conciliation which have proved so highly successful in affording inexpensive and speedy justice to the poorer class of suitors, that their fame has spread throughout the world. These royal edicts were confirmed and extended by the Norwegian acts of 1805 and 1824.[8]

The act of 1824 is very elaborate, providing with painstaking particularity for every contingency that might arise, as, for instance, that if a party should appear before the court in a drunken condition, the court should proceed as if he were absent.[9] The function of the court, however, was simple. It

4. 2 Select Essays in Anglo-American Legal History, 252; 1 id. 694. Note also the Courts of Piepoudre, or "dusty foot" courts. See 3 Bl. Comm. 32.

5. 3 Bl. Comm. 81.

6. 3 Stephen's Commentaries, 321.

7. See excellent article on the English County Courts in 64 Univ. of Penn. Law Rev. 357.

8. For summary statements of the provisions of the Norwegian law, see 68 Atlantic Monthly, 401, (July 1891), 72 id. 671 (Nov. 1893); Tribunals of Conciliation, 10 Wis. Bar Ass'n Rep. 206; Renaud v. State Board of Mediation and Arbitration, (1900) 124 Mich., 648, 83 N. W. 620, 51 L. R. A. 458, 83 Am. St. Rep. 346.

9. Art. 56.

was to secure the attendance of the parties, hear their complaints and answers orally and informally, and seek to bring them to an agreement upon an amicable adjustment of their dispute. If the court succeeded in this purpose, the agreed settlement was entered as a judgment; if it failed, the parties were given a certificate upon production of which their cause would be heard and determined by a regular court. While it is thus seen that under the original act the court could enter judgment only by consent of both parties, by an amendment in 1869 it was empowered to enter judgment in small cases upon the request of either party.

The court of conciliation seems to have developed with almost equal success in Denmark. In France, at the time of the Revolution, conciliation powers were given to justices of the peace, with the result that their courts have continued for over a hundred years to dispose annually of huge numbers of small cases by bringing the parties to an amicable understanding.[10]

As early as 1846 the desirability of introducing this system of informal determination of petty claims was urged in New York, with the result that in the constitution adopted in that year a provision was included authorizing the legislature to establish courts of conciliation. The New York legislature seems never to have seriously considered exercising the power thus given, and the provision itself was omitted from the constitution of 1869,[11] but at the meeting of the New York Bar Association in 1916 a committee was empowered to prepare a bill authorizing the establishment of a conciliation court.[12]

Constitutional provisions similar to that of 1846 in New York were adopted in Wisconsin in 1847, in Michigan in 1850, in Ohio and in Indiana in 1851, and in North Dakota in 1889. Pursuant to these provisions acts of limited scope and doubtful usefulness were passed in Indiana in 1852 and in North Dakota in 1895.[13] The Indiana act was repealed in 1865, while that of North Dakota seems to have fallen wholly into disuse.[14]

10. Tribunals of Conciliation, 10 Wis. Bar Ass'n Rep. 206, 217.
11. Tribunals of Conciliation, supra.
12. 39 N. Y. Bar Ass'n Rep. 307, 309.
13. See Laws N. D. 1895, c. 22.
14. Tribunals of Conciliation, 10 Wis. Bar. Ass'n Rep. 223, 224. For the Michigan Act of 1889, see Renaud v. State Board of Mediation and Arbitration, supra.

The failure of these efforts to transplant to American soil this European exotic was not surprising. It was hardly to be expected that such a departure from customary methods of judicial procedure would appeal to a people engaged in a vigorous but not very well organized contest with the great American wilderness. Only within the last decade, after the development of great urban communities in this country had abolished pioneer conditions and pioneer methods of thought, has any serious effort been made to put into effect the European practice of providing special informal procedure for the settlement of petty disputes. The first tribunal of such a character established in this country appears to have been instituted by rule of court as a branch of the municipal court of the City of Cleveland in 1912, under the wide powers given to that court by the Ohio Municipal Court Act.[15] The success of the conciliation court in Cleveland quickly attracted interest throughout the country. A similar branch of the Chicago muncipal court was established in that city in 1915.[16] In 1912 a general act was passed in Kansas authorizing the establishment of small debtors' courts in any county or city that might determine there was need for such a tribunal. Under this act such courts have been established in several of the larger urban communities of the state, and are reported to be working with marked success.[17] Early in 1915 a general act was passed by the legislature of Oregon requiring that in all district courts there should be established a department for the summary adjudication of small claims.[18] The tribunal established under this act in the city of Portland is also reported to be working successfully.[19]

In 1915 bills for the establishment of such tribunals were introduced in Minnesota and Wisconsin, but failed to receive consideration in either state. Another bill for the same purpose, drawn in the careful manner described below, is now pending before the Legislature of Minnesota.

At this point it is desirable to make clear the distinction between courts of conciliation and small debtors' courts. The court of conciliation, of which the best example is that which

15. See Fourth Annual Report, Municipal Court of Cleveland, p. 41.
16. Eighth and Ninth Reports, Municipal Court of Chicago, p. 129.
17. See the amusing account of the Kansas court in The Outlook, January 19, 1916, p. 153. See also 22 Case and Comment 29 (June, 1915).
18. Oregon Laws, 1915, Chap. 327.
19. See Oregon Voter, Sept. 16, 1916.

has so long existed in Norway, provides primarily machinery for bringing the parties to a dispute together before an official who is recognized by both parties to be competent and impartial, so that they may have a fair opportunity to agree upon a settlement of their differences without the expense and delay incident to ordinary legal procedure, and without the engendering of the animosities that almost invariably arise out of contested suits at law. Psychologists would naturally assume a priori that most persons, especially of the more ignorant classes, would be willing to accept the advice of a trusted public officer in regard to the settlement of any disputes which they might have with their neighbors, and that comparatively few are of such litigious disposition that they will insist upon litigating a claim when they have been informed by such an officer that the claim is without merit. The experience of the Norwegian courts through many years has confirmed this assumption as a matter of fact. Statistics show that a large proportion of all of the causes that come before the Norwegian courts are settled by agreement of the parties. Those few persons who are so determined to litigate their claims that they will not accept the settlement proposed by the court of conciliation, are, of course, allowed to carry their disputes before the regular courts to be disposed of by the tedious and expensive methods of legal procedure.

On the other hand, small debtors' courts, as usually existing in England and this country, are regular courts of limited jurisdiction, whose procedure, though informal and expeditious, is nevertheless adversary. Their judgments may be rendered in invitum, and in some jurisdictions are not subject to appeal. The conciliation functions performed by such courts are rather due to the broad discretionary powers given to the judges than to the express provisions of the court rules or statutes under which they operate, although conciliation whenever possible is expressly required of the Cleveland court.

The need for the establishment of a tribunal for the inexpensive and summary determination of small claims in Minnesota, particularly in the larger urban communities, was carefully considered during the year 1916 by the State Bar Association's Committee on Jurisprudence and Law Reform, with the result that that committee recommended to the Bar Association that it should approve the creation of such a tribunal, and that a special committee should be appointed to draft a

bill for an act that would be suited to the conditions and judicial system of the state. The Bar Association acted unanimously upon these recommendations and the special committee, duly appointed in accordance with such action, prepared the bill now pending before the legislature.

Many difficulties were encountered at the outset in the preparation of this bill. In the first place, it was thought highly undesirable to add a new court to the already large number of separate tribunals in the state. This seemed particularly undesirable in view of the growing tendency to consolidate and simplify the organization of courts rather than to make it more complex. It therefore seemed expedient to make use of the existing Municipal Court to meet the needs of the situation. But here was encountered another difficulty in that, while there is a general municipal court act for the state at large, the municipal courts in each of the three larger cities and in some of the smaller ones were organized under special acts. In Ramsey County, justices' courts still exist, while in Minneapolis they have been abolished. It was therefor decided by the committee to make the proposed bill applicable only to the city of Minneapolis, with the hope that if a conciliation court should be established there, the experience gained in the actual operation of an act so limited, would render easier the later drafting of an act of more extensive scope.

Another obstacle encountered was in that provision of the constitution of the state which provides that, "The right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy."[20] This constitutional guaranty made it impossible to provide for a summary final disposition of petty causes and rendered it necessary to provide in all causes an opportunity to litigants to remove them from the conciliation branch of the municipal court to the regular session of the court where a trial by jury can be had. Such a provision undoubtedly complies with the constitutional requirement.[21]

With these considerations in mind, the committee endeavored to construct the bill so as to include the following features

20. Art. 1, Sec. 4.

21. See Capital Traction Co. v. Hof, (1899) 174 U. S. 1, 19, S. C. R. 580. 580.

which were deemed essential to the accomplishment of the purpose in mind:

(1) The conciliation court is to be a branch of the municipal court, presided over by an additional municipal judge, to be nominated and elected as conciliation judge.

(2) The conciliation court shall sit every day but Sundays and holidays, and twice a week in the evenings, to accommodate the suitor who cannot leave his work during the day.

(3) The conciliation court is to have jurisdiction of all civil cases not involving more than one hundred dollars, with conciliatory powers only of causes involving more than fifty dollars, and summary powers of adjudication in other causes within its jurisdiction.

(4) In case the parties can be brought by the judge to a voluntary settlement, such settlement, when entered by the judge upon his docket, shall have the force of a judgment, but the judge may order it paid in such installments, and at such times as may seem to him just and reasonable.

(5) If the parties cannot be brought to agreement, if more than fifty dollars is involved, the case is dismissed, and may then, upon exhibit of a certificate of such dismissal, be filed in a regular court having jurisdiction. If not more than fifty dollars is in controversy, the judge will proceed to hear and determine the cause summarily.

(6) When judgment is rendered without the consent of the parties, either party aggrieved may appeal to the regular session of the municipal court, and there be accorded his right to a trial by jury. But such terms are imposed on such appellants as will tend to discourage frivolous and vexatious appeals.

(7) For the purpose of expediting settlements and judgments in such cases, the court is authorized to summon the defendant into court "orally, or by telephone, or by mail, or by written summons".

(8) Attorneys are not allowed to participate in proceedings before the conciliation court.

(9) The proceedings in the conciliation court are entirely without cost to the parties except in certain unusual cases in which the judge may at his discretion award to the prevailing party his disbursements.

There are many other details technically necessary for carrying into effect the main purpose of the bill as above indi-

cated, but they are merely ancillary and need no special consideration.

Brief comment will now be made upon the principal features of the bill in the order in which they are given above.

(1) The wisdom of adapting the municipal courts to the use of the proposed conciliation court is manifest from the considerations already mentioned. It is clear also that since the success of the court will depend very largely upon the peculiar qualifications in temperament, experience, and training of the judge, it is necessary that the people shall select, both at primary and general elections, the person whom they expect to act as conciliation judge, rather than to have one appointed from the regular members of the municipal court to this branch of the court.

(2) The main purpose of the court being to make justice available to the poorer classes of society, especially to the laboring people, it would seem necessary to require that evening sessions should be held to meet the needs of those who cannot leave their employment during the day.

(3) The limit of the jurisdiction of the Kansas and Oregon small debtors' courts is twenty dollars; in Cleveland the limit is thirty-five; in Chicago the jurisdictional limit was originally thirty-five, but experience showed the advisability of increasing that limit to fifty dollars where it now stands. In Minneapolis it would seem that a limit of fifty dollars would be wisely set. In the city of Topeka, Kansas, during the year 1915, the average amount of the separate claims adjudicated by the small debtors' court was less than five dollars. In England the average amount involved in each of the 1,250,000 cases that are determined each year in the small debtors' division of the county court, is less than fifteen dollars.[22] The 3,000 cases handled annually in the Minneapolis Legal Aid Bureau involve an average amount of less than ten dollars each.

(4) The power of the judge to arrange for the payment of any judgment entered, whether by confession or after a hearing, by installments or in such other manner as the circumstances of the parties may suggest, has been found most beneficial in practice in other jurisdictions, and should unquestionably be conferred.

(5) If the judge can not succeed in inducing the parties to settle a dispute involving more than fifty dollars, the concilia-

22. 64 Univ. of Penn. Law Rev. 358.

tion court can do nothing but dismiss the case, and the parties may then have recourse to their ordinary remedy. In case, however, the amount in controversy does not exceed fifty dollars, the court at once becomes a small debtors' court for the summary determination of the dispute. Thus, strictly speaking, the proposed court is a court of conciliation of causes involving sums between fifty and one hundred dollars, but a small debtors' court as to controversies involving not more than fifty dollars.

(6) The constitutional provision above mentioned, assuring to every person a trial by jury, necessitates allowing either of the parties to a case adjudicated by the conciliation court to remove the case to the regular division of the municipal court, where a trial by jury can be had under the rules of that court. It is to be regretted that these petty causes should be subject to appeal, but certainly the provisions of the proposed act will render petty litigants slow to exercise this right of appeal or removal. It is probable that very few cases will go further than the conciliation court. It is reported that of the 1,123 cases determined by the Portland small debtors' court during its first year, 21 only were appealed.

(7) The extreme informality of the summons authorized in the bill may, and probably will, shock lawyers accustomed to the more formal proceedings of the regular courts, but there seems no doubt that such summons is valid in this state,[23] and it certainly will tend to make it easier for the judge to arrange for hearings with the least possible delay.

(8) The suggestion that attorneys be barred from all proceedings before the conciliation court, will probably excite opposition on the part of even some attorneys in good standing at the bar. Such is the provision in the original Norwegian act and in some of the American acts. It is quite conceivable that there may be some of these petty causes in which the services of an attorney might be really needed, but in that event a re-trial of the case in a court where attorneys may appear can readily be arranged. Therefore there is no real danger of substantial injury to any party to one of these causes through lack of legal advice. So long as the case is in the conciliation court, the interests of both parties will be impartially cared for by the judge. The presence of an attorney,

23. Constitution, Minnesota, Art. 6, Sec. 14; Lockway v. Modern Woodmen, (1911), 116 Minn. 115, 133 N. W. 398.

especially of the kind that usually concern themselves with petty suits, would certainly tend to delay the settlement of the case and put the parties in a litigious rather than in an acquiescent state of mind.

(9) In most of the courts of similar character established in other states, small fees are charged. In the English County Courts the fees are proportionately quite heavy; but it seemed wiser to the committee to make justice in such petty causes absolutely free.

The success of small debtors' courts wherever they are properly established has been unquestionable. This becomes manifest upon even a slight consideration of the statistics available. For instance in Norway, in the year 1911, 105,310 cases were brought before the conciliation courts. Of these all were settled or summarily disposed of excepting 12,957 which were referred for trial before the regular courts. In England, the small claims branch of the county courts disposes of about 1,250,000 of these small claims annually. In the year 1913 only about four per cent of the causes came to a formal trial, all the others being settled or summarily determined.[24]

In Cleveland, in the conciliation branch of the municipal court during the year 1915, 5,208 cases were filed, this number being 98 per cent greater than the number of cases disposed of in 1913, the first year of the court's operation. In addition to the actions filed in the court, some 277 disputes were settled by the agency of the clerk of the court without being placed on the court docket at all.[25] It is reported that the small claims branch of the Chicago municipal court, during the past year has disposed of about 15,000 cases. In the little city of Topeka, Kansas, in 1915, some 378 cases were disposed of in the small debtors' court.

This view of the steady march in other states towards a system that will secure justice for the poor as well as for the rich, leads us to hope that by enacting the pending bill for a court of conciliation, Minnesota may make good to every person, however humble, the splendid declaration in her bill of rights: "He ought to obtain justice freely and without purchase; completely and without denial; promptly, and without delay, conformably to the laws."[26]

University of Minnesota. WILLIAM R. VANCE.

24. 64 Univ. of Penn. Law Rev. 358, 365.
25. See Fourth Annual Report, Municipal Court of Cleveland, p. 41.
26. Constitution, Minnesota, Art. 1, Sec. 8.

THE RULES OF THE CONFLICT OF LAWS APPLICABLE TO BILLS AND NOTES

II. Formal and Essential Validity

The Hague Convention requires a bill or note to be designated as such, the provision being intended to give to the instrument an earmark which will readily identify it.[1] The bill or note must indicate also the date, the place of issue and the name of the payee.[2] Anglo-American law is different in all of the above respects.

The only form of acceptance recognized by the Convention of the Hague is an acceptance upon the face of the bill itself.[3] In England and the United States it need not be upon the face of the bill.[4] Under the Negotiable Instruments Law it need not appear even upon the bill.[5] An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person, who, on the faith thereof, receives the bill for value.[6]

In England a bill or note may be void for want of a stamp.[7] The Hague Convention prohibits its members specifically to subordinate the validity of engagements taken in matters of bills and notes to a compliance with the stamp laws, and authorizes them only to suspend the exercise of the rights conferred until the prescribed stamp duties have been paid.[8]

What is the rule in the Conflict of Laws governing the formal validity of a bill or note?

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1. According to Article 2 of the Convention any contracting state may prescribe, however, that bills of exchange issued within its territory which do not bear the designation "bill of exchange" shall be valid, provided they contain the express indication that they are payable to order.
2. Art. 1, Uniform Law.
   Where a bill of exchange does not bear the name of the place of issue it is deemed to have been drawn at the place designated beside the name of the drawer. Art. 2, Uniform Law.
3. Art. 24, paragraph 1, Uniform Law.
4. B. E. A., Sec. 17 (2) (a).
5. N. I. L., Sec. 134.
6. N. I. L., Sec. 135.
7. See Stamp Act, 1891, 54 and 55 Vict., Ch. 39.
8. Art. 19 of the Convention.

1. *English Law*: The rules of the English law are contained in Section 72 of the Bills of Exchange Act, which provides as follows:

"Where a bill drawn in one country is negotiated, accepted or payable in another, the right, duties and liabilities of the parties thereto are determined as follows:

(1) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made.

"Provided that:

(a) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue.

(b) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom."

Proviso (a) is restricted in its application by the words "where a bill drawn in one country is negotiated, accepted or payable in another", so that it would not cover the case where suit is brought in England upon a bill drawn, negotiated, accepted and payable in a foreign country.[9] In so far as it applies it adopts the rule laid down by some of the English courts which have declined to enforce the revenue laws of a foreign country.

Proviso (b) departs from the ordinary rules governing the formal validity of contracts in the Conflict of Laws. Though the lex loci contractus is not satisfied, as regards requisites of form, a foreign contract shall be regarded as valid as between persons who negotiate, hold, or become parties thereto in the United Kingdom for the purpose of enforcing payment thereof, provided it conforms to the laws of the United Kingdom. It will probably be held to apply also to foreign acceptances and indorsements. Under this proviso, as its words imply, a party who drew, accepted, or indorsed a bill or note in a foreign country can not be held in England unless his contract satisfies the lex loci contractus. A mandatory and not merely

9. See James v. Catherwood, (1823) 3 D. & R. 190.

a permissive effect is thus given to the rule locus regit actum, proviso (b) constituting but a partial exception.

2. *American Law*: There are comparatively few cases discussing the question of the formal validity of bills and notes. Those that deal with the matter have involved usually the validity of an oral acceptance of a bill of exchange or the validity of bills and notes not complying with stamp requirements. The two leading cases on the subject of oral acceptances are *Scudder v. The Union National Bank*[10] and *Hall v. Cordell.*[11] In the former it was held that a parol agreement made in Illinois to accept a draft previously drawn upon the promisor at St. Louis, being valid by the law of Illinois, would support an action against the promisor or acceptor of the draft notwithstanding that by the law of Missouri, where the draft was payable, such parol promise was not sufficient. In the opinion of the Supreme Court, speaking through Mr. Justice Hunt, "Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the state where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance."[12] This statement is generally cited in support of the doctrine that the law of the place of execution governs the formality necessary for the validity of a contract. This expresses, no doubt, the opinion of the court, for Mr. Justice Hunt quotes from Wheaton on the Conflict of Laws, and Parsons on Bills and Notes to the same effect. Nevertheless the statement was a mere dictum under the facts of the case.[13]

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10. (1875) 91 U. S. 406, 23 L. Ed. 245.

11. (1891) 142 U. S. 116, 12 S. C. R. 154, 35 L. Ed. 956.

12. At pp. 412-413.

13. "There is no statute in the state of Illinois", says the learned Justice, "that requires an acceptance of a bill of exchange to be in writing, or that prohibits a parol promise to accept a bill of exchange: on the contrary, a parol acceptance and a parol promise to accept are valid in that state, and the decisions of its highest court hold that a parol promise to accept a bill is an acceptance thereof. If this be so, no question of jurisdiction or of conflict of laws arises. The contract to accept was not only made in Illinois, but the bill was then and there actually accepted in Illinois, as perfectly as if Mr. Scudder had written an acceptance across its face, and signed thereto the name of his firm. The contract to accept the bill was not to be performed in Missouri. It had already, by the promise, been performed in Illinois. The contract to pay was, indeed, to be performed in Missouri; but that was a different contract from that of acceptance." At p. 413.

In *Hall v. Cordell* the defendants of Chicago at Marshall, Missouri, verbally agreed with plaintiffs, bankers at the latter place, that defendants would accept and pay all drafts drawn upon them by one Farlow for cattle bought by Farlow and shipped by him to the defendants from Missouri. The defendants refused to pay upon presentation a draft drawn upon them under this agreement. By statute in Missouri an agreement to accept bills of exchange must be in writing. The defendants contended that by reason of that statute the contract could not be the basis for a recovery in Illinois. The Supreme Court of the United States held, however, as follows:

"We are, however, of opinion that, upon principle and authority, the rights of the parties are not to be determined by the law of Missouri. The statute of that state can have no application to an action brought to charge a person, in Illinois, upon a parol promise to accept and pay a bill of exchange payable in Illinois. The agreement to accept and pay, or to pay upon presentation, was to be entirely performed in Illinois, which was the state of the residence and place of business of the defendants. They were not bound to accept or pay elsewhere than at the place to which, by the terms of the agreement, the stock was to be shipped. Nothing in the case shows that the parties had in view, in respect to the execution of the contract, any other law than the law of the place of performance. That law, consequently, must determine the rights of the parties."[14]

If the statement in the Scudder case that matters bearing upon the execution are determined by the law of the place of execution means to say that the lex loci contractus is the only law which, in the nature of things, can give binding force to the will of the parties, it is, of course, inconsistent with the case of *Hall v. Cordell* which applies the intention of the parties as the test. The cases can be harmonized if the rule locus regit actum, which Mr. Justice Hunt mentions in quoting from Wheaton, were recognized by the Supreme Court of the United States as having a permissive sense, according to which a transaction would be valid, as regards formalities, if it complied with the lex loci contractus or with that of the state which governs the validity of the transaction in other respects. The Scudder case would then fall within the first branch of the rule and *Hall v. Cordell* within the second. The objection to this interpretation is that there is no evidence in the opinion of the two cases to indicate that the Supreme

14. At p. 120.

Court meant to adopt the rule locus regit actum in an optional sense. Nowhere does it appear that the court would subject the formal requirements to a rule differing from that determining the validity of the contract in general. It seems to be assumed throughout that all matters bearing upon the execution of a contract, including all formalities, are subject to one law. This law is said to be the lex loci contractus in the Scudder case and the lex loci solutionis, on account of the presumed intention of the parties, in *Hall v. Cordell.*[15] In both cases the agreement was upheld. Hence it might be suggested that just as is held in the usury cases, so in the matter of the formal validity of contracts, the parties will be presumed to have contracted with reference to the law of the place that will support the contract. The difficulty with this conclusion is that the Supreme Court in the Scudder case appears to lay down the rule that the lex loci contractus governs all matters bearing upon the execution of contracts as an absolute rule and not on the ground of presumptive intent. All that can be safely said is, therefore, that in the opinion of the Supreme Court the validity of a contract, as regards form, aside from the Statute of Frauds, which brings in the question of Procedure, is subject to the law controlling the validity of the contract in other respects, and that the Supreme Court, in a desire to uphold the contract, accepted the lex loci contractus as the governing law in the Scudder case and the lex loci solutionis in *Hall v. Cordell.*

Very few cases appear to have arisen in the state courts since the decision of the Scudder case and *Hall v. Cordell.*[16] Most of the decisions prior to the above cases favored the lex loci contractus.[17] The lower federal courts have dealt with

15. The Supreme Court of the United States has never followed a consistent theory governing the validity of contracts in the Conflict of Laws. See Pritchard v. Norton, (1882) 106 U. S. 124; 1 S. C. R. 102, 27 L. Ed. 107; Cox v. The United States, (1832) 6 Pet. 172; Liverpool & G. W. Steam Co. v. Phenix Ins. Co., (1889) 129 U. S. 397, 9 S. C. R. 469, 32 L. Ed. 788; Equitable Life Ins. Co. v. Clements, (1891) 140 U. S. 226; 11 S. C. R. 822, 35 L. Ed. 497; London Assurance v. Companhia de Moagens do Barreiro, (1897) 167 U. S. 149, 17 S. C. R. 785, 42 L. Ed. 113.

16. In Bank of Laddonia v. Bright Coy Comm. Co., (1909) 139 Mo. App. 110, 120 S. W. 648, the St. Louis Court of Appeals applied the law of the place of performance, following Hall v. Cordell.

17. See Scott v. Pilkington, (1861) 15 Abb. Pr. 280; Lonsdale v. Lafayette Bank, (1849) 18 Ohio 126; Worcester Bank v. Wells, (1844) 8 Met. (Mass.) 107; Bissell v. Lewis, (1857) 4 Mich. 450. This is true also of the formal validity of contracts in general. Hunt v. Jones,

the matter only in one or two instances since the above decisions. In *Exchange Bank v. Hubbard*[18] the Circuit Court of Appeals of the Second Circuit applied the principle of the Scudder case without referring to *Hall v. Cordell.* When the case came up on a subsequent appeal [19] the court adopted the intention test laid down in *Hall v. Cordell* and, in the application thereof, reached the conclusion that the parties under the circumstances contracted with reference to the lex loci contractus.[20]

Where the formal requirement consists in the affixing of a stamp or the use of stamped paper for revenue purposes, non-compliance with such a law may result in the invalidity of the obligation, or it may simply preclude the admissibility of the instrument in evidence. In the latter event, the provision, being a procedural one, would have no extraterritorial effect.[21] Where the non-compliance with the stamp law renders the instrument void, there is conflict in the authorities. Some courts apply the ordinary rule and deny all relief.[22] Others have enforced the contract on the ground that no regard should be paid to foreign revenue laws.[23] A further complication is presented when there is a difference between the law of the place of execution of the contract and that of its performance; for example, where the law of the place of issue makes the contract void but the law of the place of performance either has no stamp law or its stamp law affects merely the admissibility of the instrument in evidence. Assuming that foreign stamp laws are entitled to recognition when they invalidate the contract, the question raised in this case would be similar to that discussed in connection with oral acceptances. In *Vidal v. Thompson*[24] the law of the place of issue was held to govern.

(1879) 12 R. I. 265; Perry v. Mt. Hope Iron Co., (1886) 15 R. I. 380; Dacosta v. Davis, (1854) 24 N. J. L. 319.

18. (1894) 62 Fed. 112.

19. (1896) 72 Fed. 234.

20. The lex loci contractus as such appears to have been applied in Russell v. Wiggin, (1842) 2 Story 213, Fed. Cas. No. 12,165, and Garretson v. North Atchison Bank, (1891) 47 Fed. 867.

21. Fant v. Miller, (1866) 17 Gratt. (Va.) 47; Lambert v. Jones, (1856) 2 Patten & H. (Va.) 144.

22. Satterthwaite v. Doughty, (1853) 44 N. C. 314; Fant v. Miller, (1866) 17 Gratt. (Va.) 47.

23. Ludlow v. Rensselaer, (1806) 1 Johns. 93; Skinner v. Tinker, (1861) 34 Barb. (N. Y.) 333.

24. (1822) 11 Martin (La.) 23.

3. *French Law*: A bill or note, its acceptance or indorsement is valid, as regards form, if it satisfies the law of the place of execution.[25] Although there is a tendency[26] on the part of the French courts to give to the rule locus regit actum, which was formerly imperative,[27] a permissive character, the law of bills and notes has scarcely been affected thereby.[28] Whether the above rule is applicable to foreign stamp laws is uncertain.[29]

4. *German Law*: Article 85 of the German Exchange Act reads as follows:

"The essential requirements of a bill of exchange drawn abroad, as also every other statement on such a bill, are to be decided according to the law of the place at which the statement is made. If, however, the statements inserted abroad on the bill satisfy the requirements of the inland law, no objection can be taken against the legal liability incurred by statements subsequently made within the Empire (Inland) on the ground that the statements made abroad do not satisfy the foreign law. Statements on bills by which one German citizen becomes bound to another German citizen in a foreign country, are also valid although they only comply with the requirements of the inland law."

It will be noticed that the German Exchange Act speaks of the essential requirements of bills and notes. From the standpoint of the German law of exchange, which is strictly formal, all essential requirements prescribed by the legislator are in reality *formal* requirements.

The lex loci contractus means the law of the place of execution; the law of the place of performance is of no importance.[30]

Two exceptions are made by the German Exchange Act to the application of the lex loci contractus, where the latter would operate to invalidate the contract. No exception exists where the contract is valid under such law. The first excep-

25. Trib. Civ. Marseilles, Sept. 5, 1876 (4 Clunet 425); Comm. Trib. Le Havre, March 19, 1881 (9 Clunet 80); Paris, Dec. 8, 1883, (11 Clunet 285); App. Bordeaux Jan. 24, 1880 (8 Clunet 360); June 7, 1880, (8 Clunet 155); App. Paris Jan. 12, 1889 (16 Clunet 291); App. Besançon Jan. 25, 1910, (Darras' Rev. 1910, 428).

26. Cass. June 14, 1899 (S. 1900, 1, 225) and note by Professor Pillet; Cass. Aug. 18, 1856 (D. 1857, 1, 39).

27. App. Douai, Jan. 13, 1887 (S. 1890, 2, 148); Trib. Civ. Rouen, July 22, 1896 (26 Clunet 578).

28. But see Comm. Trib. Nice, May 22, 1912 (40 Clunet 156).

29. See Vincent & Penaud, pp. 345-346; Weiss IV, pp. 452-453.

30. 6 ROHG 127.

tion provides that an acceptance or indorsement in Germany of a foreign bill or note, which is void for want of compliance with the formal requirements of the law of the place of issue, is binding, provided such a bill or note complies with the requirements of the German law. The second exception has reference only to German subjects. It lays down the rule that a contract between two German subjects entered into abroad shall be binding if it meets the requirements of the German law.

Article 11 of the Law of Introduction to the German Civil Code, paragraph 1, has now the following general provision:

"The form of a legal transaction is controlled by the laws governing the relation which constitutes the subject of the transaction. However, compliance with the laws of the place where the transaction is entered into is sufficient."

This article adopts the rule locus regit actum in a permissive sense, and sustains the contract, as regards formal requisites, if it satisfies the lex loci contractus or the law governing the contract, i. e. the lex loci solutionis or the lex domicilii.[31] It seems, however, that the above provision, which went into effect on January 1st, 1900, is not applicable to bills and notes and that the latter continue to be governed by the special provisions of Article 85 of the General Exchange Act of 1849.[32]

5. *Italian Law*: The Italian law is contained in Article 58 of the Commercial Code, which reads as follows:

"The form and essential requisites of commercial obligations * * * are governed by the law * * * of the place * * * where the obligations are created * * *, save the exception laid down in Article 9 of the Preliminary Dispositions of the Civil Code for those subject to one and the same national law."

According to Article 9 of the Preliminary Dispositions of the Civil Code the "extrinsic form of acts inter vivos * * * shall be determined by the law of the place where they are done. The * * * contracting parties may choose, however, to follow their national law, provided the latter be common to all of the parties."

31. The German courts generally apply the law of the place of performance. Reichsgericht, July 4, 1904 (15 Niemeyer 285) but sometimes the law of the domicile of the debtor. 61 RG 343, Oct. 12, 1905.

32. See Staub, Sec. 85; Planck, Bürgerliches Gesetzbuch, Art. 11 Law of Introduction.

Two principal questions are suggested by the preceding comparative statement of the law.

First—Should the rule locus regit actum be adopted as the law governing the formal validity of bills and notes, and if so, should it have an imperative or merely a permissive character?

Second—What exceptions, if any, should be recognized to this rule?

As regards the first question there can be no doubt that the lex loci contractus is the controlling law. All of the modern legislations admit this principle as well as the decisions of the courts. Only in the United States there is some uncertainty regarding the application of the above rule in view of the decision of the Supreme Court of the United States in *Hall v. Cordell,* but the weight of authority agrees with the general rule. The lex loci contractus is adopted also by the Institute of International Law[33] and by the Convention of the Hague.[34] The text writers also are of the unanimous opinion that the lex loci contractus should govern.[35] The rule laid down by the Supreme Court of the United States in the Scudder case may be regarded, therefore, as the governing law by almost universal assent.

There is no agreement, however, both in the positive law and among the jurists as to whether or not the lex loci contractus should be regarded as an exclusive rule.

This conflict of opinion has largely an historical foundation and is connected with the nature of the rule locus regit

33. Annuaire VIII, p. 121.

34. Art. 75. Uniform Law, Senate Document No. 162, Sixty-third Congress, First Session, p. 64.

35. Asser, p. 207; Audinet, p. 609; v. Bar, p. 671; Champcommunal, Annales de Droit Commercial, II, p. 142; Chrétien, Etude sur la Lettre de Change, p. 72; Conde y Luque, Derecho Internacional Privado, II, p. 297; Despagnet, p. 987; Diena, III, p. 28; Esperson, Diritto Cambiario Internazionale, p. 20; Field, Art. 614; Meili, II, p. 331; Lyon-Caen et Renault, IV, p. 545; Ottolenghi, p. 81; Valéry, p. 1279; Weiss, IV, p. 448.

Under the older continental theory, according to which the bill of exchange was looked upon literally as a mandate from the drawer to the drawee for the payment of funds belonging to the drawer, the contract was deemed made at the domicile of the drawee. The formal requirements were subjected, therefore, to the lex domicilii of the drawee. Voet, Commentaria ad Pandectas, Bk. XXII, Tit. II, Sec. 10. Dupuis de la Serra, L'Art des Lettres de Change, Ch. XV, No. 12, cited in Massé, Le Droit Commercial dans ses Rapports avec le Droit des Gens et le Droit Civil, I, No. 589; Pothier, du Contrat de Change, No. 155; Brocher, Cours de Droit International Privé, II, pp. 315-316.

actum in the Conflict of Laws. In Roman law and in the earliest period of the development of the rules of the Conflict of Laws in the Middle Ages, it seems that the validity of a legal transaction, so far as its formal execution is concerned, was determined by the same law that governed its validity or legality in general.[36] The difficulty of complying with the formal requirements of a foreign law and the injustice that might result therefrom led Bartolus and his successors to advocate that a will be deemed sufficiently executed if it complied with the law of the place of execution. Through the influence of Bartolus the rule locus regit actum, which was extended later to other transactions, became established. Being introduced on grounds of convenience the lex loci contractus did not supplant the original rule and so it came that the rule locus regit actum had at first only a permissive effect. A legal transaction was valid, therefore, as regards formal execution, if it satisfied the law of the place of execution or the law governing its validity or legality in other respects.[37] In the course of time the rule lost its original character in some countries so as to become imperative; in others it remained an alternative rule, except in certain classes of cases.[38] In England and the United States the rule locus regit actum was never accepted, except as to contracts, and with respect to them only in a mandatory form. In those countries which, in modern times, have pressed the claims of the national law, the rule is not infrequently stated as allowing a compliance with the lex loci contractus or the lex patriae which is common to the parties.[39]

In the law of bills and notes Italy has adopted squarely the rule locus regit actum in a permissive sense. Germany has accepted it to a limited degree, namely, when German subjects contract abroad. France, England and the United States, on the other hand, prescribe the lex loci contractus, upon principle, as an absolute rule.

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36. See Cod. VI. 23. 9, as to Roman law, and Lainé, II, pp. 333-357, concerning the later writers.

37. See Lainé, Introduction au Droit International Privé, II, pp. 395-413.

38. See Buzzati, L'Autorità delle Legge Straniere relative alla Forma degli Atti Civili, pp. 13-49, 170-184; Niemeyer, Vorschriften und Materialien, pp. 98-100.

39. Audinet, p. 270; Despagnet, p. 665; Fiore, I, pp. 250-253; Pillet, Principes, p. 486; Surville et Arthuys, p. 267; Weiss, III, p. 120.

As for the text writers, those regarding the rule locus regit actum in the Conflict of Laws as mandatory reject, of course, any alternative rule in the matter of the formal execution of negotiable instruments.[40] Those contending that the rule has retained its original permissive character are divided in opinion upon the question whether an alternative provision is permissible in the law of bills and notes. Of those giving an affirmative answer some apply as the alternative rule the common national law of the immediate parties.[41] Others regard the various contracts as unilateral obligations and allow, therefore, a compliance with the national law of the debtor.[42] Others still would allow the lex patriae as the alternative rule only when it coincides with the lex loci solutionis.[43] Many feel, on the other hand, that the formal character of the instrument and the security of transactions involving bills and notes do not admit of an alternative rule in the law of bills and notes.[44] Jitta proposes again the law of the fiduciary place of issue, that is, the law of the place from which the instrument or the particular contract is dated, and, in the absence of such an indication, the lex domicilii or when the party in question is engaged in business or exercises a profession, the law of the state in which he has his place of business or office.[45]

Is there a sufficient reason for the adoption of an alternative rule as regards formality in a Uniform Law for the United States?

If an alternative rule is to be adopted, it cannot assume the form given to it by the German and Italian law. The German law is inacceptable because of its discrimination between citizens and foreigners. The alternative rule adopted by the Italian law—the law of nationality common to the parties,—cannot be approved, even if the lex domicilii be substituted for that of the lex patriae, for the reasons advanced in the

40. Asser, p. 66; Buzzati, pp. 152-154; Demangeat, in Foelix's Traité du Droit International Privé, (4th ed.) p. 184, note; Field, Art. 614; Laurent, Le Droit Civil International, II, p. 445.

41. Audinet, p. 610; Chrétien, pp. 84, 88; Surville et Arthuys, p. 672; Weiss, IV, p. 449.

42. Von Bar, p. 671; Champcommunal, Annales de Droit Commercial, 1894, II, pp. 145-146; Chrétien, pp. 882-89; Esperson, pp. 27-28.

43. Massé, I, p. 508.

44. Diena, III, p. 28; Lyon-Caen et Renault, IV, pp. 545, 549; Meili, II, p. 331; Ottolenghi, p. 81; Valéry, p. 1279.

45. II, p. 46.

discussion of alternative rules in connection with capacity. The only alternative rule which could reasonably be considered from the standpoint of American law is the lex loci solutionis, which has been actually proposed by Professor Despagnet,[46] of the University of Bordeaux. Is it advisable to adopt this rule in the Uniform law? Whatever doubts may have existed concerning the expediency of an alternative rule as regards capacity, there can be none so far as it affects the formal validity of bills and notes, for there are special objections which prohibit its adoption, even though it be sanctioned with respect to capacity and with respect to the formal validity of contracts in general.

In another place[47] the author has expressed his opinion that an alternative rule which would allow a contract to be valid, if it satisfied the requirements of the lex loci contractus for the law governing its validity in other respects, might be proper in jurisdictions where the lex loci contractus does not control the validity of contracts. But the following reservation was made which covers the exact subject now under consideration. "An exception should be made," it is there stated, "with respect to commercial paper. The nature of the instrument is here essentially dependent upon its form. Absolute certainty in regard to its character is of the utmost importance. A fixed rule must therefore apply which, in the nature of things, is the law of the place of issue."

That there is a valid distinction between ordinary contracts and bills and notes appears most clearly from the German law. Article 11 of the Law of Introduction to the Civil Code sustains a contract, so far as its formal validity is concerned, if it complies with the law of the place of making or with the law governing its validity or obligation in other respects, which, according to the prevailing rule, is the law of the place of performance. In the interest of security of dealings in commercial paper, this alternative provision does not extend to bills and notes, which are governed, upon principle, by the lex loci contractus.[48] The exceptional importance attached to the form of bills and notes is seen also in the attitude taken on the question of alternative rules by the Institute of Inter-

46. p. 988.
47. 20 Yale Law Journal, pp. 457-458.
48. Staub, Art. 85; Planck, Bürgerliches Gesetzbuch, Art. 11 Law of Introduction.

national Law[49] and the Convention of the Hague.[50] Both allow such an alternative rule as regards capacity but deny it in the matter of the formal execution of bills and notes.

Whatever the merits of an alternative rule may be in general, for the reasons above suggested it cannot be adopted with respect to the formal requirements of bills and notes. In this branch of the law at least the rule locus regit actum must have an imperative character.

Because of the special objections in the law of bills and notes to the adoption of an alternative rule, as regards formalities, which are based upon the negotiable character of such instruments and the consequent requirements of certainty, there is no need of considering the provisions of the English Wills Act or the statutory provisions existing in many states of this country which have introduced, in the matter of wills and deeds, the continental rule of locus regit actum in a permissive sense.

The foregoing discussion relates to the essential as well as to the formal requirement of bills and notes, for no clear line of demarcation between the two can be drawn. This is most apparent in countries belonging to the German group which have adopted the formal exchange law, according to which the rights of the parties are derived solely from the form of the instrument.[51] "The bill of exchange," says a noted Italian writer,[52] "being a literal[53] contract, its form no doubt influences the substance of the obligation." Article 85 of the German Exchange Law speaks accordingly only of the law governing the essential validity of the contract, the term including all formal requirements. In the other countries that have not adopted the formal system of bills and notes after the German type, for example, France, the impossibility of clearly distinguishing between form and substance is likewise admitted. Says Des-

49. Annuaire VIII, p. 121.

50. Art. 75, Uniform Law, Senate Document No. 162, Sixty-third Congress, First Session, p. 64.

51. See Grünhut, Wechselrecht, II, p. 572.

52. Diena, III, p. 28.

53. "The literal contract of Roman Law", says Professor Sohm, "was a fictitious loan, which operated by virtue of the 'literae'—i. e. by virtue of the writing in the codex as such, irrespectively altogether of the facts actually underlying the relations between the parties—to impose on the debtor an abstract liability to pay a fixed sum of money." Institutes, Ledlie's translation, 2nd ed. p. 413.

pagnet:[54] "Without doubt certain of these requisites may refer to matters of substance, as the 'remise de place en place' and the indication of 'value received'. But they constitute all parts of the context of the bill of exchange and by virtue of that fact become matters of form." Other writers of authority call attention to the same fact.[55] Section 72, subdivision 1, of the Bills of Exchange Act uses the expression "requisites of form", but these words are to be understood no doubt as including all essential requirements, excepting those of capacity and consideration. In the Negotiable Instruments Law the essential requirements for the validity of a bill or note, apart from capacity and consideration, are found in the chapter entitled "Form and Interpretation". The word "form" includes therefore the essential requirements. The American cases dealing with the question from the standpoint of the Conflict of Laws appear to have assumed, however, that a distinction might be drawn between the formal and essential requisites, and that they might be subjected properly to different laws. While the requirement of a written form or of a stamp has been considered a matter of formal execution, which is determined by the lex loci contractus, the statutory provision that a negotiable note must be payable at a bank[56] and the prohibition of a stipulation for attorneys' fees[57] have been classified as matters of substance and subjected to the law of the place of payment. In none of the cases was there any discussion of the problem involved. It is submitted that all of the conditions prescribed by law for the creation of a bill or note should be governed by one law—the lex loci contractus —and that the American decisions last referred to should be disapproved.

What has been said under Capacity concerning the meaning of the lex loci contractus and the importance of the place from which the original instrument or a supervening contract is dated holds true also of the present subject.

Should any exceptions to the lex loci contractus like those found in the Bills of Exchange Act or the German Exchange Law be recognized?

54. p. 988.

55. Brocher, Cours, II, p. 318; Ottolenghi, p. 81; Weiss, IV, p. 451.

56. Barger v. Farnham, (1902) 130 Mich. 487, 90 N. W. 281; Freeman's Bank v. Ruckman, (1860) 16 Gratt, (Va.) 126.

57. Strawberry Point Bank v. Lee, (1898) 117 Mich. 122, 75 N. W. 444.

Assuming that the original bill or note is void for want of compliance with the formal or essential requirements prescribed by the law of the place of issue and that such a bill or note is later accepted or indorsed in another country under the law of which the original bill or note would have been valid, should such acceptor or indorser be held? The English Bills of Exchange Act and the German Exchange Law give an affirmative answer to the question. Much controversy has arisen on the continent as to whether the result of the German and English acts can be reached without the aid of positive legislation. On the one hand it is argued that inasmuch as the different contracts on a bill or note are independent of each other, each indorser occupying, as it were, the position of a new drawer and the acceptor, that of the maker of a note, they should be held if the original instrument satisfied the requirements of the law of the place where such acceptance or indorsement occurred.[58] The weakness of this argument from the standpoint of continental law lies in the fact that in the law of bills and notes of many of the continental countries neither the acceptor nor the indorser of a bill or note which is void for non-compliance with the essential requisites prescribed by law, can be held as such.[59] If such an acceptor or indorser is not liable under the municipal law for the reason that an "acceptance" or an "indorsement" implies the existence of a valid original bill or note, it is difficult upon theory to hold him, from an international viewpoint, in the case now under consideration.

Von Bar's argument is not convincing. He says:[60] "But again, on the other hand, the acceptance or the indorsement of a bill made in this country is valid, so far as form is concerned, although the bill itself does not satisfy the forms required by the law of the place of issue, if only it does satisfy the conditions required by the law of this country. For the acceptor binds himself unconditionally for payment of the sum in the bill, and the indorser binds himself in the event of the accept-

58. Von Bar, p. 673; Beauchet, Du Droit Allemand sur les Conflits de Lois en Matière de Lettrés de Change, Annales de Droit Commercial, 1888, II, pp. 29-30; Champcommunal Annales de Droit Commercial, 1894, II, p. 147; Chrétien, pp. 101-102; Esperson, pp. 31-33; Lyon-Caen et Renault, IV, p. 550.

59. Art. 7, German General Exchange Act; Article 725, Swiss Law of Obligations; Art. 254, Italian Commercial Code.

60. p. 673.

or's failure to pay: that being so, we cannot, on the other hand, take into account the fact that the debtor may or may not have a right of recourse or of indemnity, nor can we take into account the reason why the prior obligant does not pay, and that reason may be that the principal debtor in the bill has not validly bound himself." The simple answer to v. Bar is that in a country under the law of which neither the acceptor nor the indorser warrants the validity of the instrument, there is no justification for implying such a warranty when the original instrument is issued abroad.

The solution is somewhat different under Anglo-American law. An indorser warrants that at the time of indorsement the instrument is a valid or subsisting bill or note.[61] This warranty would cover the invalidity of the original instrument as a bill or note under the lex loci contractus because of non-compliance with the formal requirements of such law.

An acceptor admits only the signature of the drawer and not the validity of the instrument in other respects.[62] Anglo-American law goes upon the theory that an acceptor has no better means than the holder or indorser to ascertain the genuineness of the body of the instrument, and that there is no reason, therefore, why the risk of alteration or forgery should not be thrown upon the person presenting the instrument for acceptance or payment. The same reasoning applies upon principle where the invalidity results from a non-compliance with the law of the place of issue. Notwithstanding the fact that an acceptor cannot be held in the above case upon the ordinary principles of American law relating to negotiable paper, and, according to the German law of bills and notes, neither an indorser nor an acceptor can be so held, the English and German acts impose liability upon both of these parties. The English act provides:[63] "Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom." This provision relates only to the original contract, since it speaks of bills, *issued* out of the United Kingdom, but there is no reason why it should not apply equally

61. N. I. L., Sec. 66; B. E. A., Sec. 55 (2).
62. N. I. L., Sec. 62; B. E. A., Sec. 54 (2) (a).
63. B. E. A., Sec. 72 (1) (b).

to the supervening contracts. The German act, which embraces clearly all contracts upon a bill or note issued abroad, is worded as follows:[64] "If, however, the statements inserted abroad on the bill satisfy the requirements of the inland law, no objection can be taken against the legal liability incurred by statements subsequently made within the Empire (Inland) on the ground that statements made abroad do not satisfy the foreign laws."

Undoubtedly the above qualification of the ordinary rules of commercial paper was adopted in the interest of a local policy, the purpose of which is the better protection of "inland" dealings in bills and notes. Such legislation, while arbitrary in the sense that it does not harmonize with the municipal law relating to bills and notes, may be justified however, if sound policy so demands. The writer is of the opinion that inasmuch as the security of domestic dealings affecting such foreign bills and notes is thereby promoted, the exception under discussion might be adopted with advantage even in a country like Germany where neither the acceptor nor the indorser warrants the validity of the instrument. He would recommend, therefore, for adoption in the Uniform Law for the United States, Section 72 subdivision (1) (b) of the English Bills of Exchange Act with a change in the phraseology, which would show clearly that it applies to the supervening contracts as well as to the original instrument.

As for the second exception to the lex loci contractus contained in the English Bills of Exchange Act, a different conclusion must be reached. Section 72, 1 (a) provides that: "Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue." Some of the American cases,[65] as we have seen, support the above provision on the ground that foreign revenue laws are not entitled to recognition. The better opinion, both in England and in this country, would give effect to such laws, however, provided their violation results in the invalidity of the contract and not merely in its unenforceability until full compliance with the stamp require-

64. Arts. 85, 98.

65. Ludlow v. Van Rensselaer, (1806) 1 Johns. 93; Skinner v. Tinker, (1861) 34 Barb. 333.

ment.[66] The cases holding that the foreign stamp laws are local or intraterritorial because fiscal in their nature, and not entitled therefore to extraterritorial recognition, have been condemned by practically all of the text writers both continental and Anglo-American.[67]

No reasons of a practical nature are evident why this view should not be adopted by the Uniform Law in the United States.[68] In our relation with continental countries it would be of no importance whether the above rule or that of the Bills of Exchange Act were adopted, for the Hague Convention prohibits the contracting states to make the validity of a bill or note or any contract thereon depend upon compliance with the stamp laws, and as for bills issued in England for circulation and payment in this country, the exception to the rule of the lex loci contractus previously discussed, corresponding with Section 72, 1 (b) of the Bills of Exchange Act, would afford a sufficient protection to those becoming parties thereto or holders thereof in the United States.

(To be continued.)

ERNEST G. LORENZEN

University of Minnesota.

66. Bristow v. Sequeville, (1850) 5 Ex. 275; Alves v. Hodgson, (1797) 7 T. R. 241; Clegg v. Levy, (1812) 3 Camp. 166; Fant v. Miller, (1866) 17 Gratt. (Va.) 47; Satterthwaite v. Doughty, (1853) 34 N. C. 314.

67. Von Bar, p. 672; Diena, III, p. 14; Despagnet, pp. 1000-1001; Grünhut, II, p. 571, note 12; Schaeffner, Entwicklung des Internationalen Privatrechts, p. 120; Jitta, II, p. 49; Champcommunal, Annales de Droit Commercial, 1894, II, p. 202; Lyon-Caen et Renault, IV, p. 552; Ottolenghi, p. 100; Surville & Arthuys, p. 696.

Chalmers, Bills & Notes, 6th ed., p. 242; Daniel, Negotiable Instruments, 6th ed., Sec. 914; Story, Conflict of Laws, 8th ed., p. 346.

68. But for the fact that the English Stamp Act requires bills issued abroad to be stamped in England and makes no allowance for any foreign stamp, the above view would probably have been followed also by the Bills of Exchange Act.

THE POWER OF THE STATE TO RESTRICT THE USE OF REAL PROPERTY.

While we at this date have a somewhat concrete idea of what we think the constitution means, the history of that instrument and the decisions of the courts clearly show that at its writing neither its authors nor the people approving it realized the possibilities in its legal development by court construction. This article involves the construction of phrases that even the highest court of the land has hesitated to define and which were undefined in our constitution. Incident only to the construction of these phrases is involved the legislative power, the power of the representatives of the people to pass laws affecting the public welfare.

We assume that our readers are, many of them, too busy to have given time to a collation of the decisions upon this subject. We shall therefore give a slight history of the subject, cite provisions of the national constitution with the early decisions of the United States Supreme Court, the decisions of many of the state courts, and finally, give in brief our own views upon the subject.

It is probably unnecessary to call attention to the fact that our American constitutions have been continually construed, insofar as they affect property rights, only as instruments of limitation, and that when the legislative action encroaches upon property rights, the only protection of the individual is the limitations of our constitutions.

The people of a state vote, in the adoption of their constitution, upon their form of government. They include in their own constitution certain limitations upon the government which they create. They have uniformly adopted representative forms of government, in which they delegate to their representatives the authority to prescribe their rules of action. According, then, to established principles of construction, the action of that law-making body is valid unless it is a plain and vital encroachment upon some provision of the protecting instrument, the constitution.

Under consideration of the phrase, "due process of law", has arisen the question of the validity of nearly every legislative act claimed to be an encroachment upon private right. The justices of the highest court in the land have differed at times as to the history and meaning of the phrase. Is it any wonder, therefore, that state courts and minor courts are confused? Is it any wonder that legislative bodies have sometimes over-stepped the boundaries of what the courts considered "due process of law"?

The states have almost uniformly adopted provisions similar to the provisions of the national constitution under discussion, so that the construction of these provisions of the national constitution is decisive of the corresponding provisions of most of the state constitutions.

At the adoption of the federal constitution the only provision of that instrument which could possibly be construed as a limitation upon the power of the state legislature to restrict the use of property was article 5 of the amendments, which reads as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

But this was held in the case of *Barron v. Baltimore*,[1] insofar as it affects the question under discussion, to be a restriction upon the government of the United States only and not a limitation upon the power of the states.

In 1866, the fourteenth amendment was added to the constitution, and section 1 thereof, insofar as it affects the subject under discussion, provides as follows:—

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1. (1833) 7 Pet. 242.

The provisions of this article were immediately presented to the Supreme Court of the United States for construction, in many cases, where persons claimed to have been denied due process of law and the equal protection of the law by the states. It then became necessary to construe these phrases upon a variety of subjects. In one case decided by the United States Supreme Court, *Murray v. Hoboken Land Co.*,[2] Justice Curtis gave what he considered the history and limits of "due process of law". In a subsequent decision, *Davidson v. New Orleans*,[3] Justice Miller of the same court differed as to the history of the phrase and its effect upon American institutions and differed as to its limits.

If there had been anything valuable in English decisions or in English law upon the subject under discussion, the American courts would have had a comparatively easy task in the construction of the phrase, as applied to cases involving restriction upon the use of property; but in England the power of parliament was nearly absolute and was for the most part unquestioned. Most of the colonies existed under royal grant where the title to property and control over it was originally in the crown. The restrictions which were included in the American constitutions, national and state, upon the powers of the law-making body find no precedent in the English law for their construction. Hannis Taylor in his work on "The Origin and Growth of the American Constitution", (p. 105), says that "the right of the court to annul the act of the state when in its judgment the limitations imposed by the constitution have been exceeded is an American invention".

To consider, briefly, the form of government adopted and method of its adoption, it would seem that the people of the state should abide by, and the courts should uphold as much as possible, the action of the law-making body, and the courts do unquestionably uphold to a considerable extent its action. When the people of the state draft a constitution, they impliedly agree that upon its adoption they shall perpetually be bound by its terms; in that instrument they commit themselves to a form of government wherein representatives, elected by themselves, shall make all laws to promote the

2. (1855) 18 How. 272.
3. (1877) 96 U. S. 97.

general welfare. If it becomes necessary, in order to promote the general welfare, to pass laws restricting the use of property, why should the people not abide by the judgment of their law-making body?

As already stated, the fourteenth amendment to the national constitution contains the limitations upon the right of the states to pass laws considered in this article. The Minnesota constitution, section 13, article 1, provides: "Private property shall not be taken, destroyed or damaged for public use without just compensation therefor first paid or secured." Other state constitutions contain substantially the same provision. These provisions were undoubtedly included in the state constitution as an element of "due process of law". The fourteenth amendment to the national constitution and these state provisions are generally considered together, but the decisions have usually considered the general subject rather than the specific provisions.

In construing the fourteenth amendment the courts very early recognized the necessity of a rule whereby the progress of law should be unhampered, and the action of the law-making body, when for the evident welfare of the state, upheld. As to restrictions upon the use of property, the difficulty arose in establishing a rule whereby one restriction might be upheld and another declared invalid. From the application of the rule which was adopted has come the confusion upon the subject.

The man who owned and conducted a business devoted to the sale of intoxicating liquors contended that he was protected by the fourteenth amendment, and that when a state legislature passed a law prohibiting the sale of intoxicating liquor within certain territory, he was denied due process of law and his property was taken for public use without compensation. His argument seemed a good one. His contention certainly was a basis for argument, in the absence of the construction which the courts have placed upon this clause of the constitution; and comparing his contention with similar cases in which the construction placed upon this clause has been different, we cannot but feel that perhaps there is some inconsistency in the positions taken by our courts. Suppose the legislature of the state of Minnesota decides in its wisdom that the use of coffee is harmful to the inhabitants of the state and

prohibits the sale of coffee within the state; how quickly would merchants claim protection of this clause of the constitution. And yet, in the absence of judicial construction and judicial precedent,—viewed without prejudice—in what way is this question different from that presented to the court when a legislature for the first time prohibited the sale of intoxicating liquor? This comparison is offered only to emphasize the question which presented itself at the time the court was first called upon to construe the national constitution upon this subject, and to emphasize the contention of the author that the whole subject is one of degree in representative action, and that it sometimes seems that one degree is as reasonable as the other. The moment the court gives judicial approval to a particular degree in advance, that degree becomes and seems as reasonable as those previously approved.

An early decision by the Supreme Court of the United States in construing this clause of the national constitution opened a field for construction by the national and state courts that appears to be limitless and seems to give force to the contention that it is only a question of degree. This decision was that "All rights are held subject to the police power of a state; and if the public safety or the public morals require the discontinuance of any manufacture or traffic, the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience".[4] This immediately injected into the construction of our national constitution a principle which has since been used in hundreds, perhaps thousands, of cases, and which had no mention in the constitution, but was the child of necessity. The term, police power, was not included in our constitution or defined elsewhere, and will be indefinable until a complete change shall have taken place in our form of government. By injecting this principle into our jurisprudence, the court made possible a construction capable of sustaining the validity of nearly every act of our representative lawmakers. It must have seemed necessary at that time to do so; and if we adopt the theory that this is entirely a representative government,—a government by the majority, for the benefit of the majority,—it was just.

4. Beer Co. v. Massachusetts, (1877) 97 U. S. 32.

The court said in this case:

"If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the state."

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens and to the preservation of good order and the public morals."

This decision followed a very extended discussion of the entire subject in the *Slaughter House Cases*,[5] in which was introduced the principle which we believe should be and is the basis of all such legislation, that

"Every person ought so to use his property as not to injure his neighbor; and that private interests must be made subservient to the general interests of the community."

The court says on page 62 of this decision:

" 'Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,' says Chancellor Kent, '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 interest must be made subservient to the general interests of the community.' This is called the police power; and it is declared by Chief Justice Shaw that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

"This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. 'It extends,' says another eminent judge, 'to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state; * * * and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state. Of the perfect right of the legislature to do this no question ever was, or, up-

5. (1872) 16 Wall. 36.

on acknowledged general principles, ever can be made, so far as natural persons are concerned."

The language employed in this case shows that this so-called principle, police power, is the basis for the courts' construction of this clause of the constitution and was necessary, as the court says, for the "protection of the lives, limbs, health, comfort and quiet of all persons and the protection of all property within the state."

While this decision seemed somewhat arbitrary at the time, and there were three dissenting opinions by eminent jurists, it is submitted that it was a construction in accord with the compact which was entered into by and between the people of the colonies, which cannot be anything else but a compact agreeing to representative government,—and agreeing to the rule of the majority—and which we call our constitution. This decision was broad enough to sustain any subsequent act of our representatives along these lines and was clear and convincing evidence that the great court which gave this decision believed this to be a government dedicated to the *rule of the majority.*

It cites approvingly the Massachusetts case of *Commonwealth v. Alger,*[6] and it is interesting to note how well defined in the mind of the Massachusetts court was the principle that people hold their property subject to such restraints and regulations as may be imposed by the legislature, for it said, (pp. 84 and 85):

"We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling

6. (1862) 7 Cush. (Mass.) 53.

power vested in them by the constitution, may think necessary and expedient.

"This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same."

In the case of *Thorpe v. The Rutland and Burlington Railroad Company,*[7] the Vermont court also had recognized the so-called police power and extended it to the protection of lives, limbs, health and comfort of all persons and all property. The court said (p. 149):

"This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state. According to the maxim, sic utere tuo ut alienum non laedas, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others."

Immediately upon the establishment of the principle of police power as justification for legislative action regulating the lives and property of individuals and corporations, where the legislative act resulted in pecuniary loss to the individual or in the restriction of his use of property, the courts began to extend this doctrine as a justification for legislative action upon other subjects where it resulted in damage to the person contesting the validity of the act.

At this point we wish to call attention to a distinction that might have been made upon the adoption of this indefinable principle, the police power, which would have prevented much of the confusion that has resulted not only in the public mind, but apparently in some of the courts, as to the limit of the power. If the courts had said the police power as exercised by the state extends to the protection of the life, health and morals of the people of the community and had not extended the principle to the protection of property, a line of demarcation would have been drawn which could have been subse-

7. (1854) 27 Vt. 140.

quently followed without confusion. But as we follow down the cases hereinafter cited, the reader will observe that legislative action protective of property as well as of life, health and morals, is upheld. From that results the confusion. The prohibition of the sale of intoxicating liquor was unquestionably justified on the ground of public health and public morals. The restriction of slaughter houses to particular districts was justified upon the ground of protection of public health; the prohibition of the building of wooden buildings in fire limits, and the restriction of gun powder factories, etc., upon the ground of protection of life and safety.

We are not arguing that the police power should stop where it is, but merely that in the application of this rule, which has always been more or less arbitrary, a line might have been drawn upon which could have been based more logical distinctions; but with the injection of the idea of protection of property into the principle has come confusion. Perhaps the adoption of this additional principle was not improper, but confusion was inevitable.

After the decision of the above mentioned cases by the Supreme Court of the United States came the case of *Butchers' Union Slaughter House Co. v. Crescent City Landing & Slaughter Co.*,[8] where it was held:

"The power of a state legislature to make a contract of such character that under the provisions of the constitution it cannot be modified or abrogated, does not extend to the subjects affecting public welfare or public morals so as to limit the power to legislate on these subjects to the prejudice of the general welfare."

In that case an exclusive privilege had been given one slaughter house company by the legislature, and by another act of the legislature a privilege was also granted to another company. The court held that the first privilege even though granted by the legislative body as an exclusive privilege, was not binding upon the state, as the state could not contract away its police power or its power to legislate upon a subject affecting the public health, morals, safety or prosperity.

In the earlier case of *Beer Co. v. Massachusetts*[9] some doubt had been expressed as to the validity of a legislative enactment prohibiting the sale and manufacture of intoxicating

8. (1883) 111 U. S. 746.
9. Supra.

liquor, where property was already owned and used in the business prohibited, but this question was definitely settled by the case of *Mugler v. Kansas*,[10] in which the court held:

"Lawful state legislation, in the exercise of the police power of the state to prohibit the manufacture and sale, within the state, of spirituous, malt, vinous, fermented or other intoxicating liquors to be used as a beverage, may be enforced against persons who at the time happen to own property whose chief value consists in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactments."

From these early cases upon the subjects of intoxicating liquor, slaughter houses, etc., began to grow the legislation upon other subjects, similar, but harmful to the public health, morals and prosperity in a lesser degree than these.

In the case of *L'Hote v. New Orleans*,[11] the United States Supreme Court again approved the principle that damage to property in the exercise of the police power was not such damage as required compensation under this clause of the national constitution. The court said:

"The truth is that the exercise of the police power often works pecuniary injury, but the settled rule of this court is that the mere fact of the pecuniary injury does not warrant the overthrow of legislation of a police character."

And very recently the United States Supreme Court, in the case of *Reinman v. Little Rock*,[12] had to determine the validity of an ordinance of Little Rock prohibiting the maintenance of a livery stable in the city of Little Rock. The case was one where a livery stable had already been constructed. The court held:

"Even though a livery stable is not a nuisance per se it is within the police power of the state to regulate the business and to declare a livery stable to be a nuisance in fact and in law, in particular circumstances and particular places. If such power is not exercised arbitrarily or with unjust discrimination, it does not impinge upon the rights guaranteed by the 14th amendment. * * * The ordinance of the City of Little Rock, Arkansas, making it unlawful to conduct the business of a livery stable in certain defined portions of that city, is not unconstitutional as depriving an owner of a livery stable already established within that district of his property

10. (1887) 123 U. S. 623.
11. (1899) 177 U. S. 587, 20 S. C. R. 788.
12. (1914) 237 U. S. 171, 35 S. C. R. 511.

without due process of law or as denying him equal protection of the law."

In reliance upon these cases legislation was extended to other businesses which might not be nuisances per se but which might be so by reason of their situation—such as laundries, tanneries, soap factories, brick kilns, stables, public garages, lumber yards; and state decisions, based upon previous holdings involving liquor cases, slaughter houses, etc., began to uphold legislation of this character. The legislation upon these subjects soon extended to bill-boards, height of buildings, lot lines, etc. As soon, however, as legislation was enacted regulating the height of buildings, lot lines, bill-boards, etc., the argument was advanced that the considerations for such legislation were purely esthetic and that it was not based upon the protection of public health, morals, safety or welfare. This introduced a new element of confusion into the decisions upon the subject, for the decision of a court approving legislation prohibiting a brickyard within certain districts was very hard to distinguish from the case where any form of building was prohibited. It is rather difficult to conceive of any consideration in the prohibition of the building of a brickyard in a certain locality other than the esthetic and the property consideration. To show the confusion which has resulted from a great mass of state decisions upon the subject, we shall briefly outline the state decisions and follow them with decisions of the United States Supreme Court, in which it is interesting to observe that the latter court in no important case has denied to the state the right to regulate or prohibit any business which it has seen fit to regulate or prohibit.

In the case of *In re Montgomery*,[13] the California supreme court held:—

"An ordinance of the city of Los Angeles dividing the territory including the municipality into industrial and residential districts and prohibiting the maintenance or conduct, within the residential districts, of any stone crusher, rolling mill, machine shop, planing mill, carpet beating establishment, hay barn, wood yard, lumber yard, public laundry or wash house, is a legitimate and constitutional exercise of the police power of the city."

13. (1912) 163 Cal. 457, 125 Pac. 1070, Ann. Cas. 1914 A 130.

This case involved the building of a lumber yard within a prohibited district. Even though the prohibition of the building of a lumber yard might, under some circumstances, be justified for fire reasons, yet the reason running through the case appears to be principally that the lumber yard was being built in a residence district. The court, however, apparently to base its decision as much as possible upon substantial grounds, said in conclusion:

"While a lumber yard is not per se a nuisance, it takes no extended argument to convince one that in a residence district such a place may be a menace to the safety of the property in its neighborhood for various reasons, among which may be mentioned the inflammable nature of the materials kept there."

In the case of *Ex parte Quong Wo*,[14] the same court upheld the validity of an ordinance of Los Angeles prohibiting laundries within a certain district. In the case of *Ex parte Hudacheck*,[15] it also held:

"The city of Los Angeles has authority, in the exercise of its police power, to regulate the business of brick making, by restricting the location within the city limits in which it may be followed. It is immaterial to the right of regulation of such business that the conduct of such business is not a nuisance."

The court further said:

"The reasonableness of a municipal restriction prohibiting the carrying on of the manufacture of brick within a specified portion of the city is sufficiently established when, in addition to the presumption in favor of the propriety of the legislative determination, there is evidence tending to show that the region in question had become primarily a residence district and that occupants of neighboring dwellings were seriously discommoded by the operations of the business."

An examination of the opinion will show that this case justifies the exercise of the police power to a great extent upon aesthetic considerations, while not so naming them.

In the case of *State v. Gurry*,[16] it was held by the Maryland Supreme Court that the city of Baltimore had authority to pass an ordinance segregating the races.

In the case of *State v. Taubert*,[17] an ordinance of the city of Minneapolis prohibiting tanneries within a certain district was upheld. In this case the Minnesota Supreme Court said:

14. (1911) 161 Cal. 220, 118 Pac. 714.
15. (1913) 165 Cal. 416, 132 Pac. 584.
16. (1913) 121 Md. 534, 88 Atl. 228, Ann. Cas. 1915 B 957.
17. (1914) 126 Minn. 371, 148 N. W. 281.

"The varying circumstances and conditions to be taken into account cannot be accurately anticipated in advance, and uniform and unvarying restrictions previously prescribed are liable to prove inadequate or inapplicable."

In the case of *State v. Withnell,*[18] the Nebraska court held an ordinance forbidding the construction of brick kilns in a city to be a valid exercise of the police power, saying:

"Within constitutional limits, private property is held subject to proper and general welfare of the people."

In the case of *People ex rel. Busching v. Ericsson,*[19] an act of the Illinois legislature giving cities and villages authority to regulate the location of public garages was declared valid and an action of a municipality pursuant thereto was sustained. The Illinois Supreme Court held:

"In the exercise of the police power, the legislature may authorize municipalities of the state to direct the location and regulate the use and construction of public garages, for the business of conducting a public garage may become a nuisance when conducted in particular localities and under certain conditions, although such a business is not a nuisance per se."

"Also an ordinance directing the location and regulating the construction and use of public garages is not unreasonable which prohibits the construction of a garage within 200 feet of a church and requires the written consent of a majority of the property owners in case the location of the garage is to be in a strictly residential district."

In the case of *People ex rel. Keller v. Village of Oak Park,*[20] the same court held:

"Under the cities and villages act as amended in 1911, cities are granted express power to direct the location of public garages, and an ordinance which prohibits the construction or maintenance of a public garage on any site where two-thirds of the buildings within a radius of 500 feet are used exclusively for residence purposes, without the consent of the majority of the property owners according to frontage, within such radius, is not void for unreasonableness, * * * and it is incumbent upon a party attacking the ordinance as unreasonable to show affirmatively and clearly that it is so."

In the case of *Attorney General v. Williams,*[21] an act of the Massachusetts legislature entitled "An act relating to the

18. (1912) 91 Neb. 101, 135 N. W. 376, 40 L. R. A. (N. S.) 898; See also, Horton v. Old Colony Bill Posting Co., (1914) 36 R. I. 507.
19. (1914) 263 Ill. 368, 105 N. E. 315, L. R. A. 1915 D 607.
20. (1915) 266 Ill. 365, 107 N. E. 636.
21. (1899) 174 Mass. 476, 55 N. E. 77, 47 L. R. A. 314.

height of buildings on and near Copley Square, in the city of Boston," was held constitutional. While this case was based upon the use of eminent domain for the restriction yet the suggestion was made that esthetic considerations might enter into and be one of the reasons for the taking.

In the case of *Welch v. Swasey,*[22] the Supreme Court of the United States held:

"Where the highest court of the state has held that there is reasonable ground for classification between the commercial and residential portions of a city as to the height of buildings, based on practical and not aesthetic grounds, and that the police power is not to be exercised for merely aesthetic purposes, this court will not hold that such a statute, upheld by the state court, prescribing different heights in different sections of the city is unconstitutional as discriminating against, and denying equal protection of the law to, the owners of property in the district where the lower height is prescribed.

"Where there is justification for the enactment of a police statute limiting the height of buildings in a particular district, an owner of property in that district is not entitled to compensation for the reasonable interference with his property by the statute."

Here the reader will again observe that the most liberal interpretation was given to the constitution in support of the right of the state to legislate upon any subject involving the public welfare.

In the case of *Noble State Bank v. Haskell,*[23] the same court says: "The police power extends to all great public needs." In the case of *Bacon v. Walker,*[24] it held that the police power of the state embraces regulations designed to promote the public convenience and general prosperity as well as those to promote public health, morals and safety. It is not confined to the suppression of what is offensive, disorderly or unsanitary, but extends to what is for the greatest welfare of the state.

In the case of *Eubank v. Richmond,*[25] in considering the constitutionality of an ordinance requiring the committee on streets, upon the request of two-thirds of the owners of the

22. (1909) 214 U. S. 91, 29 S. C. R. 567.
23. (1911) 219 U. S. 104 and 575, 31 S. C. R. 299.
24. (1907) 204 U. S. 311, 27 S. C. R. 289. See, also, Schmidinger v. Chicago, (1913) 226 U. S. 578, 33 S. C. R. 182, Ann. Cas. 1914 B 284.
25. (1913) 226 U. S. 137, 33 S. C. R. 76, Ann. Cas. 1914 B 192.

abutting property, to establish a building line in the city of Richmond, the United Sates Supreme Court said:

"Whether it is a valid exercise of the police power is the question in the case, and that power we have defined, as far as it is capable of being defined by general words, a number of times. It is not susceptible of circumstantial precision. It extends as we have said, not only to regulations which promote the public health, morals and safety, but to those which promote the public convenience or the general prosperity. *C. B. & Q. Ry. Co. v. Drainage Commissioners,* 200 U. S. 561. And further, it is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government. *District of Columbia v. Brooke,* 214 U. S. 138, 149. But necessarily it has its limits and must stop when it encounters the prohibitions of the constitution. A clash will not, however, be lightly inferred. Governmental power must be flexible and adaptive. Exigencies arise, or even conditions less peremptory, which may call for or suggest legislation, and it may be a struggle in judgment to decide whether it must yield to the higher considerations expressed and determined by the provisions of the constitution. *Noble State Bank v. Haskell,* 219 U. S. 104. The point where particular interests or principles balance 'cannot be determined by a general formula in advance.' *Hudson Water Co. v. McCarter,* 209 U. S. 349, 355."

The case of *Hadacheck v. Los Angeles,* hereinbefore cited, was taken to the Supreme Court of the United States, and that court unreservedly approved the holding of the supreme court of California,[26] and therein gave perhaps the most liberal interpretation of our constitution that has yet been given it in a very extended and thorough discussion of the subject, after citation of numerous authorities. The court said:

"While the police power of the state cannot be so arbitrarily exercised as to deprive persons of their property without due process of law or deny them equal protection of the law, it is one of the most essential powers of government and one of the least limitable—in fact the imperative necessity for its existence precludes any limitation upon it when not arbitrarily exercised.

"There must be progress, and in its march private interests must yield to the good of the community.

"The police power may be exercised under some conditions to declare that under particular circumstances and in particular localities specified businesses which are not nuisances per

26. (1915) 239 U. S. 394, 36 S. C. R. 143.

se (such as livery stables, as in *Reinman v. Little Rock*, 237 U. S. 171, and brickyards, as in this case) are to be deemed nuisance in fact and law."

We anticipate that the reader, after this citation of authorities, will immediately ask, what is the rule for determining the validity of legislative enactments passed in the exercise of the police power? The rule seems to be very clearly stated in the recent case of *State ex rel. Lachtman v. Houghton*,[27] in the following syllabus by the court:

"The use which the owner may make of his property is subject to any reasonable restrictions and regulations, imposed by the legislative power, which tend to promote the public welfare or to secure to others the rightful use and enjoyment of their own property; but only such use of property as may produce injurious consequences, or infringe the lawful rights of others, can be prohibited without violating the constitutional provisions that the owner shall not be deprived of his property without due process of law, nor without compensation first paid or secured."

This case was decided by the supreme court of Minnesota adversely to the power of the legislature to prohibit a store building in a particular locality, and was based to some extent on a similar decision in the state of Illinois prohibiting a store building in a certain locality. This, then, establishes a rule apparently as definite as a rule can be, but query, What use is a use that produces injurious consequences to others or infringes the lawful rights of others? The court in this case said that the building of a store building did not produce injurious consequences, did not infringe the rights of others. The court said the same thing in the Illinois case, but is it not somewhat hard to distinguish this case from the case of a brickyard or the case of a public garage? The court has drawn a line of distinction between legislation, regulating and prohibiting the manufacture and sale of intoxicating liquor, regulating the location of slaughter houses, tanneries, soap factories, laundries, brickyards, lumber yards, public garages, and stables on the one hand, and legislation regulating the location of a mercantile establishment on the other.

We do not question in this article the justice of such a decision, but has it not left the layman and the person interested in public and civic development in a quandary as to the limits of the legislative power?

27. (1916) 134 Minn. —, 158 N. W. 1017.

Various legislatures throughout the United States have recently passed acts providing for the districting of municipalities. The ordinances of the city of Los Angeles involved in the California cases cited were passed pursuant to legislative enactment. Such acts have been adopted in Illinois, in Minnesota, in Pennsylvania, in New York, in Maryland, evidencing unquestionably the great public demand for civic development. In the state of New York a legislative act was passed authorizing the appointment of a commission to redistrict the city of Greater New York. The commission, after many months of labor, made its report upon conditions in that city. They took evidence from authorities upon public health, from police commissioners, physicians and real estate men, evidence that established beyond question that the districting of a municipality into residence and business districts, however intricate and complex, would unquestionably promote the public health, morals, welfare and general prosperity. The evidence adduced before them showed that the presence of business houses in a residence district increased liability to street accidents and was to some extent a menace to health; that the encroachment of business districts upon valuable residence properties, materially affected property values; that the regulation of residences as to their size, the number of families permitted in each, the building of apartment houses, etc., unquestionably affected the public health and morals. Evidence was introduced from German cities of the very satisfactory results of legislation providing for more adequate housing for German laborers, and for single residences for laborers and their families, instead of the old congested conditions present when they were housed in tenements and apartment houses.

The findings of the New York commission will undoubtedly be brought to the attention of the New York court of appeals in subsequent litigation, and probably later to that of the Supreme Court of the United States; and we cannot but feel that they will probably be given the sanction of the approval of these courts. The difficulty of excluding the esthetic consideration from the exercise of the police power is very plain for the reason that however the court may term a consideration esthetic, that consideration can be definitely traced to the general welfare. Anything that beautifies a neighborhood enhances the value of property; anything that spoils or mars the beauty of a neighborhood depreciates the value of prop-

erty. The result, then, becomes not esthetic, as the courts have chosen to term it, but economic, and anything that is economic certainly must be considered in promoting the general welfare.

If in the development of the police power in protecting public health, morals, welfare, convenience and prosperity a point has been reached where legislatures must stop, and the encroachment of such businesses as legislatures and municipal councils are now attempting to restrain cannot be so prevented, and if such restriction in certain districts will unquestionably promote the public welfare, the question arises, How can we secure the result?

In Minnesota, in the year 1915, the legislature passed an act providing for the districting of cities under the power of eminent domain. We believe that this act, if its terms are compiled with and due notice given, opportunity to be heard had, compensation given when persons affected are damaged, will be upheld by the courts. Its operation will unquestionably be intricate and complex, but it may ultimately secure the desired results.

The alternative is the giving of complete effect by the courts to the rule of the majority, even though incidental damage to the individual may result. While this subject is, perhaps, not so vital as some other subjects of government, yet its decision must ultimately follow the theory of our government, as the courts will be unquestionably called upon in the future further to pronounce it. If our government progresses by the construction of the courts to a complete rule of the majority, every individual in the government must submit his individual conduct and life to the rule of the majority and to the benefit and common good of all the people. While such a result will be revolutionary of the ideas of some of our people as to the rights and liberties they possess, yet such a progress is possible.

It is undoubtedly a very satisfying sensation for many individuals to feel that when they have acquired a title to property under our system, they have the absolute and unqualified right in perpetuity to occupy and use it in any way they see fit, unhampered and unruled by their neighbors or the community, even though that use damage and mar the beauty and depreciate the value of surrounding property. If the courts construe our constitutions so as to preserve this individuality

of person and of ownership, it seems that a serious impediment to civic progress is possible. Personally we believe that this is a representative government wherein we have agreed, by adopting our constitutions, to abide by the laws which our representatives pass, and if those laws are for the benefit of the majority, our individual interests must bend to the will of the majority and to common good.

We cannot hope definitely to stop the enterprising spirit of gain. It is insistently active in engendering distinctions calculated to elude, impair and undermine the fairest and proudest models of legislation, but by the gradual progress and evolution of law we can restrict its harmful effects.

R. S. WIGGIN.*

Minneapolis.

*Assistant City Attorney of Minneapolis.

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RULE AGAINST PERPETUITIES—STATUTORY MODIFICATIONS—In order properly to understand the rule against perpetuities, two distinct doctrines of the common law, each tending towards the same end but by different means, must be kept in mind. The first of these doctrines is the rule against restraints on alienation; the other is the rule against perpetuities or, as it is sometimes termed, the rule against remoteness. During the period in which these two rules were being developed, it was deemed contrary to public policy to tie up property or exclude it from the market and commerce, and it was sought to defeat any attempt to do so by means of judicial regulation. Since the result of tieing up property could be accomplished either by restraining the alienation of vested interests in property, or by postponing to a remote period the vesting of con-

tingent future interests, both these methods had to be guarded against. The first method was provided against by the rule forbidding certain restraints on alienation, the second, by the rule against perpetuities.[1]

The effect of the rule against restraints on alienation is to render invalid certain provisions which postpone the transfer or payment to one who is entitled absolutely to property. This rule applies only to present vested interests and is not concerned with the time within which future estates must vest.[2] When, however, any provision for the postponement of the right to enjoy a vested interest is imposed for the benefit of third parties, such a restraint is valid and the right to enjoy such interest comes within the scope and operation of the rule against perpetuities.[3] Thus where property is given in trust to pay the principal to B when he reaches the age of twenty-eight: since B alone is interested in the property, such a restraint on its enjoyment is void. But if there is a gift over to other persons in case B does not live till he is twenty-eight, then the restraint would not be void and the trustee would hold the principal for the benefit of such persons and the rule against perpetuities would determine whether such gift over would vest at a time within the rule.[4] On the other hand the rule against perpetuities is concerned merely with the beginning of future interests and, when it is determined that any interest contingent upon a condition precedent must vest if at all within the prescribed limits, the rule is satisfied and no further application of the rule is to be made. But in a given case the application of both these rules, within their proper scope, may be necessary. Thus where property is given to trustees in trust for A for his life and on his death to B, who is not to receive the principal until he is twenty-five years old, the rule against perpetuities would determine whether the interest of B would begin within the period of the rule. Since, if A was in being at the time the interest was created, the estate of B would vest within the required period, the rule against perpetuities would have nothing more to do with it. The remaining question is whether the vested interest of B

1. Gray, Rule against Perp. 2nd ed. Secs. 2, 3, 118a.
2. Gray, Rule against Perp. 2nd ed. Secs. 120, 121.
3. Gray, Rule against Perp. 2nd ed. Sec. 120. See, also, Gosling v. Gosling, (1859) H. R. V. Johns, 265.
4. Gray, Rule against Perp. 2nd ed. Sec. 121f.

is fettered by any invalid restraints on alienation.[5] At common law such a provision, except in the case of a married woman, would be an invalid restraint on alienation and B would be entitled to the enjoyment of his interest upon reaching the age of twenty-one.[6] In this country, however, several states, by the doctrine of spendthrift trusts, have broken away from the rule of the common law and hold such restraints valid.[7] In case such a provision should be held valid, then the gift over would violate the rule against perpetuities as it would vest at too remote a time.[8] These two rules should be applied independently of each other. Much of the confusion at the present time as to what the rule against perpetuities really is, is the result of attempts to combine the two rules. "The rule against perpetuities settles the time within which interests must vest; but, when once vested, they are all, present and future alike, subject to the same restraints on alienation, and with this the rule against perpetuities has nothing to do."[9]

Since, in the consensus of judicial opinion, contingent estates should vest within a reasonable time, the rule against perpetuities has been developed and laid down as a binding test of what is a reasonable time within which such estates must vest or be declared void as against sound public policy. Prior to 1682 no settled test had been established by which to judge whether a certain provision was bad as violating the doctrine against perpetuities.[10] In that year the *Duke of Norfolk's Case,*[11] decided and laid down the rule as settling the law that future estates might be limited to commence on any contingency which must occur within lives in being. Following this decision the case of *Thellusson v. Woodford,*[12] held that an estate limited to commence on any contingency which must

5. Gray, Rule against Perp. 2nd ed. Sec. 121; Gray, Restraints on Alienation 2nd ed. Sec. 112a. See also In re Bevans Trusts, (1887) L. R. 34 Ch. Div. 716.

6. Rocke v. Rocke, (1845) 9 Beav. 66.

7. Claflin v. Claflin, (1889) 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393.

8. Gray, Restraints on Alienation 2nd ed. Sec. 112a.

9. Gray, Rule against Prep. 2nd ed., Sec. 121f. See also Becker v. Chester, (1902) 115 Wis. 90, 91 N. W. 87.

10. Gray, Rule against Perp. 2nd ed. Sec. 158. See also Child v. Baylie, (1618) Cro. Jac. 459.

11. (1682) 3 Chan. Cas. 1, 2 Swanst. 454.

12. (1805) 4 Ves. 227, 11 Ves. 112, 143.

occur within any number of lives in being at the creation of the estate was valid within the meaning of the rule. Though in this case the judges were very reluctant to uphold the will of the testator they refused to disregard the decision of the *Duke of Norfolk's Case,* and rather than disregard that decision allowed a vast fortune to accumulate for a very long period. This case prompted the passing of the Thellusson Act[13] which forbade provisions for accumulation in the future from holding up an estate for over twenty-one years after the testator's death. Any provision contrary to this act, and which is within the period allowed by the rule against perpetuities, is void pro tanto as to the excess. Should such a provision for accumulation violate the rule against perpetuities it is wholly void and cannot be made valid for the period of the statute.[14] After the decision of the *Duke of Norfolk's Case,* the question arose whether any period could be added to lives in being and finally a period of twenty-one years was allowed, when that period had reference to some definite infancy.[15] A few years later it was decided that a gross period of twenty-one years could be added to lives in being and still the contingency would satisfy the rule against perpetuities.[16] For the purposes of the rule against perpetuities a child en ventre sa mere is considered as in being, whether it be beneficial or prejudicial to the infant to be so considered.[17] From the above principles and decisions the rule against perpetuities has been developed, which rule is correctly stated as follows; "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the estate."[18] This rule applies both to legal and equitable future interests.[19]

While the existence of a future estate makes the interest of the owner of a present estate less marketable, still the fact that such a future estate exists does not render the present interest inalienable. The owner of the present estate can always sell what interest he has. However, inaccurate remarks by

13. Stat. 39 and 40 Geo. III., c. 98, passed in 1800.
14. Marshall v. Holloway, (1820) 2 Swanst. 432; Gray, Rule against Perp. 2nd ed. Sec. 687.
15. Stephens v. Stephens, (1736) 2 Barnard, (K. B.) 375.
16. Cadell v. Palmer, (1833) 1 Cl. and F. 372.
17. In re Wilmer's Trusts, [1903] 1 Ch. Div. 874; [1903] 2 Ch. Div. 411.
18. Gray, Rule against Perp. 2nd ed. Sec. 201.
19. Ferguson v. Ferguson, (1876) 39 U. C. Q. B. 232.

judges on several occasions to the effect that the rule against perpetuities, by confining future interests, was aimed against restraints on alienation, have given impetus to the erroneous idea that the rule against perpetuities was designed to defeat restraints on alienation. This misconception of the rule has been given full expression in the New York statutes. In that state the common law rule against perpetuities has been superseded by a system of statutory regulations which embrace: 1. Provisions as to the remoteness of interests in land; 2. Provisions as to accumulations of rents and profits from land; 3. Provisions as to remoteness of interests in personal property and accumulations of profit therefrom.[20] In Minnesota the first two parts of the New York statute have been adopted and the common law rule against perpetuities superseded,[21] except as to personal property, as to which the common law rule is still applied.[22] Proceeding upon the theory that the primary object of the rule against perpetuities was to limit restraints on alienation, these statutes provide that future estates are void if the power of alienation is suspended for a longer period than two lives in being and a definite minority from the creation of the estate.[23] Under these statutes the power of alienation is suspended when there are no persons in being, who can give an absolute fee title by joining together.[24]

Upon comparison it is evident that these statutes and the common law rule against perpetuities are fundamentally opposed to each other in their application in the following respects: 1. The common law is concerned only with the vesting of future interests, while the statutory rule looks only to restraints on alienation; 2. The common law rule allows a gross period of twenty-one years, while the statutes allow no such period;[25] 3. The common law rule allows any number of lives in being, while the statutes provide for only two lives in being.[26] Under both these rules the time of the creation of the estate is held to be, in the case of wills,[27] from the

20. Gray, Rule against Perp. 2nd ed. Sec. 747.
21. G. S. Minn. 1913, Sec. 6664, 6665, 6687, 6688; Buck v. Walker, (1911) 115 Minn. 239, 132 N. W. 205.
22. In re Tower's Estate, (1892) 49 Minn. 371; 52 N. W. 27.
23. Purdy v. Hayt, (1883) 92 N. Y. 446.
24. G. S. Minn. 1913, Sec. 6665.
25. Rong v. Haller, (1909) 109 Minn. 191, 123 N. W. 471.
26. Simpson v. Cook, (1877) 24 Minn. 180; Purdy v. Hayt, supra.
27. Cattlin v. Brown, (1853) 11 Hare, 372, 382; Mullreed v. Clark, (1896) 110 Mich. 229, 68 N. W. 989.

time of the death of the testator, and, in the case of deeds,[28] from the time of the execution of the instrument. The periods of gestation are allowed in the same manner under each rule.

The different methods of approaching the question as to whether a future estate is void under the respective rules is very apparent in cases where options for the purchase of interests in land are concerned. Both at common law and in Minnesota such an option creates in the optionee an equitable right in such land, contingent upon the exercise of his right of option.[29] The common law rule against perpetuities determines when this right must vest if at all. If it must vest within lives in being and twenty-one years after, it is valid; if it may not vest within that time it is void.[30] The Minnesota and New York statutes determine, not when this right must vest, but whether the power of alienation is suspended beyond two lives in being at the creation of the estate. If there are persons in being who can, by joining together convey an absolute title the power of alienation is not suspended.[31]

In the recent case of *Mineral Land Company v. Bishop Iron Company*,[32] the Minnesota supreme court held that a fifty year option for a thirty year mining lease did not violate the rule against perpetuities, since under the statute there was no suspension of the absolute power to alienate if there were persons in being by whom an absolute fee in possession could be given. The same rule has been applied in upholding a provision for the perpetual reservation by the grantor of mineral rights in land conveyed by him.[33] However, under the common law application of the rule, the mere fact that persons in being may release a contingent interest in land and thus allow a good title to be given, is not enough to take the case out of the rule against perpetuities. The validity or invalidity of the provision is to be determined with reference to the result if the parties fail to agree or give a release. If the owner of the vested interest in land cannot give an absolute title be-

28. Minor & Wurts, Real Prop., 555.

29. London & S. W. Ry. v. Gomm, (1882) L. R. 20 Ch. Div. 562; Woodall v. Clifton, [1905] 2 Ch. Div. 257; Starcher v. Duty, (1906) 61 W. Va. 373, 56 S. E. 524, 9 L. R. A. (N. S.) 913.

30. London & S. W. Ry. v. Gomm, supra; Winsor v. Mills, (1892) 157 Mass. 362, 32 N. E. 352; Gray, Rule against Perp. 2nd ed. Sec. 330.

31. Simpson v. Cook, supra.

32. (Minn. 1916) 159 N. W. 966.

33. Simpson v. Cook, supra.

cause a possible contingent interest is created which may not vest within the period of the rule, such contingent interest violates the rule against perpetuities and is void.[34] If the precedents of the common law be followed, such an option as in the recent Minnesota case would be held void as violating the rule against perpetuities since it might vest at too remote a period.

However, since the rule against perpetuities is concerned only with the vesting of future interests, it does not follow that because the provision for an option violates such rule as vesting at too remote a period, it is to be considered void for all purposes. Though the optionee, under the option agreement, is unable to obtain specific performance of the provision because his interest in such land may vest at too remote a time; still he can hold the optionor on the covenant to convey and recover any damages sustained by reason of the breach of such covenant.[35] This result is reached on the theory that the contract to convey is a valid contract in every respect, but it is the limitation which, by the operation of the doctrines of the courts of equity, it is the effect of the contract to create, in the form of an equitable interest in land that is void.

POWER OF MUNICIPALITY TO PROHIBIT THE LIQUOR TRAFFIC UNDER A HOME RULE CHARTER.—The supreme court of Minnesota recently decided that the city of Duluth has the power under its Home Rule Charter to prohibit the retailing of intoxicating liquor within its limits.[1] This case is novel in that it illustrates the liberal attitude of the court toward municipalities operating under home rule charters and for the further reason that it presents the question whether the prohibition of the liquor traffic is a proper municipal function.

The power of the state to delegate to a municipality the right to settle for itself the question of the sale of liquor within its limits is at the present time unquestioned.[2] This position

34. See Winsor v. Mills, supra.

35. Worthing Corporation v. Heather, [1906] 2 Ch. Div. 532, 95 L. T. 718, 22 T. L. R. 750, 75 L. J. Ch. Div. 761.

1. State ex rel. Zien v. City of Duluth, (Minn. 1916) 159 N. W. 792.

2. Mayor, etc., of Town of Valverde v. Shattuck, (1893) 19 Colo. 104, 34 Pac. 947; State of Minnesota v. Ludwig, (1875) 21 Minn. 202;

has been taken in spite of the objections that this is a delegation of legislative power and that such laws are special and not uniform. It being settled that such power may be given to a municipality, the question arises as to whether it has been given to the City of Duluth by the following provision of its Home Rule Charter adopted under Art. 4, Sec. 36 of the state constitution as amended, and under the enabling act passed by the legislature in pursuance of that provision: "The city shall have * * * also all municipal powers, functions, rights, privileges and immunities of every name and nature whatsoever." The supreme court takes the position that this clause does confer the right in question, saying, "As here used the expression is obviously broad enough to include all powers which are generally recognized as powers which may properly be given to and exercised by municipal corporations."

The first question to be considered is whether the power here exercised is one which might properly be given in express terms to a municipality by a home rule charter. Art. 4, Sec. 36 of the constitution provides that "Any city or village in this state may frame a charter for its own government as a city consistent with and subject to the laws of this state. * * * But no local charter, provision or ordinance passed thereunder shall supersede any general law of the state defining or punishing crimes or misdemeanors." The enabling act provides that: "Subject to the limitations in this chapter provided, it may provide for any scheme of municipal government not inconsistent with the constitution, and may provide * * * for the regulation of all local municipal functions, as fully as the legislature might have done before the adoption of Sec. 33, Art. 4, of the constitution."[3] A proper consideration of this matter requires a survey of the legislative history of Minnesota in regard to the liquor question. The control of the liquor traffic was originally a power belonging to the state legislature. The first local option statute was the provision in Chapter 112 of the Laws of 1875 which granted to towns alone the right to determine whether or not liquor should be sold within their boundaries. By Sec. 48 of Chapter 145 of the Laws of 1885, local option was extended

State of Minnesota v. Cooke, (1877) 24 Minn. 247, 31 Am. Rep. 344; City of Danville v. Hatcher, (1903) 101 Va. 523, 44 S. E. 723.

3. This section prohibits special legislation.

to incorporated villages of the state. In 1913, by Chapter 387 of the Laws of that year, this right was further extended to cities of the fourth class, and in 1915 the legislature passed the present county option law. It will be seen from this that there never has been a legislative act extending the right to vote on the question of the retailing of intoxicating liquors to cities of the first three classes. It is settled in Minnesota that home rule charters must be in harmony with and subject to the laws of the State.[4] This merely means that they must not contravene the public policy of the state as declared in its general laws. They may differ in details from the state laws; the provisions of home rule charters upon all proper subjects of municipal regulation prevail over general statutes relating to the same subject-matter, except in those cases where the charter contravenes the public policy of the state as declared by the general laws, and except in those instances where the legislature expressly declares that a general law shall prevail or a purpose that it shall so prevail appears by fair implication, taking into consideration the subject and the general nature of the charter and the general statute provisions.[5] It would seem that the legislature had announced the public policy of the state to be to allow all municipal corporations except cities of the first three classes to determine the liquor question for themselves. However, the supreme court takes a contrary view and holds that the extension of the power of passing on the liquor question to cities of the first three classes does not contravene the public policy of the state, as determined by the various legislative enactments. Consequently, such a provision might be incorporated into any home rule charter either in its original draft or by amendment.

Taking then the view of the court that the power to prohibit the sale of liquor is one that might properly be given to a municipality in express terms, the court seems to have laid down a very broad doctrine as to the construction and interpretation of municipal charters. The position early taken by

4. Const. Art. 4. sec. 36, supra; State ex rel. Latshaw v. Board of Water & Light Commissioners of City of Duluth, (1908) 105 Minn. 472, 117 N. W. 827.

5. Grant v. Berrisford, (1904) 94 Minn. 54, 101 N. W. 940; Peterson v. City of Red Wing, (1907) 101 Minn. 62, 111 N. W. 840; Turner v. Snyder, (1907) 101 Minn. 481, 112 N. W. 868; American Electric Co. v. City of Waseca, (1907) 102 Minn. 329, 113 N. W. 899; Schigley

this court was that unless it could be shown that the power claimed had been expressly given, the municipality would not be allowed to exercise it.[6] In the case of *City of St. Paul v. Briggs*,[7] the court said: "It is a rule of general application that the authority given municipal corporations to enact ordinances must be construed strictly, and this rule should apply with special force to cities authorized to form home rule charters." Later decisions, however, indicate a tendency to apply a much more liberal rule to cities having home rule charters.[8] The provision of the Home Rule Charter of the City of Duluth above quoted does not expressly give to it the power in question. Another provision by incorporation preserves to the city the right to license and regulate the liquor traffic. It would seem, therefore, that it required a very liberal construction to hold that the power to prohibit is given by implication. This decision, however, is certainly in harmony with the theory of municipal home rule.

ANTICIPATORY BREACH OF CONTRACT.—Where one party to a contract, before the time set for performance, unequivocally repudiates his entire obligation thereunder, and the other party acts upon the repudiation, the latter has an immediate cause of action for anticipatory breach of contract. This rule does not apply to negotiable paper,[1] or to promises to pay money;[2]

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v. City of Waseca, (1908) 106 Minn. 94, 118 N. W. 259; State v. Collins, (1909) 107 Minn. 500, 120 N. W. 1081.

6. Milwaukee, etc. Ry. Co. v. City of Faribault, (1876) 23 Minn. 167; Nichols v. City of Minneapolis, (1883) 30 Minn. 545, 16 N. W. 410; Village of Pine City v. Munch, (1890) 42 Minn. 342, 44 N. W. 197; Long v. City of Duluth, (1892) 49 Minn. 280. 51 N. W. 913; Nerlien v. Village of Brooten, (1905) 94 Minn. 361, 102 N. W. 867.

7. (1902) 85 Minn. 290, 88 N. W. 984.

8. State ex rel. Getchell v. O'Connor, (1900) 81 Minn. 79, 83 N. W. 498; State ex rel. Freeman v. Zimmerman, (1902) 86 Minn. 353, 90 N.W. State ex rel. Ryan v. District Court of Ramsey County, (1902) 87 Minn. 146, 91 N. W. 300; State ex rel. Barber Asphalt Paving Co. v. District Court of St. Louis County, (1903) 90 Minn. 457, 97 N. W. 132; City of St. Paul v. Haughbro, (1904) 93. Minn. 59, 100 N. W. 470.

1. Benecke v. Haebler, (1901) 38 N. Y. App. Div. 344, 58 N. Y. S. 16; affirmed 166 N. Y. 431, 60 N. E. 1107; Roehm v. Horst, (1900) 178 U. S. 1, 17 semble, 20 S. Ct. 780, 44 L. Ed. 953.

2. Alger-Fowler Co. v. Tracy, (1906) 98 Minn. 432, 437 semble, 107 N. W. 1124.

and it has been said to be confined to bilateral contracts.[3] It had its origin in the case of *Hochster v. De la Tour,*[4] and notwithstanding the fact that Lord Campbell's opinion in that case is based upon a misunderstanding of previous authorities and upon false premises, it has met with almost universal approval.[5] Lord Campbell relied principally upon the cases of *Short v. Stone,*[6] *Ford v. Tiley,*[7] and *Bowdell v. Parsons.*[8] The decision in *Bowdell v. Parsons* was merely that where a party contracted to do an act upon request, his voluntary disabling of himself dispensed with the necessity of a request. *Short v. Stone* was to the same effect. In *Ford v. Tiley* there was a dictum that "where a party has disabled himself from making an estate he has stipulated to make at a future day, by making inconsistent conveyance of that estate, he is considered as guilty of a breach of his stipulation, and is liable to be sued before such day arrives." This dictum was due to a misapprehension of prior decisions where the covenant to convey was contained in a bond on condition, and the condition was made impossible of performance by the inconsistent conveyance.[9]

After concluding that these authorities sanctioned the bringing of action for breach of a promise before time for performance, where the promisor had voluntarily disabled himself, Lord Campbell pointed out that impossibility of per-

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3. Roehm v. Horst, (1900) 178 U. S. 1, 17 semble, 20 S. Ct. 780, 44 L. Ed. 953.

4. (1853) 2 E. and B. 678, 22 L. J. Q. B. 455, 17 Jur. 972, 1 W. R. 469.

5. Williston's Wald's Pollock on Contracts, 361, Notes 13, 14, 15; 1 Ann. Cas. 422, 427; Ann. Cas. 1913 C, 384.

6. (1846) 8 Q. B. 358, 15 L. J. Q. B. 143, 10 Jur. 245.

7. (1827) 6 B. and C. 325, 5 L. J. K. B. 169.

8. (1808) 10 East 359.

9. "At the present day a bond with a condition to convey before a certain day would be regarded as in substance the equivalent of a covenant to pay on or after the day the penal sum of the bond (for which the law would substitute appropriate damages) if a conveyance was not made before that day. That does not represent the early understanding of such an instrument. The words of the bond, which are still used, acknowledging an immediate indebtedness and adding a proviso in which case the instrument is to become void, had a literal meaning for our ancestors. 'A specialty debt was the grant by deed of an immediate right, which must subsist until either the deed was cancelled or there was a reconveyance by deed of release.' It has been frequently pointed out that a debt was not regarded in our early law as a contractual right but a property right, and a deed creating a debt was not looked upon, as it is today, as a promise to pay money, but as a grant or conveyance of a sum of the grantor's money to the grantee. Accordingly a bond was closely analagous to a mortgage—a conveyance with a provision of defeasance attached.

formance could not be the true reason for permitting such premature action, because the ability to perform might be restored before the time for performance. He was inclined to approve the statement that any contract establishes between the parties thereto a relation similar to that of betrothment in a contract to marry at a future day, and that there is an implied promise not to disturb that relation. A repudiation seemed to him more ground for an immediate action than a mere disability; and notwithstanding dicta to the contrary by Baron Parke in *Phillpot v. Evans*[10] and *Ripley v. McClure*,[11] he so held. His principal reason was that unless the repudiator were subject to an immediate action, the other party must hold himself in readiness to perform.

It must be obvious that an ordinary contract creates no relation or status between the parties similar to betrothment.[12] At any rate many of the courts which adopt the doctrine of anticipatory breach fail to recognize such relation. For example, in *Loveridge v. Coles*,[13] the supreme court of Minnesota held that where A and B entered into a contract for the sale and purchase of certain real estate, on A's express representation of ownership thereof, B was obliged to pay all instalments due prior to the date set for conveyance, notwithstanding that A actually had title to only an undivided one-third of the premises and had no present means of compelling a transfer of title to the remainder, even by the day set. And in *Western, etc., Co. v. Daniels-Jones Co.*,[14] it stated obiter that where a vendor contracts to convey land owned by him, and before the day set for conveyance to the vendee, he conveys it to a third party, the vendee has no cause of action before the date set for the conveyance, without a further showing of facts constituting repudiation. The same ruling

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If the condition was or became impossible there remained an absolute debt created by the bond." Williston's Wald's Pollock on Contracts, 356, 357. See further pp. 357, 358, and notes.

10. (1839) 5 M. and W. 475, 9 L. J. Ex. 33.

11. (1849) 4 Exch. 345, 18 L. J. Ex. 419; affirmed 5 Exch. 140.

12. "So far as the lord chief justice could perceive an analogy between the engagement between the plaintiff and defendant in that case [Hochster v. De la Tour] and an engagement between a man and woman who are betrothed, his faculty for discovering similitudes is certainly phenomenal." Corliss, C. J. in Stanford v. McGill, (1897) 6 N. D. 536, 556, 72 N. W. 938, 38 L. R. A. 760.

13. (1898) 72 Minn. 57, 74 N. W. 1109.

14. (1911) 113 Minn. 317, 320, 129 N. W. 508.

obtains in California, Utah, and Washington.[15] It would seem difficult to harmonize these holdings with any theory of status or relationship created by the contract. Furthermore, the statement that unless the repudiator is subject to immediate action, the other party must hold himself in readiness to perform is clearly a non sequitur. It is due to a failure to distinguish between a cause of action and a defense; and its incorrectness is demonstrated by the case of *Cort v. Amberbate, etc., Co.*,[16] decided a full year prior to *Hochster v. De la Tour,* and by the same court, the same judge writing the opinion. In that case it was clearly held that a repudiation by one party excused the other party from going on with performance, and authorized him to recover after the time for performance without proof of ability to perform on the date set for performance.

It not infrequently happens in our law that a correct doctrine is established upon an unsound theory; and it has been urged that although Lord Campbell may have been mistaken in his reasons, yet the doctrine of anticipatory breach is justified by practical considerations; that the real damage is done when the repudiation takes place, for it is then that the injured party desires to take steps to protect himself; that sound policy encourages the speedy settlement of controversies between litigants; and that the rule works well in practice. Of course, the damage to the promisee is just as great in unilateral as in bilateral contracts, and in breaches of promises to pay money as of promises to do other acts. Yet the doctrine does not apply here.[17] The damage is also as great where the repudiation is conditional, and where the announcement is not strictly a repudiation, but a statement of practical im-

15. Garberino v. Roberts, (1895) 109 Cal. 125, 41 Pac. 857; Foxley v. Rich, (1909) 35 Utah 162, 99 Pac. 666; Webb. v. Stephenson, (1895) 11 Wash. 342, 39 Pac. 952.

16. (1851) 17 Q. B. 127, 20 L. J. Q. B. 460, 15 Jur. 877.

17. "The opinion of Judge Wells in Daniels v. Newton, [114 Mass. 530] is generally regarded as containing all that could be said in opposition to the decision of Hochster v. De la Tour, and one of the propositions on which the opinion rests is that the adoption of the rule in the instance of ordinary contracts would necessitate its adoption in the case of commercial paper. But we are unable to assent to that view. In the case of an ordinary money contract, such as a promissory note, or a bond, the consideration has passed; there are no mutual obligations: and cases of that sort do not fall within the reason of the rule." Fuller, C. J. in Roehm v. Horst, (1900) 178 U. S. 1, 17, 20 S. Ct. 180, 44 L. Ed. 953.

"The reason why a contract to pay money at a definite time in the future is an exception to the rule is that money is not a commodity which is

possibility of performance. But in neither of these cases is the doctrine applied.[18] Moreover it is said that unless the injured party acts upon the repudiation, it does not constitute a breach, and he must hold or make himself ready to perform at the date set. If he must do so, he certainly has the privilege of doing so; and this brings the doctrine into apparent conflict with the rule requiring the party injured by a breach or repudiation of contract to cease performance where continuing it would increase the damages.[19]

Having regard to the exceptions and peculiarities of the rule, it would seem that it would be difficult to administer, and that practical considerations would not require its establishment or retention. But the fact that courts continue to adopt it after full consideration is a powerful argument for its practical usefulness.[20] It cannot, however, be gainsaid that the doctrine tends to a certain looseness of analysis and reasoning on the part of the courts adopting it. The failure to distinguish between present and anticipatory breaches, apparent in Lord Campbell's opinion, persists in many modern cases. In *Merchants' National Bank v. Continental Building and Loan*

sold and bought in the market and the market value of which fluctuates, as in the case with grain, stocks, and other similar articles." Start, C. J. in Alger-Fowler Co. v. Tracy, (1906) 98 Minn. 437, 107 N. W. 1124.

18. Dingley v. Oler, (1886) 117 U. S. 490, 6 S. Ct. 850, 29 L. Ed. 984; Johnstone v. Milling, (1886) L. R. 16 Q. B. D. 460, 55 L. J. Q. B. 162, 54 L. T. 629, 34 W. R. 238. But see Chamber, etc., v. Sollitt, (1866) 43 Ill. 519.

19. Clark v. Marsiglia, (1845) 1 Denio (N. Y.) 317, 43 Am. Dec. 670; Gibbons v. Bente, (1892) 51 Minn. 499, 53 N. W. 756, 22 L. R. A. 80; Williston's Wald's Pollock on Contracts, 349, note 69. But see Hart-Parr Co. v. Finley, (1915) 31 N. D. 150, 153 N. W. 137, where the court expressly adopts the doctrine of anticipatory breach for the alleged reason that the contrary view is opposed to the rule requiring cessation of performance upon notice.

20. "After a somewhat extended examination of the question, we are of the opinion, and we so hold, upon principle and the weight of judicial authority, that as a rule, if one party to an executory contract, before performance is due, expressly renounces the contract and gives notice that he will not perform it, his adversary, if he so elects, may treat the renunciation as a breach of the contract and at once bring an action for damages. * * * The leading cases to the contrary are Daniels v. Newton, 114 Mass. 530, 19 Am. [Rep.] 384, and Stanford v. McGill, 6 N. D. 536, 72 N. W. 938, 38 L. R. A. 760.

"* * * We adopt the rule laid down by the federal supreme court, for we believe it to be sound in principle; but, even if we were not entirely clear as to its correctness, we should be inclined to follow it, as the question is one of commercial law, which should be uniform so far as practicable." Start, C. J. in Alger-Fowler Co. v. Tracy, (1906) 98 Minn. 432, 435, 438, 107 N. W. 1124. See also Hart-Parr Co. v. Finley, (1915) 31 N. D. 130, 153 N. W. 137, overruling Stanford v. McGill, supra. Browning v. North Missouri Cent. Ry. Co., (Mo. 1916) 188 S. W. 143.

Association,[21] the Circuit Court of Appeals for the Ninth Circuit recently held a voluntary bankruptcy of a building and loan association to be an anticipatory breach of its obligation to repay to its shareholders what they had paid in plus their shares of the profits. Since the Court regarded these amounts as payable on demand, it is clear that the bankruptcy constituted a waiver of the demand, and that no question of anticipatory breach was involved. In like manner the United States Supreme Court in *Central Trust Co. v. Chicago Auditorium Association*,[22] held an involuntary bankruptcy an anticipatory breach of a contract to furnish adequate and satisfactory livery and baggage service during a specified period. Here the bankruptcy ipso facto breached the contract; and the real question was whether the breach amounted to a total breach of the bankrupt's undertaking, which it obviously did.[23]

It is, perhaps, unfortunate that so illogical a rule is so firmly established in our law. But since it is so well established, it would seem desirable that it should be applied to situations where the reasons for its application obtain, and that its arbitrary exceptions be abolished. If a voluntary disability on the part of the promisor will justify the bringing of a premature action, it would seem that an involuntary disability should have the same effect. The fact of disability, rather than its voluntary or involuntary character, should be controlling. Although most, if not all, of the cases lay stress upon the voluntary character of the disability,[24] Mr. Justice Pitney's

21. (1916) 232 Fed. 828.

22. (1916) 240 U. S. 581, 36 S. Ct. 412.

23. Cf. Bowe v. Minnesota Milk Co., (1890) 44 Minn. 460, 47 N. W. 151.

24. "Many cases can be found which support the doctrine that, where one party to a contract announces in advance his intention not to perform, the other party may treat the contract as broken, and sue at once for the breach, without waiting the arrival of the time fixed by the contract for performance. * * *

"It is equally well settled that, if one party to a contract voluntarily disables himself from performing his part of the contract, the other party has an immediate right of action for the breach. * * *

"A third case in which a breach of the contract may be anticipated by the injured party is where the other party, by his unauthorized act prevents performance. * * *

"Aside from any stipulation in the contract of the parties respecting the right of rescission for an anticipatory breach of the contract, we are not aware of any instances which authorize a rescission in anticipation of a breach other than those that may be ranged within the principles of the cases set out above." Lansden, J. in Brady v. Oliver, (1911) 125 Tenn. 595, 147 S. W. 1135. See also 1 Ann. Cas. 422; Ann. Cas. 1913 C, 384; 7 Am. and Eng. Ency. 151; 9 Cyc. 639, 640; 41 L. R. A. N. S. 60, note.

reasoning in the last mentioned case seems to consider that of no importance. He says:

"As was said in *Roehm v. Horst,* 178 U. S. 1. 19: 'The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance, as well as to a performance of the contract when due.' Commercial credits are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done, or omitted to be done by the bankrupt, in violation of his engagement. * * * We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory contract within the doctrine of *Roehm v. Horst,* supra."

It is, of course, possible to argue that even an involuntary bankruptcy is due to the voluntary acts of the bankrupt, and consequently within the ordinary rule. But the reasoning of the court goes farther, and assuming the correctness of the original doctrine, properly extends the rule.

JURISDICTION OF EQUITY TO COMPEL SPECIFIC PERFORMANCE OF CONTRACTS REQUIRING CONTINUOUS ACTS.—It has frequently been said that equity will hesitate to order specific performance of contracts where the execution of the decree requires supervision extending over a long period of time, or calls for a knowledge of technical matters, incident to its performance, which neither the court nor its officers may be expected to possess.[1] The basis for this rule is said to be the inadequacy of the machinery of equity to properly supervise the performance of a contract calling for continuous acts and involving

1. Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co., (1874) L. R. 9 Ch. App. 331 (right given by statute to use defendant's railroad track, the exercise of which by the plaintiff would necessitate the operation by defendant of its signals); Marble Co. v. Ripley, (1870) 10 Wall. (U. S.) 339, 19 L. Ed. 955 (agreement to furnish a perpetual supply of marble requiring the working of a quarry); 36 Cyc. 576, C; 36 Cyc. 584, 5.

details as well as an element of personal service.[2] In the light of recent decisions, however, it is believed that this difficulty has been greatly exaggerated and it is submitted that the jurisdiction of equity to compel specific performance of such a contract depends on the ordinary principle upon which equity takes jurisdiction, namely, the inadequacy of the remedy at law.

The English Courts, recognizing the inadequacy of the legal remedy, early granted specific performance of a contract to build, although this involved personal service, on the theory that performance could be had once for all by a single decree.[3] They refused, however, to decree performance of a contract to repair.[4] By the end of the Eighteenth Century, this distinction had been abandoned and specific performance was denied in both classes of cases.[5] This principle was then applied to all contracts for the performance of a continuous act.[6] The reason assigned for this refusal was the inability of the court to properly enforce its decree.[7] Perhaps the real reason was

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2. Rayner v. Stone, (1762) 2 Eden, 129 (covenant to repair); Lucas v. Comerford, (1790) 1 Ves. Jr. 235, 3 Bro. C. C. 166 (covenant to build); Ross v. Union Pacific Ry. Co., (1863) 1 Woolw. (U. S. C. C.) 26, Fed. Cas. No. 12,080 (agreement to build a railway); Beck v. Allison, (1874) 56 N. Y. 366, 15 Am. Rep. 430 (agreement by lessor to repair damages caused by fire. Treated by the court as a contract to repair but actually amounted to a contract to build).

3. Holt v. Holt, (1694) 1 Eq. Ab. 274, pl. 11, 2 Vern. 322; Allen v. Harding, (1780) 2 Eq. Ab. 17, pl. 6; Pembroke v. Thorpe, (1740) 3 Sw. 437; City of London v. Nash, (1747) 3 Atw. 512. In City of London v. Nash, supra, Lord Hardwicke said, "upon a covenant to build, specific performance (1), otherwise on a covenant to repair; for to build is one entire single thing."

4. Flint v. Brandon, (1803) 8 Ves. Jr. 159. In Lucas v. Comerford, supra, Lord Thurlow pointed out that there was no great difference so far as the court's supervision of performance was concerned between specific performance of a contract to build and one to repair.

5. Lucas v. Comerford, supra.

6. Powell Duffryn Steam Coal Co. v. Taff Vale Ry. Co., supra; Texas, etc., Ry. Co. v. Marshall, (1890) 136 U. S. 393, 10 S. C. R. 846, 34 L. Ed. 385 (semble-agreement by railroad, in consideration of a large gift of land by plaintiff town, to establish its offices and shops there—interest of the public was against the performance of the contract); Strang v. Richmond, etc., Ry. Co., (1900) 101 Fed. 511 (construction of railroad); Port Clinton R. Co. v. Cleveland, etc., R. Co., (1862) 13 Oh. St. 544 (covenant in lease of railroad to operate it); Beck v. Allison, supra.

7. See not 6 supra; Pomeroy, Contracts, 2nd ed., Secs. 307, 312. In Marble Co. v. Ripley, supra, p. 358, the court, per Mr. Justice Strong, said, "If performance be decreed, the case must remain in court forever, and the court to the end of time may be called upon to determine not only whether the prescribed quantity of marble has been

the adequacy of the legal remedy.[8] Accordingly specific performance was allowed where the act to be done was relatively simple and did not extend over a considerable period of time.[9]

This alleged reason for the refusal of a decree broke down, however, where the building was to be built on land conveyed by the plaintiff to the defendant in return for an agreement to build thereon and where a case of real inadequacy of legal remedy was presented. Here the courts allowed specific performance.[10] Another exception to the usual rule was allowed where a right of way through the land of the plaintiff was conveyed to a railroad with an agreement on the part of the railroad company to erect a station or some similar structure on the land conveyed for the benefit of the plaintiff or to stop its trains there to take up and set down passengers and freight.[11] The granting of specific performance in these cases shows that the theory upon which the courts formerly refused

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delivered, but whether every block was from the right place, whether it was sound, whether it was of suitable size, or shape, or proportion. . . . It is manifest that the court cannot superintend the execution of such a decree. It is quite impracticable."

In Port Clinton R. Co. v. Cleveland, etc., R. Co., supra, p. 556, the court, per Mr. Justice Gholson, said, "Even if the contract were sufficiently specific, so that the party when ordered to operate the railroad, would know the manner and mode in which the order was to be obeyed, still the question of obedience to the order must necessarily be left open. And the question of obedience to such an order might come up for solution, not once, but in instances innumerable, and for an indefinite time. Instead of the final order being the end of litigation, it would be its fruitful and continuous source, and that, too, of litigation not in the regular course of judicial proceedings, but irregularly, on a summary application. And such application to be made by either party, one when he conceived there had not been faithful compliance with the order, and the other when exemption from some provision might be claimed, on the ground of inability or unforeseen events."

8. In Errington v. Aynesly, (1788) 2 Bro. C. C. 341, 2 Dick. 692, Sir Lloyd Kenyon, M. R. gave this dictum: "There is no case of a specific performance decreed of an agreement to build an house, because if A will not do it B may. A specific performance is only decreed where the party wants the thing in specie and cannot have it in any other way."

9. Hepburn v. Leather, (1884) 50 L. T. R. 660 (to build a wall on the land of the plaintiff); Jones v. Parker, (1895) 163 Mass. 564, 40 N. E. 1044, 47 Am. St. Rep. 485 (agreement by lessor to put into a building apparatus to heat and light it).

10. Mayor, etc. of Wolverhampton v. Emmons, [1901] 1 K. B. 515; Stuyvesant v. Mayor, etc. of New York, (1845) 11 Paige (N. Y.) 414 (to improve and maintain land as a public square); Fry, Specific Performance, 4th ed., Sec. 103.

11. Storer v. Great Western Ry. Co., (1842) 2 Y. & C. C. C., 48 (to construct and forever maintain an archway); Hood v. Northeastern Ry. Co., (1869) L. R. 8 Eq. 666 (to maintain a station where trains should

it was without foundation.[12] Of course specific performance may in the discretion of the court be refused where it would be injurious to the interests of the public to grant it.[13] This phase of the question may properly be taken care of by a conditional decree.[14] Certainly the reason formerly assigned has not deterred the courts from granting a decree of specific performance in recent cases involving continuous acts.[15] In the last decade, courts of equity have made a very wide departure from the old rule and have specifically enforced railway operating contracts and contracts of a similar nature whose performance extended over very long periods of time and involved numerous details.[16]

While these cases of railway operating contracts may be considered exceptional in that the courts were impelled to grant specific performance by the interest of the public in their performance and it may be argued, therefore, that they form an exception to the usual rule founded upon the rights of the public rather than those of the plaintiff, they certainly show that such contracts are not beyond the power of a court of

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be stopped for the purpose of taking up and setting down passengers); Lawrence v. Saratoga Lake Ry. Co., (1885) 36 Hun (N. Y.) 467 (overhead crossing and railroad station where trains should be S. E. 617 (freight and passenger depot). Contra, Blanchard v. Detroit, stopped); Murray v. Northwestern R. Co., (1902) 64 S. C. 520, 42 etc., R. Co., (1874) 31 Mich. 43, 18 Am. Rep. 142 (semble—to build a depot and stop trains thereat to take up and set down passengers and freight).

12. Prospect Park, etc., R. Co. v. Coney Island, etc., R. Co., (1894) 144 N. Y. 152, 39 N. E. 17, 26 L. R. A. 610 (agreement to run horse cars).

13. Conger v. New York, etc., R. Co., (1890) 120 N. Y. 29, 23 N. E. 983 (agreement by railroad in return for a grant of a right of way to locate a station on the land of the plaintiff and stop its trains thereat); Parrott v. Atlantic, etc., R. Co., (1914) 165 N. C. 295, 81 S. E. 348.

14. Harper v. Virginian Ry. Co., (W. Va. 1915) 86 S. E. 919.

15. Wolverhampton Co. v. London Co., (1873) L. R. 16 Eq. 433; Prospect Park, etc., R. Co. v. Coney Island, etc., R. Co., supra.

16. Joy v. St. Louis, (1890) 138 U. S. 1, 11 S. C. R. 243, 34 L. Ed. 843 (to give trackage rights); Franklin Tel. Co. v. Harrison, (1891) 145 U. S. 459, 12 S. C. R. 900, 36 L. Ed. 776 (contract of a telegraph company to allow use of its wire); Union Pac. Ry. Co. v. Chicago, etc., Ry. Co., (1896) 163 U. S. 564, 16 S. C. R. 1173, 41 L. Ed. 265 (contract of railroad to allow use of tracks and bridges for 999 years and to make schedules); Schmidt v. Louisville, etc., Ry. Co., (1897) 101 Ky. 441, 19 Ky. L. Rep. 666, 41 S. W. 1015, 38 L. R. A. 809 (railroad operating contract extending over thirty years); So. Ry. Co. v. Franklin, etc., R. Co., (1899) 96 Va. 693, 32 S. E. 485, 44 L. R. A. 297 (implied covenant to run a leased railroad, the lease having one half of its term, eight and a half years, to run).

equity to superintend. If these cases are to be considered as another arbitrary exception to the former rule, it must be admitted that that rule has been so perforated with exceptions as to amount to an abandonment of it. Moreover, the objection that the contracts called for continuous acts, have been specifically disposed of by the courts.[17]

Nor have these recent cases been confined to railway operation contracts alone. They have included cases of commercial contracts where the remedy at law was inadequate. They indicate that the interest of the public is not essential to a decree of specific performance.[18] A recent decision of the supreme court of Pennsylvania is in line with the tendency of modern decisions. An electric power company leased its plant and system for ninety-nine years at a stipulated rental, with covenants on the part of the lessee to maintain and preserve the building and general efficiency of the plant during the continuance of the lease. The lessee, with the consent of the lessor, assigned to the defendant who undertook the per-

17. Joy v. St. Louis, supra; Union Pac. Ry. Co. v. Chicago, etc., Ry. Co., supra. In Joy v. St. Louis, supra, p. 47, the court, per Mr. Justice Blatchford, said: "In the present case, it is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash Company for the running of trains upon its tracks by the Colorado Company. But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver. Irrespectively of this, the decree is complete in itself and disposes of the controversy; and it is no unusual thing for a court of equity to take supplemental proceedings to carry out its decree to make it effective under altered circumstances." In Union Pac. Ry. Co. v. Chicago, etc., Ry. Co., supra, p. 601, the court, per Mr. Chief Justice Fuller, said: "It must not be forgotten that in the increasing complexities of modern business relations equitable remedies have necessarily and steadily expanded, and no inflexible rule has been permitted to circumscribe them."

18. Texas Co. v. Central Fuel Oil Co., (1912) 194 Fed. 1, 114 C. C. A. 21 (agreement to run oil into plaintiff's pipe line, to be paid for by plaintiff according to a contract); Indianapolis Northern Traction Co. v. Essington, (1912) 54 Ind. App. 286, 99 N. E. 757 (agreement contained in a right of way deed to construct and maintain an overhead crossing); Owens v. Carthage, etc., Ry. Co., (1905) 110 Mo. App. 320, 85 S. W. 987 (agreement contained in a right of way deed whereby railroad company agreed to construct an underway for the benefit of the plaintiff). Contra—Brown & Sons v. Boston & Maine Ry. Co.,(1909) 106 Me. 248 (agreement contained in a right of way deed to construct and always maintain an overhead crossing); Lone Star Salt Co. v. Texas Short Line Ry. Co., (1906) 99 Tex. 434, 90 S. W. 863, 3 L. R. A. (N. S.) 828. The case of Brown & Sons v. Boston & Maine Ry. Co., supra, might be explained on the ground that the specific performance of the defendant's agreement would impose an unnecessary burden on it with absolutely no benefit to the plaintiff. Performance would be nugatory owing to the circumstances of the case. Lone

formance of all the covenants of the lease. Defendant failed to perform these covenants and plaintiff filed its bill to compel the defendant to do so. *Held,* that plaintiff was entitled to a decree of specific performance. *Edison Illuminating Co. v. Eastern Pennsylvania Power Co.*[19] While the court relied on the fact that the plaintiff was a public service corporation and that, therefore, the interest of the public weighed in favor of specific performance, it does not seem that this element was very strong as the decree was not that the plant should be operated but only that it should be preserved and its general efficiency maintained and restored by the replacement of property.

Some of the recent cases have denied specific performance of contracts calling for the performance of continuous acts.[20] However, many of these decisions may be sustained on the ground of the adequacy of the legal remedy.[21] Certainly the trend of modern decisions is toward an extension of the supervisory power of courts of equity to cases which would formerly have been considered beyond its scope. This expansion of equitable remedies to meet the increasing complexities of modern business relations is not only serviceable but justified by the inherent elasticity of chancery powers.

Star Salt Co. v. Texas Short Line Ry. Co., supra, reversed the decision of the same case in the Texas Court of Civil Appeals, (1905) (86 S. W. 355). The defendant agreed to ship 66 per cent of its freight over the line of the plaintiff in return for the latter building its line to defendant's plant. The decision of the higher court leaves considerable force in the decision of the Court of Civil Appeals for the decision of the Supreme Court was based on the grounds that there was no breach of the contract, that if there was a breach damages were a sufficient remedy, and that the contract was so indefinite that specific performance could not be decreed.

19. (Pa. 1916) 98 Atl. 652.

20. Pantages v. Grauman, (1911) 191 Fed. 317 (agreement whereby plaintiff agreed to see to it that an amusement company should have the first call on vaudeville acts booked in a city by a theater company); Crane v. Roach, (Cal. 1916) 156 Pac. 375 (building contract); Beckham v. Munger Oil & Cotton Co., (Tex. Civ. App. 1916) 185 S. W. 991 (maintain a gin plant).

21. Blue Point Oyster Co. v. Haagenson, (1913) 209 Fed. 278 (contract to furnish oysters for 20 years, having 16 years still to run. It did not appear that the oysters to be furnished were of peculiar value or that the legal remedy was inadequate). City of Pittsburgh v. Pittsburgh Ry. Co., (1912) 234 Pa. St. 193, 83 Atl. 67 (specific performance of contract based on ordinances to repair streets refused).

ADVERSE POSSESSION OF MINERALS.—The question of adverse possession of minerals apart from adverse possession of the surface is not an old one, having come into prominence at a comparatively recent date. It was early decided that minerals beneath the surface might be made the subject of a separate conveyance.[1] And the result of such a conveyance was a severance of the two estates, that part of the land consisting of minerals becoming a separate estate as distinct from the surface.[2] This having been decided, the first question that arose was whether adverse possession of the surface carried with it possession of the minerals when there had been no such severance and it was unanimously held that it did.[3] The converse of this proposition is also true, namely, that where there has been a severance of the two estates before disseisin, adverse possession of the surface, no matter how long continued, can have no effect on the ownership of the mineral rights.[4] After a severance, title to the minerals can be acquired by adverse possession, but this can take place only where there is actual possession of the minerals and where the mining operations are actual, continuous, and independent of the possession of the surface.[5]

The most recent question that has arisen in regard to this subject is the effect of an attempted severance by a disseisor, the conveyance being made before the running of the statute of limitations, to a grantee who does not begin mining operations or otherwise take possession of the minerals. The first case on this point. *Murray v. Allred*,[6] decided that such a conveyance of the mineral rights severed the minerals and that the disseisor's subsequent possession of the surface did not extend to the minerals after such severance. Consequent-

1. Caldwell v. Fulton, (1858) 31 Pa. 475, 72 Am. Dec. 760.

2. Caldwell v. Copeland, (1860) 37 Pa. St. 427, 78 Am. Dec. 436.

3. Caldwell v. Copeland, supra; Delaware & Hudson Canal Co. v. Hughes, (1897) 183 Pa. St. 66, 38 Atl. 568, 38 L. R. A. 826, 63 Am. St. Rep. 743.

4. Catlin Coal Co. v. Lloyd, (1899) 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216; Arnold v. Stevens, (1839) 24 Pick. (Mass.) 106, 35 Am. Dec. 305; Wallace v. Elm Grove Coal Co., (1905) 58 W. Va. 449, 52 S. E. 485, 6 Ann. Cas. 140.

5. Gill v. Fletcher, (1906) 74 Oh. St. 295, 78 N. E. 433, 113 Am. St. Rep. 962; Gordon v. Park, (1907) 202 Mo. 236, 100 S. W. 621, 119 Am. St. Rep. 802.

6. (1897) 100 Tenn. 100, 43 S. W. 355, 39 L. R. A. 249, 66 Am. St. Rep. 740.

ly, where the grantee did not go into possession, the right to the minerals reverted to the original owner. However, this case was overruled by the case of *McBurney v. Coal & Coke Co.*,[7] decided by a divided court. The argument of the majority of the court was that where such an attempted conveyance of the mineral rights was made by warranty deed and the grantor's possession of the surface continued for the statutory period, such possession inured to the benefit of the grantee. The conveyance, said the court, did not effect a severance, but transferred only what the grantor had, the right to acquire title. Thus the continued possession of the surface by the grantor was a possession of the minerals underlying, and when he had perfected the title in himself, it passed immediately to the grantee by virtue of the warranty deed. The later case of *Black Warrior Coal Co. v. West*[8] arrived at the same result although on a different theory. It was there decided that the conveyance severed the estates, and that the grantor who remained in possession of the surface was a tenant at sufferance of the minerals for the benefit of the grantee. The court cited *McBurney v. Coal & Coke Co.*, supra, but disapproved its reasoning. The latest word on this subject is contributed by the case of *Northcut v. Church*,[9] recently decided by the Supreme Court of Tennessee. It specifically overrules *McBurney v. Coal & Coke Co.*, supra, formerly decided by that court and reinstates *Murray v. Allred*, supra. The court says that it makes no difference whether the attempted conveyance of the mineral rights severs the estates or not. In either case the possession of the grantor ceases to be adverse so far as the minerals are concerned and they revert to the original owner.

The doctrine of this last case seems more consistent with well established principles of law than that of either of the two earlier cases cited which took an opposite view. It is more logical to say that the disseisor severs the two estates by his conveyance of the mineral rights before the running of the statute. For should his grantee begin mining operations, he ripens his title by his own adverse holding and does not then rely on any further possession by the holder of the surface. In the case of adverse possession of the surface only, where

7. (1908) 121 Tenn. 275, 118 S. W. 694.
8. (1910) 170 Ala. 346, 54 So. 200.
9. (Tenn. 1916) 188 S. W. 220.

the disseisor conveys away a part only of the land and neither makes any further claim to that tract nor continues to occupy it, he has severed it and the grantee must go into possession or it will revert to the original owner. Hence, where the grantee of mineral rights does not go into possession he is forced to rely on the possession of the adverse holder of the surface to perfect his title to the mineral rights. However, as the estates have been severed, possession of the surface ceases to be possession of the minerals, as decided by an unbroken line of authorities.[10] Thus, there being no one in adverse possession of the minerals, possession reverts to the original owner. It has been held, it is true, that the owner cannot by a deed purporting to convey the minerals, so sever them as to interfere with an adverse possession of the land and use the deed as a reentry.[11] But that is manifestly different from the case of one in actual possession deeding away the mineral rights. It seems, therefore, that such a conveyance by the disseisor should operate as a severance of the estates and that the title to the minerals should revert to the owner under the circumstances supposed. However, if it be said that the attempted conveyance does not sever the estates, as the disseisor's possession is under a claim that does not embrace the minerals, it cannot be said to be adverse to the true owner, as to the mineral rights. The disseisor no longer claims any right in them and has abandoned possession of them by his conveyance. Where the question of adverse possession arises, all presumptions are in favor of the true owner,[12] and any fiction of law which gives the advantage to one claiming under an adverse holding, is a departure from this well settled principle. The doctrine of *Northcut v. Church,* supra, gives effect to this presumption and reaches a result which is satisfactory both in its logic and in its protection of the rights of owners of property.

10. Note 4, supra.

11. Finnegan v. Stineman, (1897) 5 Pa. Super. Ct. 124, 28 Pittsb. Leg. J. (N. S.) 68.

12. Welcker v. Staples, (1889) 88 Tenn. 49, 12 S. W. 340, 17 Am. St. Rep. 869; Sydnor v. Palmer, (1871) 29 Wis. 226.

RECENT CASES

CHARITIES—CHARITABLE INSTITUTION—LIABILITY FOR TORTS OF EMPLOYEES.—Defendant, a hospital organized and maintained with donated funds, cared for all sick, charging those who were able to pay and treating free of charge those who were not. Plaintiff, a patient who was charged for treatment, was injured through the negligence of a nurse by being burned with a hot water bottle while under the influence of anaesthetics. *Held,* the defendant is a charitable institution and, therefore, not liable for the negligence of its employees in the absence of primary negligence on its part in hiring them. *Bishop Randall Hospital v. Hartley,* (Wyo. 1916) 160 Pac. 385. There was a similar holding in another recent case. *Morrison v. Henke,* (Wis. 1916) 160 N. W. 173.

The following cases arising upon the same facts accord exactly with the instant cases, and charitable institutions are held not liable either to patients, servants, or strangers. *Adams v. University Hospital,* (1907) 122 Mo. App. 675, 99 S. W. 453; *Ward v. St. Vincent's Hospital,* (1898) 23 N. Y. Misc. 91, 50 N. Y. Supp. 466; *Conner v. The Sisters of the Poor of St. Francis,* (1900) 7 Ohio N. P. 514. This rule is established by the great weight of authority. Many reasons are given, e. g., that there is an implied agreement on the part of the patient that the corporation shall not be liable. *Powers v. Massachusetts Homoeopathic Hospital,* (1901) 109 Fed. 294. That the donations to the hospital are given in trust for a certain purpose from which they can not be diverted. *Downes v. Harper Hospital,* (1894) 101 Mich. 555, 16 N. W. 42. That the rule of respondeat superior does not apply to charitable institutions, as the employer derives no private gain from the servant. *Hearns v. Waterbury Hospital,* (1895) 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224. That it is against public policy to allow such an action against a charitable institution. *Whittaker v. St. Luke's Hospital,* (1909) 137 Mo. App. 116, 117 S. W. 1189.

Several states, however, have refused to exempt charitable institutions from liability for the acts of their employees. Thus, a public hospital was held liable for the negligence of its attending surgeon, though defendant was not negligent in its selection. *Glavin v. Rhode Island Hospital,* (1879) 12 R. I. 411, 34 Am. Rep. 675. The rule of this case was later changed by statute. Ch. 177, Sec. 38, *General Laws of Rhode Island,* 1896. The Alabama supreme court has held a charitable institution liable for the negligence of its employees. *Tucker v. Mobile Infirmary Association,* (1915) 191 Ala. 572, 68 So. 4, L. R. A. 1915D, 1167. There is a strong dissenting opinion in this case. The above two cases stand alone in holding absolute liability and rejecting the reasons for holding otherwise mentioned above. The following cases hold that the corporation is liable to strangers injured by neglect of

its servants, but not to beneficiaries of its charity. *Bruce v. Central Methodist Episcopal Church,* (1907) 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150; *Hordern v. Salvation Army,* (1910) 199 N. Y. 233, 92 N. E. 626, 32 L. R. A. (N. S.) 62, 139 Am. St. Rep. 889; *Basabo v. Salvation Army,* (1912) 35 R. I. 22, 85 Atl. 120, 42 L. R. A. (N. S.) 1144. In New Hampshire such a corporation has been held liable to its servants. *Hewett v. Woman's Hospital Aid Ass'n,* (1906) 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N. S.) 496. Minnesota has held that a charitable institution is liable to its servants for injuries caused by its neglect to provide proper guard for a mangle, in violation of statute, on the ground that such a duty is by force of statute absolute and undelegable. *McInerny v. St. Luke's Hospital Ass'n of Duluth,* (1913) 122 Minn. 10, 144 N. W, 837, 46 L. R. A. (N. S.) 548; *Maki v. St. Luke's Hospital Ass'n,* (1913) 122 Minn. 444, 142 N. W. 705. New York has approved of this doctrine. *Kellogg v. Church Charity Foundation,* (1908) 128 N. Y. App. Div. 214, 112 N. Y. Supp. 566. The decision of the principal case is almost universal law, but it must be admitted that the reasons upon which the decisions rest are not compelling.

CONSTITUTIONAL LAW—INTERSTATE COMMERCE—INTOXICATING LIQUORS —WEBB-KENYON ACT—STATE LAW PROHIBITING SHIPMENTS FOR PERSONAL USE.—A statute of West Virginia prohibited not only the sale of intoxicating liquor, but also the shipment of such liquor for personal use, and solicitations for such purchases, and declared the place of delivery the place of sale. An interstate carrier having refused to accept liquor for shipment to persons within from a point without the state upon the ground that it would be a violation of the law of the state, *Held,* the Act of Congress known as the Webb-Kenyon Law (Act of March 1, 1913, 37 Stat. 699) divesting intoxicating liquors of their interstate character, and prohibiting the shipment or transportation of such liquors "from one state * * * into any other state * * * which said * * * intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original packages or otherwise, in violation of any law of such state * * * ", is constitutional, the state law is also constitutional, and an injunction sought to restrain the carrier from refusing to accept the liquor for shipment must be refused. *James Clark Distilling Co. v. Western Maryland Ry. Co.,* (U. S. Sup. Ct., Jan. 8, 1917).

The validity of the state law depended upon whether or not it was repugnant to the commerce clause of the constitution. It was not repugnant if the Webb-Kenyon Law is valid. The plaintiff claimed that the Act of Congress only forbade the shipment, receipt, and possession of liquor for a forbidden use; that individual use was not forbidden by the state law, and therefore the shipment, receipt, or possession for such use was not embraced by the Webb-Kenyon Law, and the state law, so far as it was outside of that Act, was repugnant to the commerce clause. White, C. J., announcing the opinion of the court, shows that the only purpose of the Act was to give effect to existing and future state prohibitions, not to compel states to prohibit personal use, and that the meaning sought to be affixed to the Act, if accepted, would have the effect of compelling the

states to prohibit personal use, since otherwise all their prohibitory laws would be easily evaded. The evil arising from the admitted right to ship liquor into a state and there sell it in the original package in violation of state prohibitions led to the enactment of the Wilson "Original Package" Law (Aug. 8, 1890, 26 Stat. 313) permitting the prohibition by a state of the sale of liquor in the original package even though brought in through interstate commerce. The Webb-Kenyon Law was enacted simply to extend the scope of the Wilson Act, that is, to prevent the evasion of the state laws under the immunity characteristic of interstate commerce.

In the case of *Adams Express Company v. Kentucky*, (1915) 228 U. S. 190, 35 S. C. R. 824, it was held that as the court of last resort of Kentucky had held that the state statute did not forbid the shipment and receipt of liquor for personal use, therefore the Webb-Kenyon Act did not apply, since it only applied to things which the state law prohibited. In the present case the court holds that the Webb-Kenyon Act "did not simply forbid the introduction of liquor into a state for a prohibited use, but took the protection of interstate commerce away from all receipt and possession of liquor prohibited by state law."

This being the effect of the Act, is it constitutional? In spite of the contrary opinion of the Attorney General (30 Op. A. G. 88), and of President Taft (Veto Message, 49 Cong. Rec., 4291), the Supreme Court answers the question in the affirmative, two justices dissenting. Congress might unquestionably have prohibited the shipment of all intoxicants in the channels of interstate commerce. *Lottery Case*, (1903) 188 U. S. 321, 23 S. C. R. 321; *Hoke v. United States*, (1913) 227 U. S. 308, 33 S. C. R. 281. The question therefore is not one of power but of method. The precise issue is, whether the power to regulate embraces the power to transfer the whole subject of regulation to the states; thereby seemingly abdicating the control over interstate commerce, and introducing a want of uniformity. The Court therefore must hold that, in the execution of its power to regulate, Congress may adopt whatever regulation the states choose to provide. This was the difficulty encountered in upholding the Wilson Act. *In re Rahrer*, (1891) 140 U. S. 545, 11 S. C. R. 865. The want of uniformity thus presented is not, however, greater than that existing under the Bankrupt Law, which adopts the exemptions provided by the laws of the states, but is not on that account lacking in uniformity. *Hanover National Bank v. Moyses*, (1902) 186 U. S. 181, 22 S. C. R. 857. In *Leisy v. Hardin*, (1890) 135 U. S. 100, 10 S. C. R. 681, it was declared that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movements to state prohibitions, and that case contained repeated intimations that Congress may, if it pleases, remove the restriction upon the state in dealing with imported articles, which have not been mingled with the common mass of property therein, if in its judgment the end to be secured justifies and requires such action. This ruling must have been in the mind of Congress in enacting the Wilson Law. The spirit of the two Acts being identical, it is obvious that the Court could not hold the Webb-Kenyon Law unconstitutional without reversing *Leisy v. Hardin* and *In re Rahrer*.

If Congress has the power to forbid the movement of intoxicants in interstate commerce, it must be clear that it has the power to make it

impossible for one state to violate the prohibitions of the laws of another through the channels of interstate commerce. Considering the dual character of the American constitutional system, Congress, in the regulation of interstate commerce, may properly preserve the rights of both governments. It seems from this decision, that any legislation which the states may hereafter think proper to adopt for the suppression of the liquor traffic, within the scope of the police power, will run no risk of conflict with the commerce clause of the constitution.

CONTRACTS—ANTICIPATORY BREACH BY BANKRUPTCY.—A hotel company and a transfer company entered into a contract whereby the latter for sufficient consideration agreed to furnish the former and its guests adequate and satisfactory livery and baggage service during a specified period. Before the expiration of the period, the transfer company became an involuntary bankrupt. *Held,* that the hotel company's claim for damages occasioned by the breach covering the entire life of the contract is provable. *Central Trust Co. v. Chicago Auditorium,* (1916) 240 U. S. 581, 36 S. C. R. 412.

This decision settles a question not heretofore passed upon by the United States Supreme Court and as to which the other Federal Courts were in conflict. *In re Swift,* (1901) 112 Fed. 315, 319, 321; *In re Inman & Co.,* (1909) 171 Fed. 185.

The shareholders of a building and loan association had the right to withdraw from the association at any time and to receive what they had paid in plus their shares of the profits minus the penalties imposed for withdrawals. *Held,* applying the doctrine of *Central Trust Co. v. Chicago Auditorium,* supra, that the voluntary bankruptcy of the association constituted an anticipatory breach of its obligations to its shareholders, and made their claims for such breach provable in the bankruptcy proceedings. *Merchants' National Bank v. Continental Building & Loan Association,* (1916) 232 Fed. 828.

For a discussion of the doctrine of anticipatory breach, see NOTES, p. 163.

CORPORATIONS—ISSUES—CORPORATE EXISTENCE—GENERAL DENIALS.—Plaintiff, a foreign corporation, sued for goods sold and delivered. The complaint alleged that it was a corporation. The answer specifically denied this. The plaintiff offered no proof on the question, nor did the defendant. The trial court dismissed the action at the close of the plaintiff's testimony. *Held,* judgment must be reversed, for the fact of incorporation was not material and need not have been proved. *Moorman Mfg. Co. v. Haack,* (Minn. 1916) 160 N. W. 258.

Minn. G. S. 1913, Sec. 7774, provides that, "In actions by or against a corporation, domestic or foreign, it shall be a sufficient averment of its incorporation to allege, in substance, that the party is a corporation duly organized and existing under the laws of the designated state, country, or place. And unless the adverse party shall specifically aver that the plaintiff or defendant is not a corporation, no proof thereof shall be required at the trial." This section may be found in its present form in *Minn.* G. L. 1876, Chap. 32 and G. L. 1877, Chap. 25. Under it the court

has held that the corporate existence of a party need not be alleged in an action by or against it, unless the corporate existence is the substance of the action, as in an action for stock assessments, etc. *Holden v. Great Western Elevator Co.*, (1897) 69 Minn. 527, 72 N. W. 805, 65 Am. St. Rep. 585; *Hollister v. United States Fidelity & Guaranty Co.*, (1901) 84 Minn. 251, 87 N. W. 776. And this is the general rule. A minority hold the contrary. *Miller v. Pine Mining Co.*, (1892) 2 Idaho 1206, (3 Idaho 493), 31 Pac. 803, 35 Am. St. Rep. 289, and note; *Citizen's Bank v. Corkings*, (1897) 9 S. D. 614, 70 N. W. 1059, 62 Am. St. Rep. 891. In the principal case the court holds the averment of incorporation immaterial and, as a matter of substance, it obviously is so. But clearly, if the plaintiff were an unincorporated association, it could not sue in its associate name. *St. Paul Typothetae Co. v. St. Paul Bookbinders' Union*, (1905) 94 Minn. 351, 102 N. W. 725. Therefore, if the issue were raised by the pleadings, it would challenge plaintiff's capacity to sue. Ordinarily an issue is not raised by the denial of an unnecessary averment of the complaint. *First National Bank of Shakopee v. Strait*, (1898) 71 Minn. 69, 73 N. W. 645, semble. But our supreme court has held otherwise as to denials of allegation of good reputation in actions of libel and slander and of contributory negligence. *Dennis v. Johnson*, (1891) 47 Minn. 56, 49 N. W. 383; *Hill v. Minneapolis Street Ry. Co.*, (1910) 112 Minn. 503, 128 N. W. 831, semble, and cases therein cited. Under the terms of the statute it would seem that the pleadings in the principal case raised the issue of plaintiff's capacity to sue. But the mere raising of the issue did not shift the burden of proof or the burden of going forward with the evidence. *Hill v. Minneapolis Street Ry. Co.*, supra. Proof of the dealings of the defendant with the plaintiff under a company name, and the ordinary presumption of the capacity of a plaintiff to sue would put upon the defendant the burden at least of going forward with the evidence of lack of such capacity. *Johnston Harvester Co. v. Clark*, (1883) 30 Minn. 308, 15 N. W. 252. Consequently, whether the burden of proof of corporate capacity was upon the plaintiff, or the defense be regarded as a plea in abatement with the burden of proof upon the defendant, the result reached by the court seems inevitable, although contrary to a decision of the Supreme Court of Nebraska. *Davis v. Nebraska National Bank*, (1897) 51 Neb. 401, 70 N. W. 963.

COVENANTS—BUILDING RESTRICTIONS—SINGLE DWELLING.—A deed conveying a lot to defendants contained a covenant that the grantee should not build upon the property "any building or structure except a single detached dwelling house to cost not less than $10,000." *Held*, this did not prohibit the erection of a flat or apartment building. *Voorhees v. Blum*, (Ill. 1916) 113 N. E. 593.

The court went upon the ground that where such a term as "dwelling house" has a settled legal meaning its consruction is not open to oral evidence. Both the English and American courts disagree upon the interpretation of this and similar terms in restrictive building covenants. Those courts which are in accord with the principal case in allowing the erection of apartment houses under a covenant to erect none save a single detached dwelling, or a like restriction, base their decisions for the most

part upon the ground that the covenant was designed to prevent plural structures rather than plural users. *Kimber v. Adman,* [1900] 1 Ch. 412, 82 L. T. N. S. 136, 16 T. L. R. 207; *Hutchinson v. Ulrich,* (1893) 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391; *Pank v. Eaton,* (1905) 115 Mo. App. 171, 89 S. W. 586. This interpretation is supportable on the principle that all doubt should be resolved in favor of the free use of land. *Schoomaker v. Heckster,* (1916) 157 N. Y. Supp. 75, 171 App. Div. 148; *Hunt v. Held,* (1914) 90 Ohio St. 280, 107 N. E. 765. In these decisions the courts have held that such terms as "dwelling house" have settled legal meanings and that oral evidence of the practical construction given them is therefore inadmissible. *Reformed Church v. Building Co.,* (1915) 214 N. Y. 268, 118 N. E. 444; *Johnson v. Jones,* (1914) 244 Pa. 386, 90 Atl. 649, 52 L. R. A. (N. S.) 325. The courts which hold that such structures violate the restrictive provisions of the covenants attempt to construe them according to the intent of the parties. Prohibitions against the erection of any buildings other than for the use and purposes of private dwellings have been construed as intended to preserve the private and residential character of the property and therefore as violated by the erection of flats for two or more families. *Skillman v. Smatheurst,* (1898) 57 N. J. Eq. 1, 40 Atl. 855; *Koch v. Gorruvo,* (1910) 77 N. J. Eq. 172, 75 Atl. 767; *Levy v .Schreyer,* (1898) 50 N. Y. Supp. 584, 27 App. Div. 282. There are numerous cases which hold that a covenant that no more than one dwelling shall stand upon a certain lot is violated by the erection of residential flats, double houses or apartments. *Rogers v. Hosegood,* [1900] 2 Ch. 388, 87 L. T. N. S. 186, 16 T. L. R. 489; *Ilford Park Estates, Ltd. v. Jacobs,* [1903] 2 Ch. 522, 89 L. T. N. S. 295, 19 T. L. R. 574; *Schadt v. Brill,* (1913) 173 Mich. 647, 139 N. W. 878, 45 L. R. A. (N. S.) 726; *Bringham v. Mulock Co.,* (1908) 74 N. J. Eq. 287, 70 Atl. 185. A covenant that "only one single dwelling" should be erected on the premises, as in the instant case, was construed to refer to the use and not to the structure and was held to be violated by the erection of a building to accommodate three families in severalty. *Gillis v. Bailey,* (1850) 21 N. H. 149. While, perhaps, not following strictly the principle that all doubt should be resolved in favor of the free use of land, this interpretation would seem to do less violence to the actual intention of the parties than the doctrine of the principal case.

EVIDENCE—EVIDENCE AT FORMER TRIAL—IDENTITY OF PARTIES.—Plaintiff's son was injured by being run over by defendant's train. In an action by the plaintiff to recover in his own behalf for loss of the son's services and sums paid out for treating the injuries, he attempted to introduce testimony of a witness who had testified at a previous action brought by the plaintiff as natural guardian of his son, said witness having since died. *Held,* the testimony was admissible. *Palon v. Great Northern Ry. Co.,* (Minn. 1916) 160 N. W. 670.

The general rule is that testimony of a deceased witness is admissible in the trial of a subsequent suit, provided the matters in issue are the same, and the action is between the same parties or their privies. *Yale v. Comstock,* (1873) 112 Mass. 267; *Morehouse v. Morehouse,* (1886) 17 Abb. N. C. (N. Y.) 407, 41 Hun 146; 2 *Wigmore, Evidence,* Sec. 1386. The reason for the above rule is that in order to give the evidence credi-

bility there must be proper opportunity for cross-examination of the witness. *Turnley v. Hanna,* (1886) 82 Ala. 139, 2 So. 483; *Willsen v. Metropolitan Street R. Co.,* (1904) 95 N. Y. App. Div. 388, 88 N. Y. Supp. 597. Generally, the term "privies" within this rule means persons claiming under former parties to the litigation. *Morgan v. Nicholl,* (1886) L. R. 2 C. P. 117, 36 L. J. C. P. 86, 15 L. T. 184. The courts, however, are not agreed when it comes to the general application of the rule. The more liberal courts seem to say that, where the same person is named as plaintiff, either beneficial, formal, or representative, in actions, both of which grow out of the same personal injury, there is such identity of issues and parties as to render the testimony in the former case admissible. *Minea v. St. Louis Cooperage Co.,* (1913) 179 Mo. App. 705, 162 S. W. 741; *Lyon v. Rhode Island Co.,* (R. I. 1915) 94 Atl. 893, L. R. A. 1916A, 983; contra, *Fearn v. West Jersey Ferry Co.,* (1891) 143 Pa. 122, 22 Atl. 708, 13 L. R. A. 366 (but the injury was to two different persons). To the same effect, it has been held that the test of admissibility of this kind of evidence should be identity of issues and practical or representative identity of parties, together with a full cross-examination in the former action. *Hartis v. Charlotte Electric Ry. Co.,* (1913) 162 N. C. 236, 78 S. E. 164, Ann. Cas. 1915A 811; *St. Louis, etc., R. Co. v. Hengst,* (1904) 36 Tex. Civ. App. 217, 81 S. W. 832. The instant case comes within the spirit of these decisions. Following this liberal interpretation of the general rule above stated, some courts, probably a majority of them, hold that the requirement that the question at issue be the same in both cases does not require that all issues in the two cases shall correspond, but is satisfied if the evidence relates to material issues that are substantially the same in both actions. *Walkerton v. Erdman,* (1894) 23 Can. S. C. 352; *Atlantic, etc., R. Co. v. Venable,* (1881) 67 Ga. 697; *Hartis v. Charlotte Electric Ry. Co.,* supra. But there are a number of cases which apply the rule strictly and require that all issues in the two cases correspond. *Oliver v. Louisville etc., R. Co.,* (1895) 17 Ky. L. Rep. 840, 32 S. W. 759; *Murphy v. New York, etc., R. Co.,* (1844) 31 Hun (N. Y.) 358. What appears to be the full extent of the strict application of this rule was reached when the issues were held to be so changed upon the interposing of an additional defense in the second action as to make some of the testimony given in the first action inadmissible. *Hooper v. Southern Ry. Co.,* (1900) 112 Ga. 96, 37 S. E. 165. But it is submitted that the case is unnecessarily narrow, for the testimony offered in no way related to the new defense, while it was in point on other material issues which were common to both actions. It has been suggested that the more liberal application of the rule is desirable whenever the testimony was given upon such issues that the parties in the former case had the same interests and motives in cross-examination as the present opponent. 2 *Wigmore, Evidence,* Sec. 1388. This view has been at least partially accepted. *Lyon v. Rhode Island Co.,* supra. This case was cited with approval by the instant case. As long as the real basis of the rule, that there must be an opportunity for cross-examination and confrontation, is kept clearly in view, there can be little danger in adopting the view of the instant case, while in many cases it may aid justice materially. *Illinois Steel Co. v. Muza,* (Wis. 1916) 159 N. W. 908.

FRAUDS—ACTIONS—MEASURE OF DAMAGES.—Plaintiff sued defendant for damages because of fraudulent misrepresentations as to the value of land, sold by defendant to plaintiff. *Held,* the correct measure of damages is the difference between the price paid and the actual market value of the land at the time of purchase. *Nupen et al. v. Pearce,* (C. C. A. 8th Cir., 1916) 235 Fed. 497.

The rules applicable to the measure of damages in cases such as the above may be stated as follows: First, the defrauded vendee shall recover the difference between the actual value of the property at the time of the purchase and its value as it would have been, had the representations been true. This is the usual rule. *Morse v. Hutchins,* (1869) 102 Mass. 439; *Beare v. Wright,* (1905) 14 N. D. 26, 103 N. W. 632, 69 L. R. A. 409. Second, the defrauded vendee shall recover the difference between what he parted with and the actual value of what he received. *Peek v. Derry,* (1885) 37 Ch. Div. 541; *Smith v. Bolles,* (1889) 132 U. S. 125, 10 S. C. R. 39, 33 L. Ed. 279 (the leading case on this view); *Nelson v. Gjestrum,* (1912) 118 Minn. 284, 136 N. W. 858; (but see *Knopfler v. Flynn,* Minn. Jan. 12, 1917). A minority of the states follow this rule. The Texas court gives the defrauded plaintiff the "difference between the purchase price and a sum of money which bears the same proportion to the purchase price as the actual value of the land bears to the value thereof if it had been as represented." *Pruitt v. Jones,* (1896) 14 Tex. Civ. App. 84, 36 S. W. 502. This conflict obtains both as to chattels and real estate, the courts usually applying whichever rule they adopt to both classes of property. *Smith v. Bolles,* supra; *Sigafus v. Porter,* (1900) 179 U. S. 116, 21 S. C. R. 34, 45 L. Ed. 113. And whether property is real or personal seems quite immaterial in considering the question of damages. *Clark v. Baird,* (1853) 9 N. Y. 183, 1 Seld. Notes 187; *Krumm v. Beach, et al.,* (1884) 96 N. Y. 398. The courts make no distinction between a sale and an exchange of lands. *Stoke v. Converse,* (1911) 153 Iowa 274, 133 N. W. 709, 38 L. R. A. (N. S.) 465, and note. Those cases which adopt the rule first stated hold that the plaintiff must be allowed the value of his bargain or his profits in order to be adequately compensated. *Morse v. Hutchins,* supra. They seem to proceed as if the action were in contract, not in tort, and as if the measure of damages were the same as that in an action for breach of warranty. *Whitney v. Allaire,* (1848) 1 N. Y. 305, 4 How. Prac. 447. This, however, is not an action for breach of warranty, but an action in tort for deceit. See *2 Sedgwick, Damages,* 9th Ed. Sec. 761a. The courts which adopt the second rule are merely applying the ordinary rule of damages in tort actions. *Smith v. Bolles,* supra. They find that the actual damage is what the plaintiff has parted with without receiving an equivalent therefor, and that it includes no conjectural profits which he might have made. *Peek v. Derry,* supra; *High v. Berret,* (1892) 148 Pa. 261, 264, 23 Atl. 1004. The rule of those cases which are in the majority add to the actual damage, i. e., to what the plaintiff is actually out of pocket, the value or profit of the bargain. This would seem to be in the nature of a penalty. It is not the function of damages to penalize the defendant, unless the case is a proper one for punitive damages which may, in such case, be given under proper instructions of the court. These considerations would lead to the conclusion that the rule

of the instant case is the correct one. Yet it cannot be said that the courts are departing from the usual rule. In fact, Iowa has recently specifically overruled a decision which adopted the rule of the principal case. *Ross v. Bolte,* (1914) 165 Iowa 499, 146 N. W. 31.

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—COMPLAINT—LIMITATION.—In an action under the Federal Employers' Liability Act to recover damages for injuries suffered by the plaintiff while engaged in interstate commerce, the complaint contained no allegation that the action was commenced within two years after the injury. Defendant answered pleading settlement. *Held,* demurrer to answer must be overruled, since complaint is fatally defective. *Corico v. Smith,* (1916) 161 N. Y. Supp. 293.

The decision proceeds on the theory that the two year limitation in the act is a condition precedent to the cause of action and must be alleged in the complaint in order to be proved. The question decisive of this case is whether the act creates a new right of action, or whether it merely modifies an existing common law right. It is well settled that when a statute creates a right unknown to the common law and limits the time within which an action can be brought, such limitation forms a part of the right created. *Bear Lake, etc. Co. v. Garland,* (1896) 164 U. S. 1, 17 S. C. R. 7; *Negaubauer v. Great Northern Ry. Co.,* (1904) 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674, 2 Ann. Cas. 150. Courts are not entirely agreed on the construction that should be given to the Federal Employers' Liability Act. Some cases favor the viewpoint that it is remedial in its nature and should be liberally construed. *St. Louis etc. Ry. Co. v. Conley,* (1911) 187 Fed. 949, 110 C. C. A. 97. Other cases state that it is in derogation of the common law and should be strictly construed. *Fulgham v. Midland Ry. Co.,* (1909) 167 Fed. 660, 662; *Morrison v. Baltimore, etc., R. Co.,* (1913) 40 D. C. App. 391. Before the act was passed there would have been a right of action in a case like the principal one, differing only in that the defenses of assumption of risk and contributory negligence would have been open to the defendant. The intention of Congress in passing this Act was to benefit the employees in a hazardous occupation and make it easier for them to obtain relief, not to limit their existing rights; to enlarge the liability of the master, not to curtail it. *Watson v. St. Louis, etc., Ry. Co.,* (C. C. 1909) 169 Fed. 942. In the case of *Burnett v. Atlantic Coast Line Co.,* (1913) 163 N. C. 186, 79 S. E. 414, the court took the opposite view on a question similar to the one in the principal case. There the intention of Congress was considered; the fact that the time limitation is in a separate section was given weight; and the court reached the conclusion that it constituted a statute of limitations and not a condition precedent to the bringing of the cause of action. If it is a statute of limitations it is matter to be pleaded as a defense to the action. It would seem that the court in the principal case gave an unnecessarily narrow construction to the Federal Employers' Liability Act.

MASTER AND SERVANT—INJURY TO THIRD PERSON—WHERE AGENCY EXISTS.—Defendant's chauffeur, after having left defendant at a hotel with instructions to call for defendant later, used the automobile to visit

his brother. While returning to the hotel for defendant, he negligently injured the plaintiff. *Held,* the chauffeur resumed the relation of servant to defendant as soon as he had accomplished the visit to his brother and had started on the return trip to the hotel, and defendant is therefore liable. *Graham v. Henderson,* (Pa. 1916) 98 Atl. 870.

Authority may be found in accord. *Moore v. Manchester Liners, Ltd.,* [1910] Appeal Cases 498, 79 L. J. K. B. 1175, 103 L. T. 226 (Seaman went ashore to purchase necessaries and was drowned while returning; two Lords dissented); *McKiernan v. Lehmaier,* (1911) 85 Conn. 111, 81 Atl. 969 (after leaving defendant at theatre, chauffeur went on private errand and injured plaintiff while returning); *Barmore v. Vicksburg, etc., Ry. Co.,* (1905) 85 Miss. 426, 70 L. R. A. 627 (servant went beyond place of duty on private errand and in returning injured plaintiff); *Missouri, etc., Ry. Co. v. Edwards,* (Texas 1902) 67 S. W. 891 (brakeman left train to visit saloon; the train started and while running to catch it he injured plaintiff). And where a servant is entrusted with discretion or is given general orders, the master is liable for the servant's negligence although the latter has departed from the regular course of business. *Venables v. Smith,* (1877) L. R. 2 Q. B. D. 279; *Mulvehill v. Bates,* (1884) 31 Minn. 364, 47 Am. Rep. 796, 17 N. W. 959, followed in *Rudd v. Fox,* (1910) 112 Minn. 477, 128 N. W. 675. And the master is usually held liable if the servant, in performing master's business, makes a mere detour in returning to the master. *Ritchie v. Waller,* (1893) 63 Conn. 155, 28 Atl. 29, 38 Am. St. Rep. 361, 27 L. R. A. 161; *Krizikowsky v. Sperring,* (1903) 107 Ill. App. 493; *Williams v. Koehler,* (1899) 41 N. Y. App. Div. 426, 58 N. Y. Supp. 863. But where servant makes a clear departure for his own purposes, i. e., where he goes on a "frolic of his own," the master is not liable. *Mitchell v. Crassweller,* (1853) 13 C. B. 237, 22 L. J. C. P. 100, 17 Jur. 716; *Patterson v. Kates,* (1907) 152 Fed. 481; *Brinkman v. Zuckerman,* (Mich. 1916) 159 N. W. 316. Whether, in a given case, the servant has made a mere detour or a clear departure is a question of fact for the jury. *Ritchie v. Waller,* supra. It is submitted that the present case is one where the servant was "on a frolic of his own" and that the master should not have been held liable. *Mechem, Agency,* 2nd. ed., Sec. 1907, p. 1483, has the statement, "It seems unsound to say, that though the outward journey be a clear departure, the servant immediately resumes the service the moment he starts to return. A servant is not in the service merely because he is going toward the place of service any more than he is when going away from it." And the logic of the statement recommends itself. See the strong dissenting opinion of Chief Justice Whitfield in *Barmore v. Vicksburg, etc., Ry. Co.,* (supra). The court intimated that even though defendant had given the chauffeur permission to use the machine, the license expired as soon as the chauffeur started on the return journey to get the defendant. One who loans his property to another to be used in business purely his own is not liable for a negligent use thereof by the borrower, even where the borrower is on his way to return the article. *Freibaum v. Brady,* (1911) 143 N. Y. App. Div. 220, 128 N. Y. Supp. 121. Why should it be different where the borrower is his servant?

MINES AND MINERALS — TITLE — ADVERSE POSSESSION — BY POSSESSION OF SURFACE—TACKING.—An adverse possessor of land had held the land for a period less than that required by statute to acquire title when he conveyed the mineral interest therein to plaintiff. The disseisor remained in possession of the surface until after the running of the statute. The grantee of the mineral rights did not go into possession but now asserts a claim to the mineral rights as against disseisee. *Held,* possession of the surface of land by one who has by his conveyance of the mineral interest severed the latter from the surface, is not a possession of the underlying severed mineral interest, nor does his possession inure to the claimant of the mineral interest. *Northcut et al. v. Church,* (Tenn. 1916) 188 S. W. 220.

For a full discussion of the principles involved, see NOTES, p. 175.

MUNICIPAL CORPORATIONS—GOVERNMENTAL FUNCTION—UNSAFE STREETS.—A pole erected in one of the streets in the city of St. Paul was used solely for the purpose of supporting a telegraph wire and an alarm box of the fire alarm system of the city fire department. Because it had rotted through where it entered the ground, the pole fell, killing the plaintiff's son, who, with several other boys, was playing in the street. *Held,* while in providing fire protection the city is exercising a governmental function and is not liable for the negligent maintenance of an instrumentality of its department, yet the city is liable for negligently failing to keep its streets safe for public use, although the unsafe condition be caused by such instrumentality. *Hillstrom v. City of St. Paul,* (Minn. 1916) 159 N. W. 1076.

In many cases similar to the case at hand the courts have failed to note the distinction between governmental and municipal functions, basing their decision on one ground without considering the other, although both were involved. *Frederick v. City of Columbus,* (1898) 58 Oh. St. 538, 51 N. E. 35. See *McQuillin, Municipal Corporations,* Sec. 2627. The decision of the principal case has authority to support it which considered both functions involved, and though the case is a close one, the result seems to be based upon a logical application of well settled legal principles. *Village of Palestine v. Siler,* (1907) 225 Ill. 630, 80 N. E. 345. If the principle of the instant case be applied logically, it would seem that the city would not have been liable had the pole fallen upon the private land of the plaintiff and killed his son while he was playing thereon. But, by reason of the fact that it was upon the street that the pole fell, the city is liable. Such results may seem startling, if not anomalous. But it must be remembered that an act which may be excused upon one ground may well create a liability on another ground.

MUNICIPAL CORPORATIONS—HOME RULE CHARTER—POWER TO PROHIBIT SALE OF INTOXICATING LIQUORS.—The city of Duluth, under its home rule charter adopted in 1913, adopted, under the initiative and referendum provision, an ordinance prohibiting the sale of liquor and the issuing of licenses for such sale, within the city. Relator, claiming that the ordinance was of no effect, applied for a license, which was refused. The trial court ruled that the ordinance was valid and dismissed the writ of

mandamus, which relator had secured. *Held,* the city of Duluth could and did take to itself, under the home rule charter, the power to prohibit the sale of liquor within its limits, and that the ordinance is valid, at least in so far as it prohibits the sale of liquor *at retail* (italics are ours). *State ex rel. Zien v. City of Duluth,* (Minn. 1916) 159 N. W. 792.

For a discussion of this case, see NOTES, p. 160.

NEW TRIAL—AFTER JUDGMENT—TIME FOR MOTION.—After affirmance of judgment on appeal, and more than six months after entry of judgment, defendant moved the trial court for a new trial. *Held,* the trial court ruled correctly in denying the motion, because it came too late. *Smith v. Minneapolis Street Railway Co.,* (Minn. 1916) 159 N. W. 623.

This is a point of procedure decided for the first time in Minnesota. Under the code practice, generally, a motion for a new trial will be entertained after judgment has been entered on the verdict. *Beem's Adm. v. Chicago, etc., R. Co.,* (1882) 58 Ia. 150, 12 N. W. 222; *Kimball v. Palmerlee,* (1882) 29 Minn. 302. 13 N. W. 129. In Wisconsin a motion for new trial made after judgment will be entertained only if joined with a motion to vacate the judgment. *Bailey v. Costello,* (1896) 94 Wis. 87, 68 N. W. 663. In *Kimball v. Palmerlee,* supra, the court intimated that such a motion must be made before the time for appeal from the judgment had expired. The principal case adopts this dictum, notwithstanding the fact that during the six months' period the case was pending on appeal.

NEW TRIAL—VERDICT—IMPEACHMENT—AFFIDAVIT OF JUROR.—In an action in tort the jury returned an affirmative verdict for the defendant. The following day all the jurors made an affidavit to the effect that they had in fact agreed upon a verdict in favor of the plaintiff; that two forms of verdict were given to them by the court; that the foreman, by mistake, filled out and signed the wrong form; and that, when the verdict was read to them in open court, they did not notice the error and assented to the verdict as read. Plaintiff moved for a new trial. *Held,* that the affidavit was admissible to show that, by the clerical error of the jury, the verdict returned in open court was the opposite of the one agreed upon by them, and that such error was ground for a new trial. *Paul v. Pye,* (Minn. 1916) 159 N. W. 1070.

The general rule is that the affidavits or testimony of jurors are incompetent to show any fact tending to impeach or invalidate their verdict. *Ruckle v. American Car & Foundry Co.,* (1912) 194 Fed. 459 (affirmed in C. C. A., 200 Fed. 47); *Williams v. Howard,* (1875) 60 N. Y. 648. Likewise affidavits of jurors are not admissible in support of a motion for a new trial to show their understanding of the facts and the grounds on which their verdict was rendered. *Chandler v. Thompson,* (1886) 30 Fed. 38; *Frank v. Taubman,* (1889) 31 Ill. App. 592; *Hannum v. Inhabitants of Belchertown,* (1837) 19 Pick. (Mass.) 311; *Sheldon v. Perkins,* (1865) 37 Vt. 550. Where, however, the verdict is reached by resorting to chance, some courts make an exception and admit the evidence of jurors to impeach their verdict. *Johnson v. Husband,* (1879) 22 Kan. 277. Some states reach the same result by statute. *Giffen v. City of Lewiston,* (1898) 6 Idaho 231, 55 Pac. 545; *Long v. Collins,* (1900) 12 S. D. 621, 82 N. W.

95. The same court which decided the principal case has held that the affidavit of a juror as to matters occurring in the jury room is not competent evidence to impeach the verdict, but that an affidavit as to matters occurring outside of the jury room during the progress of the trial is admissible. *Rush v. St. Paul Ry. Co.*, (1897) 70 Minn. 5, 72 N. W. 733; *Pierce v. Brennan*, (1901) 83 Minn. 422, 86 N. W. 417. Such affidavits are not admissible to show that the jury misunderstood the effect of their verdict. *Polhemus v. Heiman*, (1875) 50 Cal. 438; *Murphy v. Murphy*, (1890) 1 S. D. 316, 47 N. W. 142, 9 L. R. A. 820. A local statute is involved in these two cases, but that statute does not seem decisive. One case has held that even a mistake in the nature of a clerical error is not provable by affidavit of the jurors. *McKinley v. First National Bank*, (1888) 118 Ind. 375, 21 N. E. 36. The weight of judicial authority, however, is contra and in accord with the decision in the principal case. *Pelzer Mfg. Co. v. Hamburg-Bremen Fire Ins. Co.*, (1896) 71 Fed. 826 (affirmed in 76 Fed. 479, 22 C. C. A. 283); *Schwamb Lbr. Co. v. Schaar*, (1901) 94 Ill. App. 544; *Randall v. Peerless Motor Car Co.*, (1912) 212 Mass. 352, 99 N. E. 221; *Wolfgram v. Town of Schoepke*, (1904) 123 Wis. 19, 100 N. W. 1054. The principal case seems also correct on principle. The rule that the affidavit of a juror to impeach the verdict is inadmissible should apply only to the actual agreement of the jurors and not to the slip of paper which is the mere written evidence of the agreement, when a mere clerical error might result in a gross miscarriage of justice.

PARTNERSHIP—LIQUIDATION—"GOOD WILL."—The members of a firm were all brothers. The firm name was that of the father. One brother died leaving two brothers surviving, who are now carrying on the business under the firm name. *Held*, on liquidation of the partnership, the surviving partners cannot be charged with the "good will" of the firm as an asset. *Marmaduke v. Brown*, (Pa. 1916) 98 Atl. 769.

A century or more ago this was the English rule. *Hammond v. Douglas*, (1800) 5 Ves. 539. But it is not the English law at the present time. *In re David and Matthews*, [1899] 1 Ch. 378. In the United States the courts are not agreed, but the tendency seems to be to hold that the surviving partner should be charged with the "good will" of the firm. *Brooklyn Trust Co. v. McCutcheon*, (1914) 215 Fed. 952; *Slater v. Slater*, (1903) 175 N. Y. 650; 67 N. E. 224, 61 L. R. A. 796, 96 Am. St. Rep. 605; *Rammelsberg et al. v. Mitchell*, (1875) 29 Oh. St. 22. Yet some states hold that the surviving partner should not be so charged. *Chittenden v. Whitbeck*, (1883) 50 Mich. 401, 15 N. W. 526; *Lobeck v. Lee-Clark-Andreesen Hardware Co.*, (1893) 37 Neb. 158, 55 N. W. 650, 23 L. R. A. 795. "Good will," "is an advantage and benefit that is acquired by business establishments beyond the value of the money or property invested therein, and is property in the legal sense of the term, and subject to sale and transfer in conjunction with a sale of the business precisely as other personalty." *Haugen v. Sundseth*, (1908) 106 Minn. 129, 118 N. W. 666, 16 Ann. Cases 259. The value of "good will" is the advantage secured by succeeding to the business of the firm and is capable of ascertainment from probabilities based upon profits of preceding years. *Brooklyn Trust Co. v. McCutcheon*, supra. Before the death of one partner, the "good will" could have been sold for

the benefit of all. It seems inconsistent with this right to permit the surviving partners to take over the business of the firm as a going concern without accounting to the estate of the deceased for this valuable item among the assets of the partnership, as was done in the instant case.

PERPETUITIES—SUSPENSION OF POWER OF ALIENATION—VALID.TY.—Owners of land for a valuable consideration conveyed an undivided interest in certain lands and gave to the grantee an option to call for a thirty-year mining lease in the remainder of the fee, which was held by the grantors, at any time within fifty years. The assignees of the grantors after a lapse of thirty years sought to have the option set aside on the ground that such option violated the rule against perpetuities. *Held*, such option did not suspend the absolute power of alienation and did not violate the rule against perpetuities. *Mineral Land Investment Co. v. Bishop Iron Co.*, (Minn. 1916) 159 N. W. 966.

For a discussion of the principles of this case, see NOTES, p. 154.

PUBLIC OFFICERS—COUNTY COMMISSIONERS—NEGLECT OF MINISTERIAL DUTIES—PERSONAL LIABILITY.—Plaintiff alleged that the county commissioners negligently failed to repair a bridge, though there were sufficient funds in the treasury, and that by reason of such negligence plaintiff's horses broke through the bridge and were killed. *Held*, the complaint stated a cause of action against the commissioners personally. *Strong v. Day et al.*, (Okla. 1916) 160 Pac. 722.

It was provided by statute in this state that "The Board of County Commissioners shall provide all roads * * * with suitable bridges of a permanent and substantial character and shall keep and maintain same in repair." The court stated that the power to repair carries with it the duty to exercise that power within the lawful limits regarding funds and that no distinction exists in Oklahoma between acts of nonfeasance and misfeasance. In accord with this case are: *County Commissioners of Garrett County v. Blackburn*, (1907) 105 Md. 226, 66 Atl. 31; *Hipp v. Farrell et al.*, (1915) 169 N. C. 551, 86 S. E. 570. Where the act of the county or town officer is one of affirmative misconduct, such as commencing to in charge of the highway are held liable in the great majority of cases. in charge of the highway are held liable in the great majority of cases *Tholkes v. DeCock*, (1914) 125 Minn. 507, 147 N. W. 648, 52 L. R. A. (N. S.) 142; *Mott et al. v. Hull*, (Okla. 1915) 152 Pac. 92, L. R. A. 1916B, 1184. But if the act involves the use of discretion as to what repairs are most badly needed, such officers are not held liable in the absence of a gross abuse of that discretion. *Taylor v. Manson*, (1908) 9 Cal. App. 382, 99 Pac. 410. The reason for non-liability is that it would be against reason to elect commissioners to use their best judgment and then sue them for doing it. *Nagle v. Wakey*, (1896) 161 Ill. 387, 43 N. E. 1079. If, however, the county commissioners are without funds, they are not held liable for failure to make repairs and consequent injury. *Pearl v. King*, (1913) 179 Ill. App. 562; *Garlinghouse v. Jacobs*, (1864) 29 N. Y. 297, semble.

The Idaho court has held that the principle of the instant case can not be applied in a thinly populated state, as it would result in the literal abro-

gation of the office of county commissioner. *Worden v. Witt,* (1895) 4 Idaho 404, 39 Pac. 1114. The instant case, however, is supportable both by authority and on principle; the main difficulty is in construing the statute, that is, in deciding whether such duties are ministerial or discretionary. The question whether the county is liable or not should have no bearing in deciding whether the commissioners are liable. This is recognized by the majority of cases deciding the point. *Tholkes v. DeCock,* supra. There are cases contra, but they do not seem supportable on principle. *Schneider v. Cahill,* (Ky. 1910) 127 S. W. 143, 27 L. R. A. (N. S.) 1009.

RAILROADS — PROCESS — SERVICE — FOREIGN CORPORATIONS.—Plaintiff brought an action in the State of Minnesota against a railroad corporation incorporated in the State of Colorado for injuries received in the latter state. Service was made on the soliciting freight agent, as authorized by Ch. 218, Laws of 1913, Minn. G. S. 1913, Sec. 7735. The defendant carried on no other business in the State of Minnesota than the soliciting of freight. *Held,* the service was valid. *Rishmiller v. Denver, etc., R. Co.,* (Minn. 1916) 159 N. W. 272.

Even though a statute without qualification authorizes service of process upon a foreign corporation the court will, in order to satisfy the requirements of due process of law, interpret the statute as authorizing service upon those corporations only which are doing business within the state. *North Wisconsin Cattle Co. v. The Oregon Short Line R. Co.,* (1908) 105 Minn. 198, 117 N. W. 391. It has been suggested that the reason for this limitation is that a state may impose conditions upon the right of foreign corporations to do business within its borders. *McGehee, Due Process of Law,* pp. 100-105; See *Paul v. Virginia,* (1868) 8 Wall. 168, 19 L. Ed. 357; 28 Harv. L. Rev. 804. But it is clear that a state has no right to attach conditions to the right of a foreign corporation to carry on interstate commerce. *International Text Book Co. v. Pigg,* (1909) 217 U. S. 91, 30 S. C. R. 481. And it has been held that if a foreign corporation is doing solely interstate business within a state, it may be served with process. *International Harvester Co. v. Kentucky,* (1913) 234 U. S. 579, 34 S. C. R. 944. Consequently the above suggested reason must fail. Another suggestion is that by doing business the corporation is actually present in the state and like any other entity or like any individual may be served with process as being found therein. *International Harvester Co. v. Kentucky,* supra. Still another suggestion is that by doing business in a state where a statute provides for service of process, the foreign corporation submits itself to the jurisdiction of the court. *Moulin v. The Trenton Mutual, etc., Co.,* (1853) 24 N. J. L. 222; see suggestion of Start, C. J. in *North Wisconsin Cattle Co. v. The Oregon Short Line R. Co.,* supra. It is obvious that service under the statute in question can not be upheld on the ground that the corporation is doing business, for what constitutes doing business is a federal question. The supreme courts of the United States and of Minnesota have held the mere solicitation of freight not to constitute doing business. *Green v. Chicago, etc., R. Co.,* (1907) 205 U. S. 530, 27 S. C. R. 595; *North Wisconsin Cattle Co. v. The Oregon Short Line R. Co.,* supra. And if the foreign corporation is not doing business within

the state it is difficult to conceive how it could be said to be found therein. The court in the principal case relies upon the consent theory suggested by Start, C. J., as mentioned above, and pursuant to which suggestion the statute in question appears to have been enacted.

It will be observed that the entire transaction on which the action in the principal case is founded occurred outside the state of Minnesota and had no connection with any transaction of the corporation within the state. It would seem logical to say that if a foreign corporation consented to jurisdiction by sending into the state a solicitor, it consented to jurisdiction in personam; and the place where any transitory action arose would be entirely immaterial. This would be indisputable, were the consent really voluntary. However, the United States Supreme Court has placed a very definite limitation upon the power of the state to require such consent, viz., the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states. *Old Wayne Mutual Life Association v. McDonough,* (1906) 204 U. S. 22, 27 S. C. R. 236; *Simon v. Southern Ry. Co.,* (1914) 236 U. S. 115, 35 S. C. R. 255. This seems to revert to the doctrine of the right of a state to impose conditions as a basis for service of process, but, as mentioned above, it is difficult to see how this can be the true basis. *International Harvester Co. v. Kentucky,* supra. The Minnesota Court distinguishes the two cases last cited upon the ground that in them service was upon an involuntary agent, whereas here service was upon an agent in fact. From the standpoint of consent, the validity of this distinction is hardly apparent.

REMOVAL OF CAUSES—PARTIES FOR PURPOSE OF REMOVAL.—Property owned by a citizen of Alabama and partially insured was burned through the negligence of defendant, a Virginia corporation. The insurers, a British corporation and a New York corporation paid the amounts of their respective policies and took partial assignments of the cause of action of the insured against the defendant. The insured and the insurers as joint plaintiffs brought action against defendant in Alabama. By statute in that state every action must be prosecuted in the name of the real party in interest. Defendant removed the case to the federal court. Plaintiffs moved to remand. *Held,* the motion must be denied, for the insurers are not indispensable parties and are to be disregarded in determining the right of removal. *Webb v. Southern Ry. Co.,* (1916 Dist. Ct. Ala.) 235 Fed. 578.

The first question necessarily involved is as to the nature of the insurer's interest in the cause of action of the insured against the wrongdoer. Some courts holding such cause of action non-assignable, have decided that the insurer gets no such interest therein as to make him even a proper party. *Over v. Lake Erie, etc., R. Co.,* (1894) 63 Fed. 34; *Turk v. Illinois Cent. R. Co.,* (1912) 193 Fed. 252. Other courts have gone so far as to hold the insurer's interest such as to make him an indispensable party. *Palmer v. Oregon-Washington R. & Nav. Co.,* (1913) 208 Fed. 666. But the great weight of authority in code states is that while the insurer gets a real and substantial interest in the cause of action so that he is a proper party plaintiff, the insured may sue alone either as the legal owner of the chose in action or as trustee of an express trust. *Traveler's*

etc. Co. v. Great Lakes Co., (1911) 184 Fed. 432; *Carlton County, etc. Co. v. Foley Brothers*, (1910) 111 Minn. 199, 126 N. W. 727; *People's Oil, etc., Co. v. Charleston, etc., Ry. Co.*, (1909) 83 S. C. 530, 65 S. E. 733. The second question is what parties determine the right of removal. It is well settled that purely formal or nominal parties are to be disregarded. *Wormley v. Wormley*, (1823) 8 Wheat. (U. S.) 421, 451. There are some decisions and very numerous dicta to the effect that only indispensable parties are to be considered. *Rogers v. Penobscot Mining Co.*, (1907 C. C. A.) 154 Fed. 606; *Barney v. Latham*, (1880) 103 U. S. 205. But the Federal Supreme Court seems to draw the line between purely formal or nominal parties and parties having a real and substantial interest in the controversy. *Wilson v. Oswego Township*, (1893) 151 U. S. 56; *Moon, Removal of Causes*, Sec. 132. And on practically the same facts as in the principal case the Circuit Court of Appeals of the Sixth Circuit reached the opposite result. *Turk v. Illinois Central Ry. Co.*, (1914) 218 Fed. 315. On principle, it is difficult to see why in determining the right of removal parties having real and substantial rights in the cause of action should be disregarded, or how the fact that the Federal courts preserve the distinction between law and equity can be controlling.

SPECIFIC PERFORMANCE—RIGHT TO—SUPERVISON.—An electric power company leased its plant for ninety-nine years. The lessee covenanted to maintain and preserve the building and the efficiency of the plant during the life of the lease. Lessor had the power to terminate the lease upon breach of the covenants. The lease was assigned with consent of the lessor, the assignee undertaking to perform the covenants. The assignee defaulted in performance of the covenants. Plaintiff brought bill for specific performance. *Held*, the bill will lie. *Edison Illuminating Co. v. Eastern Penn. Power Co.*, (Pa. 1916) 98 Atl. 652.

For a discussion of the principles of this case, see NOTES, p. 169.

WITNESS—COMPETENCY OF JUDGE TO TESTIFY TO STATEMENTS MADE AT FORMER TRIAL.—A will was disallowed by probate court because of mental unsoundness of the testator. On appeal to a superior court, the judge of the probate court before whom the original proceedings were held testified voluntarily as to a statement made at the hearing by one of the appellants. *Held*, the statement testified to lacked the element of confidentiality which is essential to a privileged communication and, since the privilege of a judge not to be compelled to testify against his will as to a statement made before him at a trial is a personal privilege, it may be waived and the testimony was competent. *Hale et al. v. Wyatt*, (N. H. 1916) 98 Atl. 379.

In early English practice a judge at times acted both as judge and witness in the same trial. *Regicides' Trials*, (1660) Kelyng, J. 12. But the propriety of this was doubted later. *Duke of Buccleuch v. Metropolitan Board*, (1872) L. R. 5 H. L. 418, 433. Especially, if a sole judge presided. *Regina v. Petrie*, (1891) 20 Ont. 317. A text writer has suggested that this could be done in this country. 1 *Chamberlayne, Evidence*, Sec. 576. It has been held that the court retains jurisdiction while one of the judges is off the bench and testifying, although it is an improper

procedure. *People v. Dohring,* (1874) 59 N. Y. 374. Most cases comment upon such conduct as being improper. *People v. Miller,* (1854) 2 Park. Cr. R. (N. Y.) 197; *Shockley v. Morgan,* (1897) 103 Ga. 156, 29 S. E. 694. Various reasons are assigned for not permitting the judge to leave the bench to testify. Thus, he is unable to administer the oath to himself and might refuse to give proper testimony. *McMillen v. Andrews,* (1859) 10 Oh. St. 113. Also it is improper to allow the judge to assume two characters and to pass upon the competency of his own testimony. *Rogers v. State,* (1894) 60 Ark. 76, 29 S. W. 894; *Morss v. Morss,* (1851) 11 Barb. (N. Y.) 510. Moreover, the testimony of the judge would have undue weight with the jury and put him more or less in the attitude of a partisan. *Maitland v. Zanga,* (1896) 14 Wash. 92, 44 Pac. 117. Yet text writers are of the opinions that the testimony should be allowed. 3 *Wigmore, Evidence,* Sec. 1909; 1 *Chamberlayne, Evidence,* Sec. 579.

In cases where the testimony of a judge is offered in a proceeding over which he is not presiding as to proceedings which had been before him in another cause, all cases seem to agree that he cannot be compelled to give such testimony because of personal privilege. But they are not agreed as to whether he may waive the privilege and become a witness, as was held in the principal case. Practically all, however, so hold, *State v. Hindman,* (1903) 159 Ind. 586, 65 N. E. 911 (a typical case). In Delaware it has been held that he may not. *State v. Dyer,* (1904) 5 Pennewell (Del.) 88, 58 Atl. 947. The Colorado supreme court has held that he may not be called to give the ground of a former decision. *Noland v. People,* (1905) 33 Colo. 322, 80 Pac. 887. The grounds of public policy which would preclude a judge from being compelled to testify are obvious. But there seems to be no good reason why a communication made before a judge should be considered privileged so that the declarant could prevent its being testified to by the judge in a later case. The Delaware Court has held that to allow the judge to so testify would be against public policy, no reason being given. *State v. Dyer,* supra. The reason cannot be that to allow a judge to so testify would discourage full disclosures by witnesses, for a judge could testify to nothing that a hanger-on of the court room could not, being subject to the same rules of evidence. Nor is there any confidential relation as is found in the case of attorney and client, etc.

BOOK REVIEWS

THE LAW OF PROMOTERS.—By Manfred W. Ehrich, Albany: Matthew Bender & Co. 1916. pp. lxi, 645. Price, $6.50.

This is the first treatise on promoters' law published since 1898. The intervening eighteen years have provided much new material; and a fresh statement of this subdivision of the law of corporations should find a ready welcome.

After a review of the several definitions of the term "promoter," the following topics are discussed in turn: The making and enforcement of promotion agreements; contracts made by promoters for the corporation; promotion expenses; secret profits; lawful profits; suits between

the corporation, or its stockholders, and the promoter; criminal liability of promoters; vendors of property; the rights and liabilities of promoters *inter se*; reorganizations and consolidations; and abortive promotions—a comprehensive list.

The reader will find numerous footnotes, complete citations to cases, frequent cross-references, an elaborate index and a complete table of cases—in short, a well-made book. To the practicing lawyer it should prove a source of much useful information, well arranged and readily available.

The preface discloses the aim of the author to write "for the busy lawyer as well as for the academic student of the law," and emphasizes the fact that a case can be readily found, and its facts understood, from the text. The facts of particular cases under discussion are given in considerable detail; for example, the exact amount of money, or the precise number of shares of capital stock, is commonly stated. Undoubtedly, such treatment of the cases under discussion makes it possible for the hurried seeker for precedents to dispense with the reading of the decision in the reports, and enables him to determine at once whether he has found an authority directly in point. Should the book be consulted for a statement of fundamental principles, however, or for a review of the recent cases in the light of those principles, or for a careful analysis of a number of cases taken together, or for illuminating comment upon the trend of the decisions, it is less apt to give satisfaction. Within the limits which the author has set for himself, the book is well written; but it is to be regretted that Mr. Ehrich, having gathered such a wealth of material, and having classified and arranged it, has not given us a broader treatment of his subject. Such treatment would not only have been a service to "the academic student of the law," but would have been valuable to the "busy lawyer" in the unfortunate event that no one case be found to solve his problem.

WILBUR H. CHERRY.

Minneapolis.

BANKRUPTCY FORMS; second edition, 1916. By Marshall S. Hagar and Thomas Alexander. Albany: Matthew Bender & Co., pp. liv, 909. Price, $9.00.

THE LAW OF AUTOMOBILES; fourth edition, 1916. By Xenophon P. Huddy. Albany: Matthew Bender & Co. pp. xxxii, 576.

A REVIEW OF BLACKSTONE'S COMMENTARIES with Explanatory Notes; second edition, 1915. By Marshall A. Ewell. Albany: Matthew Bender & Co. pp. xvi, 867.

THE MINNESOTA STATE BAR ASSOCIATION

The Editor welcomes pertinent communications from members of the Bar.

SHOULD THE OFFICE OF COUNTY CORONER BE ABOLISHED?

The office of County Coroner should be abolished, and the duties of the Coroner should be made a part of the work of the County Attorney's office.

The primary function of a Coroner is to investigate cases of death by violence when a crime is believed to have been committed, collect such evidence as may be obtained at the time, and if the Coroner's jury returns a verdict that a crime has been committed, then to set in motion the activities of the prosecuting officer. In short, it is the present duty of the Coroner to determine whether a crime has been committed, to determine what evidence is necessary to establish the crime, and how to ferret it out. It is clear that it is eminently more proper that such duties should be performed by the County Attorney, who by training, education and position is fitted for such work, than by a physician, or other person who is not by training, education and position fitted to perform such duties.

The laws governing the office, salary and duties of County Coroner in this State are really in a jumble; there are over thirty enactments governing the office of Coroner that are scattered through the Revised Laws. There are special laws governing the office of Coroner in Hennepin, Ramsey and St. Louis Counties and the law is different as to each of these Counties. In all Counties, other than the three large Counties, the Coroner is paid by fees, whereas in the three large Counties the Coroner receives a salary. For instance in Ramsey County the Coroner, who is required to be a practicing physician (Section 2, Chapter 446, Laws 1913) receives an annual salary of four thousand dollars, and is provided with a chief deputy, who receives twelve hundred dollars yearly and a secretary who receives nine hundred dollars per year, and certain other assistants. Throughout the state, except in Ramsey County, the Coroner "shall hold inquests upon the dead bodies of such persons only as are supposed to have come to their death by violence and not when death is believed to have been evidently occasioned by casualty" (Section 994 General Statutes 1913). In Ramsey County by a neat piece of special legislation, the Coroner may make "such investigations as he shall deem necessary and issue his death certificate in all of the following cases and no other: violent, mysterious and accidental deaths including suspected homicides occurring in his County" (Chapter 272 Laws 1915). It will be noted that in all Counties but Ramsey ordinary physicians may complete and file death certificates in cases of accidents or where homicides are suspected, but in Ramsey County, by Section 3 of the said Act, it is made unlawful for an ordinary physician to make out a death certificate in cases where

the Coroner is authorized so to do. By another neat piece of special legislation the Coroner in Ramsey County is made "non-partisan", and at an election his name is placed upon the ballot in "like manner and in the same way as judges of the District Court are now selected." (Chapter 446 Laws 1913). As has been pointed out Ramsey County is the only County in the State where by law the office must be filled by a physician. It costs the County of Ramsey approximately eleven thousand dollars per year to maintain the office of Coroner. During the year ending December 30th, 1915, there were 425 death cases reported to the Ramsey County Coroner, and upon these eighteen inquests were held, and the Coroner, notwithstanding the fact that he receives four thousand dollars per year and is supplied with a chief deputy and other assistants, employed and caused the County to pay outside physicians to hold autopsies in one hundred eighty-two cases.

The writer is informed that there were but three inquests held in Hennepin County in 1915.

The above facts are set forth not as any particular criticism of the conduct of the office of any Coroner, but for the purpose of showing the absolute lack of uniformity of the law and the administration of it throughout the State so far as this office is concerned.

An examination of our Statutes governing this office, and especially the law applicable to the three large Counties, shows that the Legislature seemed to recognize the inefficiency of the average Coroner. The law provides that all microscopic examinations and chemical analyses shall be made by the chief chemist of the State Dairy and Food Department; that the County Attorney SHALL conduct the examination of all witnesses at inquests; that for autopsies the Coroner may call in as many physicians as he deems necessary who shall be paid at the rate of six dollars per day and mileage, and it further provides that in Ramsey County the Coroner may appoint as many deputy Coroners as he deems necessary. It is readily to be understood (especially in view of the above statistics) that much of the work of the Coroner may be done by others at his request.

The main purpose of the office of County Attorney is to protect society against crime by the prosecution of offenders. The taxpayers maintain at the University a law school for the purpose of training a sufficient number of men in the profession of law properly and adequately to administer the laws of the State and protect society. Prosecution of offenders against the laws is intrusted to the County Attorney, who has been thoroughly trained to know what constitutes a crime, what evidence is necessary to secure conviction, and how to ferret out such evidence and produce it in legal shape. At present the office of County Attorney is, to use the language of the County Attorney for Ramsey County, "a mere prosecuting office, whose activities are not set in motion except on the complaint of some one". When a body has been found and such person "is supposed to have come to his death by violence" the County Attorney's office should come immediately in touch with such case so that the State should have the benefit of the training, experience and professional ability of an officer whose duty it is to protect society against crime. What does the average doctor, who holds the office of Coroner, know as to what constitutes a crime, and as to what evidence is necessary to secure a

conviction, and how to get it, as compared with a trained lawyer? If it be said that the cause of death is sometimes a question for medical men, and it is necessary in some cases to hold autopsies and post mortems, then give to the County Attorney such authority to call in physicians as the Coroner now has. By such an arrangement the County Attorney can call to his aid an expert upon whom he can rely. In the three large Counties of the State, by special laws if necessary, give to the County Attorney an assistant to be known as a Medical Examiner, and an assistant to attend to the clerical work necessary. There is no question, but that Ramsey County for instance could save at least five thousand dollars yearly by such an arrangement. But economy of the taxpayers' money is not the primary consideration. The work can be better and more efficiently done. In the outlying Counties of the State where but few cases of "suspected homicide" occur, and where a Coroner does but little work, efficiency would be greatly promoted by imposing the duties upon the County Attorney, who would likewise have the authority to call in physicians to hold autopsies when necessary.

The President of the Minnesota State Bar Association forcibly expresses the writer's opinion when he says: "I have often thought that the office of the Coroner was nothing but a dry husk of an ancient tradition and that we ought to get rid of it." Massachusetts long ago saw the evil arising from the lack of coördination between the office of Coroner and the District Attorney and in 1877 abolished the office, providing in its stead for certain medical examiners. (Chapter 200 Laws and Resolves of Mass. 1876-7). Later by Chapter 24 of the Revised Laws of Massachusetts in 1902, it remodeled its medical examiner system and provided, in substance, that certain medical examiners should be appointed in each County, and that before an autopsy could be held by them written consent must first be obtained from the District Attorney, and that before making an examination the examiner should forthwith file with the District Attorney, a report to the end that the District Attorney would be immediately advised of the facts surrounding a case of suspected homicide and that appropriate action might be taken by him. The law further provides that all inquests shall be conducted by certain Courts in order that a real judicial examination may be had. In this manner the machinery of justice is set in motion in a proper and legal way.

The present method of holding inquests in this State is a perfect farce. There is nothing more absolutely un-American in our whole administration of the law than the way and manner in which a Coroner's jury is summoned and an inquest held. The law provides that whenever the Coroner desires to hold an inquest "he shall make his warrant to the constable" * * * "to summon six good and lawful men of said County" (Section 995, Revised Laws 1913) to serve as a jury. The Coroner, if he desires to do so, can pick the jury as he sees fit, so that the verdict of the jury will be just as he wants it to be. As a present Coroner expressed it: "he can 'hand pick' them as he wants to." This law should be immediately amended so as to require the Coroner when he desires to summon a jury to make a written request upon the Clerk of the District Court for a jury whose names shall be drawn in the same manner as the petit juries of the District Court. By such a change in the law the disgraceful "packing" of

Coroner's juries will be done away with. The present method is indefensible. The provision of the law that the Coroner shall act as sheriff during a vacancy in the office of sheriff in no manner militates against the changes proposed. Such provision could be easily changed so that some other County officer could fill the office of Sheriff in such contingency.

The main thing, however, is to bring the County Attorney's office in immediate touch with cases of suspected homicide; place the duty of protecting society in such cases upon that Department of the County Government that is best fitted to perform such duties; make an inquest a judicial investigation rather than a doctor's clinic. Nothing is quite so ridiculous to the practicing lawyer, familiar with judicial trials, as the proceedings at a coroner's inquest. The present system is archaic, inefficient and expensive.

Some time in May, 1916, the writer presented the substance of this article in writing to the State Bar Association for action, and was informed in writing by the Association that these subjects were not such as "peculiarly interested lawyers", and that the Board of Governors was "pretty strongly set in the idea that the Association ought to confine its activities quite narrowly to those questions in which lawyers, as such, have a special interest." In the January issue of the MINNESOTA LAW REVIEW the President of the Bar Association, on page 101, says:

"Where defects are found in the laws governing matters of procedure, in or out of court, the transmission of property by will or inheritance, questions of title to and sales of real and personal property, rules by which ordinary every-day business is conducted, the administration of estates and trust funds, questions affecting guardians and trustees, and a thousand and one other subjects that might be mentioned, an Association representing the lawyers of the State is the ONLY BODY that can and will deal intelligently and effectively with the situation." He further says:

"The individual lawyer cannot be expected to act alone. * * * It is only where the request for reform of this sort comes from a body like the State Bar Association, whose disinterestedness is recognized, whose recommendations are known to be backed by knowledge, experience and conservative consideration, and whose representative character is such that its influence is not to be disregarded, that the average legislature will hear, heed and act."

It may be that the question of the abolishment of the office of Coroner, and the adoption of an effectual, efficient and economical system in its place is somewhat "political" in its nature, and it may be that the amendment of the un-American system of summoning a Coroner's jury is "political", but, nevertheless it must be apparent that in such matters the "individual lawyer cannot be expected to act alone" and that the State Bar Association could without any very great departure from its functions as declared by its President, at least have considered these subjects and have brought to them the "knowledge, experience and conservatism" that make its influence felt with the average Legislature.

PRICE WICKERSHAM.

Saint Paul.

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CHARITABLE GIFTS AND THE MINNESOTA STATUTE OF USES AND TRUSTS.

THE Revised Statutes of the Territory of Minnesota, enacted March 31st, 1851, contained a number of notable changes from the rules of common law and, in particular, set up a scheme of real property law which differed materially from the doctrines of common law and equity regarding future interests, powers, and uses and trusts.[1] These particular provisions have, with few changes, been carried down through the various revisions of the Minnesota statutes and are now found in Chapters 59, 60 and 61 of the General Statutes of Minnesota of 1913.

The Revised Statutes of 1851, like the Wisconsin Revised Statutes of 1849 and the Michigan Revised Statutes of 1847, were largely based upon the New York Revised Statutes of 1830, although there are a number of important points of difference from the New York Revised Statutes which are common to the revisions of Michigan, Wisconsin, and Minnesota. Consequently, in the endeavor to reach a satisfactory understanding of the provisions of the Minnesota statutes as interpreted by the courts, it is helpful to consider briefly not only those doctrines of the common law which are pertinent,

1. Revised Statutes of the Territory of Minnesota 1851. Chapter 43, Of the Nature and Qualities of Estates in Real Property and the Alienation Thereof; Chapter 44, Of Uses and Trusts; Chapter 45, Of Powers.

but also the New York Revised Statutes and the decisions thereunder, as well as the statutes and decisions of Michigan and Wisconsin.

In the year 1825 the legislature of New York appointed a commission to prepare and present to the legislature a general revision of the statutes of that state. This commission, composed of Messrs. John Duer, Benjamin F. Butler, and James C. Spencer, presented, and the legislature with a few changes enacted, in installments during the year 1827-28, to take effect January 1, 1830, what was for that time a most ambitious attempt at codification of certain portions of the law. Drastic changes were wrought in the law of real property, and as to trusts in particular the whole fabric of the common law was swept aside and a new scheme set up.[2]

The object of the commissioners in making these changes was to simplify conveyancing.[3] Yet, in reality, the scheme established by the New York Revised Statutes not only has been fruitful of litigation,[4] but also, as it has been construed by the courts, has resulted in a goodly number of unfortunate doctrines in the law of trusts. Some of the most glaring of these have been corrected by statutory amendments in New York, as well as in Michigan and Wisconsin, which states, like Minnesota, have adopted the scheme of the New York Revised Statutes of 1830; and it is submitted that the time is now ripe for their correction in Minnesota.

It is with respect to the present deplorable state of the law as to charitable gifts in Minnesota that the present paper is concerned.

2. "In Part II Chapter 1, New York Revised Statutes of 1830, the revisers undertook to re-write the whole law of future estates in land, uses and trusts (including, according to judicial interpretation, charitable uses), powers, perpetuities and accumulations, and to abolish the common law rules on these subjects. In Chapter IV, Title IV, they undertook in like manner to re-write the law of personal property relating to future interests, perpetuities, accumulations of income and, according to judicial interpretation, also charitable uses, and to abolish the common law rules on these subjects." Canfield, New York Cases and Statutes on Trusts, Introduction, page ii.

3. See the notes of the revisers appended to the second edition of the New York Revised Statutes of 1830 and especially the notes to Article 2 of Part II, Chapter I, Title II.

4. "This crude and reckless legislation [The New York Revised Statutes of 1830] seems to have been as unsuccessful in practice as it deserved to be. It has led to great litigation and there has been the utmost difference of opinion on points which ought to have been put beyond doubt." Gray, Restraints on Alienation, (2nd edition Sec. 282.)

CHARITABLE TRUSTS.

A charitable trust has two marked points of difference from a private trust: the beneficiaries are indefinite and it is not subject to the rules prohibiting perpetuities.[5]

The objects for which charitable trusts may be established are generally said to fall into four classes, to-wit: (1) the relief and assistance of the poor and needy; (2) the promotion of education; (3) the advancement of religion; and (4) public purposes in general, such as the creation of parks, the erection of public monuments, the improvement of highways, and the like.[6]

If, through a change in circumstances, the charitable trust cannot be carried out in the precise form designated by the donor, under the doctrine of cy pres the court will direct that the trust be administered in a manner as near the donor's particular directions as possible. Many jurisdictions in this country repudiate this doctrine either in whole or in part.[7]

There is another use of the term cy pres which has led to much confusion, namely, the prerogative power of the English court of chancery under the sign manual of the crown to direct illegal charitable trusts to legal purposes and to lay out a charitable scheme for the administration of gifts to charity generally with no uses specified, which gifts would otherwise be void for indefiniteness. It is undoubted that American

5. "The characteristics of a charitable use . . . were indefiniteness and permanence; indefiniteness in that the trust was for the benefit of a class or the public and not for a particular person; permanence in that the rules relating to perpetuities had no relation to charity, unless the execution of the charity was postponed." Fowler, Charitable Uses, 100. There is necessarily some limit to the uncertainty or indefiniteness of the beneficiaries. "It must sufficiently appear that [the donor] designed to establish a charity, and the purpose must be indicated with sufficient clearness to enable the court, by means of its settled doctrines, to carry the design into effect."—3 Pom. Eq. Jur. Sec. 1025. Furthermore, many of our states require a greater degree of certainty than do the English courts. See 3 Pom. Eq. Jur. Sec. 1025 and authorities there cited.

6. 3 Pom. Eq. Jur. Secs. 1020-1024. The oft quoted definition of Justice Gray, in Jackson v. Phillips, (1867) 14 Allen 539, is as follows: "A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."

7. See 3 Pom. Eq. Jur. Sec. 1027.

courts of equity have no jurisdiction of this character, since they have succeeded only to the judicial powers of the English chancellor and not to his prerogative powers.[8]

Much of our modern law as to charitable trusts has received its impetus from the Statute 43 Elizabeth, Chap. 4 (1601) known as the Statute of Charitable Uses. This statute, although at one time considered to be the origin of the law of charitable trusts in England, is now understood to have been (so far as its general provisions are concerned) merely declaratory of the rules already recognized and enforced by the court of chancery.[9]

In the great majority of jurisdictions in the United States charitable trusts have been upheld upon either one of two grounds: (1) that the Statute of Elizabeth as to charitable uses has been adopted as one of those early English statutes which form a part of our local common law;[10] (2) that the law of charitable trusts had been developed as a part of the general equity jurisprudence of the court of chancery long before the enactment of the Statute of Charitable Uses, and thus it is immaterial whether or not that statute is in force in this country.[11]

This latter view, that the validity of charitable trusts is in no wise dependent upon the Statute of Elizabeth, is undoubtedly the correct doctrine. A doubt as to the existence of the jurisdiction of equity over charitable uses prior to the Statute of Charitable Uses had been expressed in a dictum of Lord Loughborough in the case of *Attorney General v. Bowyer*,[12] and that dictum was relied on by Chief Justice Marshall as the basis of his opinion in *Baptist Church v. Hart's Executors*,[13] holding that charitable trusts were void in Virginia, where the Statute of Charitable Uses had been repealed.

Subsequent to this decision, the English Record Commissioners published the "Calendar of Proceedings in Chancery

8. See the excellent exposition of cy pres in both its phases in the opinion of Gray, J., in Jackson v. Phillips, (1867) 14 Allen (Mass.) 539, 574 et seq.

9. 3 Pom. Eq. Jur. Sec. 1028 and cases there cited.

10. Haeffer v. Clogan, (1898) 171 Ill. 462; Preacher's Aid Society v. Rich (1858) 45 Me. 552; Clayton v. Hallett (1902) 30 Colo. 231, 70 Pac. 429, 59 L. R. A. 407, 97 Am. St. Rep. 117.

11. Vidal v. Girard (1844) 2 How. 127, 11 L. Ed. 205. This is now the doctrine in most states. The authorities are collected in 5 Am. & Eng. Ency. of Law (2nd Ed.) 899, 900, and in 14 L. R. A. (N. S.) 55.

12. (1798) 3 Ves. Jr. 714, 726.

13. (1819) 4 Wheat 1, 4 L. Ed. 499.

during the reign of Queen Elizabeth", which showed that a large number of bills had been filed for relief relative to charitable uses long prior to the passage of the Statute of Elizabeth.[14] Since that publication, it has been very generally held that charitable trusts were not dependent on the Statute of Charitable Uses. In *Vidal v. Girard's Executors*,[15] the United States Supreme Court, in an able opinion by Story, J., adopted this view.

Chief Justice Marshall's ruling in *Baptist Church v. Hart's Executors*,[16] had, in the meantime, been followed in Virginia[17] and Maryland;[18] and West Virginia[19] has followed the Virginia precedents. In these jurisdictions more or less complete relief from this unfortunate state of affairs has been provided by statute.[20]

Charitable Trusts in New York.

When we come to consider the law in New York after the enactment of the Revised Statutes of 1830 and the law of Michigan, Wisconsin and Minnesota, after those states copied the New York Revised Statutes, a further question must be considered in determining whether charitable trusts are lawful. The New York Revised Statutes provided that "uses and trusts except as authorized and modified in this article are

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14. See Binney's argument in Vidal v. Girard's Executors, (1844) 2 How. 127, 155, 11 L. Ed. 205.

15. (1844) 2 How. 127, 11 L. Ed. 205.

16. (1819) 4 Wheat 1, 4 L. Ed. 499.

17. Gallego's Executors v. Attorney General (1832) 3 Leigh 45, 24 Am. Dec. 650. This decision was followed in Fifield v. Van Wyck (1897) 94 Va. 557, 27 S. E. 446, 64 Am. St. Rep. 745, where the court, repudiating the dictum contra in Prot. Epis. Ed. Soc. v. Churchmans Reps. (1885) 80 Va. 718, said that even though the doctrine of Gallego's Case may have been erroneous, since it had been the settled law in Virginia for fifty years, any reversal thereof must be made by the legislature.

18. Dashiell v. Attorney General (1822) 5 H. & J. 392, 9 Am. Dec. 572.

19. Wilson v. Perry, (1886) 29 W. Va. 169, 188, 1 S. E. 302.

20. Virginia in 1839 and 1841 authorized charitable trusts for literary and educational purposes, Va. Code, 1904, Secs. 1420, 1421. See also Sec. 1398. In West Virginia in 1868, the Virginia statutes of 1839 and 1841 were adopted, and in 1885, these were amended in such a way as to permit the courts by a liberal construction to sustain charitable gifts generally. See Hays v. Harris, (1914) 73 W. Va. 17, 80 S. E. 827. In Maryland, a statute enacted in 1888, (Code, 1912, Sec. 328, Art. 93) validates gifts for any charitable use, "if the devise or bequest contained directions for forming a corporation to take the same within twelve months of the probate of the will." See Novak v. Orphan's Home, (1914) 123 Md. 161, 90 Atl. 997.

abolished."[21] A later section enumerated the purposes for which express trusts might be created. This enumeration included four classes of private trusts of land and contained no reference either to charitable trusts or to trusts of personal property.[22]

The revised statutes also prohibited the suspension of the power of alienation of real estate for a longer period than two lives in being,[23] and imposed a similar prohibition on the suspension of absolute ownership of personal property.[24]

For a considerable time after the enactment of the New York Revised Statutes of 1830, there was a genuine doubt as to whether these provisions totally abolished charitable trusts, or whether it was to be considered that the legislature intended to leave intact the great subject of charitable trusts, as they existed prior to the enactment of the revised statutes. Throughout the New York decisions this question has been more or less confused with the question already discussed as to whether charitable trusts are dependent upon the Statute of Charitable Uses or are independent thereof. In *Shotwell v. Mott*,[25] Sandford, then Assistant Vice Chancellor, held (1) that charitable trusts were independent of the Statute of Elizabeth and consequently the repeal of that Statute in New

21. 1 R. S. 727 Sec. 45.

22. 1 R. S. 727 Sec. 55.

23. 1 R. S. 723 Secs. 14, 15.

24. 1 R. S. 773 Sec. 1.

25. (1844) 2 Sandf. Ch. (N. Y.) 46. "Did the revised statutes intend to cut off gifts and devises to charitable uses for all time to come? For if the article 'Of Uses and Trusts' applies to charitable uses, that must have been the intention in respect of all save devises to corporations directly for their own use. The proposition is startling, and of vast importance. And I presume everyone, on first hearing it, will declare that it is impossible; that no legislature in the nineteenth century could have intended such a result. I do not think that such is to be the construction of the act. That it was not the intention clearly appears by the notes of the revisers, accompanying this article when it was submitted to the legislature. They proposed sweeping and radical changes in the existing law of uses and trusts, and stated their reasons and objects fully and elaborately. But there is not one word upon the subject of charitable uses. They were treating wholly of private uses and trusts; of those intricacies and refinements in the dealings of individuals with real property which had perplexed conveyancers, and filled the courts with litigation. They proposed to cut up this class of estates by the roots, and the legislature adopted their suggestion and destroyed it most effectually. But public trusts and charitable uses were not within the purview of the lawgivers. The evils which they sought to remedy were not incident to those trusts. The provisions which they enacted for preserving what was useful and beneficial in private trusts are inapplicable to the administration of charities."

York in 1788 was not significant,[26] and (2) that the provisions of the revised statutes had no application whatever to charitable trusts. But a few years later, the superior court of the city of New York in the case of *Ayres v. The Methodist Church*,[27] adopted a different view on both these points. Duer, J., who delivered the opinion of the court in this case, had been one of the commissioners who drew up the Revised Statutes of 1830.[28] In full accord with this latter case is the decision of the New York supreme court in *Yates v. Yates*.[29]

The first case to raise the question before the court of appeals of New York was *Williams v. Williams*.[30] The case involved the validity of a charitable trust of personal property. Denio, J., speaking for the majority of the Court,[31] held (1) following *Vidal v. Girard's Executors*,* that the law of charitable trusts was not dependent upon the Statute of 43 Elizabeth, (repealed in New York in 1788), but "was at an indefinite and early period in English judicial history, engrafted upon the common law", and (2) that "charitable gifts are excepted from the law respecting perpetuities and consequently the provisions of the Revised Statutes."

A series of subsequent decisions in New York cast doubt upon and finally overruled both the points decided in the *Williams Case*. *Levy v. Levy*,[32] involved a will in which the testator had devised upon trust, to establish and maintain a

26. Chancellor Walworth also had held that, though the statute of Elizabeth relative to charitable uses was never in force in the state of New York, yet independently of that statute the court of chancery had an original jurisdiction to enforce and compel the performance of trusts for pious and charitable uses, when the devise or conveyance in trust was made to a trustee capable of taking the legal estate. Dutch Church in Garden St. v. Mott, (1838) 7 Paige Ch. 77. (the case involved a charitable trust created prior to the enactment of the revised statutes.)

27. (1849) 3 Sandf. (5 N. Y. Supr. Ct.) 351.—"As such uses are most plainly and directly repugnant to the statutory provisions, in relation to trusts and perpetuities, we confess our present inability to understand or conceive why they are not now to be considered as positively forbidden, and therefore abolished."

28. It is interesting to note that in one of the first cases involving the revised statutes of 1830, Coster v. Lorillard (1835) 14 Wend. 265, the three revisers were of counsel for different parties to the suit and that no two of them agreed in their several expositions of the meaning of the statute.

29. (1850) 9 Barb. (N. Y.) 324.

30. (1853) 8 N. Y. 524.

31. Judge Denio's opinion was concurred in by four of the other judges, three judges dissenting.

* (1844) 2 How. 127, 11 L. Ed. 205.

32. (1865) 33 N. Y. 97.

school of agriculture, his farm at Monticello in Virginia (formerly the residence of President Jefferson), together with his residuary estate comprising real and personal property situated in New York. Wright, J., in an extended opinion laid down four propositions.

(1) By its repeal of the Statute of Charitable Uses, (together with the mortmain acts) in 1788, the New York legislature intended "to abrogate the entire system of indefinite trusts which were [at that time] understood to be supported by that statute alone", as was clearly indicated by the fact that at the same time the legislature had provided ample encouragement to learning, piety, and benevolence "through the medium of corporate bodies created by the legislative power, their charters specifying the precise nature of the charity intended to be sanctioned and encouraged. . . ."[33]

(2) A gift to charitable purposes, whether of real or personal property, offends against the provisions of the New York Revised Statutes as to perpetuities imposing restraints upon the suspension of the absolute power of alienation of estates in land and the absolute ownership of personalty.[34]

(3) So much of this trust as involved real estate was void under the provisions of the revised statutes to the effect that "all express trusts of land, except those enumerated in the statute, are abolished," the trust in question not being among those enumerated.[35]

(4) As the trust of Monticello was void under the Virginia law,[36] and as the scheme of a charitable trust provided by the will was indivisible, the trust of the New York property must also fail.[37]

The doctrines laid down by Wright, J., in *Levy v. Levy*,[38] were re-affirmed in *Bascom v. Albertson*,[39] *Holmes v. Mead*,[40]

33. (1865) 33 N. Y. at p. 111.
34. (1865) 33 N. Y. at pp. 124, 128, 132.
35. (1865) 33 N. Y. at p. 133.
36. Gallego's Executor v. Attorney General, 3 Leigh 450, 24 Am. Dec. 650. See note 17, supra.
37. (1865) 33 N. Y. at p. 135. The last point was the only one of the four in which a majority of the court concurred.
38. (1865) 33 N. Y. 97.
39. (1866) 34 N. Y. 584.
40. (1873) 52 N. Y. 332.

Holland v. Alcock,[41] and finally in *Tilden v. Green*,[42] holding invalid the great trust of several millions of dollars created by the will of Samuel J. Tilden for the establishment of a public library in the city of New York.

In 1893, as a result of this last decision, the legislature in New York enacted a statute which provided that:

"No grant, bequest, or devise for religious, educational or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indefiniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. . ."[43]

In *Allen v. Stevens*,[44] this statute came before the court of appeals for construction and that court, in an elaborate opinion by Parker, C. J., held that in consequence of this statute it was no objection to a charitable trust (1) that the beneficiaries thereof were indefinite, or (2) that it created a perpetuity. It is true that the statute contains no provision expressly absolving charitable trusts from the statutory prohibition of perpetuities, but the court took this opportunity to go back to the doctrine announced in *Williams v. Williams*[45] and to re-instate in its entirety the historic charitable trust. This was obviously a highly commendable result, even though one may have difficulty in reconciling the conclusion here reached with the current of previous decisions in the same court for a considerable period of years.[46]

41. (1888) 108 N. Y. 312, 16 N. E. 305, 2 Am. St. Rep. 420. This case contains an able review of the New York authorities by Rapallo, J.

42. (1891) 130 N. Y. 29, 28 N. E. 880, 14 L. R. A. 33, 27 Am. St. Rep. 487.

43. Laws of N. Y. 1893 Chap. 701, Sec. 1.

44. (1899) 161 N. Y. 122, 55 N. E. 568.

45. (1853) 8 N. Y. 524.

46. The court, in coming to this conclusion, reasoned as follows: "Under the provisions of the act, a testator may name a corporation as trustee or provide that a corporation to be founded shall act as trustee, or the trustee named may be an individual; but if he names none of these, the statute provides, in effect, that the trust shall not fail, but the title to the property devised or bequeathed shall vest in the supreme court, which shall have control over gifts, grants, bequests and devises provided for by the act.

"If the contention be well founded that it was not the intention of the legislature to revive the ancient law as to the administration of such trusts by the supreme court, and to do away with the rule requiring the formation of a corporation for such purpose, then no permanent charity can be administered by the supreme court, notwithstanding the title to the trust property is by the command of the statute vested in the supreme court when no trustee is named by the testator. It is insisted that it cannot be, because the trust term is not measured by lives. Neither is a

This statute was amended in 1901 by giving to the court a modified cy pres jurisdiction, viz., the right to alter the terms of the gift in order to carry out the general intent of the testator, if the precise terms of the gift cannot be literally carried out.[47]

Much of the same development has taken place in the states of Michigan and Wisconsin. As already pointed out, these states, at an early date in their several histories, copied largely from the New York Revised Statutes of 1830, Michigan in its revision of 1847 and Wisconsin in its revised statutes of 1849.

Two points of difference common to the revisions of Michigan and Wisconsin must be noted: the enumeration of au-

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corporation, which may, as a trustee, execute a permanent trust for charity. But, it is answered, the law has created an exception to the general rule in favor of corporations. True, and the lawmaking power had the right to create other exceptions, or change the law altogether; and it has changed the law as to all cases within the scope of the act, 'to regulate gifts for charitable purposes,' so that now the supreme court must execute such a trust, if the title to the trust property vests in it under the statute and shall have control over the administration, if a trustee be named by the testator. A construction of this statute allowing the supreme court to execute a permanent charity when the title to the real estate is vested in it, and at the same time declaring that, where such property is devised to a trustee named, the devise is void, would be absurd." (1899) 161 N. Y. at p. 143, 55 N. E. 568.

47. Laws N. Y., 1901, Chap. 291. The statute was again amended slightly in 1909. In its present form it reads as follows:

"Grants and devises of real property for charitable purposes. 1. No gift, grant, or devise to religious, educationai charitable or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid by reason of the indenniteness or uncertainty of the persons designated as the beneficiaries thereunder in the instrument creating the same. If in the instrument creating such a gift, grant, or devise there is a trustee named to execute the same, the legal title to the lands or property given, granted, or devised for such purposes shall vest in such trustee. If no person be named as trustee then the title to such lands or property shall vest in the supreme court. 2. The supreme court shall have control over gifts, grants and devises in all cases provided for by subdivision one of this section, and whenever it shall appear to the court that circumstances have so changed since the execution of an instrument containing a gift, grant or devise to religious, educational, charitable or benevolent uses as to render impracticable or impossible a literal compliance with the terms of such instrument, the court may, upon the application of the trustee or of the person or corporation having the custody of the property, and upon such notice as the court shall direct, make an order directing that such gift, grant or devise shall be administered or expended in such manner as in the judgment of the court will most effectually accomplish the general purpose of the instrument, without regard to and free from any specific restriction, limitation or direction contained therein; provided, however, that no such order shall be made without the consent of the donor or grantor of the property,

thorized trusts of real property includes, in addition to the four classes of private trusts found in the New York statute, the following:

"For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it, subject to the limitations as to time prescribed in this title."[48]

A second point of difference is that the provisions of Chapter IV of Part II of the New York Revised Statutes regarding future interests, perpetuities, and accumulations of income of personal property are wholly omitted from the Michigan and Wisconsin statutes.

Charitable Trusts in Michigan.

In Michigan the question of the validity of a charitable trust came before the court for the first time in the case of *Methodist Episcopal Church of Newark v. Clark*.[49] In that case, which involved a charitable trust of real estate, Cooley, J., speaking for the court, after noting that the Michigan statute prohibited the suspension of the absolute power of alienation of real property for a longer period than two lives in being and that trust estates came within this restriction, proceeded as follows:

"If the law of charitable uses were in force in this state, the trust might be upheld under its rule. But that law is generally referred to as the Statute of Elizabeth, commonly called the Statute of Charitable Uses, which, with other English statutes, was repealed in Michigan in 1810. 1 Territorial Laws 900. There is no evidence that any pre-existing law on that subject has ever been recognized in this state. The Revised Statutes which took effect March 1, 1847, expressly abolished uses and trusts, except as authorized and modified therein, and no distinction is made in the statute between charitable uses and any others. The same requisites are therefore essential to their validity. The New York and Wisconsin decisions, which are made in the light of statutes similar to our own, are directly in point here, and we refer to

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if he be living. 3. The attorney-general shall represent the beneficiaries in all such cases, and it shall be his duty to enforce such trusts by proper proceedings in the courts." 4 Consol. Laws of New York, 1909 Sec. 113, p. 3396.

The New York personal property law Sec. 12 contains similar provisions as to charitable trusts of personal property.

48. Mich. R. S. 1847 Sec. 8839 (5); Wis. R. S. 1849 Sec. 2081 (5).

49. (1879) 41 Mich. 730, 3 N. W. 207.

them as rendering any discussion by us unnecessary. Phelps v. Pond, 23 N. Y. 69; Levy v. Levy, 33 N. Y. 97; Bascom v. Albertson, 34 N. Y. 584; Gram v. Prussia, &c Society, 36 N. Y. 161; Holmes v. Mead, 52 N. Y. 332; Ruth v. Oberbrunner, 40 Wis. 238. And it may be well to mention, also, that our statute, after defining cases in which express trusts may be created, none of which would include indefinite charitable trusts, provides for others only in the following words: 'For the beneficial interest of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it.' It is for the very reason that trusts for charitable purposes are not fully expressed and clearly defined that the law of charitable uses has grown up and been maintained."[51]

Consequently this trust of real estate was held to be void.

In *Hopkins v. Crossley*,[52] a charitable trust of personal property was involved and it was urged upon the court that since the provisions of the New York Revised Statutes regulating interests in personal property had not been adopted in Michigan, the New York decisions holding invalid charitable trusts of personal property were not applicable in Michigan and that the language of Cooley, J., just quoted was mere dictum, the decision in *Methodist Episcopal Church v. Clark*,[53] being based upon the statutory prohibition of restraints on the alienation of real estate. The court, however, held that Justice Cooley's language, in the earlier case, to the effect that the Statute of Elizabeth as to charitable uses had been repealed in Michigan and that "there is no evidence that any pre-existing law on that subject has ever been recognized in this state" was not mere dictum, but decision, and consequently that the question was settled in that case as to all charitable trusts, real or personal.[54]

51. (1879) 41 Mich. at p. 741.

52. (1903) 132 Mich. 612, 96 N. W. 499.

53. (1879) 41 Mich. 744.

54. "We are convinced that the rule laid down is not a dictum, and that the question was settled in that case. It is urged that this holding was wrong, and that the court of chancery, having the powers of the English court of chancery, has a jurisdiction over charities independent of the statute of charitable uses,—one whose origin antedated such statute. It must be admitted that many authorities sustain this contention, but to adopt it we must overrule authorities in this state of long standing, which have been followed by the profession and the courts. The conflict among the decisions of other states indicates that the doctrine contended for may be of questionable policy, and, if it is not, a remedy can readily be applied. We have felt reluctant to hold invalid this charitable trust, which seems a meritorious one, but we see no escape from that responsibility."—132 Mich. at p. 617.

The legislature of Michigan, in 1907,[55] enacted a statute providing that charitable trusts should not be invalid by reason of the indefiniteness of the beneficiaries thereof, nor by reason of the same contravening any statute or rule against perpetuities. This statute was amended in certain particulars in 1915.[56]

Charitable Trusts in Wisconsin.

In Wisconsin, although the statutes applicable were, at the outset, the same as those of Michigan, a somewhat different development is to be observed.

In *Ruth v. Oberbrunner*,[57] real estate was devised to A and B upon trust for two unincorporated charitable organizations. The court (or, more properly, two of the three judges thereof, for Ryan, C. J., having been of counsel, did not sit in the case,) after noticing the conflicting decisions in New York and after pointing out that "the view which we have taken of the case renders it unnecessary to consider whether the law of charities had its origin in that Statute [of Charitable Uses]

55. Mich. Public Acts 1907, No. 122.

56. Mich. Pub. Acts 1915 No. 280. "Sec. 1. No gift, grant, bequest or devise, whether in trust or otherwise to religious, educational, charitable or benevolent uses, or for the purpose of providing for the care or maintenance of any part of any cemetery, public or private, or anything therein contained which shall in other respects be valid under the laws of this state, shall be invalid by reason of the indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities. If in the instrument creating such a gift, grant, bequest or devise, there is a trustee named to execute the same, the legal title to the lands or property given, granted, devised or bequeathed for such purposes, shall vest in such trustee. If no such trustee shall be named in said instrument or if a vacancy occurs in the trusteeship, then the trust shall vest in the court of chancery for the proper county, and shall be executed by some trustee appointed for that purpose by or under the direction of the court; and said court may make such orders or decrees as may be necessary to vest the title to said lands or property in the trustee so appointed? Sec. 2. The court of chancery for the proper county shall have jurisdiction and control over the gifts, grants, bequests and devises in all cases provided for by section one of this act. Every such trust shall be literally construed by such court so that the intentions of the creator thereof shall be carried out whenever possible. The prosecuting attorney of the county in which the court of chancery shall have jurisdiction and control shall represent the beneficiaries in all cases where they are uncertain or indefinite, and it shall be his duty to enforce such trusts by proper proceedings in the court, but he shall not be required to perform any duties in connection with such trusts in any court outside of this State."

This statute is not retroactive, but applies only to trusts created after its enactment. Stoepel v. Satterthwaite, (1910) 162 Mich. 457, 127 N. W. 673.

57. (1876) 40 Wis. 238.

or not," following the later New York cases, held that the statutory declaration to the effect that "uses and trusts, except as authorized and modified in this chapter, are abolished" necessarily includes charitable trusts:

"The statute was evidently an attempt on the part of the legislature to revise and codify the law of uses and trusts; including, it would seem, within clearly prescribed regulations, charitable uses as well as other trusts, in order that a complete system might exist, 'adapted to the condition of our people and the nature of our institutions'. We must therefore hold that all trusts, except those specifically saved by subsequent provisions of Chapter 84, are abolished by the first section."

Shortly after this decision, the legislature amended the statute restricting the suspension of the absolute power of alienation and that section of the Statute of Uses and Trusts which contains the enumeration of authorized trusts, by excluding from the operation of the former and including within the latter "real estate given, granted, or devised to literary or charitable corporations which shall have been organized under the laws of this state for their sole use and and benefit."[58]

In 1879, by which time the court had been increased to five judges, in *Dodge v. Williams*,[59] Ryan, C. J., speaking for a unanimous court, upheld as valid a charitable trust of property which by the doctrine of equitable conversion was held to be personal property.

"Strenuous objections to the charitable bequests in the will before the court, were founded on the statutes prohibiting perpetuities, and regulating uses and trusts. Chaps. 83 and 84 R. S. 1858. It is almost sufficient to say, for the purposes of this case, that both of these statutes are expressly limited to realty.

"The English doctrine of perpetuities applied to estates both real and personal, and grew up by a series of judicial decisions. Perry on Trusts, Secs. 377, 379. It appears to have been applied to private trusts, but not to trusts for charitable uses, which usually are essentially and indefinitely permanent. Perry, Secs. 384, 687, 736: 'The rule of public policy which forbids estates to be indefinitely inalienable in the hands of individuals, does not apply to charities. These, being established for objects of public, general and lasting benefit,

58. Wis. Rev. St. 1878 Secs. 2039, 2081, (5).
59. (1879) 46 Wis. 70, 1 N. W. 92.

are allowed by the law to be as permanent as any human institution can be, and courts will readily infer an intention in the donor that they should be perpetual.' . . .

"But were this otherwise, the statute limiting the rule against perpetuities to realty, manifestly abrogates the English doctrine as applicable to personalty. Expressio unius exclusio alterius. . . .

"It is proper to say in this connection that a statute of New York, 1 Revised Statutes, 773, applies the doctrine of perpetuities to personal estate, without exception in favor of charitable uses. This renders New York cases on this point inapplicable here. Levy v. Levy, 33 N. Y. 97."[60]

In *Beurhaus v. Cole*,[61] the court held void a devise of realty to the city of Watertown upon a charitable trust, on the ground that the power of alienation was perpetually suspended and that this devise was not within the exception provided in the revision of 1878.[62]

Harrington v. Pier[63] involved a bequest to trustees of what by the rule of equitable conversion was personal property "to be by them or the survivor of them expended for temperance work in the city of Milwaukee . . . within five years from the time the same shall come to the hands of the trustees". Marshall, J., speaking for the court, carefully reviewed the authorities and pointed out that the doctrines announced by *Ruth v. Oberbrunner*[64] and *Dodge v. Williams*,[65] though not necessarily the judgments therein, were so mutually inconsistent that "if one theory was right, the other was necessarily wrong".[66] *Dodge v. Williams* was triumphantly upheld. and the following propositions, among others, laid down:

(1) The common law system of trusts for charitable uses

60. (1879) 46 Wis. at pp. 95, 96, 97.

61. (1897) 94 Wis. 617, 631, 69 N. W. 986.

62. See note 58, supra. The court said: "It is clear that the city is not a literary or charitable corporation organized for 'their sole use and benefit;' hence, althous the trusts are charitable in their nature, they do not come within the exceptions laid down in sec. 2039, and hence the absolute power of alienation cannot be suspended longer than two lives in being and twenty-one years thereafter. The evident intention of the will is that the twenty acres shall be perpetually used for the home for aged and poor people, and that the race track shall be perpetually used as a driving park and agricultural grounds. This plainly constitutes a future estate in each parcel with the power of alienation perpetually suspended, which, under Sec. 2038, is void in its creation."

63. (1900) 105 Wis. 485, 82 N. W. 345.

64. (1876) 40 Wis. 238.

65. (1879) 46 Wis. 70.

66. (1900) 105 Wis. at 502.

did not originate with, nor is it dependent upon, the Statute of Charitable Uses.

(2) The Wisconsin statutes of perpetuities and of uses and trusts do not apply to bequests for charitable uses. Whether they do to devises to such uses is not here decided.

(3) The New York doctrine as to the effect of its statutes of perpetuities and uses and trusts upon trusts for charitable uses, does not prevail in Wisconsin as to personal property. Whether it does as to real estate is not here decided.[67]

In *Danforth v. Oshkosh,*[68] certain real estate situated in the city of Oshkosh was devised to trustees upon trust, to be by them conveyed to the city for a public library site within three years, if by that time a certain sum should be donated by others for the erection, equipment, and maintenance of such library. Dodge, J., speaking for the majority of the court, adopted as final the rule laid down in *Ruth v. Oberbrunner*[69] and *Beurhaus v. Cole,*[70] saying:

"Our conclusion on this subject is both that the statutes, as an original question of construction, prohibit suspension of the power of alienation for the forbidden period, whether the grant be for charitable or other purposes, save for the express exceptions; also that all the prior decisions of this court are in support of such a construction, and the question is not an open one in this state. If the policy is unwise, it can be further modified for the future by the legislature, without sacrifice of rights acquired upon faith of the present statutes and the construction given thereto by this court during at least twenty-five years."

The court, however, upheld the gift as an absolute one to the city, which must vest within three years, a lawful provision.[71]

Marshall and Siebecker, JJ., while concurring in the judgment, delivered separate opinions to the effect that the statutes prohibiting perpetuities and regulating uses and trusts did not,

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67. The above propositions are from the syllabus prepared by Marshall, J. Cassoday, J. dissented, mainly on the ground that the terms of the trust in question were too indefinite, relying upon Morice v. Bishop of Durham, (1804) 9 Ves. 399.

68. (1903) 119 Wis. 262, 97 N. W. 258.

69. (1876) 40 Wis. 238.

70. (1887) 94 Wis. 617, 69 N. W. 986.

71. The statute had been amended in 1887 to allow a suspension of the power of alienation for two lives in being plus twenty-one years. See Kopmeier's Will, (1902) 113 Wis. 233, 89 N. W. 134.

in their opinion, apply to trusts for charitable uses. The concluding paragraph of Justice Marshall's dissenting opinion embodied a prayer for legislative intervention in support of charitable trusts.[72]

This prayer was promptly granted, for in 1905 the legislature amended the statute regulating restraints on the alienation of real property by excepting therefrom real estate given or devised "to a charitable use."[73]

In *Will of Cavanaugh*,[74] a testamentary gift, upon a trust for masses, of a residuary estate comprising real and personal property, was upheld, the court holding it to be a trust of personalty under the doctrine of equitable conversion and overruling an earlier decision[75] which had held that a bequest for masses was void.

Here the court returned to its earlier view that charities are not within the Statute of Uses and Trusts.

"It seems clear that the testator intended an equitable conversion. The main question in the case before us, therefore, is whether a bequest for masses is a charitable bequest, and, this being determined in the affirmative, we easily reach the conclusion that the will is valid. In Dodge v. Williams and Harrington v. Pier, it is determined, after an exhaustive

72. "It is now, seemingly, up to the legislature, as it was in New York in 1893, to say whether a broad policy as to devises of property to charity shall prevail in this state, or not. It will, in the light of the decision in this case, be unmistakable that if the public desire is that men of wealth shall at least be permitted to have a free hand in devoting their property to the benefit of mankind instead of to mere selfish or private ends, legislative aid or command must be had in the matter. Why should such free hand not be permitted? That is the policy which generally prevails in every section of our country. Why should Wisconsin be an exception? The legislature must answer that. The responsibility for the continuance of the exception rests with that branch of the government, regardless of whether it is responsible for having created it or not. If what I have written shall so emphasize that situation as to stimulate remedial action, placing our state in the front rank of communities as regards favoring devises of privately accumulated wealth to charitable objects, it will be a 'consummation devoutly to be wished'." 119 Wis. at p. 310.

73. Laws of 1905, Ch. 511. The statute as thus amended reads as follows: "The absolute power of alienation shall not be suspended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate and twenty-one years thereafter, except in the single case mentioned in the next section, and except when real estate is given, granted or devised to a charitable use or to literary or charitable corporations which shall have been organized under the laws of this state, for their sole use and benefit, or to any cemetery corporation, society or association."

74. (1910) 143 Wis. 90, 126 N. W. 672.

75. McHugh v. McCole, (1897) 97 Wis. 166, 176, 72 N. W. 631.

review of the authorities, that chancery had jurisdiction over public trusts or charities in England before the Statute of 43 Elizabeth, c.4, and such chancery jurisdiction became a part of our jurisprudence, and, therefore, charitable trusts may be enforced and are not controlled by our Statute of Uses and Trusts. In the nature of things, this was held necessary, because a public trust or charitable use is necessarily indefinite and uncertain, especially as to beneficiaries; that a public trust begins where a private trust ends as regards certainty and definiteness. Of course some degree of certainty must obtain even in a public trust. The scheme of charity must be sufficiently indicated, or a method provided whereby it may be ascertained and its objects made sufficiently certain to enable the court to enforce an execution of the trust according to the scheme."[76]

Again in *Maxey v. Oshkosh*,[77] a charitable trust of personal property was once more upheld, this time by a unanimous court. Marshall, J., in a separate opinion of concurrence, rejoices that "the spectre of the New York heresy" which "was buried out of sight in that state in *Allen v. Stevens*"[78] has finally been banished from Wisconsin.

Charitable Trusts in Minnesota.

In Minnesota the history of charitable trusts proper is simple enough, though far from being satisfactory. The history of the judicial inventions to which the supreme court of the state has had to resort in order to sustain many worthy gifts for charitable objects is more or less tortuous and will only be briefly summarized in this paper.

The Minnesota Territorial Revised Statutes of 1851, like those of Michigan and Wisconsin, copied the provisions of the New York Revised Statutes as to restraints on alienation of real estate, but did not adopt the provisions as to restraints

76. (1910) 143 Wis. at pp. 101, 102.

77. (1910) 144 Wis. 238, 128 N. W. 899. It is difficult to find much difference between the terms of the gift in this case and the terms of the gift in Danforth v. Oshkosh, (1903) 119 Wis. 262, 97 N. W. 258, supra, but the court here found that "there are many provisions in the will under consideration which indicate an intention on the part of the testatrix to create a public charitable trust." Marshall, J., in his concurring opinion, suggests that the changed situation wrought by the legislative declaration (i. e. the amendment of 1905, exempting from the statute of perpetuities real estate granted or devised to a charitable use) may perhaps justify the court in now declaring to be a charitable trust what prior to the amendment must have been upheld as an outright gift to the city in order to save it from destruction.

78. (1899) 161 N. Y. 122, 55 N. E. 568.

upon the absolute ownership of personalty. The Statute of Uses and Trusts was for many years like that of New York.[79] But in 1875 and again in 1893 additional subdivisions were added to the list of authorized trusts, covering trusts of personal property.[80]

The first case involving the validity of a charitable trust seems to be *Little v. Willford*.[81] In this case the plaintiff had deeded land to certain individuals as trustees of the Methodist Episcopal Church of Olmsted County, (which church was not incorporated) "in trust to be used, maintained, kept, and disposed of as a place of divine worship, for the use of the ministry and membership of the Methodist Episcopal Church in the United States". The court held that this was a charitable trust and, in consequence, void.

"Such trusts are not recognized in the statute, and it is expressly declared, in the first section of the chapter upon uses and trusts, that, except as thereby authorized, they are abolished. The subject has undergone elaborate discussion in New York under an act substantially like our own, and it may be regarded as settled in that state, as well as in other states which have adopted similar statutory provisions, that such uses are abolished by our statute. Willard, Eq. Jur. (Potter's Ed.) 569; 2 Pom. Eq. Jur. Sec. 1029; Holmes v. Mead, 52 N. Y. 332; Meth. Church v. Clark, 41 Mich. 730."[82]

The opinion continues:

"The legislative policy of this state is not only indicated by the terms of this statute, but by the provisions that are made for the incorporation of religious and other societies under the general law, and for the direct ownership and control of property granted to them, or for their benefit. Pub. St. 1858, c. 17, Secs. 20, 21, 39; Gen. St. 1878, c. 34, Sec. 214, etc. The purpose is sufficiently manifest, (as respects real estate, certainly,) to discourage the accumulation of property in the hands of trustees, subject to an uncertain disposition, and to place it under the direct control of those entitled to the beneficial interest in it, except in the particular cases expressly declared in the statute. The sections of the statute last above referred to recognize inchoate and equitable rights in such associations to property acquired by or intended to be granted to them, the

79. The fifth class of authorized trusts added to the Michigan and Wisconsin statutes—see note 48 supra—was inserted in the Minnesota revision of 1851, (Ch. 44, Sec. 11 (5), but was dropped from the General Statutes of 1866.

80. Laws 1875, Ch. 53, Laws 1893 Ch. 84.

81. (1883) 31 Minn. 173, 17 N. W. 282.

82. (1883) 31 Minn. at p. 176.

control of which, upon their becoming incorporated, passes to the corporate body."

The doctrine announced by this case has been followed without question ever since. In *Lane v. Eaton*[83] a devise of realty to trustees for the benefit of the Salvation Army (an unincorporated religious society) was held invalid as a gift in trust. (Happily, the gift was upheld on another ground, of which more will be said later.) Said the court:

"Section 4274, c. 43, G. S. 1894, provides that uses and trusts are abolished, except as authorized by that chapter. It is well settled in the states from which we derived this statute that it has abolished the great body of the English law of charitable uses and trusts and the doctrine of cy pres as administered in England. See 2 Pomeroy, Eq. Jur. Secs. 1018-1029. Under this statute the beneficiary of the trust must be certain, or capable of being rendered certain. Therefore no unincorporated, voluntary association, whose membership is fluctuating and uncertain, can be the cestui que trust. Downing v. Marshall, 23 N. Y. 366; Methodist Church v. Clark, 41 Mich. 730, 3 N. W. 207; Ruth v. Oberbrunner, 40 Wis. 238. See, also, 2 Pomeroy, Eq. Jur. Sec. 1029, and cases cited in Holland v. Alcock, 108 N. Y. 312, 16 N. E. 305. See, also, German v. Scholler, 10 Minn. 260 (331)."[84]

This doctrine was re-affirmed in *Shanahan v. Kelly*:[85]

"That all trusts, including charitable trusts in real estate, except as authorized by chapter 43, are abolished, and that the beneficiary of any authorized trust must be certain, or capable of being rendered certain, or the trust is void, is the settled law of this state."

It was held at an early date that the Statute of Uses and Trusts as originally enacted in Minnesota did not apply to trusts of personal property, or at least that the section abolishing certain resulting trusts was applicable only to resulting trusts of realty.[86] But in *Shanahan v. Kelly*,[87] it was held that the amendments of 1875 and 1893, adding to the list of authorized trusts certain trusts of personalty, brought all

83. (1897) 69 Minn. 141, 71 N. W. 1031.

84. (1897) 69 Minn. at p. 143.

85. (1903) 88 Minn. 202, 210, 92 N. W. 948. See to the same effect, Watkins v. Bigelow, (1904) 93 Minn. 210, 221; 100 N. W. 1104; Young Men's Christian Association v. Horn, (1913) 120 Minn. 404, 139 N. W. 806.

86. Baker v. Terrell, (1863) 8 Minn. 195 (165). But see Y. M. C. A. v. Horn, 120 Minn. 404, 139 N. W. 806, discussed infra.

87. (1903) 88 Minn. 202, 211, 92 N. W. 948.

trusts of personal property, as well as trusts of real property, within the statute.[88]

"It is obvious from the mere reading of [the statute] as it now stands that, whatever may have been the rule prior to 1875, all express trusts, including charitable trusts, in personal property, except as provided therein, are abolished, precisely as are trusts in real estate. There is no reasonable rule of construction which will exclude personal property from the trusts prohibited by the statute, and we so hold."

In the meantime, one more subdivision had been added to the enumeration of authorized trusts:

"Sixth. Any incorporated city or village in the state of Minnesota now or hereafter organized is authorized to receive by gift, grant, devise or bequest and take charge of any money, stocks, bonds, personal, real or mixed estates, choses in action and property of any kind whatever, and to invest, re-invest and loan the same for the benefit of any public library association in such city or village and any public cemetery association located within ten miles of the corporate limits of any such city or village free from taxation, and administer the same in accordance with the will of the testator or the grant of the grantor of the estate. The district court of the state of Minnesota shall have the power in respect to such trust, estate and trustees as are conferred on the said court by this chapter in respect to other trusts."[89]

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88. The amendments were as follows:

(5) "To receive and take charge of any money, stocks, bonds, or valuable chattels of any kind, and to invest and loan the same for the benefit of the beneficiaries of such express trust; and the district courts of the state shall, on petition and hearing, have power to appoint a trustee for the purpose herein set forth, requiring such trustee to give such bond for the faithful execution of such express trust as to the court may seem right and proper; and express trusts, created under the provisions of this clause, shall be administered under the direction of the court." Laws 1875 Ch. 53,—now G. S. 1913 Sec. 6710 (5).

(7) "For the beneficial interests of any person or persons, when such trust is fully expressed and clearly defined upon the face of the instrument creating it; providing such trust shall not endure for a period longer than the life or lives of specified persons in being at the time of its creation, and for twenty-one years after the death of the survivor of such persons; provided, further, that any and all trusts which do not permit the free alienation of the legal estate by the trustee so that when so alienated it shall be discharged from all trusts, shall be deemed and construed, as heretofore, and shall not be authorized by the provisions of this subdivision." (Laws 1893 Ch. 84, as amended by Laws 1901 Ch. 95—now, with slight amendments, G. S. 1913 Sec. 6710 (6). A provision much like this subdivision is found in the Michigan and Wisconsin statutes, but, it seems, has not been construed to apply to personal property. See the Michigan and Wisconsin cases already discussed. The 1905 Minnesota Revision removes all doubt by inserting after the first clause the words: "whether such trust embraces real or personal property or both."

89. Laws 1893, Ch. 84. This was amended in 1901 by adding the words,

Referring to this subdivision, the court, in *Shanahan v. Kelly*,[90] said:

"All trusts, with the possible exception of those authorized by the sixth subdivision of section 11, whether in real or personal estate, authorized by chapter 43, in order to be valid, must be definite and certain as to the beneficiaries of the trusts, or capable of being rendered certain. This is no longer an open question in this state."

In *City of Owatonna v. Rosebrock*,[91] a bequest of five thousand dollars to the city of Owatonna, as an endowment in perpetuity for a kindergarten, was upheld under the section last above quoted, the court holding further that "the proviso attached to [subdivision 4 of the same section] in reference to perpetuities has no application to bequests of this character to a municipality, they being expressly authorized".[92]

Within a few months of the decision in *Shanahan v. Kelly*,[93] the legislature enacted a statute authorizing charita-

"or for the purpose of establishing or maintaining a kindergarten or other school or institution of learning therein," in order to uphold the trust referred to in Owatonna v. Rosebrock, (1903) 88 Minn. 318, 322, 92 N. W. 1122. This subdivision is now G. S. 1913, Sec. 6710 (7).

90. (1903) 88 Minn. 202, 212, 92 N. W. 948.

91. (1903) 88 Minn. 318, 92 N. W. 1122.

92. (1903) 88 Minn. at p. 324. This subdivision as to municipal charitable trusts was again amended by Laws 1915, Ch. 98, as follows:

"Provided, however, that each city in the State of Minnesota which now has or hereafter may have 20,000 and not more than 50,000 inhabitants, in addition to the foregoing, may receive by gift, grant, devise, or bequest, and take charge of, convert, invest and administer, free from taxation, real or personal property, or both, of any kind or nature whatsoever, and wherever located, for any public or charitable purpose, or to provide, enlarge, improve, lease and maintain for the use and benefit of the inhabitants of such city, animal, bird, fish, game and hunting preserves, public parks, public grounds, public waterways, public bath houses and grounds used in connection therewith and public play grounds within or without the limits of such city, whether within or without this state, or for the support, medical treatment and nursing of the worthy poor residing in such city."

A further act by the same legislature also affects municipal charitable trusts.—Laws 1915, Ch. 183:

"Any city in the state of Minnesota now or hereafter having a population of over fifty thousand inhabitants, shall, in addition to all other powers now possessed by it, have, and it is hereby given, power and authority to accept in trust, gifts, devises and bequests of money or property, whether the same be donated, devised or bequeathed prior or subsequent to the passage of this act, for the purpose of founding, establishing and maintaining free medical dispensaries for the benefit of the poor of any such city or of the county in which any such city is situated, and for the purpose of founding, establishing and maintaining free public libraries for the use and benefit of any of the inhabitants of any such city or of the county in which any such city is situated."

93. (1903) 88 Minn. 202, 92 N. W. 948.

ble trusts, modelled apparently on the New York statute of 1893 as amended in 1901,[94] though much more loosely drawn. The statute was entitled an act to amend the sixth subdivision [what is now the seventh subdivision] of that section of the state of uses and trusts which enumerates authorized trusts.[95] The restrictive form of the title of this statute led to its undoing, for in *Watkins v. Bigelow*,[96] the enactment was held to be unconstitutional, on the ground that its subject matter was not expressed in the title:

"No legislator, lawyer, or layman, by reading the title, would understand, or even suspect, that the purpose of the act was to effect a practical repeal of the existing statute prohibiting express trusts by authorizing the creation of trusts for nearly every conceivable purpose; to change the settled public policy of the state on the subject of trusts, as indicated by its statutes and the decisions of its courts for fifty years; to open wide the door for the abuses which the original statute was intended to remedy; to permit an evasion of our law against perpetuities and accumulations by the creation of trusts; to abrogate the rule requiring the beneficiaries to be certain, or capable of being rendered certain; and to establish the ancient and discarded rule of charitable uses, and to invest the courts with the prerogative power of cy pres in its most obnoxious form. Such is the legal effect of the statute in question.

"Such radical changes in our laws and public policy were concealed under a title declaring that the purpose of the act was to amend a particular subdivision of a section of the statute authorizing the creation of a particular class of trusts. The title relates to a particular class of trusts, while the act itself relates to general legislation on the subject of trusts—a clear departure from the title. We hold that the title of chapter 132, p. 188, Laws 1903, is restrictive, and that the subject matter of the act is not expressed in its title, and therefore the whole act is unconstitutional."[97]

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94. See note 47, supra.

95. Now G. S. 1913, Sec. 6710.

96. (1904) 93 Minn. 210, 100 N. W. 1104.

97. (1904) 93 Minn. at pp. 223, 224. Contrast with this vigorous disapproval of "the ancient and discarded rule of charitable uses," the opinion of Parker, C. J., in Allen v. Stevens, (1899) 161 N. Y. 122, 55 N. E. 568, and the views several times expressed by Marshall, J., in the late Wisconsin decisions above quoted, especially note 72 supra.

PRESENT STATE OF THE LAW RESPECTING CHARITABLE DISPOSITIONS IN MINNESOTA.

Thus in Minnesota today there are many difficulties attendant upon the creation of charitable gifts. The present status of the law may be briefly summarized as follows:

I. A gift, inter vivos or by will, of realty or personalty may be made to a municipal corporation in trust for one of the charitable purposes enumerated in subdivision seven of section 6710 General Statutes 1913, together with the amendment thereof by Laws 1915, chapter 98. The provisions of Laws 1915, chapter 183, also fall within this class of what might be called municipal trusts.* Such trusts (certainly those in subdivision seven), if of personal property, may last in perpetuity.[98]

Whether the same would be true if the trust res were real property and whether the free alienation of the legal estate by such trustee might be suspended for a period exceeding two lives in being[99] are questions which seem not yet to have been decided.

II. A gift of property, real or personal, inter vivos or by will, may be made outright to an existing corporation which is authorized by its charter to receive and hold such property, the property given to be employed for some purpose for which such corporation is organized.[100] The authorities disclose a commendable tendency to hold as such an outright gift what would under ordinary circumstances be more properly construed as a gift to the corporation in question for a charitable

* See Note 92, supra.

98. City of Owatonna v. Rosebrock, (1903) 88 Minn. 318, 324, 92 N. W. 1122. See, also, Young Men's Christian Ass'n. v. Horn, (1913) 120 Minn. 404, 413, 139 N. W. 806.

99. See G. S. 1913 Secs. 6664, 6665, 6710.

100. Atwater v. Russell, (1892) 49 Minn. 57, 82, 51 N. W. 629, 52 N. W. 261; Lane v. Eaton, (1897) 69 Minn. 141, 146, 71 N. W. 1031; Watkins v. Bigelow, (1904) 93 Minn. 210, 224, 100 N. W. 1104; Young Men's Christian Ass'n. v. Horn, (1913) 120 Minn. 404, 415, 139 N. W. 806. In the case last cited, P. E. Brown, J., speaking for the court, said (p. 415): "It must be conceded, as contended by the respondent, that it is the settled law of this state that a gift to a private individual, in trust for either personal or charitable purposes, must designate the beneficiaries at least in such a way that they are capable of being rendered certain, but that a gift to a corporation, with directions as to use, may be valid, not as a trust, but as a gift upon condition, though the ultimate beneficiaries of the gift are more or less uncertain."

use.[101] This same tendency was noticeable in New York and Wisconsin before the statutes of those states reinstated the doctrine of charitable trusts.[102]

It is not entirely clear what would happen if the corporation were to use the property so given for one of its authorized purposes, but not the purpose designated by the donor, but it seems probable that the courts would recognize a right of reverter to the donor or his representatives.[103]

III. A gift of property, real or personal, seemingly either inter vivos or by will, may be made to trustees, to be by them transferred to a corporation thereafter to be organized for the purpose of carrying out the objects stipulated by the donor or testator, provided that (1) such corporation be formed within a reasonable time thereafter, or perhaps within "the life or lives of specified persons in being at the time of (the trust's) creation and for twenty-one years after the sur-

101. See the cases cited in the preceding note.

In Cone v. Wold, (1902) 85 Minn. 302, 88 N. W. 977, it is stated that "a donor has a right to impose upon a gift a condition which will bind the donee to use the funds in the nature of a trust."

102. Bird v. Merklee, (1895) 144 N. Y. 544, 39 N. E. 645, 27 L. R. A. 423; Danforth v. Oshkosh, (1903) 119 Wis. 262, 97 N. W. 258. See also Woman's Foreign Missionary Society v. Mitchell (1901) 93 Md. 199, 48 Atl. 737, 53 L. R. A. 711.

103. Reference is made in Atwater v. Russell (see note 100, supra) to the provision that charitable corporations "are prohibited from diverting such gift from the specific purposes designated by the donor." (See G. S. 1913 Sec. 6527.) Shanahan v. Kelly, (1903) 88 Minn. 202, 92 N. W. 948, suggests by way of dictum that if a corporation were "expressly organized and authorized by law to do the work for which the bequests were made, it could be dissolved should it abuse its franchise." This statement is quoted with approval in Young Men's Christian Ass'n v. Horn, (1913) 120 Minn. 404, 416, 139 N. W. 806.

In the statute authorizing the formation of a corporation "for the purpose of administering and furnishing relief and charity for the worthy poor who may reside in a designated locality," (G. S. 1913 Secs. 6534 et seq., L. 1895 Ch. 158) and also in the case of corporations formed for maintaining homes for dependent children (G. S. 1913 Sec. 6549 et seq., L. 1913 Ch. 314.) or for aged men and women (G. S. 1913 Sec. 6552 et seq., L. 1911 Ch. 65) it is expressly provided that any court of equity, on its own motion or on application, may have and exercise visitorial powers over its officers and affairs (G. S. 1913 Secs. 6535, 6550, 6555). But, obviously, there are many charitable corporations not within these statutes last quoted.

In Cone v. Wold, (1902) 85 Minn. 302, 88 N. W. 977, the court imposed a resulting trust on the funds contributed by the city of Minneapolis to the Minneapolis Police Department Relief Association when the association was dissolved and could not, therefore, carry out the conditions annexed to the gift. "The acceptance of the money from the city impressed with the condition amounted to a contract on the part of the association that it would use the money for the particular purposes specified in its constitution and by-laws as then existing, and upon its refusal to proceed further the money should be returned to the city as a resulting trust. The purposes for which it was created have ceased, and the trust has failed."

vivor of them",[104] and (2) if the subject matter of the gift be real estate, the trustees must be given a power of sale thereof; otherwise there is a suspension of the power of alienation which is not limited by two lives in being, as is required by the Minnesota statute.[105]

IV. A gift, either, it seems, inter vivos or by will, of personal property or of real property directed to be sold (which by the doctrine of equitable conversion is treated as personal property,)[106] if of the character described in subdivision five, —"to receive and take charge of any money, stocks, bonds or valuable chattels of any kind and to invest and loan the same for the benefit of the beneficiaries of such express trust"[107] may be made to a trustee upon a perpetual trust, for a definite beneficiary, and such beneficiary may be a charitable corporation, receiving the profits of the trust upon a condition as to its use.[108]

The unusual feature of the case cited in support of this last proposition is that a private trust of personalty in perpetuity is held to be lawful.[109] This seems to the writer to be an un-

104. In Young Men's Christian Ass'n. v. Horn, (1913) 120 Minn. 404, at 417, 139 N. W. 806, the court uses the phrase "[a corporation] to be thereafter organized within the time limited by law."

105. G. S. 1913 Secs. 6710, 6664, 6665. See Atwater v. Russell, (1892) 49 Minn. 22, 56, 51 N. W. 629, 52 N. W. 261. In re Tower's Estate (1892) 49 Minn. 371, 52 N. W. 27. Y. M. C. A. v. Horr (1913) 120 Minn. 404, 417, 139 N. W. 806.

106. See In re Tower's Estate, (1892) 49 Minn. 371, 52 N. W. 27; Y. M. C. A. v. Horn, (1913) 120 Minn. 404, 421, 139 N. W. 806.

107. G. S. 1913, Sec. 6710 (5). "To receive and take charge of any money, stocks, bonds, or valuable chattels of any kind and to invest and loan the same for the benefit of the beneficiaries of such express trust; and the district courts of the state shall, upon petition and hearing have power to appoint a trustee for the purpose herein set forth, requiring such trustee to give such bond for the faithful execution of such express trust as to the court may seem right and proper; and express trusts created under the provisions of this paragraph shall be administered under the direction of the court."

108. Y. M. C. A. v. Horn, (1913) 120 Minn. 404, 139 N. W. 806. Here again we may observe a tendency, already noted in another connection, (note 100 supra,) to hold such a disposition as a gift of the beneficial interest to the corporation, with a direction or condition as to its use, rather than a gift to such corporation upon a charitable trust. "The language of the donation plainly indicates a gift of the proceeds of the bond to the corporation, with directions as to its use, or possibly upon condition. To hold that the young men and boys referred to are the beneficiaries in the sense contemplated by our trust statutes and the cases construing the same would be a very strained construction." Y. M. C. A. v. Horn, (1913) 120 Minn. 404, 418, 139 N. W. 806.

109. "We hold that, so far as its perpetuity feature is concerned, the trust here involved, assuming for the moment that its corpus consists

fortunate doctrine, although it must be confessed that the result reached in the particular case is to be commended. What the testator sought to provide for was a trust for a charitable purpose, and this he could have done in practically every other jurisdiction in the United States;[110] and of course it is well settled that the ordinary doctrines as to perpetuities do not apply to charitable trusts. It is only because of the unfortunate restrictions upon the free creation of charitable trusts in Minnesota that the testator did not adopt the simple and natural method of giving the property in question to the Young Men's Christian Association upon a perpetual trust, to expend the income as it accrued, in providing boys and young men "with education along industrial lines".

To reach its conclusion that a private trust in perpetuity is lawful, the court, as the first link in the chain of argument—and seemingly as an essential link,—lays down the doctrine that prior to the enactment of the amendment of 1875, adding subdivision five to the list of authorized trusts,[111] "a trust in personalty could not be created in this state (Minnesota); all trusts except those authorized by statute having been

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entirely of personalty, is authorized by subdivision 5. It is true, as contended by respondent, that the spirit of our laws is against perpetuities; but we think, nevertheless, that the legislature did not intend to place any limitation upon trusts of this kind, any more than upon those authorized by subdivision 7, [municipal charitable trusts] as to which we have seen that no time limit is deemed to have been imposed. We have nothing to do with the wisdom of this lack of limit upon duration, and if it should lead to abuse, the remedy would be with the legislature." Y. M. C. A. v. Horn (1913) 120 Minn. 404, 414-415, 139 N. W. 806.

The identical question has come up for decision in Michigan and in Wisconsin. It seems to have been taken for granted in Michigan that the common law rule against perpetuities continues as to personalty, Toms v. Williams, (1879) 41 Mich. 552, 562, 2 N. W. 814; while in Wisconsin an early decision, Dodge v. Williams, (1879) 46 Wis. 70, 92, 1 N. W. 92; held that "the statute limiting the rule against perpetuities to realty manifestly abrogates the English doctrines as applicable to personality, *expressio unius exclusio alterius.*" Though occasionally questioned, (e. g. in DeWolf v. Lawson, (1884) 61 Wis. 469, 21 N. W. 115, 50 Am. Rep. 148; Webster v. Morris, (1886) 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278) this doctrine was finally and decisively upheld in Becker v. Chester, (1902) 115 Wis. 90, 126-131, 91 N. W. 87, where it was said: "Whether the decision was right or wrong, to disturb it now by mere judicial power would be a far greater mistake than the making thereof, if it were clearly erroneous. When such a question has been so long settled as to have become firmly impressed upon property, the maxim, *Stare decisis, et non quieta movere,* should be regarded as a governing principle in respect thereto."

110. Perhaps not in Maryland or Virginia. See note 19, supra.

111. Laws 1875 Ch. 53. See note 88, supra.

abolished by General Statutes 1866, chapter 43, section 1, and there being then no provisions in our laws authorizing trusts in personalty."[112]

A contrary view was expressed in *Baker v. Terrell*,[113] where Emmett, C. J., held that the statutory modification of the rule creating a presumption of a resulting trust where one who purchases property takes title in the name of another, did not apply to such a transaction involving personal property. The opinion in this case opens with the statement that "there can be but little doubt that the chapter of our statute concerning uses and trusts . . . relates to real property only." This statement was quoted with approval in *Shanahan v. Kelly*,[114] where the court held that the amendment of 1875, by listing among the authorized trusts certain private trusts of personalty, necessarily brought all trusts of personal property, including charitable trusts of personalty, within the operation of section 1 of the chapter on uses and trusts, which declares that "uses and trusts, except as authorized and modified in this chapter, are abolished".

As has already been pointed out, the statute of New York, regulating uses and trusts was practically identical with the Minnesota statute before the amendments of the latter statute made in 1875 and subsequent thereto. It has uniformly been held in New York, that this statute, enumerating trusts of real estate and making no mention of trusts of personal property, leaves intact the usual rules applicable to trusts of personal property as they existed at the time the statute under discussion was enacted.[115]

Conclusion.

The foregoing exposition inevitably leads us to the conclusion that Minnesota sorely needs a statute restoring "the ancient charitable use".

To quote from the opinion of Parker, C. J., in *Allen v.*

112. (1913) 120 Minn. at p. 411. The General Statutes of 1866, so far as they applied to trusts, as already noted, were, with one exception, not here material, the same as the Minnesota Territorial Statutes of 1851, Ch. 60.

113. (1863) 8 Minn. 165 (195).

114. (1903) 88 Minn. 202, 210, 92 N. W. 948.

115. Kane v. Gott, (1840) 24 Wend. (N. Y.) 641, 35 Am. Dec. 641; Matter of Carpenter, (1892) 131 N. Y. 86, 29 N. E. 1005. See also Dodge v. Williams, (1879) 46 Wis. 70, quoted at page 214, supra.

Stevens,[116] in explanation of the New York statute of 1893 reinstating charitable trusts:

"Looking back over the twenty years that had elapsed since the decision of the court in Holmes v. Mead, the legislature could discover nothing but wrecks of original charities, charities that were dear to the hearts of their would-be founders, and the execution of which would have been of inestimable value to the public."

So it has been in Minnesota, though perhaps to a less extent, because in this state the judges have displayed a greater tendency to strain settled principles of the law in order to uphold charitable gifts. Nor can they be blamed for so doing. Of the eleven cases found in our reports involving dispositions of property for charitable objects, which are usually cited as authorities upon the matters here under discussion,[117] four were held to be fatally defective, two because they were attempts to create charitable trusts,[118] and the other two because the devise upon trust to convey to a corporation about to be formed either did not provide for a power of sale in the trustees or did not provide that the conveyance to the corporation should take place within the time limited by the statute of perpetuities.[119] Of the remaining seven decisions, one was a municipal trust falling within the express provision of subdivision seven of the statute;[120] another has led the Minnesota supreme court into adopting the obviously unfortunate doctrine that a private trust of personal property may be created to last in perpetuity;[121] and the remaining five are all cases where to uphold the gift the court treats it as an outright gift to a charitable corporation already formed, or to be formed, when it is obvious that the real intent was to make the corporation the legal owner of the property, but to give the beneficial interest therein, not to the corporation itself, but to

116. (1899) 161 N. Y. 122, 140, 55 N. E. 568.

117. Most of the cases in this summary are cited in 1 Dunnell's Minnesota Digest Secs. 1419, 1423, and the 1916 Supplement.

118. Little v. Willford, (1883) 31 Minn. 173, 17 N. W. 282, Shanahan v. Kelly, (1903) 88 Minn. 202, 92 N. W. 948.

119. Rong v. Haller, (1909) 109 Minn. 191, 123 N. W. 471; Bemis v. Northwestern Trust Co., (1912) 117 Minn. 409, 135 N. W. 1124. The former objection seems to have been overlooked in Atwater v. Russell, (1892) 49 Minn. 57, 51 N. W. 629, 52 N. W. 26.

120. City of Owatonna v. Rosebrock (1903) 88 Minn. 318, 92 N. W. 1122.

121. Y. M. C. A. v. Horn, (1913) 120 Minn. 404, 139 N. W. 806.

those individuals who might be the recipients of its bounty.[122]

In an appendix to this paper, the writer submits a proposed statute to authorize charitable trusts in Minnesota.

EDWARD S. THURSTON.

UNIVERSITY OF MINNESOTA.

APPENDIX.

PROPOSED STATUTE FOR THE AUTHORIZATION OF CHARITABLE TRUSTS IN MINNESOTA.*

An act relating to charitable trusts and amending section 3249 of the Revised Laws, 1905, now section 6710 of the General Statutes of Minnesota, 1913, by adding thereto a new subdivision to be known as subdivision 8.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That section 3249 of the Revised Laws of Minnesota 1905 (now section 6710 of the General Statutes, 1913) is hereby amended by the addition thereto, as subdivision 8, the following, to-wit:

8. To receive by grant, devise, gift, or bequest and take charge of, invest, and administer, free from taxation, in accordance with the terms of the trust, any property, real or personal, upon and for any religious, educational, charitable, benevolent, or public use or trust.

No such trust shall be invalid because of the indefiniteness or uncertainty of the object of such trust or of the persons designated as the beneficiaries thereunder in the instrument creating the same, nor by reason of the same contravening any statute or rule against perpetuities or against restraint upon the free alienation of the legal or equitable estate of real or personal property.

If in the instrument creating such a grant, devise, gift, or bequest there is a trustee named to execute the same, the legal title to the lands or property granted, devised, given, or be-

122. Atwater v. Russell, (1892) 49 Minn. 57, 51 N. W. 629, 52 N. W. 26. (See note 121, supra.) In re Tower's Estate, (1892) 49 Minn. 371, 52 N. W. 27; Lane v. Eaton, (1897), 69 Minn. 141, 71 N. W. 1031, 38 L. R. A. 669, 65 Am. St. Rep. 559; Kahle v. Evangelical Lutheran Joint Synod, (1900) 81 Minn. 7, 83 N. W. 46; Watkins v. Bigelow, (1904) 93 Minn. 210, 100 N. W. 1104.

* The reader will notice that this proposed statute is, to a great extent, modeled upon the present statutes of New York and Michigan, which are printed in notes 47 and 56, supra.

The writer wishes to acknowledge his indebtedness to Professor Henry J. Fletcher of the law faculty of the University of Minnesota for assistance in the preparation of this proposed statute.

queathed for such purposes shall vest in such trustee. If no such trustee shall be named in said instrument, or if a vacancy occurs in the trusteeship, then the trust shall vest in the district court for the proper county, and shall be executed by some trustee appointed for that purpose by or under the direction of the court; and said court may make such orders or decrees as may be necessary to vest the title to said lands or property in the trustee so appointed.

The district court for the proper county shall have jurisdiction and visitorial power and control over the grants, devises, gifts, and bequests in all cases provided for by this act and over all trusts thereby created. Every such trust shall be liberally construed by such court so that the intentions of the creator thereof shall be carried out whenever possible.

And whenever it shall appear to the district court for the proper county that circumstances have so changed, since the execution of an instrument containing a grant, devise, gift, or bequest to any religious, educational, charitable, benevolent, or public use, as to render impracticable or impossible a literal compliance with the terms of such instrument, the court may, upon the application of the trustee or of the person or corporation having the custody of the property, and upon such notice as the court shall direct, make an order directing that such grant, devise, gift, or bequest shall be administered or expended in such manner as in the judgment of the court will most effectually accomplish the general purpose of the instrument, without regard to and free from any specific restriction, limitation, or direction contained therein; provided, however, that no such order shall be made without the consent of the donor or grantor of the property, if he be living.

The attorney general shall represent the beneficiaries in all cases arising under this act, and it shall be his duty to enforce such trusts by proper proceedings in the courts.

Section 2. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed, but nothing in this act contained shall in any manner impair, limit, or abridge the operation and efficacy of the whole or any part of any statute authorizing the creation of corporations for charitable purposes, or permitting municipal corporations to act as trustees for any public or charitable purpose.

Section 3. This act shall take effect and be in force from and after its passage.

NATIONAL BANKS AS TRUSTEES UNDER THE FEDERAL RESERVE ACT.

May National Banks act as trustees, executors, administrators, and registrars of stocks and bonds under the Federal Reserve Act? Section 11 confers various powers on the Federal Reserve Board, one of which is found in clause K in this language:

"To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to be trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

To ascertain how far the present functions of national banks may be extended under this enactment, two inquiries become necessary: First, what power has Congress to authorize corporations to engage in the business named? Secondly, what has Congress intended with the restrictive phrase, "when not in contravention of state or local law"?

One of the first controversies concerning the power conferred on Congress by the constitution grew out of the act adopted in 1791 to incorporate the Bank of the United States. Washington was urged to veto the bill as unconstitutional and called for the opinion of the members of his cabinet. Jefferson and Hamilton responded, each with a lengthy opinion. Jefferson quoted what Congress had then proposed as the twelfth amendment and which was soon after ratified as the tenth; "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states, or to the people;" and he proceeded to show that authority to charter a national bank was not to be found in the constitution among the delegated powers. Hamilton, on the other hand, while conceding that Congress had only such powers as the constitution gave it, pointed out that the constitution gave Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers vested by this constitution in the government of the United States, or in any department or officer thereof," and

from this, and because the national government must be considered completely sovereign within its sphere, he argued that Congress was the judge of the means necessary for carrying out the enumerated powers; that it had implied powers to select and adopt such means, and could do so by chartering corporations; that by a national bank the government could conduct affairs coming plainly within the scope of its enumerated or express powers, and that the proposed charter would, therefore, be valid. He conceded that the implied powers could not be carried beyond the limits of the powers expressly named. He said:

"The principle in question does not extend the power of the government beyond the prescribed limits, because it only affirms a power to incorporate within the sphere of the specified powers."[1]

Washington adopted Hamilton's views and approved the act, but its constitutionality continued to be the subject of bitter controversy and the bank was unable to procure an extension of the charter and was compelled to go out of existence in 1811.

But the broad constructionists were gaining ground. Another bank of the United States was chartered in 1816. This bank the state of Maryland undertook to tax and that brought the right of Congress to charter the bank and the power of a state to tax it before the Supreme Court in 1819 in the noted case of *McCulloch v. Maryland*.[2] The Court held in favor of the power of Congress to charter the bank and against the power of the state to tax it in an opinion by Marshall, which defined the scope and limit of federal authority under the constitution in a manner that has not been improved upon since.

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

In spite of this decision, the power to charter a national bank was still questioned. The state of Ohio also undertook to tax the bank and that brought the question before the Court

1. Bank Controversies (In U. S. History), Alexander Johnstone, Cyc. Political Science, etc., Vol. 1, p. 199.

2. (1819) 4 Wheat. 316, 4 L. Ed., 579.

again in 1824 in the case of *Osborn v. Bank of United States.*[3] The opinion was again by Marshall, who reviewed and explained the opinion in *McCulloch v. Maryland,* as follows:

"The whole opinion of the court in the case, is founded on and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the Government of the United States.' . . . It is 'necessary and proper' for carrying on the fiscal operations of the government."

The question was now put at rest in the courts, but the controversy continued in and out of Congress for many years, notably during Jackson's administration. It is probably no exaggeration to say it took almost half a century after the adoption of the constitution before the right of Congress to create national banks was generally conceded. The conflict runs through our history in one form or other almost down to the time of the Civil War. One cannot follow it and study the cases cited without becoming impressed to the point of conviction that when Congress in 1864 adopted the present national bank act, it went to the limit of its implied powers; and that to invest these corporations with powers and functions of the character designated in the clause under consideration (except as hereafter noted) would exceed its constitutional authority. For if Congress can create a corporation, or endow a corporation which it has previously created, with the power to act as executor or administrator of the estate of a deceased person, or to hold property in trust for widows and minors, it is impossible to name any property or business so private and so disconnected with the affairs of the national government as *not* to be subject to the authority and control of that government.

The two decisions, which have been cited in support of the power of Congress to create corporations for banking purposes, furnish a strong argument against the authority of Congress to extend the franchise of national banks to common private business. The banks cannot be taxed by the states, says the Supreme Court, for the power to tax is the power to destroy, and under the constitution there cannot be conceded to a state the power to destroy an instrumentality of the national government. Our national banks are accordingly

3. (1824) 9 Wheat. 738. 6 L. Ed. 204.

held subject to state taxation only to the extent permitted by Congress, and they are exempt from state usury laws, no permission to have such laws apply having been given. Now suppose it could be held that by the Federal Reserve Act the government makes the national banks its instrumentalities in the ownership and management of all sorts of real and personal property and of all sorts of business, and that the government should also insist upon its right not to have its instrumentalities taxed by the states, what would there be left *to* the states? And if that principle were carried to its logical limit, what would there eventually be left *of* the states?

Federal legislation cannot be carried to that extent without disregarding the fact that the states are as sovereign within their sphere as the national government is within its sphere. This is aptly expressed by the Supreme Court in *Collector v. Day.*[4]

"The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting, separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the Tenth Amendment 'reserved' are as independent of the general government as that government within its sphere is independent of the States."

To take, own and manage property as trustee, or as executor or administrator, cannot be treated as an incident to banking, and furnish a reasonable ground for claiming that the right of a national bank to act in these capacities would only be part of their banking franchise. Banking is to do business with money and papers representing money.[5] The Supreme Court says:

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper; making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and deal-

4. (1870) 11 Wall. 113, 124, 20 L. Ed. 122; Tenth Amendment; Munn v. Illinois, (1876) 94 U. S. 113, 24 L. Ed. 77; Calder v. Bull, (1709) 3 Dall. 386, 1 L. Ed. 648; Martin v. Hunter's Lessee, (1816) 1 Wheat. 304, 4 L. Ed. 97.

5. Banks, Cyc. Political Science, etc., Vol. 1, p. 227.

ing in negotiable securities issued by the government, state and national, and municipal and other corporations."

The language quoted was used in a case in which a state tax on a national bank, consented to by Congress on condition that it should not be higher than the tax imposed on the banks of the state, was claimed to be illegal because the trust companies and savings banks in the state were taxed at a lower rate. The Court held the tax valid because those state trust companies and savings banks were not *banks*.[6]

The conclusion seems inevitable that under the Federal Reserve Act a national bank cannot be authorized to act as executor or administrator, or as trustee of an ordinary express trust. But it does not follow that it may not be made trustee of *some* trusts. It can undoubtedly be authorized to act as trustee in bankruptcy for that is a matter which is entirely under federal authority, and the bankruptcy act provides that a corporation, as well as an individual may be trustee.[7] Many other trusteeships may occur in matters under federal authority in which national banks may doubtless be authorized to act as trustee. It is possible that such trusts may be created in connection with various strictly federal affairs, but to enumerate them by way of anticipation would be impossible. In such matters it could not be said that the trusteeship would be in contravention of state or local law. Contravention means, "violates", "conflicts", "obstructs", "defeats"; and in a domain wherein state or local laws have no application, or where they are subordinate to the laws of the United States, there is no place for conflict or contravention.

What is said of trusts must also be said about acting as registrars of stocks and bonds. The registration may be so connected with federal securities as to make it perfectly constitutional for Congress to make a national bank the registrar and it may be so entirely and exclusively a matter of state concern, as to place the authorization beyond the scope of federal legislation.

When a statute is open for interpretation all its provisions must be considered, and each, if possible, be given such effect as to make the whole consistent. The object is to ascertain the legislative intent. If a statute is susceptible of two meanings, one of which would make it unconstitutional and the

6. Mercantile Bank v. New York, (1887) 121 U. S. 138, 156, 30 L. Ed. 895.
7. Bankruptcy Act of July 1, 1898, Sec. 45.

other constitutional the courts always adopt the latter. In the light of these rules, what must be said to have been the intention of Congress with the phrase, "When not in contravention of state or local law"? State laws having no application, the subject matter being always out of their reach, and state laws which cease to apply as soon as the subject matter is taken up for federal legislation cannot be the laws contemplated by the clause, for, as already stated, such laws could not properly be said to contravene. Yet Congress has meant something by the phrase, there can be no doubt about that. The language shows plainly that it has recognized the right to act as trustee, executor, administrator and registrar of stocks and bonds to be a subject matter for past and future state legislation—a legislation with which it does not wish the Federal Reserve Act to conflict. It has recognized the constitutional limitations upon its own legislative authority in that field. It has realized that if national banks should, on the authority of a federal statute, exercise functions which Congress has not the power to grant, it would be in contravention of the law of the state in which the functions were so exercised, even though there was no specific state law forbidding it. When the clause is examined from this point of view the consistent, harmonious, and constitutional meaning of it, and the meaning which Congress must have actually intended for it, is this: National banks may have their charters enlarged under the Federal Reserve Act so as to be competent trustees, executors, administrators and registrars of stocks and bonds, except in matters beyond the scope of federal legislation. In such state matters they may also under the act obtain the *consent* of Congress to the exercise of these functions. But in state matters the *power* must come from the state legislatures.

It follows that except in the federal affairs referred to, national banks cannot lawfully act as trustees, executors, administrators and registrars of stocks and bonds, unless there is state legislation expressly conferring upon them the power so to do. At present there is no such legislation in any of the six states comprising the Ninth Federal Reserve District, except South Dakota.

But suppose the legislature in any of these states enacts a statute which provides that a national bank may be trustee, executor, administrator, or registrar of stocks and bonds, and

a special permit is obtained from the Federal Reserve Board under Section 11, Clause K, can it be said that a national bank is nevertheless unable to act in that state in the prescribed capacity because the authority does not come from the United States under its charter? The answer must be no. A state can designate the agencies through which the business within its border may be lawfully done, and what is done through such agencies is valid, although the agent is a foreign or federal corporation acting ultra vires. The ultra vires acts may subject the corporation to discipline from the government of its creation, but the act done in the state authorizing it is valid.[8] In the supposed instance, the permission from the Federal Reserve Board would be a consent on the part of Congress sufficient to make the bank immune against attack for usurpation of franchise.

A. UELAND.

MINNEAPOLIS.

8. The American Bible Society v. Marshall, (1864) 15 Ohio St. 537; White v. Howard, (1871) 38 Conn. 342.

THE RULES OF THE CONFLICT OF LAWS APPLICABLE TO BILLS AND NOTES.

III. Interpretation and Obligation.

A. The Governing Law.

1. In General.

a. *English Law*: Section 72, (2) of the Bills of Exchange Act provides as follows:

"Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made."

Chalmers[1] gives the following explanation of the above provision:

"The term 'interpretation', in this subsection, it is submitted, clearly includes the obligations of the parties as deduced from such interpretation.

"Story, §154, points out the reasons of the rule adopted in this subsection. 'It has sometimes been suggested', he says, 'that this doctrine is a departure from the rule that the law of the place of payment is to govern. But, correctly considered, it is entirely in conformity with that rule. The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guarantee its acceptance and payment in that place by the drawee; and in default of such payment, they agree upon due notice to reimburse the holder in principal and damages where they respectively entered into the contract.'

"The case of a bill accepted in one country but payable in another gives rise to difficulty. Suppose a bill is accepted in France, payable in England. Perhaps the maxim, Contraxisse unusquisque in eo loco intelligitur in quo ut solveret se obligavit, would apply. But if not, then comes the question, What is the French law, not as to bills accepted and payable in France, but as to bills accepted in France payable in England? Probably the lex loci solutionis would be regarded: Cf. Nouguier, §1419."

Dicey[2] makes the following comment:

1. P. 244.
2. Pp. 593-94.

"It is therefore doubtful whether, when a bill is accepted in one country, e.g., England, and made payable in another, e.g., France, the obligations of the acceptor are governed, as the words of the section strictly taken imply, by the law of the country where the bill is accepted (lex loci contractus), or, as they ought to be on principle, by the law of the country where the bill is made payable (lex loci solutionis).

"The probable explanation of this difficulty is curious. Story's expressions have apparently suggested the terms of subsection 2. Story's language may be read, and probably was read by the persons engaged in considering the bill, as meaning that the obligations of the parties to a bill are governed by the law of the place where each party contracts. But this is not his real meaning; he clearly intends to lay down, though in a very roundabout way, that each contract embodied in a bill is to be interpreted by the law of the country where it is to be performed (lex loci solutionis). Unfortunately the language of subsect. (2) reproduces the words rather than the meaning of Story. The result is, that if the terms of the subsection be strictly interpreted, the obligations of an acceptor are to be governed, not, as Story intended, by the lex loci solutionis, but by the lex loci contractus. Mr. Chalmers' suggestion to a certain extent meets the objections to this result, but it may be doubted whether his suggestion is not in conformity rather with the doctrine of Story, when properly understood, than with the language of the Bills of Exchange Act, 1882, s. 72, subs. (2)."

b. *American Law*: The great weight of American authority is to the effect that the liability of the parties and the defences available to them, are governed by the law of the place where the bill or note is payable, and not by the law of the place of issue.[3] A few courts apply the lex loci contractus.[4]

c. *French Law*: The intention of the parties governs. Where the intention is not expressed the law presumes that the parties contracted with reference to the lex loci contractus.[5]

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3. Brabston v. Gibson, (1850) 9 How. (U. S.) 263, 13 L. Ed. 131; Mason v. Dousay, (1864) 35 Ill. 424; Smith v. Blatchford, (1850) 2 Ind. 184, 52 Am. Dec. 504; Hunt v. Standart, (1860) 15 Ind. 33, 77 Am. Dec. 79; Rose v. Park Bank, (1863) 20 Ind. 94, 83 Am. Dec. 306; Emanuel v. White, (1857) 34 Miss. 56, 69 Am. Dec. 385; Strawberry Point Bank v. Lee, (1898) 117 Mich. 122, 75 N. W. 444; Barger v. Farnham, (1902) 130 Mich. 487, 90 N. W. 281; Freeman's Bank v. Ruckman, (1860) 16 Gratt. (Va.) 126; Emerson v. Patridge, (1854) 27 Vt. 8, 62 Am. Dec. 617.

4. Howenstein v. Barnes, (1879) 5 Dill. (U. S. C. C.) 482, Fed. Cas. No. 6786.

5. Cass. Feb. 6, 1900 (S. 1900, 1. 161, and note). Many of the text writers hold that where the parties have the same nationality they will be presumed to have contracted with reference to their national law.

d. *German Law*: The intention of the parties is the controlling law. In the absence of evidence of such an intention the parties will be deemed to have contracted with reference to the law of the place of performance.[6]

e. *Italian Law*: Article 58 of the Commercial Code provides as follows:

"The form and essential requisites of commercial obligations, the form of the acts necessary for the exercise and preservation of the rights derived therefrom and for their execution, and the effect of the acts themselves, are regulated, respectively, by the laws and usages of the place where the obligations are created and where said acts are done or performed, save in every case the exception laid down by Article 9 of the Preliminary Dispositions of the Civil Code for those subject to the same nationality."

Article 9 of the Preliminary Dispositions of the Civil Code has the following wording:

"The substance and effect of obligations are deemed to be regulated by the law of the place in which they were done, and, if the contracting parties are foreigners and belong to the same nationality, by their national law. The showing of a different intent is reserved in each case."

Article 58 of the Commercial Code has given rise to much controversy with reference to the present question. Does it intend to lay down the lex loci contractus as a rule of law, except where the parties have the same nationality, or is it intended merely as an expression of the presumptive intention of the parties in the absence of other evidence? The majority and better view appears to be that the Italian legislator did not intend to exclude the principle of the autonomy of the will in the law of obligations. The intention of the parties is to be regarded, therefore, as the law governing the obligations of the parties. Where the parties are of the same nationality they will be deemed to have contracted with reference to their national law. Where they are of different nationality, they will be presumed, in the absence of evidence showing a contrary intention, to have had in mind the law of the place of execution.[7]

Audinet, p. 611; Chrétien, pp. 104-05; Champcommunal, pp. 148-50; Despagnet, p. 989; Surville et Arthuys, p. 674; Weiss, IV, pp. 357, 458.

6. 6 RG 24 (Jan. 17, 1882).

7. Diena, Trattato, I, pp. 73-79; Ottolenghi, pp. 131-38.

Which of these rules should be adopted in a Uniform Law for the United States?

As the question before us relates to the interpretation and obligation of the contract and not to its validity, the governing principle, recognized in all countries, is that the intention of the parties is, in the last analysis, the controlling factor. In the law of bills and notes, however, such an intention is rarely, if ever, directly expressed and cannot ordinarily be gathered with sufficient definiteness from the surrounding circumstances. In the interest of certainty and the security of commercial dealings involving negotiable paper it is necessary, therefore, for the courts or legislatures to lay down certain presumptions which shall fill in the gap. These presumptions, except in so far as they must yield to considerations of policy, should represent the law which the parties, acting as reasonable men, would probably have chosen as the governing law had their attention been directed to the matter.

On behalf of the lex patriae it is said that the contracting parties are generally familiar with their national law, while they are ordinarily ignorant of the law of the place where they may happen to make the contract. Where they have a common nationality it is deemed fair to presume, therefore, that they had the lex patriae in mind.[8] Against this presumption it may be urged, even from a continental viewpoint, that the law of obligations, unlike the family law, does not express national peculiarities based upon racial characteristics or local, physical conditions. Having to do with business the parties would naturally be more apt to know the law of their domicile than their lex patriae.

Some authors, Pillet,[9] for example, have realized the force of the above objection against the lex patriae and contend that the lex domicilii, if common to both parties, best expresses their presumptive intention. This presumption may best express the probable intention of the parties in the older countries, but it cannot be adopted in a country like the United States, where the population is very migratory. The criterion of domicile under the conditions prevailing in this country would present too many difficult issues of fact to make it a

8. Audinet, p. 611; Despagnet, p. 989; Foelix, I, p. 243; Laurent, VII, p. 518; Rolin, Principes du Droit International Privé, I, p. 509; Surville et Arthuys, p. 674; Weiss, IV, pp. 357, 458.

9. Pillet, Principes, p. 441; Cours, p. 325; Annuaire, XX, p. 153.

practical standard for the defining of legal rights, particularly in the law of negotiable paper, where certainty is a paramount consideration. This objection applies equally to von Bar's[10] theory, which supports the lex domicilii of the debtor.

There remain the lex loci contractus and the lex loci solutionis. Which of these rules should determine the obligation of the parties to a bill or note?

Our comparative study fails to give us a convincing answer. We have seen that the great weight of authority in this country and the German courts apply the law of the place of performance; while the Bills of Exchange Act, the Italian Code and the French courts lay down the law of the place where the contract is made. It seems, however, that the provisions of the English act resulted from a misunderstanding of Story's view which clearly supports the lex loci solutionis.[11] In view of this conflict in the positive law, it will be necessary to look into the theory upon which the conflicting views rest.

The chief supporters of the lex loci solutionis are Story and Savigny. Savigny's argument in favor of the law of the place of performance is put by him in the following form:[12]

"In every obligation, then, we find principally and uniformly two visible phenomena, which we might take as our guides. Every obligation arises out of visible facts; every obligation is also fulfilled by visible facts: both of these must happen at some place or another. We can, therefore, select either the place where the obligation has originated, or the place where it is fulfilled, as determining its seat and its forum,—either the beginning or the end of the obligation. To which of the two points shall we give the preference upon general principles?

"Not to the origin. This is in itself accidental, transitory, foreign to the substance of the obligation and to its further development and efficacy. If in the eyes of the parties a permanent influence reaching into the future were to be ascribed to the place where the obligation arose, this certainly could not

10. Pp. 443-46.

The most recent Norwegian authors appear to have adopted the same view. Synnestvedt, Le Droit International Privé de la Scandinavie, p. 261.

While it is impossible to accept von Bar's reasoning in general, it must be admitted that there is a scientific basis for the adoption of the lex domicilii of the debtor with respect to unilateral obligations. From a theoretical standpoint, therefore, this rule might be applied to bills and notes in jurisdictions where the contracts of the different parties are regarded as creating unilateral obligations.

11. See Dicey, pp. 593-94.

12. Pp. 198-99.

flow from the mere constituent act, but only from the connection of that act, with extrinsic circumstances, by which a definite expectation of the parties was directed to that place.

"The case is quite different with respect to the fulfillment, which is indeed the very essence of the obligation. For the obligation consists just in this, that something which was previously in the free choice of a person, is now changed into something necessary, —that which was hitherto uncertain, into a certainty; and when this necessary and certain thing has come to pass, that is just the fulfillment. To this, therefore, the whole expectation of the parties is directed; and it is therefore part of the essence of the obligation that the place of fulfillment is conceived as the seat of the obligation, that the special forum of the obligation is fixed at this place by voluntary submission."

The above view has found many adherents, particularly in Germany, where it has been adopted by the Reichsoberhandelsgericht[13] and the Reichsgericht[14] and was approved at the twenty-fourth session of the German Juristentag, in 1897.[15]

Notwithstanding Savigny's eminence the arguments used by him in support of the law of the place of performance fail to carry conviction. Von Bar[16] advances the following argument against the position taken by Savigny:

"In support of this view, it is pleaded that performance is the end and object of the obligation to which the whole view of the parties is directed. This does not by itself, however, justify the subjection of the obligation exclusively to the law recognized at the place of performance. All that one can infer is, that in points depending upon the agreement of parties there is foundation for inferring a voluntary subjection to the law of the place of performance, by virtue of that expectation of parties which is directed to that end; while the law of obligations consists to a large extent, although not exclusively, of rules which may be avoided at the pleasure of parties. But even with this limitation, it is impossible, without a revolt against the general logical rules for interpreting the intention of parties, to carry out the theory of the rule of the place of performance in regard to obligations. For even if we leave out of account that, as the parties often know nothing of the law of the place of performance, and as it is often very difficult to say what is the place of performance in this sense, we

13. See von Bar, p. 541, note.

14. RG May 10, 1884 (13 Clunet 609); March 22, 1901 (31 Clunet 960); June 16, 1903, 55 RG 105; July 4, 1905 (15 Niemeyer, p. 285); April 26, 1907 (18 Niemeyer, p. 177).

15. Verhandlungen des 24. deutschen Juristentages, IV, p. 127.

16. Pp. 541-42.

cannot assume any voluntary subjection of the parties to the law of that place, an alteration in the place of performance made subsequently to the conclusion of the contract must alter the contract in each and every point, if the law of the new place of performance differs from that of the old; and if there are several places of fulfillment, we are at a loss for any rule of interpretation."

The above quotation summarizes briefly the arguments against the lex loci solutionis. From the mere fact that the debtor may have to be sued at his residence, the courts of which have jurisdiction in the premises, certainly no deduction regarding the presumptive intention of the parties can be made. Great difficulties might arise in ordinary contracts in the determination of the place of performance when the parties have not indicated the same.[17] In the words of Professor Niemeyer,[18] the rule proposed by Savigny would introduce "a complicated legal concept, the criteria of which pre-suppose again a definite law". In bilateral contracts obligations may arise on both sides, the place of performance of which may be indifferent jurisdictions. In these cases we might have the strange spectacle of having the mutual obligations arising out of one and the same contract controlled by conflicting laws. How are we to look at the obligation of one of the parties separately from that of the other when the one obligation constitutes the condition of the other? And yet, this is the precise thing that the German courts have been forced to do in following Savigny's theory in the above class of cases.[19]

Story considers the application of the lex loci solutionis as "the result of natural justice".[20] In support of this conclusion he relies upon two passages from the Roman law, upon

17. See Story, Secs. 282 et seq.; Wharton, pp. 867-71, 877-83; Minor, pp. 377-82, 388-400. "But although the general rule is so well established", says Story, "the application of it in many cases is not unattended with difficulties; for it is often a matter of serious question, in cases of a mixed nature, which rule ought to prevail, the law of the place where the contract is made, or that of the place where it is to be performed. In general it may be said that if no place of performance is stated, or the contract may indifferently be performed anywhere, it ought to be referred to the lex loci contractus. But there are many cases where this rule will not be a sufficient guide." Sec. 282.

18. Vorschläge und Materialien, p. 241.

19. 34 RG 191 (October 13, 1894); 46 RG 193 (April 28, 1900); 51 RG 218 (April 21, 1902; 55 RG 105 (June 16, 1903); RG April 26, 1907 (18 Niemeyer 177).

20. P. 380.

statements of some of the older authors, and the decisions of English and American courts. Let us inquire into these authorities in order to discover to what weight they are entitled.

Story asserts, first of all, that the Roman law adopted the lex loci solutionis as a maxim, quoting the two passages from the Digest of the Corpus Juris Civilis which follow:[21] "Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret, se obligavit", and "Contractum autem non utique eo loco intelligitur, quo negotium gestum sit; sed quo solvenda est pecunia."

In regard to these quotations it may be said that they do not establish the proposition in support of which they are cited. In the first place, there are other passages in the Corpus Juris, equally explicit, which appear to support the lex loci contractus. For example: "Si fundus venierit ex consuetudine ejus regionis in qua negotium gestum est pro evictione caveri oportet";[21a] and "Uniuscujusque enim contractus initium spectandum et causam."[21b]

Fiore[22] attempts to reconcile the four passages from the Roman law above mentioned by suggesting that the last two refer to the vinculum juris of the contract while the former two, that is, those which were cited by Story, govern merely the mode of performance.

In the second place, it is very doubtful whether the passages quoted by Story have any bearing whatever upon the question before us, for they may refer merely to the forum, that is, to the place where suit may be brought, and not to the law governing the contract itself.

Says von Bar:[23]

"An appeal is made to the fact that by Roman law the forum contractus was set up in the place where the obligation was to be performed, and Savigny especially tries to make out that the local jurisdiction, as well as the local law of the obligation, depends upon a voluntary submission of the parties, and therefore that the rules which regulate the former are to be applied also to the latter. But, in the first place, the Romans, "in determining the jurisdiction, had no intention of laying down what the law of the obligation was to be. Fur-

21. P. 376.
21a. Dig. XXI, 2, 6.
21b. Dig. XVII, 1, 8, pr.
22. I, p. 160.
23. P. 543.

ther, by Roman law the forum contractus was not exclusive, but concurrent with the forum domicilii of the debtor. This could not be the case if the Roman law had conceived the place of performance to be the seat of the obligation. In the third place, it is at variance with the general principles adopted by Savigny himself, and by far the greater number of authorities, to conclude from the competency of a court that the law recognized at its seat is uniformly applicable. By a similar deduction, we should hold that the law recognized at the seat of the court which had to decide any case must rule the case in all its bearings. Lastly, we shall show (see our discussion of jurisdiction) that it is not by any means the case that the Roman law unconditionally set up the forum contractus in the place where the obligation was to be performed."

Wächter,[24] one of the leading authorities on Roman law, expresses himself more fully in regard to the passages from the Roman law cited by Savigny.

"It is certain," he says, "that in so far as a legal transaction is subject to the will of the parties, it must be assumed in case of doubt that they wish the law of the place where the transaction took place to be applied, quo actum est, quo negotium gestum est. In the matters which are subject to the control of the parties, the rule locus regit actum governs therefore in case of doubt. However, a meaning is ordinarily given to this principle of the Roman law which does not appear to be the correct one.

"It is commonly asserted, at least by the more recent (German) writers, that in case the parties have agreed upon a place of payment, the law of such place should control, as that place constitutes, under these circumstances, in effect the locus contractus. They cite in support, D. XLIV. 7 de O et A. l. 21, XLII 5. de reb. auct. jud. 1, 3. These passages say, it is true, that the place of payment agreed upon is deemed legally the locus contractus. But they say this solely with respect to the creation of the forum contractus, in regard to which the agreement is naturally of importance, and by no means as regards the interpretation of the will of the parties and the supplementing of what the parties left uncertain. Indeed on this very point a contrast is made with the place of payment. The will of the parties shall be supplemented by the law of the place in which the negotium gestum est; but as regards the forum contractus the locus contractus shall be deemed not the place quo negotium gestum est, sed quo solvenda pecunia est."

Many other writers agree with von Bar and Wächter and hold that Savigny and Story have given too broad a meaning to the Latin texts quoted.

24. Archiv für die civilistische Praxis, XXV, pp. 42-43.

In the light of the above considerations, Story's assertion that the law of the place of performance is supported by the Roman law must be said to rest upon a questionable foundation.

Story next relies upon the ancient authors, quoting from Paul Voet, Huber and Everhardus, though he admits that John à Sande maintained that the law of the place where the contract was made should govern. He says:[25]

"Paul Voet has laid down the same rule. 'Hinc, ratione effectus et complimenti ipsius contractus, spectatur ille locus, in quem destinata est solutio: id, quod ad modum, mensuram, usuras, etc., negligentiam, et moram post contractum initum accedentem referendum est.' He puts the question: 'Quid si in specie, de nummorum aut redituum solutione difficultas incidat, si forte valor sit immutatus, an spectabitur loci valor, ubi contractus erat celebratus, an loci, in quem destinata erat solutio. Respondeo; ex generali regula, spectandum esse loci statutum, in quem destinata erat solutio'. So that, according to him, if a contract is for money or goods, the value is to be ascertained at the place of performance, and not at the place where the contract is made. And the same rule applies to the weight or measure of things, if there be a diversity in different places. Everhardus accepts the same doctrine. "'Quod, aestimatio rei debitae consideratur secundum locum ubi destinata est solutio, seu deliberatio, non obstante quod contractus alibi sit celebratus. Ut videlicet inspiciatur valor monetae, qui est in loco destinatae solutionis.' Huberus adopts the same exposition. 'Verum tamen non ita praecise respiciendus est locus, in quo contractus est initus, ut si partes alium in contrahendo locum respexerint, ille non potius sit considerandus.' Indeed, it has the general consent of foreign jurists; although to this, as to most other doctrines, there are to be found exceptions in the opinions of some distinguished names."

Is Story correct in saying that the lex loci solutionis "has the general consent of foreign jurists"?

It is noteworthy, in the first place, that Story has quoted only from Dutch authors. No reference is made to Italian writers. Of the many French writers on the subject of the Conflict of Laws, Boullenois alone is cited in a note, and of the German writers, only Hertius.

The Italian school of jurists following Bartolus, the founder of the science of the Conflict of Laws, regarded the law of the place of making as the law governing the obligation of contracts. In his two volume classic work Introduction au

25. Pp. 377-80.

Droit International Privé published in 1888 and 1892, Professor Lainé makes the following statement concerning Bartolus' view on the subject.[26]

"As far as the substance itself of the litigation is concerned (ipsius litis decisio), a distinction must be made. The point in question may relate either to the natural consequences of the contract, to the consequences which inhere in the contract from its inception (aut quaeris de his quae oriuntur secundum ipsius contractus naturam tempore contractus); in this case the lex loci contractus governs, and by the lex loci contractus must be understood the place where the contract is formed and not the place where it is to be performed. Or the question relates to the consequences which arise subsequent to the formation of the contract as the result of negligence or default (aut de his quae oriuntur ex postfacto propter negligentiam aut moram), in which event the law of the place indicated for the performance of the contract must govern, or, if nothing has been specified in this regard, the law of the forum; for it is there that the negligence or default has occurred."

Bartolus' view appears to have prevailed until Domoulin advanced his theory that the express or tacit intention of the parties was the governing law. Contrasting this view with that of Bartolus, Lainé states the following:[27]

"The contracts are, . . . the object of two entirely different systems, that of Bartolus and that of Dumoulin. Bartolus submits the contract to the law of the place where it is executed, at least as to its direct effects, to the consequences which inhere in it from the beginning, and the majority of authors after him regard the contract as formed in the place where it is made, and not where it is to be performed. Bartolus admits, moreover, that as regards the indirect and accidental effects, that is, the consequences which have happened through the negligence or default of the party obligated, the applicatory law is that of the place designated for the performance of the contract, or (in the absence of such an indication) that of the forum . . . Dumoulin, starting from the idea that in the matter of contracts the will of the parties governs, lays down the principle that if the intention of the parties has not been expressed it must be derived from the circumstances under which the contract has been executed. In his opinion the lex loci contractus is only one of the attendant circumstances. . . . Moreover, he does not distinguish between the direct effects and indirect consequences of a contract."

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26. I, pp. 135-36.
27. I, pp. 255-56.

In his discussion of the French, Dutch and German schools of jurists, Lainé unfortunately does not deal specifically with the question now under consideration. He mentions the fact that various authors[28] of the French school applied the lex loci contractus, without stating whether it would govern where the place of performance and the place of execution do not coincide. There is no reason to assume, however, that a radical change with respect to this point had taken place since Bartolus and because of this fact, no doubt, Lainé fails to refer to the matter. The fact that in modern times the French jurists almost without exception support the lex loci contractus as against the lex loci solutionis would tend to show also that this has been the traditional rule in France.

Owing to the uncertainty of the Roman texts, dissenting voices from the doctrine that the lex loci contractus controls the obligation of contracts, have existed at all times, and Boullenois, whom Story cites in support of his statement,[29] seems to have belonged to this class.

As a result of Savigny's influence the prevailing view in Germany today holds that the parties must be deemed to have contracted with reference to the law of the place of perform-

28. E. g. Froland and Bouhier, Lainé II, pp. 37, 64-65.

29. The reference is to Boullenois, Vol. II, Title 4, Ch. 2, Observ. XLVI, pp. 475-76, 488, of his treatise on the Personnalité et de la Réalité des Loix, Coutumes, ou Statuts. On page 488 Boullenois says that where a place of payment is agreed upon the law of that state shall determine the time within which suit must be brought. On pages 475-76 Boullenois quotes from Colerus, de Process. execut. The first part of the quotation consists of a statement of the following general principles which Colerus deems applicable to a contract of sale: "Si agitur de subjiciendo contractum Legibus, aut Consuetudini alicujus loci, tunc attenditur locus, aut Consuetudo fori, ubi verba obligatoria proferuntur, et contractus perficitur, non autem locus destinatae solutionis: Consuetudo si quidem loci ubi negotium geritur, ita subintrat ipsum contractum, ut secundum Leges loci intelligatur actus fuisse celebratus, quamvis ea de re nihil fuerit expressum." Then follows an application of these principles to the sale of a horse at Magdeburg, the purchase price being payable in Nuremberg. Colerus reaches the conclusion that the law of Magdeburg should control the implied warranties of the vendor. Boullenois remarks with reference to the above, "I agree with the decision of Colerus, but not with his preliminary principles. In my opinion the law of the place of contracting must be followed in this case because, inasmuch as movable property is involved, and a bargain, the making and performance of which take place on the spot, the intention of the parties cannot have been other than to conform to the law of the place where they contracted". Boullenois approved evidently the lex loci solutionis as the governing law but regarded the collateral contract of warranty as an executed transaction and not as a contract to be performed in the place where the contract of sale was performable, that is, where the purchase price was to be paid.

ance.[30] But this was not the view of the old German writers and Story is wrong when he cites Hertius as favoring the lex loci solutionis. Story relies upon Number 53 of that author's work De Collisione Legum. Hertius asks the following question:[31]

"Praestanda sunt aliqua ex contractu, quae postea acciderunt v. g. propter culpam vel moram; quaeritur, si discrepent leges, utra utri praeponderet?

His answer is:

"Quidam ad locum iudicii respiciunt, quidam ad locum destinatae solutionis. Ut Bartolus, Barbosa, quos sequitur Brunnem. ad L. 6. de evict. n. 7. Christin, V. 1. D. 283. n. 12. seq. Ab utrisque recte dissentit D. Cocceius Diss. de fundat. in territ iurisdict. tit. 6 § 7. quia obligationes culpae vel morae ex ipso contractu oriuntur, eiusque propriae praestationes sunt."

Hertius says that the obligations arising out of a breach of contract on account of negligence or default are governed, according to some, by the law of the forum, and, according to others, by the law of the place of performance, citing Bartolus and Barbosa, but he adds that Cocceius rightly dissents from either view. It would seem from this that Cocceius must have applied the law of the place of making and that Hertius agrees with this view. That such was the opinion of Hertius appears clearly from Number X of his treatise, where he lays down the following rule: "Si lex actui formam dat, inspiciendus est locus actus, non domicilii, non rei sitae." In the comment which he adds, he says:[32]

"Valet (II.) ut extendatur ad consequentia sive profluentia ex actu illo principali, de quo elegans est L. 6. ff. de Evict. *Si fundus venierit ex consuetudine eius regionis, in qua negotium gestum est, pro evictione caveri debet.* Quae enim auctoritate legis vel consuetudinis contractum concomitantur eidemque adhaerent, naturalia a Dd. appellantur: & sicut consuetudo, ita etiam lex & statutum est altera quasi natura, & in naturam transit. l. 31. §20. de aedilit, edict. Scip. Gentil. de solennit, c. 4. Mantic. l. 1. de tacit. et ambig. conuent. tit. 13. n. 10. t. 14. n. 4. Hinc quantitas usurarum definienda est secundum leges loci, ubi contractus fuit initus. L. 1. pr. D. de usur. l.

30. See resolutions in favor of the lex loci solutionis adopted by the association of German jurists in 1897, Verhandlungen des 24. deutschen Juristentages, IV, p. 127.

31. Hertii Opera, de Collis, Leg. s. 4. Sec. 53, p. 147.

32. Id. s. 4. Sec. X, pp. 126-27.

37. eod. Consult. Holland. part. 2, cons. 1. Idem dicendum de solutione. Brunnem. ad. d. l. 6. de evict. n. 9 et 10. Nec obstat forum fieri competens in loco destinatae solutionis, sive ubi ex contractu aliquid praestandum est. L. 21. ff. de O. et A. l. 3. de reb. auct. iud. poss."

The naturalia of a contract are determined, therefore, according to Hertius, by the lex loci contractus and not by the lex loci solutionis. As the meaning of Hertius is very plain, and the conclusion above stated, so far as the author is aware, is not challenged by anybody,[33] Story's reference to Hertius in support of the lex loci solutionis must be due to either accident or mistake.

Instead of having the "general assent of foreign jurists", as Story maintains, our investigation up to this point has shown that the lex loci solutionis was rejected by the Italian, the French and the older German school of jurists.

The only jurists left to lend any real support to Story's statement are the Dutch writers, and it is from these that all of Story's quotations are taken. Story admits, moreover, in the later editions of his work, that the Dutch writers themselves were divided upon the subject, mentioning John à Sande as favoring the lex loci contractus. Story quotes only from Paul Voet, Huber, and Everhardus, but there is reason to doubt that Paul Voet would subscribe to the lex loci solutionis as governing the obligation of contracts in all respects. The first passage from Paul Voet quoted by Story is preceded in the original text by the following:

"Quod si de ipso contractu quaeratur, seu de natura ipsius contractus, seu iis quae ex natura contractus veniunt, puta fidejussione, etc., etiam spectandum est loci statutum, ubi contractus celebratur . . . : quod ei contrahentes semet accommodare praesumantur."[34]

Both Fiore[35] and Rivier,[36] in his notes to Asser's Conflict of Laws, conclude that Paul Voet drew a distinction between the vinculum juris, i. e. the intrinsic validity, substance and extent of the obligation, in regard to which the lex loci contractus would govern, in accordance with the passage above

33. See, for example, von Bar, p. 540, note; Wächter, Archiv für die civilistische Praxis, XXV, p. 43, note.

34. P. Voet, de Stat., Sec. 9, Ch. II, n. 10.

35. Fiore, I, p. 161.

36. Rivier, in Asser's Éléments de Droit International Privé, p. 74, note.

quoted, and the onus conventionis, i. e. the performance, in regard to which the law of the place of performance should control, as indicated in the quotation given by Story.

Whatever the majority view among the Dutch jurists may have been, they constitute but a small number of the writers of the various statutory schools of jurists, most of whom appear to have entertained the view that the law of the place of execution and not that of the place of performance should determine the obligation of contracts, at least in so far as the direct consequences are concerned. Story's assertion that the lex loci solutionis is supported by the general consent of foreign jurists is therefore utterly untrue.[37]

As for English and American authority, the first sanction of the theory that the lex loci solutionis should determine the obligation of contracts is a dictum by Lord Mansfield in *Robinson v. Bland*[38] to the following effect:

37. See also Aubry, 23 Clunet, p. 465; Fiore I, p. 163; Foelix, I, p. 235.

38. (1760) 2 Burrow 1077.

"The action was an action upon the case upon several promises; and the declaration contained three counts. The first count was upon a bill of exchange, drawn at Paris, by the intestate Sir John Bland, on the thirty-first of August, 1755, and bearing that same date, on himself in England, for the sum of £672 sterling, payable to the order of the plaintiff, ten days after sight, value received and accepted by the said Sir John Bland.

"The first question is, whether the plaintiff is entitled to recover upon this bill of exchange, by force of the writing. . . .

"There are three reasons why the plaintiff cannot recover here upon this bill of exchange.

"First, the parties had a view to the laws of England. The law of the place can never be the rule, where the transaction is entered into with an express view to the law of another country, as the rule by which it is to be governed. Huberi Praelectiones, lib, 1, tit. 3, p. 34, is clear and distinct: 'Veruntamen, etc. locus in quo contractus, etc., potius considerand', etc., se obligavit.' Voet speaks to the same effect.

"Now here, the payment is to be in England; it is an English security, and so intended by the parties.

"Second reason: Mr. Coxe has argued very rightly, 'That Sir John Bland could never be called upon abroad for payment of this bill, till there had been a wilful default of payment in England'. The bill was drawn by Sir John Bland on himself, in England, payable ten days after sight.

"In every disposition or contract where the subject matter relates locally to England, the law of England must govern, and must have been intended to govern. Thus, a conveyance or will of land, a mortgage, a contract concerning stocks, must be all sued upon in England; and the local nature of the thing requires them to be carried into execution according to the law here.

"Third reason: The case don't leave room for a question. For the law of both countries is the same. The consideration of a bill of exchange might, in an action upon it, be gone into there as well as here. And as to

"The law of the place can never be the rule where the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed."

When Story wrote his treatise on the Conflict of Laws Lord Mansfield's dictum had been followed by a number of courts in the United States.[39] In none of these cases is there any discussion of the rule to be adopted. The authority of Lord Mansfield was sufficient to preclude the need of a consideration of the matter de novo.[40] And what support did Lord Mansfield adduce for the rule laid down? None except the passage from Huber quoted by Story and the statement that Voet supported the same doctrine.[41]

As neither Lord Mansfield nor Story nor any of the American cases have given any reasons why the law of the place of performance should govern the obligation of contracts, but have contented themselves with relying upon questionable passages from the Roman law and the writings from one or two of the ancient authors it may not be amiss to examine the matter briefly with special reference to the law of bills and notes.

The main objections raised against the lex loci contractus are: (1) that the place of contracting is often accidental and is chosen without reference to its effect upon the contract;

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the money won at play, it could not be recovered in any court of justice there, notwithstanding the bill of exchange.

"This writing is, as a security, void (being for a gaming debt), both in France and in England. We may therefore lay the bill of exchange out of the case: it is very clear the plaintiff cannot recover upon that count." Pp. 1077-79.

39. Story cites Ludlow v. Van Rennsselaer, (1806) 1 Johns. 94; Powers v. Lynch, (1807) 3 Mass. 47; Thompson v. Ketcham, (1811) 8 Johns. 189; Fanning v. Consequa, (1820) 17 Johns. 511; Prentiss v. Savage, (1816) 13 Mass. 20; Van Reimsdyk v. Kane, (1812) 1 Gall. 371; Cox v. U. S. (1832) 6 Pet. 172, 8 L. Ed. 359.

40. "It is a principle too well known and established and founded upon reasons too obvious to require proof or illustration." Sedgwick, J., in Powers v. Lynch, supra.

"It seems to be an undisputed doctrine . . .. This is nothing more than common sense and sound justice." Parker, C. J., in Prentiss v. Savage, supra.

41. In the modern law of England the law intended by the parties is the law which governs the validity and obligation of the contract. "The essential validity of a contract," says Dicey, "is (subject to the exceptions hereinafter mentioned) governed indirectly by the proper law of the contract. . . . Proper law of the contract means the law, or laws, by which the parties to a contract intended or may fairly be presumed to have intended, the contract to be governed; or (in other words) the law or laws to which the parties intended or may fairly be presumed to have intended, to submit themselves." Conflict of Laws, 2nd ed., pp. 545, 529.

(2) that when the contract is concluded by correspondence the lex loci contractus can be determined only by a fiction of the law. These objections do not exist if the lex loci solutionis is adopted as the governing law, but others arise, which, in the opinion of the writer of this article, are even more formidable in so far as the law of bills and notes is concerned. There is no reason, in the first place, to assume in the average case that the parties contracted with reference to the law of the place of performance rather than to the law of the place of execution. In the majority of cases the place of payment is inserted by the maker or acceptor, no doubt, as a mere matter of personal convenience, so that there is no reasonable basis for the assumption that the contracting parties would have chosen that law, had their attention been directed to the matter, as the law governing the obligation of their contract.[42] In view of the fact that the law of the place of execution alone is directly ascertainable at the time of contracting and is accessible to both parties with equal facility it seems more rational to assume that they would have chosen that law as the governing law, rather than the law of the place of payment, to which neither of them had ready access and with which both were probably unfamiliar.[43]

The lex loci contractus, has, in the second place, the great advantage over the lex loci solutionis in its application to bills and notes in that it conduces towards greater certainty. It has been seen that the formal and essential validity of a bill or note is determined by the law of the place of execution. As the obligations of the parties to a bill or note depend for the most part upon provisions in the instrument which are formal or essential requisites, one rule should govern both matters. Otherwise we should have the unsatisfactory condition of having the necessity of a particular requirement controlled by one law, viz. the lex loci contractus, while its meaning would be determined by another law, viz. the lex loci solutionis. Logic as well as simplicity and certainty demand the application of a single rule, and that rule, in the nature of things, is the lex loci contractus, which controls both capacity and the formal and essential requirements.

On account of the foregoing advantages, the lex loci contractus is advocated as the law governing the obligation of

42. Conde y Luque, II, p. 307.

43. Foelix I, No. 96; Bustamante, Autarquia, pp. 130-32, 138-48.

the contracts of the different parties to bills and notes by the great majority of authors who have made a special study of the problem.[44] It is recommended also by the Institute of International Law,[45] and should be adopted as the governing principle in a Uniform Law for the United States.

(To be continued.)

ERNEST G. LORENZEN.

UNIVERSITY OF MINNESOTA.

44. Beauchet, Annales de Droit Commercial, 1888, II, p. 62; Beirao, Da Letra de Cambio em Direito Internacional, p. 67; Champcommunal, Annales de Droit Commercial 1894, II, p. 150-200; Chrétien, p. 129; Despagnet, p. 989; Diena, III, p. 124; Diena, Principi, II, p. 213; Esperson, p. 37; Fiore, I, p. 164; Fiore, Elementi di Diritto Internazionale Privato, p. 448; Grünhut, II, p. 579; Lyon-Caen et Renault, IV, No. 645; Ottolenghi, p. 186; Schäffner, p. 122; Valéry, p. 1280.

To the same effect, Asser, p. 209; Calvo, Dictionnaire de Droit International, I, p. 438; Vincent et Penaud, p. 342.

Jitta applies again the law of the fiduciary place of issue, pp. 76, 95.

45. Annuaire, VIII, p. 121. At its session at Florence in 1908 the Institute adopted a series of resolutions as regards the law governing the obligation of contracts. According to these resolutions, if the parties have not expressed a real intention, the determination of the law to be applied shall be derived from the nature of the contract, from the relative condition of the parties and from the situs of the property. In the matter of bills and notes it is to be the law of the place where each contract is entered into, or, if such place be not mentioned in the instrument, that of the domicile of the obligor. Notwithstanding the above presumption, a manifestation of the real will of the contracting parties, even though it be tacit, shall prevail. Annuaire, XXII, pp. 289-92.

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LIABILITY OF HUSBAND FOR NECESSARIES FURNISHED TO WIFE WHERE THE MARRIAGE IS VOID.—It has often been said that the creation of the marriage relation alone does not ipso facto constitute the wife her husband's agent to pledge his credit, but that her power to bind her husband by her contracts depends upon the fact of agency alone, she having, as wife, no original and inherent power to bind him by any contract.[1] It follows, and has been uniformly held, that wherever an authority in the wife to contract in her husband's name can be established according to the ordinary rules of agency the

1. Montague v. Espinasse, (1824) 1 Car. & P. 356; Seaton v. Benedict, (1828) 5 Bing. 28, 2 Mo. & P. 66, 6 L. J. C. P. (O. S.) 208; Benjamin v. Benjamin, (1843) 15 Conn. 347, 39 Am. Dec. 384; Sawyer v. Cutting, (1851) 23 Vt. 486; Savage v. Davis, (1864) 18 Wis. 637.

husband will be bound, regardless of the existence or non-existence of a valid marriage.[2]

But it is also a familiar rule of law that if a husband does not himself provide for his wife's support, he is legally liable for necessaries furnished to her by tradesmen, even though against his orders, provided she has not violated her duty as his wife.[3] It would seem at first sight that these two principles were irreconcilable. As a matter of fact, however, the incongruity is more apparent than real.

In its inception, the doctrine that a husband was liable for necessaries furnished his wife, even though against his express orders, was worked out on the theory of an implied agency, and was regarded as a wise and beneficent provision of the law. The liability of the husband for necessaries furnished his wife rested primarily upon contract—his contract with her, entered into by the fact of marriage, by which he undertook to support and maintain her. But since the wife could not compel her husband's compliance with his contract, under the common law theory that the personal identity of the wife was merged in that of her husband, and since she could not, aside from statute, enter into a contract herself, it was clear that, if her husband did not supply her with necessaries, she had no resource except to obtain such necessaries from the public. But it was not deemed good policy for the public to perform that which it was the duty of some individual to do, and therefore the rule was established that the law will hold the husband liable for articles purchased by the wife and actually necessary for her support and maintenance. Still, it was deemed necessary to put the liability upon the grounds of agency, in order to avoid the apparent inconsistency, and so resort was had to the fiction of implied assent, on the theory that what was his moral duty to do, he would consent to have another do for him.[4] It has been thus

2. 1 Am. and Eng. Encyc. of Law, 2nd ed., p. 946.

3. Cromwell v. Benjamin, (1863) 41 Barb. (N. Y.) 558; Keller v. Phillips, (1868) 39 N. Y. 351.

4. "The husband may be liable for necessaries furnished to the wife, in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence, and this, upon the ground of an agency implied in law, though there can be none presumed in fact. It is a settled principle in the law of husband and wife, that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessaries to the wife, so long as she does

concisely put: "Marriage imposes on the husband the general duty of supporting his wife, and if he is derelict in this duty, he is liable to third persons who furnish necessaries to his wife. His liability in this respect is not abrogated by statute enabling the wife to hold to her own use property acquired by her, and otherwise enlarging her rights and liabilities."[5]

It would seem, therefore, that those statements to be found in many of the reported cases, mostly arguendo or dicta, which regard the liability of the husband as directly created by the marriage relation,[6] are not theoretically correct. The contract entered into by the fact of the marriage relation is the *ground* of his liability, but the so-called "implied agency" created by the law is the direct *means* by which he is bound.[7] Neither is it strictly correct to say that the liability of the husband for necessaries furnished his wife is based on any agency, implied in fact, for it is an established principle that even an express instruction to a third person not to furnish supplies will not relieve the husband from liability for necessaries furnished if he was in default as to her support.[8]

The question then presents itself as to what effect the fact that the apparent marriage was totally void has upon the liability of the husband for necessaries furnished to his wife when he himself neglects to provide for her support. The inquiry is raised by a recent decision in New York in the case of *Frank v. Carter*.[9] In that case, defendant had gone through the form of marriage with his alleged wife, who then had a hus-

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not violate her duty as wife. . . . The husband may discharge this obligation . . . but if he does not himself provide for her support, he is legally liable for necessaries furnished to her by tradesmen, even though against his orders," Per Curiam in Cromwell v. Benjamin, supra, p. 560.

5. 13 R. C. L. 1198.

6. Bergh v. Warner, (1891) 47 Minn. 250, 50 N. W. 77, 28 Am. St. Rep. 362. This case has often been cited as supporting the view that the liability of the husband for necessaries furnished to his wife is created directly by the marriage relation, but this seems to have resulted from a misunderstanding of the language there used by Mr. Justice Mitchell. That he never intended any such meaning to be read into his words seems obvious. He says, p. 252, "The real *foundation* of the husband's liability in such cases is the clear legal duty of every husband to support his wife." And again in Oltman v. Yost, (1895) 62 Minn. 261, 263, 64 N. W. 564, he says, "Inasmuch as defendant's liability is *based* on his marital duty."

7. 65. L. R. A. 529, note.

8. Cromwell v. Benjamin, supra.

9. (N. Y. Ct. App. 1916) 113 N. E. 549.

band living. Defendant lived with the woman, and for several years held her out as his wife, until, upon discovering that she had another husband living, he proceeded to institute a prosecution against her for bigamy, whereupon she fled from the country. On the eve of her departure she purchased necessaries. It was held, that, for the purposes of the action against him for the goods furnished her on his credit, his status was the same as if the marriage had been a legal one. The decision seems to be in accord with the decided cases.

But, it may be asked, if the liability of the husband, to third persons for necessaries furnished to his wife, which he himself has neglected to provide, is founded primarily on the contract of marriage, why does not the whole doctrine fall when the marriage is void? The answer is that it assuredly does fall, and in such case the husband is not liable to the tradesmen unless an authority can be worked out according to the ordinary rules of agency.[10] This is evident from the fact that it has been uniformly held that the liability of the husband for necessaries supplied to the wife after separation depends entirely on whether he really has been lawfully married to her or not.[11]

It is submitted that the same rule applies, even though the parties were living together at the time the necessaries were furnished to the wife, in cases where no agency implied in fact can be shown by the plaintiff. But in actual practice it is evident that where necessaries are furnished to the wife while she is living with her husband, in almost every such case the husband will be found to have held out the woman to the public as his wife, so that an agency implied in fact will be raised. For the well recognized rule is that where a man has lived with a woman and has held her out to society as his wife, he is estopped to deny the relationship when third persons deal with the woman on his credit and on her implied agency.[12] "There seem to be three reasons why this should be so: one, that a tradesman cannot be expected to inquire into such mat-

10. Maintenance of the wife by the husband is alone incident to the marriage relation, and there is no duty to furnish maintenance when that relation does not exist. 13 R. C. L. 1188.

11. 13 R. C. L. 1199.

12. Munro v. De Chemant, (1915) 4 Camp, 215; Redferns Limited v. Inwood et al., (1912) 27 Ont. Law Rep. 213, Ann. Cas. 1913 D, 1061; Johnstone v. Allen, (1869) 6 Abb. Prac. N. S., (N. Y.) 306; Ann. Cas. 1913 D, 1062, note; 13 R. C. L. 1199.

ters; another, that agency binds any principal; the third, that it is just that a man who holds out a woman to society as his wife should maintain her as such."[13]

As a matter of actual practice, it will therefore be seen, the validity of the marriage ordinarily becomes material only where it is sought to charge the husband for necessaries furnished to the wife when the husband and wife are living apart at the time the necessaries are supplied to the wife, and where no actual agency or agency implied in fact can be shown.

STATING A NEW CAUSE OF ACTION BY AMENDMENT AFTER THE STATUTE OF LIMITATIONS HAS RUN.—At common law the right to amend a declaration was limited as to time and as to substance. So long as pleadings were oral, the time limit did not expire until the pleadings were reduced to record by the judges.[1] When written pleadings came to be required, amendments were liberally allowed until the rolls for the trial were made up and docketed.[2] Because a plaintiff could usually begin anew, an amendment would not be sanctioned after the expiration of the term succeeding that in which the action was commenced.[3] But if the statute of limitations would bar a new action, the amendment would be permitted.[4] Further, at strict

13. Schouler, Domestic Relations, 5th ed., 117.

1. "To use the language of the court in Rush v. Seymour (10 Mod. 88), 'If any error were spied in them it was presently amended;' that is, before the roll of that term was made up, or engrossed as the final record of its proceedings (Blackmore's Case, 8 Co. 157); for, says Coke in the case cited, 'during the term the record is in the breast of the court and not in the roll,' or, as the practice is more distinctly set forth in an anonymous case in 3 Salk. 31, in which it was ruled that 'whilst the declaration is in paper, the court may give leave to amend anything in it at pleasure, and 'during the term might amend any mistake in the roll at common law; the roll being only the remembrance of the court during the term,' but that 'after the term, the court could not amend any fault in the roll, for then the record is not in the breast of the court, but in the roll itself'." Daly, C. J. in Diamond v. Williamsburg Ins. Co., (1873) 4 Daly (N. Y.) 494.

2. "The course of procedure after this change was made, and the nature of it, is thus explained by Chief Justice Parker in Garner v. Anderson, Str. 11: 'The foundation of amendments by the court whilst the proceedings remain in paper, before they be recorded, is that these papers delivered to and fro supply the declaring and pleading ore tenus at the bar, and may be amended as easily as spoke at the bar.'

"The pleadings were 'in paper' until the record on rolls for the trial were made up, engrossed, sealed at the nisi prius office and docketed. 1 Slerk's Inst. 153; 2 Tidd's Pr., 9th ed., 728." Ibid.

3. Aubeer v. Barker, (1746 K. B.) 1 Wils. 149.

4. Dutchess of Marlborough v. Wigmore, (1731) Fitzg. 193. See Tobias v. Harland, (1828) 1 Wend. (N. Y.) 93.

common law, a new cause of action could not be introduced nor could the form of action be changed by amendment.[5] Legislative enactments in both code and common law states now usually provide that amendments may be made in furtherance of justice at almost any stage of the proceedings.[6] The codes have, of course, abolished forms of action, and statutes of amendment in common law jurisdictions frequently authorize change of form of action. But the prohibition against the introduction of a new cause of action still persists, or if the amendment is allowed, it does not relate back to the time of the original pleading.

What constitutes a cause of action within this prohibition is not clearly deducible from the cases. All courts agree that if the original pleading defectively states a good cause of action, an amendment which makes the statement perfect is allowable.[7] A small minority refuse to permit the addition of an omitted necessary averment, on the ground that where no cause of action is stated in the original pleading, and a good cause is stated in the amended pleading, the latter must perforce state a new cause of action.[8] The majority, however, refuse to adopt such subtle reasoning.[9] It is usually held that adding a new breach of the same contract[10] or a new ground of negligence[11] does not constitute the statement of a new cause of action. But the courts have worked out no test by the application of which each case as it arises can be solved. The disallowance of an amendment before the statute of limitations has run is not attended with very serious consequences, for the plaintiff may bring a fresh action, although even then the delay may work a considerable injustice. But many of the cases, like *Card v. Stowers, etc., Co.*,[12] recently decided in

5. Newall v. Hussey, (1841) 18 Me. 249, 36 Am. Dec. 317; People v. Circuit Judge, (1865) 13 Mich. 206. See Philadelphia, etc., R. Co. v. Gatta, (1913) 4 Boyce (Del.) 38, 85 Atl. 721, 47 L. R. A. (N. S.) 932.

6. See 1 Ency. Pl. & Pr. 590-620; 3 Ency. L. & P. 735-780; 31 Cyc. 393-407.

7. Salmon v. Libby, (1905) 219 Ill. 421, 76 N. E. 573.

8. Missouri, etc., Ry. Co. v. Bagley, (1902) 65 Kan. 188, 69 Pac. 189, 3 L. R. A. (N. S.) 259; Eyenfeldt v. Illinois Sttel Co., (1879) 165 Ill. 185, 46 N. E. 266.

9. Neubeck v. Lynch, (1911) 37 App. D. C. 576, 37 L. R. A. (N. S.) 813. See also notes 3 L. R. A. (N. S.) 297-304; 33 id. 196; 47 id. 932.

10. Coxe v. Tilghman, (1835) 1 Whart. (Pa.) 282.

11. Chobanian v. Washburn Wire Co. (1911) 33 R. I. 289, 80 Atl. 394, Ann. Cas. 1913 D. 742. For a few cases contra see Ann. Cas. 1913 D, 745.

12. (Pa. 1916) 98 Atl. 728.

Pennsylvania, present situations where a denial of the amendment will deprive the plaintiff of all remedy, because of the lapse of the statutory period. It is, therefore, important that a proper test be found, a test which will result in substantial justice between the parties and will not exalt procedural rules at the expense of substantive rights.

No doubt much of the confusion in the decisions is due to the failure to distinguish between a cause of action, as a matter of substantive law, and the statement of a cause of action, as a matter of pleading.[13] The former consists of an invasion by defendant of a primary right of the plaintiff.[14] For one invasion of the same right by one defendant, only one cause of action arises. But the grounds of liability and the items of damage in that one invasion may be many. The plaintiff may make a statement of a cause of action arising from that invasion by setting forth only a single ground of liability and a single item of damage. If he does so, he states a sufficient cause of action; he does not necessarily state his entire cause of action. At common law he was obliged to state in separate counts each matter which would of itself sufficiently support his demand, else his pleading would be bad for duplicity.[15] For this reason it has been suggested that only those allegations may be added by amendment which might have been pleaded cumulatively in the same count.[16] The rule against duplicity was one of the most technical requirements of common law pleading, and was based on the theory that but a single issue should be submitted to the jury. The common law practice and the modern statutes as to amendments are designed for the furtherance of justice. Obviously, then, a technical rule as to the method of stating the invasion of a substantive right should not furnish the rule for permitting an amendment.

In like manner it has been said that the principles by which this right to amend must be solved "are those which belong to the law of departure, since the rules which govern this subject afford the true criterion by which to determine whether there is a new cause of action in case of an amend-

13. See Box v. Chicago, etc., R. Co., (1899) 107 Ia. 660, 78 N. W. 694.
14. Reilly v. Sicilian Asphalt Paving Co., (1902) 170 N. Y. 40, 62 N. E. 772; Payne v. New York, etc., Ry. Co., (1911) 201 N. Y. 436, 95 N. E. 19. But see King v. Chicago, etc., Ry. Co. (1900) 80 Minn. 83, 82 N. W. 1113.
15. People's National Bank v. Nickerson, (1910) 106 Me. 502, 76 Atl. 937.
16. Richardson v. Fenner, (1855) 10 La. Ann. 599.

ment".[17] It must be apparent that this test concerns itself with the statement of a cause of action rather than with the cause itself, and makes amendments impossible except for the sole purpose of merely correcting a defective statement of a ground of liability relied upon in the original pleading. It absolutely prevents the shifting of ground of liability, that is, it prohibits a departure from law to law or from fact to fact. In other words, it violates the spirit of the statutory provisions respecting amendments and preserves procedural distinctions at the cost of substantive rights.

Several other tests have been proposed, for example, whether the same plea would meet the original pleading and the amendment,[18] whether the same evidence would support both,[19] and whether the same measure of damages is applicable to both.[20] It requires but slight consideration to expose the inadequacy of these tests. The plea of not guilty, or non assumpsit, or non est factum at common law, or a general denial under the code might be interposed to a pleading containing numerous separate and distinct causes of action. Hence, identity of plea must be discarded as a criterion. If the same evidence must support the original and the amended declaration, then the amendment is practically useless. One of the chief objects of amending is to make other evidence available. If by same measure of damages is meant the same rule of damages, this test is too broad; if the same amount or extent of damages is meant, it is too narrow, and confuses item of damage with cause of action.

All of the foregoing suggested criteria deal with the method of stating the cause of action rather than with the underlying substantive right. The following tests have regard to the latter: (1) "Whether the proposed amendment is a different matter, another subject of controversy, or the same matter more fully or differently laid to meet the possible scope and varying phases of the testimony";[21] (2) whether judgment upon the original pleading would bar an action upon the amendment, or vice versa.[22] In an opinion in which the

17. Union Pacific Ry. Co. v. Weyler, (1895) 158 U. S. 285, 290, 15 S. C. R. 877, 39 L. Ed. 983, per Mr. Chief Justice White.
18. Goddard v. Perkins, (1838) 9 N. H. 488.
19. Scovil v. Glasner, (1883) 79 Mo. 449.
20. Hurst v. City Ry., (1891) 84 Mich. 539, 48 N. W. 44.
21. 1 Ency. Pl. & Pr. 564.
22. Davis v. New York, etc., R. Co. (1888) 110 N. Y. 646, 17 N. E. 733.

whole matter is satisfactorily discussed, the supreme court of Georgia concludes:

"If the plaintiff has two causes of action of the same class, though the same facts may, in part, be common to both of them, he is not allowed to declare upon one and afterwards abandon it and substitute the other by amendment. . . . He may, however, add further facts to more fully describe the cause of action,—the wrong—which he originally alleged. He may allege additional facts to show the existence of his primary right, as long as he does not undertake to set up another and distinct right. And he may allege additional facts to show that the defendant has been guilty of the alleged violation of plaintiff's right. If there is substantial identity of wrong (which necessarily includes identity of the right violated), there is substantial identity of cause of action. . . . So long as the facts added by the amendment, however different they may be from those alleged in the original petition, show substantially the same wrong in respect to the same transaction, the amendment is not objectionable as adding a new and distinct cause of action."[23]

It is submitted that these three last mentioned tests have the proper basis, that the sole inquiry should be whether the plaintiff in his amendment is in fact going for the same infringement of the same primary right of plaintiff by defendant. If so, then no technical considerations based upon analogies from the common law pleading rules as to duplicity or departure, no rules as to variance in evidence or as to measure of damages, should prevent plaintiff from restating in proper form the various elements constituting that infringement of that right.

OFFER OF GUARANTY—REQUIREMENT OF NOTICE OF ACCEPTANCE.—A guaranty as distinguished from a mere offer of guaranty, exists in the following classes of cases: (1) when there is a distinct consideration moving to the guarantor from the guarantee; or when the receipt of such consideration is acknowledged by the guarantor in the instrument;[1] (2) when the guaranty is by specialty,[2] or is in the form of a promise by the

23. City of Anglin, (1904) 120 Ga. 785, 793, 48 S. E. 318, per Simmons, C. J.

1. Davis v. Wells, (1881) 104 U. S. 159, 26 L. Ed. 686; Lawrence v. McCalmont, (1844) 2 How. (U. S.) 426, 11 L. Ed. 326.

2. See Davis v. Wells, supra; Powers & Weightman v. Bumcratz, (1861) 12 Oh. St. 273.

guarantor or surety jointly with the principal,[3] (3) when the guaranty is signed by the guarantor at the request of guarantee or when there is a contemporaneous agreement on the part of the guarantee to accept it;[4] (4) when the guaranty is in regard to a definite, subsisting liability of a third party to guarantee,[5] or in regard to a contract entered into contemporaneously with the guaranty and as a part of the same transaction.[6]

In the above enumerated cases notice of acceptance is not required. In regard to mere offers to guarantee there is a conflict of authority as to whether notice of acceptance is necessary. The common law rule in force in England is that such notice is unnecessary.[7] In other jurisdictions including that of the United States Supreme Court, notice of acceptance by the guarantee has been held requisite.[8] A third rule is suggested by a dictum of the Massachusetts supreme court in *Bishop v. Eaton*,[9] which involved an offer to guarantee the payment of obligations incurred by the guarantee for the benefit of a third person. "Ordinarily," says the Massachusetts court, "there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a subsequent withdrawal of it, if within a reasonable time afterward he notifies the promisor."

3. Maynard v. Morse, (1864) 36 Vt. 617.
4. Davis v. Wells, supra; Davis Sewing Machine Co. v. Richards, (1885) 115 U. S. 524, 6 S. C. R. 173, 29 L. Ed. 480 (semble); Wildes v. Savage, (1839) 1 Story (U. S. C. C.) 22, Fed. Cas. No. 17,653.
5. Davis v. Wells, supra.
6. Bechtold v. Lyon, (1891) 130 Ind. 194, 29 N. E. 912.
7. Sommersall v. Barneby, (1612) Cro. Jac. 287.
8. Edmondston v. Drake, (1831) 5 Pet. (U. S.) 624, 8 L. Ed. 251.
9. (1894) 161 Mass. 496, 499, 37 N. E. 665, 42 Am. St. Rep. 437.

This dictum was later adopted as a law in Massachusetts.[10]

The difference between the doctrine of the United States Supreme Court on this matter and that suggested in *Bishop v. Eaton,* is that in the former, notice of acceptance is requisite for the inception of the contract, while in the latter the contract is deemed to be completed and binding when the act called for is done, subject to be defeated if knowledge of the acceptance does not come to the guarantor within a reasonable time. It is submitted that the Massachusetts view is correct. Suppose that the guarantee does the act called for on Monday; that on Tuesday, the guarantor revokes his offer of guaranty; and that on Wednesday, after receiving the guarantor's revocation, guarantee notifies guarantor of his previous acceptance in fulfilling the terms of the guaranty. Confronted by this situation it is exceedingly doubtful whether any of the courts following the rule laid down by the United States Supreme Court would decide that there was no contract or that the notice of acceptance was essential to the inception of the contract, in the face of the general rule that an offer for a unilateral contract is accepted and binding when the act called for is completed[11] and the many modern authorities to the effect that the commencement of performance of the terms of an offer for a unilateral contract consummates the contract so far that the promisee cannot be affected by a subsequent withdrawal of the offer.[12] The rule of the United States Supreme Court may be explained on the theory that the offer of the guarantor calls for two acts which together constitute an acceptance of the offer, namely, the doing of the act called for, and the giving of notice of the performance of that act. However, even on that basis, it would seem that performance had

10. Lascelles v. Clark, (1910) 204 Mass. 362, 376, 90 N. E. 875.

11. Williston's Wald's Pollock on Contracts, 3rd Am. ed., 13, note 12; Cummings v. Gann, (1866) 52 Pa. St. 484, 490.

12. Blumenthal v. Goodall, (1891) 89 Cal. 251, 29 Pac. 906; Los Angeles Traction Co. v. Wilshire, (1902) 135 Cal. 654, 658, 67 Pac. 1086; Plumb v. Campbell, (1888) 129 Ill. 101, 107, 18 N. E. 790; Lapham v. Flint, (1902) 86 Minn. 376, 90 N. W. 780. See remark of Erle, C. J. in Offord v. Davies, (1862) 12 C. B. N. S. 748, 31 L. J. C. P. 319, 9 Jur. (N. S.) 22, 6 T. L. 579, 19 W. R. 758. These somewhat progressive cases are in accordance with the theory of an implied collateral contract advanced by Mr. McGovney in 27 H. L. R. 654. Briefly, this theory is that in connection with the offer for a unilateral contract there is also an implied promise not to withdraw this principal offer, with commencement of performance by the offeree as the consideration for this collateral promise.

been so far completed by the doing of the act that the offer could not thereafter be revoked.[13]

The recent decision of the Minnesota supreme court in the case of *Northern National Bank v. Douglas*[14] seems to adopt the view of the United States Supreme Court. Defendants had signed a guaranty to pay at maturity all debts owed to plaintiff by a certain lumber company and providing that the defendants' liability on this account should not exceed three thousand dollars. The note in question was made out in the name of the plaintiff but really belonged to another bank from its inception and was immediately indorsed to it. The note did not come into the hands of the plaintiff till some six years after the guaranty had been signed by the defendants and shortly before suit was brought. The defendants had no notice of the existence of the note. *Held* that this was a mere offer of guaranty requiring notice of acceptance within a reasonable time to make it binding and that as such notice had not been given the defendants were not liable. The force of this decision is weakened by the fact that the note was not given to the plaintiff by the lumber company and the court intimated that even had the guaranty been absolute it could not be considered to cover loans made by other banks. However, the decision stands for the principle that an offer to guaranty requires notice of acceptance within a reasonable time and that the contract is not complete until that notice is given. Previous to this decision, the rule applied by the Minnesota court seems to have been in substance the Massachusetts rule of *Bishop v. Eaton*.[15] Thus a casual question by the guarantor as to how the party whose bills were guaranteed was taking care of them and an answer of "all right" was held to be sufficient notice of the acceptance of a former offer to guarantee their payment and of the fact that the offer was

13. Note 12 supra.

14. (Minn. 1916) 160 N. W. 193.

15. In Winnebago Paper Mills v. Travis, (1894) 56 Minn. 480, 58 N. W. 36, the court held that notice was necessary in some form or other, but as in that case no notice had reached the guarantor within a reasonable time, the court was not under the necessity of deciding between the doctrines of Bishop v. Eaton and Davis v. Wells. Although the latter case was quoted and the court intimated that notice was requisite to the inception of the contract, the court further stated that the guarantor should have notice, in order that he might protect himself on account of his new obligation. The decision is not decisive on this point.

being acted upon.[16] In *Burns v. Poole*,[17] the court stated that "if knowledge of the consummation of the loan was conveyed to them (the guarantors) within a reasonable time thereafter, the purpose for which such notice is intended was accomplished." However, the instant case emphasizes the necessity for a guarantee who would be safe, to give formal notice within a reasonable time of the acceptance of the offer of guaranty.

INTERNATIONAL LAW—PENALTY FOR CARRYING CONTRABAND —CONTINUOUS VOYAGE—EFFECT OF KNOWLEDGE ON PART OF OWNERS OR MASTER OF SHIP.—The ancient penalty for the carriage of contraband was the confiscation of the ship and the non contraband cargo.[1] The severity of the ancient rule was subsequently modified so as to provide for the confiscation of the ship in such cases only where the ship belonged to the owner of the contraband or where there had been some co-operation "in a meditated fraud upon the belligerents by covering up the fraud under false papers and with a false destination".[2] The old presumption of guilt on the part of the owner of the ship still remained, however, in case the greater portion of the cargo was contraband.[3] But this presumption, according to the judgment of the Supreme Court in the case of the *Springbok*,[4] was no longer operative where the vessel was sailing to a neutral port, even though the port in question "had been constantly and notoriously used as a port of call and transhipment by persons engaged in the systematic violation of blockade and in the conveyance of contraband of war and was meant by the owners of the cargo carried on this ship to be so used in regard to it". The neutral ownership of the ship, together with the fact that the owners "did not appear to have had any interest in the cargo and that there was no sufficient proof that they had any knowledge of the alleged unlawful destination" was held to relieve the vessel from the taint which attached to the cargo under the doctrine of con-

16. Straight v. Wight, (1895) 60 Minn. 515, 63 N. W. 105.
17. (1908) 106 Minn. 69, 72, 118 N. W. 156.
1. The Med Guds Hielpe, (1745) Pratt, Contraband of War, 191 (a), 1 Roscoe, Prize Cases, 1.
2. Carrington v. Merchants' Insurance Co., (1834) 8 Pet. (U. S.) 495, 8 L. Ed. 1021.
3. The Bermuda, (1865) 3 Wall. (U. S.) 514, 555, 18 L. Ed. 200; Davis, Elements of International Law, (third ed.,) 464.
4. The Springbok, (1866) 5 Wall. (U. S. 1, 18 L. Ed. 480.

tinuous voyages. The ship was innocent and should consequently be released.

Such was the rule of law until the present war. An attempt was made in the Declaration of London[5] to lay down a new doctrine for the carriage of contraband. By Article 40 it was provided that "the confiscation of the vessel carrying contraband is allowed if the contraband forms, either by value, by weight, by volume or by freight, more than half the cargo". But as England declined to ratify the Declaration and by an Order in Council after the outbreak of war emphatically repudiated the provision of the convention excluding conditional contraband from the doctrine of continuous voyages,[6] it was generally assumed in neutral states that the British prize courts would disregard the convention and fall back upon the older well established principles of international law.

The neutrals were soon undeceived. In the recent case of the *Hakan,*[7] the court laid down that a neutral vessel carrying contraband of the prescribed amount to an enemy port was subject to condemnation as good and lawful prize under the provisions of the 40th article of the Declaration of London. This principle has just been extended in the case of the *Maracaibo,*[8] to the carriage of contraband goods to a neutral port when the ultimate destination of the goods was in the enemy country. The court found in this instance that the master and owners of the ship were fully aware of the true destination of the goods and that they had participated in the deception by which a neutral agent or intermediary in Holland was put forward as the consignee of the contraband. Under the circumstances the court very properly condemned the vessel and barred all claims for freight expenses,[9] etc.

But the court was not content to rest its case upon this safe ground. It proceeded to consider the question of the liability of a ship for carrying contraband in case of the bona-fide ignorance of the owners or master as to the ultimate destination of the goods. Upon this point the court pronounced the

5. International Law Situations. Naval War College, 1909.

6. Order in Council Mar. 30, 1916. Supplement to 10 American Journal of International Law, (Special Number) Oct. 1916, p. 4.

7. (1916) 32 T. L. R. 639, 2 Trehern, Prize Cases, 210.

8. (1916) 33 T. L. R. 48.

9. The Rosalie and Betty, (1800) 2 C. Rob. 343, 1 Roscoe, Prize Cases, 246; The Graaf Bernstorf, (1800) 3 C. Rob. 109, 1 Roscoe, Prize Cases, 265; The Adonis, (1804) 5 C. Rob. 256, 1 Roscoe, Prize Cases, 467.

sweeping opinion that under the Declaration of London it did not make a particle of difference what the knowledge or ignorance of the owners as to the destination of the ship might be. The effect upon belligerents was practically the same in either case and the ship should accordingly suffer the like penalty. "I think that in the present state of the law as agreed and understood between nations, the element of knowledge of the owners or master of the vessel has been eliminated altogether where such a proportion of contraband is being carried as forms half the cargo in weight, bulk, value or freight. The principle applies in my view whenever the vessel carries that proportion or amount of confiscable contraband (absolute or conditional) whatever the circumstances or facts may be which make it subject in law to confiscation."

This material modification of the law by substituting a qualitative or quantitative standard for the former test of destination[10] undoubtedly confers great practical advantages upon the belligerent, as the court frankly confesses. It "avoids the necessity for the courts to embark upon the very difficult and often unsatisfactory inquiry into the state of mind or extent of information of the persons concerned." It has been difficult to convict the neutral carrier of actual knowledge of the true destination of his cargo. The neutral has been prone to adopt a policy of "voluntary ignorance" in order to defeat the inquisitorial demands of the belligerent captors and it has been only by the chance interception of letters or messages that the court in many cases has been able to detect the ingenious devices of the contraband carriers and traders. In the face of these practical difficulties, the court determined to relieve the government of the whole responsibility of establishing the guilty knowledge of the carrier, by applying a simple mathematical test of culpability.

But this simple solution is open to grave objections. It sets aside the existing rule of law to the serious disadvantage of the neutral carrier. It is interesting to observe in this connection that the court is unable to cite a single case in support of its conclusion save one of its own decisions. It entirely disregards the well-known precedents of the Civil War. The *Springbok* was a case directly in point but the court had the best of reasons for not referring to that judgment. The court

10. The Jonge Margaretha, (1799) 1 C. Rob. 189, 1 Roscoe, Prize Cases, 100; The Peterhof, (1866) 5 Wall. (U. S.) 28, 18 L. Ed. 564.

was glad to seize upon an article of the unratified Declaration of London in order to bolster up its weak position. And even though the Declaration were accepted as a true exposition of the existing principle of law in regard to the penalty for the carriage of contraband, it would not be open to the court to play fast and loose with its provisions according to the convenience or necessity of the English government. The court cannot appeal, as it has done, to the 40th article of the convention for a justification for the condemnation of the ship, and at the same time repudiate the 35th article of the same convention, because it protects conditional contraband from condemnation under the doctrine of continuous voyage. The English prize courts cannot expect to play the game of "heads I win and tails you lose" with the Declaration without coming in conflict with the strongest and most justifiable protests of neutral nations.

But there is a further practical ground of protest on the part of the neutral carrier. It is doubtless difficult for the belligerent nation, owing to the complexity of modern trade, to determine the true character and destination of the commerce that has fallen into its hands. But the neutral carrier is by this decision placed in an almost equally difficult position. He is transformed into a national trade commissioner. He is expected to know the true contents of the parcels and the legitimate course of trade of all those multitudinous articles which may be committed to his care as a public carrier. And the penalty of failure on his part to take the precautions demanded by the belligerent is the confiscation of his ship. It is manifestly unfair for the belligerent to throw off on the neutral carrier the burden of determining whether the conditional contraband entrusted to his care is really intended for the neutral consignee or is ultimately destined for an unknown enemy firm. It is the duty of the captor to furnish the necessary evidence upon that point and if he is unable to do so, the ship and suspected goods should be released.

RECENT CASES

APPEAL AND ERROR—REVIEW—DISCRETION OF TRIAL COURT—VACATION OF DEFAULT JUDGMENT—In a case before a court in Idaho the defendant's attorney, who lived in Washington, was there served with an order overruling a demurrer to the complaint and giving leave to answer within ten days. The attorney noted an erroneous date in his daily docket as the last day to serve his answer. He also assumed erroneously that the Idaho practice required notice before entry of default judgment. Before he discovered his mistake, plaintiff entered judgment by default. Upon seasonable application showing a good defense, the trial court set aside the default judgment. *Held,* that the order vacating the default judgment was an abuse of discretion. *Valley State Bank, Ltd., v. Post Falls Land & Water Co.,* (Idaho 1916) 161 Pac. 242.

An Idaho statute provided that the court may "relieve a party, or his legal representative from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." Rev. Code, Sec. 4229. This statute is common to many states. Minn. G. S. 1913, Sec. 7786. It would seem that the mistake may be either of law or fact. *Baxter v. Chute,* (1892) 50 Minn. 164, 52 N. W. 379, 36 Am. St. Rep. 633; *Jean v. Hennessy,* (1888) 74 Ia. 348, 37 N. W. 771, 7 Am. St. Rep. 486; *Whereatt v. Ellis,* (1887) 70 Wis. 207, 35 N. W. 314, 5 Am. St. Rep. 164; contra, *Domer v. Stone,* (1915) 27 Idaho 279, 149 Pac. 505, semble. The granting of a motion to vacate default judgment is a matter vested in the sound discretion of the trial court, and it has been stated that any doubt should be resolved in favor of the moving party in order to bring about a judgment on the merits of the case. *Miller v. Carr,* (1897) 116 Cal. 378, 48 Pac. 324, 58 Am. St. Rep. 180. The courts are generally very liberal in granting vacation of default judgments. The Minnesota court would find very little difficulty in sustaining the trial court on the facts of the principal case. *Lathrop v. O'Brien,* (1891) 47 Minn. 428, 50 N. W. 530. That court has held it an abuse of discretion not to grant the motion where the defendant failed to answer because of mistaken advice of his attorney as to the validity of his defense. *Baxter v. Chute,* supra. The question is how far will the courts go in sacrificing the merits of the case in order to speed up the machinery of legal procedure.

BANKS AND BANKING—POWERS OF CONGRESS—FEDERAL RESERVE ACT—BANKS ACTING AS TRUSTEES.—The Federal Reserve Act, Dec. 23, 1913, Sec. 11 K, providing that the Federal Reserve Board may grant to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, registrar, etc., under such rules as the Board may prescribe, has been *held* to be not within the power of Congress, as such functions belong exclusively to the states, and as the pos-

session of such powers by national banks is not necessary to their continued existence, or to their performance of their governmental functions. *People ex rel. First National Bank of Joliet v. Brady,* (1915) 271 Ill. 100, 110 N. E. 864; *Fellows v. First National Bank,* (Mich. 1916) 159 N. W. 335.

For discussion of the principles involved in the two cases see article by Judge A. Ueland, ante p. 232.

CARRIERS—EXPULSION OF PASSENGER—CONTRIBUTORY NEGLIGENCE.—Regulations of a railroad required the holders of excursion tickets to surrender the entire ticket to the conductor. The conductor returned the wrong portion of the round-trip ticket to the plaintiff, and on the return trip plaintiff refused to pay another fare and was put off by the conductor. The trial court dismissed the action. *Held,* the company is liable for the negligence of its agents in giving plaintiff the wrong half of his ticket and expelling him; and that even though plaintiff had not looked at ticket when buying it, or when it was returned to him, he was not, as a matter of law, guilty of contributory negligence, but that, at most, it was a question for the jury. *Cohen v. Erie R. Co.,* (1916) 160 N. Y. Supp. 1091.

The same court on facts similar to those of the above case reached the conclusion that the railroad was not liable, if the passenger could by using ordinary diligence have discovered the mistake of the conductor. *Wiggins v. King, et al.,* (1895) 91 Hun (N. Y.) 340, 36 N. Y. Supp. 768. The question is a troublesome one and there is no unanimity in the decisions. Some courts hold that the ticket is not conclusive evidence of the right of a passenger to ride and that the conductor is bound to take reasonable explanations from the passenger. *Evansville, etc., R. v. Cates,* (1895) 14 Ind. App. 172, 41 N. E. 712; *Illinois Central Ry. v. Harper,* (1903) 83 Miss. 560, 102 Am. St. Rep. 469, 64 L. R. A. 283; *Gulf, etc., Ry. Co. v. Wright,* (1893) 2 Tex. Civ. App. 463, 21 S. W. 399. Other cases have held that the ticket is conclusive evidence of a passenger's right to ride. If it is wrong, the conductor in accordance with his duty has a right to eject the passenger, if the latter refuses to pay his fare, and the passenger is not permitted to resist. He may, however, have an action for breach of contract because of the mistake of the agent. *Western Maryland, etc., R. Co. v. Stocksdale,* (1896) 83 Md. 245, 34 Atl. 880; *Van Dusan v. The Grand Trunk Ry.,* (1893) 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354; *Townsend v. The New York, etc., Ry.,* (1874) 56 N. Y. 295, 15 Am. Rep. 419.

The instant case implies by its holding that there is no absolute duty on the part of the passenger to read the ticket when handed to him. This is generally the rule with regard to street car transfers. Many cases hold that the passenger may rely upon the inference that the conductor has done his work properly. *Indianapolis St. Ry. Co. v. Wilson,* (1903) 161 Ind. 153, 100 Am. St. Rep. 261; *Morrill v. Minneapolis St. Ry.,* (1908) 103 Minn. 362, 115 N. W. 395 (the passenger did not have time to examine the transfer); *O'Rourke v. Citizens' St. Ry. Co.,* (1899) 103 Tenn. 124, 52 S. W. 872, 76 Am. St. Rep. 639, 46 L.

R. A. 614; *Lawshe v. Tacoma Ry. & Power Co.*, (1902) 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350. In cases holding that the ticket is conclusive evidence of a passenger's right, some say that there is a duty on the part of the passenger to read his ticket. *Elmore v. Sands*, (1874) 54 N. Y. 512, 13 Am. Rep. 617. In view of the fact that in many cases the transfer or ticket is incomprehensible to a person of ordinary intelligence (See *Morrill v. Ry.*, supra) and that at times not sufficient time is given to the passenger to examine his ticket or transfer, it seems more consonant with sound reason to hold that ordinarily there is a duty on the part of a passenger to examine his ticket or transfer, but that such duty is not absolute, and that, if the conductor refuses to accept the explanation of the passenger, it must be submitted to the jury whether under all the circumstances the passenger was guilty of contributory negligence.

CARRIERS—LIMITATION OF LIABILITY FOR NEGLIGENCE.—Defendant had contracted to haul the cars of a circus company. Plaintiff, an employee of the circus, was injured in a collision caused by defendant's negligence. Defendant set up as defenses a contract between it and the circus company, which exempted the defendant from liability as common carrier or for negligence, to such a person as plaintiff, and also a contract between the plaintiff and the circus company which exempted the latter and any railroad company from liability for injury to him, howsoever caused. *Held*, defendant was a common carrier in transporting this circus train and the contract of exemption was invalid as against public policy. *Maucher v. Chicago, etc., Ry. Co.*, (Neb. 1916) 159 N. W. 422.

It is settled in this country that a railroad company is under no common law duty to receive and haul sleeping cars owned by a sleeping car company, such as the Pullman Company. *Chicago, etc., R. Co. v. Hamler*, (1905) 215 Ill. 525, 530, 74 N. E. 705, 106 Am. St. Rep. 187, 1 L. R. A. (N. S.) 674. Nor express cars. *Express Cases*, (1885) 117 U. S. 1, 29 L. Ed. 791, 6 S. C. R. 542. Nor circus trains owned and fitted up by showmen. *Cleveland, etc., R. Co., v. Henry*, (1907) 170 Ind. 94, 83 N. E. 710. In all of these cases the reason given is that loaded cars of that character are not such goods as a railroad holds itself out to carry and in respect to which they assume a public duty to serve all alike who apply for carriage. The majority of our courts in carrying out this principle hold that, as a railroad company is under no such public duty, it contracts as a private carrier and in such capacity may properly make a contract exempting itself from liability. *Baltimore, etc., R. Co. v. Voigt*, (1899) 176 U. S. 498, 20 S. C. R. 385, 44 L. Ed. 560. (Pullman cars); *Sager v. Northern Pacific Ry. Co.*, (1908) 166 Fed. 526 (circus); *Robertson v. Old Colony R. Co.*, (1892) 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482 (circus). See also Moore, Carriers, second ed., p. 96. And an employee of such sleeping car or circus company is bound by the contract, though the same is made without his assent. Ibid. The minority of our courts have taken the position of our principal case that, while a railroad company may not be under a duty to accept such cars, if it does accept them, it does

so in its capacity as a common carrier, and any contract exempting the carrier from liability for its negligence is invalid as against public policy. *Weir v. Rountree,* (C. C. A. 1909) 173 Fed. 776, 19 Ann. Cas. 1204 (express cars); *Coleman v. Pennsylvania R. Co.,* (1913) 242 Pa. 304, 89 Atl. 87, 50 L. R. A. (N. S.) 432 (sleeping cars). In a case where a railroad company permitted a news agency to maintain a stand in its cars under just such a contract as in the principal case, the court held, on one of the news agents being injured by the negligence of the railroad, that the contract was no defense, being invalid as against public policy. *Starr v. Great Northern R. Co.,* (1895) 67 Minn. 18, 69 N. W. 632. The case is distinguishable from those previously discussed for the cars were those of the railroad and under its control, but the courts in discussing such cases have placed them in the same category and have decided them on similar principles. *Chicago, etc., R. Co. v. Hamler,* supra; *Texas, etc., Ry. Co. v. Fenwick,* (1904) 34 Tex. Civ. App. 222, 78 S. W. 548.

COMMERCE—EXCLUSIVENESS OF FEDERAL REGULATION—CARRIERS' LIABILITY—A cargo of flour was shipped from Minneapolis to Bellington, W. Va. Through the negligence of the carrier the shipment was delayed six days at Columbus, Ohio, and while there, was destroyed by an unprecedented flood, amounting to an act of God. The delay was the only negligent act of the carrier. *Held,* the carrier is not liable. *Northwestern Consolidated Milling Co. v. Chicago, Burlington & Quincy R. Co.,* (Minn. 1917) 160 N. W. 1028.

Heretofore the states have been in conflict on the question of the liability of a common carrier for loss of goods through an act of God subsequent to or concurrent with negligent delay. Some courts held that if the negligent delay concurs with or contributes to the loss, it is such a proximate cause as to render the carrier liable. *Alabama, etc., R. Co. v. Quarles,* (1906) 145 Ala. 436, 40 So. 120, 5 L. R. A. (N. S.) 867; *Green Wheeler Shoe Co. v. Chicago, etc., R. Co.,* (1906) 130 Ia. 123, 106 N. W. 498. This is on the theory that the carrier should be held liable if the goods would not have been exposed to the act of God but for the negligent delay. *Read v. Spaulding,* (1859) 5 Bos. (N. Y.) 395, affirmed in 30 N. Y. 630, 86 Am. Dec. 426. The opposite view was criticized as being based on too strict an interpretation of the rule of proximate cause. *Bibb Broom Corn Co. v. Atchison, etc., R. Co.,* (1905) 94 Minn. 269, 102 N. W. 709. Some courts even went so far as to say that the act of God which excuses the carrier must not only be the proximate cause, but the sole cause of the loss. *Wolf v. American Express Co.,* (1869) 43 Mo. 421, 97 Am. Dec. 406. The courts holding that the carrier is not liable in such case based their decisions on the ground that the loss was caused proximately by the act of God and that it was too remote a consequence of the carrier's negligence. *Morrison v. Davis,* (1852) 20 Pa. St. 171, 57 Am. Dec. 695; 1 Hutchinson, Carriers (third ed.) 297. This was also the rule in the federal courts. *St. Louis, etc., R. Co., v. Commercial Union Insurance Co.,* (1891) 139 U. S. 223, 11 S. C. R. 554, 35 L. Ed. 154. These varying rules were allowed to govern in the state courts in cases concerning interstate commerce as it is well settled that until Congress has

legislated on the subject of the liability of a carrier for loss or damage, the liability of a common carrier, although engaged in interstate commerce may be fixed by the state. *Chicago, etc., Ry. Co. v. Solan,* (1898) 169 U. S. 133, 137, 18 S. C. R. 289, 42 L. Ed. 688; *Pennsylvania R. Co. v. Hughes,* (1903) 191 U. S. 477, 24 S. C. R. 132, 48 L. Ed. 268. But when Congress has acted in such a way as to manifest a purpose to exercise its conceded authority, the regulative power of the state ceases. *Northern Pacific Ry. v. State of Washington,* (1911) 222 U. S. 370, 32 S. C. R. 160, 56 L. Ed. 237; *Southern Ry. Co. v. Reid,* (1912) 222 U. S. 424, 32 S. C. R. 140, 56 L. Ed. 257. It has been repeatedly determined that the Carmack Amendment to the Hepburn Act, Act of June 29, 1906, 34 Stat. at Large, 584, c. 3591, manifested an intention on the part of Congress to exercise exclusive control over the liability of a carrier engaged in interstate commerce, *Adams Express Co. v. Croninger,* (1912) 226 U. S. 491, 33 S. C. R. 148, 57 L. Ed. 314; *Kansas City So. Ry. Co. v. Carl,* (1912) 227 U. S. 639, 33 S. C. R. 391, 57 L. Ed. 683; *Missouri, etc., Ry. Co. v. Harriman,* (1913) 227 U. S. 657, 33 S. C. R. 397, 57 L. Ed. 690; *Chicago, etc., R. Co. v. Cramer,* (1914) 232 U. S. 490, 34 S. C. R. 383. This Act embraces the liability of a carrier under a bill of lading which it must issue and the subject is so completely covered that "there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it". *Adams Express Co. v. Croninger,* supra. From the language of these decisions it seems fair to hold that by the Carmack Amendment exclusive federal control is extended to the entire subject of the liability of a carrier engaged in interstate commerce, regardless of any necessary connection with a bill of lading, because the chief purpose was to establish a uniform liability. The instant case, accordingly, held that the rule heretofore obtaining in the forum was not applicable and that the federal rule must hereafter apply. Under this federal rule unless the carrier is chargeable with some negligence other than mere delay, the injury or destruction of a shipment by an act of God, which could not have been foreseen, creates no liability on the carrier. *New Orleans & Northeastern R. Co. v. National Rice Milling Co.,* (1914) 234 U. S. 80, 34 S. C. R. 726, 58 L. Ed. 1223. The ruling in the principal case is sustained in *Continental Paper Bag Co. v. Maine Cent. R. Co.,* (Me. 1916) 99 Atl. 259.

CRIMINAL LAW—ADDITIONAL INSTRUCTION—DISCRETION OF COURT.—In a criminal prosecution after the jury had deliberated for forty-eight hours, the court of its own motion gave an additional instruction to the jury impressing upon them the importance of reaching a verdict if they could conscientiously do so, without in any way intimating whether the accused was guilty of the offense charged. Within four hours the jury brought in a verdict of guilty. *Held,* the verdict can not stand. *State v. Peirce,* (Ia. 1916) 159 N. W. 1050.

Ever since the jury system was introduced into Anglo-American law, courts have insisted in criminal cases on unanimity as of the essence of the jury's verdict. The development of the jury system has concerned itself with the most reasonable method of assuring a proper unanimity. In early English law, the necessity of an agreement by the jury was deemed

so important that the jurors were kept until they agreed, even though coercive measures had to be used. *Winsor v. Queen,* (1866) 6 B. & S. 143. Indeed it was the settled practice in England even in the time of Blackstone to keep the jury without food, drink, fire, or light until they reached a verdict. 3 *Black. Comm.* (twentieth ed.) 414. In the United States this practice was denounced at an early date as unreasonable and barbarous. *People v. Olcott,* (1801) 2 Johns. Cases (N. Y.) 301, 1 Am. Dec. 168. The American courts have adopted the rule that where a trial judge is satisfied that the jury cannot agree, he may discharge the jury and order another trial. *Commonwealth v. Bowden,* (1813) 9 Mass. 494; *U. S. v. Perez,* (1824) 9 Wheat. 579. The same rule now prevails in England. *Regina v. Charlesworth,* (1861) 1 B. & S. 460; *Winsor v. Queen,* supra. At the present time no vestige of the old practice of coercing a jury remains. The jurors are furnished the ordinary comforts of life and their verdict cannot stand if any species of coercion exists. *People v. Goodwin,* (1820) 18 Johns. (N. Y.) 187, 9 Am. Dec. 203. But the length of time a jury shall be kept together in consultation is a matter over which the trial court has large discretionary power. *State v. Rose,* (1897) 142 Mo. 418, 44 S. W. 329, (four days); *Russel v. State,* (1902) 66 Neb. 497, 92 N. W. 751 (eighty-nine hours). In civil cases it is discretionary with the trial court to recall the jury and change its instructions upon the law of the case, on its own motion. *Holland v. Sheehan,* (1909) 106 Minn. 545, 119 N. W. 217. Or properly to urge upon the jury the necessity of reaching an agreement. *Watson v. Minneapolis St. Ry. Co.* (1893) 53 Minn. 551, 55 N. W. 742; *Gibson v. Minneapolis, etc. Ry.,* (1893) 55 Minn. 177, 56 N. W. 686. And the court will be reversed only for a clear abuse of this discretion. *Carter v. Becker,* (1904) 69 Kan. 524, 77 Pac. 264. In criminal cases it has been held proper for the trial court to urge the jury to agree if possible because of the expense of another trial. *Hannon v. State,* (1886) 70 Wis. 448, 36 N. W. 1. Or to urge that a dissenting juror consider whether his doubt is a reasonable one. *Allen v. U. S.,* (1896) 164 U. S. 492, 501, 17 S. C. R. 154, 41 L. Ed. 528. But if a statement of the court clearly shows a tendency to coerce the jury into an agreement, it is improper. *State v. Hill,* (1886) 91 Mo. 423, 4 S. W. 121. Where a trial court exercises a discretionary power, it should not be reversed for abuse of its discretion unless the rights of the accused have been so violated as to make it reasonably clear that a fair trial was not had. *State v. Nelson,* (1903) 91 Minn. 143, 97 N. W. 652, approved in *State v. Price,* (Minn. 1916) 160 N. W. 677. In the principal case the trial judge used no language nor made any statement which showed any tendency to coerce the jury. But the court held that from all the circumstances under which the instructions were given the jury might have received the impression that a failure to agree meant confinement over Sunday. But this is mere conjecture and seems unwarranted. To justify a reversal defendant should show that a fair and impartial trial was not had.

DAMAGES—INJURIES TO SERVANT—RELEASE OF JOINT TORT-FEASOR.—A railroad fireman broke his leg, and the injured limb was negligently treated by the railroad's local surgeon. The fireman compromised with the road and in consideration of $8,000 gave a release to the road, for the

injury received, including all claims for loss of time, medicine, service and other expenses. Later plaintiff brought an action against the surgeon for malpractice in the treatment of his injured leg. *Held*, plaintiff can not recover. *Martin v. Cunningham*, (Wash. 1916) 161 Pac. 355. (Ellis, J. dissenting).

The release of one joint tort-feasor is a release of all. *Flynn v. Manson*, (1912) 19 Cal. App. 400, 126 Pac. 181; *Dwy v. Connecticut Co.*, (1915) 89 Conn. 74, 92 Atl. 883. Satisfaction by one joint tort-feasor is a bar to an action against another. *Hartigan v. Dickson*, (1900) 81 Minn. 284, 83 N. W. 1091; *Rogers v. Cox*, (1901) 66 N. J. L. 432, 50 Atl. 143. For distinction between release and satisfaction see 92 Am. St. Rep. 881. A tort-feasor is not released from liability by settlement of the injured party with another not shown to have been liable. *Iddings v. Citizen's State Bank*, (1902) 3 Neb. Unof. 750, 92 N. W. 578; *Thomas v. Central R. Co.*, (1900) 194 Pa. St. 511, 45 Atl. 344; *Randall v. Gerrick et al.* (Wash. 1916) 161 Pac. 357. The majority of the court in the instant case held that the physician was released because his negligent treatment was necessarily a part of the original injury, on the ground that, according to the law of Washington (*Ross v. Erickson Construction Co.*, (1916) 89 Wash. 634, 155 Pac. 153,) a railroad is liable for the malpractice of its attending surgeon and a release of the railroad would consequently release those for whom it is liable. The law seems definite that if the injury is aggravated by the negligent treatment of the physician employed by the injured party, the defendant is liable for all the injury, irrespective of the physician's negligent treatment. *Gray v. Boston Elevated Ry. Co.*, (1913) 215 Mass. 143, 102 N. E. 71; *Reed v. City of Detroit*, (1896) 108 Mich. 224, 65 N. W. 967; *Fields v. Mankato Electric Traction Co.*, (1911) 116 Minn. 218, 133 N. W. 577; *City of Dallas v. Meyers*, (Tex. Civ. App. 1900) 55 S. W. 742. But some cases hold, where a common carrier has furnished a competent physician to attend an injured passenger, it is not liable for his malpractice or neglect. *Secord v. St. Paul, etc., Ry. Co.*, (1883) 18 Fed. 221; *Galveston, etc., Ry. Co. v. Scott*, (1898) 18 Tex. Civ. App. 321, 44 S. W. 589. The same rule has been applied in a case involving a steamship company. *Laubheim v. Netherland Steamship Co.*, (1887) 107 N. Y. 228, 13 N. E. 781. The dissenting opinion in the instant case takes the view of these last cases that the railroad performed its duty in selecting a competent physician and is not liable for the malpractice of the latter. A necessary corollary of such view would be that the physician was not a joint tort-feasor and his negligence being independent of that of the railroad company, a release of the latter would not release the former. The principal case refuses to recognize the tenuous distinction between the liability of the company for the negligence of the physician when he is employed by the person injured, and a case where he is in the employ of the defendant railroad itself.

EASEMENTS—PRESCRIPTION—INTERRUPTION OF ADVERSE USER.—Defendant was using a right of way over plaintiff's land with the intention of acquiring an easement of way by prescription. While the easement was still inchoate, plaintiff wrote a letter to defendant forbidding him to continue to pass over any portion of his land. *Held*, plaintiff's letter of remon-

strance was sufficient evidence of non-acquiescence and was an interruption of defendant's inchoate easement. *Dartnell v. Bidwell,* (Me. 1916) 98 Atl. 743.

A statute in this state provided that adverse user may be interrupted by notice in writing served and recorded notifying the claimant of the easement that he has no rights therein, and that the writer owns the land free from any easement. Many states have statutes to the same or similar effect, e. g., Burns' Ann. Indiana Stat., Sec. 6181; Ia. Ann. Code, Secs. 3007, 3008. But the court does not base its decision directly on the statute and could not very well do so, as not all the requirements had been complied with. The case may, therefore, be considered authority for the proposition that mere remonstrance is sufficient to prevent the acquisition of an easement by prescription.

The right of gaining an easement by prescription still rests today on the legal presumption of a lost grant. Jones, Easements, 158. Though this is purely a fiction, proof that no grant was in fact made is not admissible. *Lehigh Valley R. Co. v. McFarlan,* (1881) 43 N. J. L. 605; Washburn, Easements, 112, 113. The rule for the acquisition of such an easement is universally stated to be that the adverse use must be for the prescribed period, under a claim of right, uninterrupted, and with the knowledge and acquiescence of the owner. *City of Princeton v. Gustavson,* (1909) 241 Ill. 566, 89 N. E. 653; Washburn, Easements, p. 182. Thus far the courts are agreed, but they are squarely in conflict on the question what acts are necessary to interrupt such user. The doctrine of the principal case proceeds on the theory that since acquiescence of the owner of the servient estate is an indispensable ingredient to the acquirement of an easement by prescription, and since acquiescence is consent by silence, any act of the owner which "breaks the silence" is sufficient to rebut the presumption of a grant. This view is supported by some respectable authorities. *Powell v. Bagg,* (1857) 8 Gray (Mass.) 441, 69 Am. Dec. 262; *Andries v. Detroit, etc., Ry. Co.,* (1895) 105 Mich. 557, 63 N. W. 526; *Reid v. Garnett,* (1903) 101 Va. 47, 43 S. E. 182; *Crosier v. Brown,* (1909) 66 W. Va. 273, 66 S. E. 326, 25 L. R. A. (N. S.) 174. The contrary view, which is stated to be the weight of authority in 2 Tiffany, Real Property, p. 1023, is to the effect that in case of a positive easement, the owner of the dominant estate is put to an unconscionable disadvantage if, after having been an adverse user for a period just short of the statutory requirement, his adverse use could be broken by a postal card of remonstrance, and that to compel the servient owner to take some action which could be made the basis of a settlement of the rights of the parties in a court of law does not appear to place an unjust hardship upon him. *Lehigh Valley R. Co. v. McFarlan,* supra. It is submitted that the better reasoning is with the rule of the principal case. Courts often lose sight of the distinction between acquiring title to land by adverse possession and the acquisition of an easement by prescription. In the former, public policy demands the removal of clouds from titles to land; in the latter, there is no such cloud. The one rests on disseisin; the other rests upon use by acquiescence. In the absence of statute providing for the serving of notice, the owner of the dominant estate in order to interrupt the running of the statute, would

have to take some drastic action, which might lead to violence, if the rule of the majority is to be followed. The argument that injustice is done to the claimant rests upon a false assumption, as he generally has no right at all until the statute has run. The law does not favor wanton disseisors, open trespassers, or those who were mere wrongdoers from the start. *Stillman & Co. v. White Rock Mfg. Co.*, (1847) 3 Woodb. & M. 538, Fed. Cas. No. 13, 446. How can it be said that he has acquiesced when he remonstrates? It is to be noted that the cases cited in support of the doctrine of our instant cases are all comparatively recent. No recent decision has been found favoring the contrary view.

EMINENT DOMAIN—CONDEMNATION OF LEASED PREMISES—COMPENSATION.—The city of St. Paul condemned for street purposes part of a lot upon which there was a building occupied by tenants. The award of compensation was made in gross. Plaintiff, a tenant, applied to the board of public works for a separate allowance to him. The award was affirmed on the ground that it might be made in gross and apportioned later, and the whole amount of the award was paid to the defendant lessor and assignee of the fee owner. The city then removed a portion of the building condemned rendering the leased premises untenantable; the lessor refused to repair, and the city removed the remainder of the building. Plaintiff sued defendant lessor for taking his leasehold estate and for damages, his action apparently being, in substance, to recover his share of the award. *Held*, plaintiff may recover the market value of the leasehold. *Kafka v. Davidson*, (Minn. 1917) 160 N. W. 1021.

In condemnation proceedings the award may be made in gross to be later apportioned. *State ex rel. Kafka v. District Court*, (1915) 128 Minn. 432, 151 N. W. 144. And it is universally conceded that the lessee of the property as well as the owner is entitled to compensation. *Chicago etc., Ry. Co. v. Miller*, (1908) 233 Ill. 508, 84 N. E. 683; Lewis, Eminent Domain, (third ed.) Sec. 719. If damages be awarded to the tenant separately they must de deducted from the damages awarded the owner. *In re Willcox et al.*, (1914) 165 App. Div. 197, 151 N. Y. Supp. 141. The amount will vary depending upon whether the whole or only a part of the leased premises are condemned. When the entire property is taken the covenant to pay rent is usually held discharged as it has nothing upon which to operate. *Corrigan v. Chicago*, (1893) 144 Ill. 537, 33 N. E. 746, 21 L. R. A. 212; *O'Brien v. Ball*, (1874) 119 Mass. 28; *Dyer v. Wightman*, (1870) 66 Pa. St. 425. There is some authority contra. Lewis, Eminent Domain (third ed.) p. 1255, note 2. But taking only a portion of the leased premises, by the weight of authority, does not release the lessee from his obligation to pay the full rent. *Rhode Island Hospital Trust Co. v. Hayden*, (1898) 20 R. I. 544, 40 Atl. 421, 42 L. R. A. 107; *Stubbings v. Evanston*, (1891) 136 Ill. 37, 26 N. E. 577, 29 Am. St. Rep, 300, 11 L. R. A. 839. In the instant case, though only a portion of the land was taken, the duty to pay rent ceased when the premises became untenantable by virtue of a state statute. Minn. G. S. 1913, Sec. 6810. But whether the obligation to pay rent is discharged or not, there is conflict as to the amount due the tenant. The majority, in accord with the principal case, hold that the amount recoverable is determined by the market value of

the leasehold estate, or, if only a part is taken, it is the difference between the market value of the whole and the market value of the part of the leasehold not taken. *Corrigan v. Chicago*, supra; *Mayor of Baltimore v. Rice*, (1891) 73 Md. 307; *Lawrence v. Boston*, (1875) 119 Mass. 126. And this does not mean the value to the lessee for a particular purpose, but its fair market value. *Kishlar v. Southern Pacific R. Co.*, (1901) 134 Cal. 636, 66 Pac. 848. Hence, if the obligation to pay rent is discharged the lessee can recover only if he shows the market value of the lease to be greater than the rental called for by the lease. The above test has been criticised because a lease subject to the payment of rent rarely has any market value. Even if the lease is a favorable one, its value cannot be satisfactorily measured by the difference between the rental value and the rent reserved. It is contended that the tenant is entitled to compensation for the loss arising from the deprivation of the right to remain in undisturbed possession until the end of the term. *Metropolitan, etc., R. Co. v. Siegel*, (1896) 161 Ill. 638, 44 N. E. 276. But the expense of removal and interruption of the business are to be considered not as substantive elements of damage, but as tending to prove the value of the leasehold interest. *McMillan Printing Co. v. Pittsburg, etc., R. Co.*, (1907) 216 Pa. St. 504, 65 Atl. 1091. In case only part of the building is taken, compensation must be given for the sum necessary to repair for occupancy. *Gluck v. Baltimore*, (1895) 81 Md. 315, 32 Atl. 515, 48 Am. St. Rep. 515. The conflict is illustrated by a Massachusetts case which, on facts similar to the instant case, held that the lessee could recover compensation for the loss of earnings and for the reasonable rent of another store. *Patterson v. Boston*, (1839) 23 Pick. 425.

GUARANTY — REQUISITES — CONSIDERATION — NOTICE OF ACCEPTANCE — EVIDENCE.—Defendants had signed a guaranty to pay at maturity all debts owed to plaintiff by a certain lumber company and providing that the defendants' liability on this account should not exceed three thousand dollars. The note in question was made out in the name of the plaintiff but really belonged to another bank from its inception and was immediately indorsed to it. The note did not come into the hands of the plaintiff until some six years after the guaranty had been signed by the defendants, and shortly before suit was brought. The defendants had no notice of the existence of the note. *Held*, that this was a mere offer of guaranty requiring notice of acceptance within a reasonable time to make it binding, and that as such notice had not been given the defendants were not liable. *Northern National Bank v. Douglas*, (Minn. 1916) 160 N. W. 193.

The principles involved in this case are discussed in a NOTE, p. 265.

HUSBAND AND WIFE—LIABILITY OF HUSBAND FOR NECESSARIES FURNISHED WIFE—VOID MARRIAGE.—Defendant went through the marriage ceremony with a woman, but after living with her for several years, learned that she had another husband living at the time of this marriage. Before defendant could institute bigamy proceedings against her, she fled from the country. Before so leaving, she purchased goods for the price of which the defendant is being sued. *Held*, inasmuch as defendant had gone through the ceremony of marriage with the woman and held her

out as his wife, his status for the purpose of this suit was the same as if the marriage had been a legal one, and he is, therefore, liable for the price of the goods purchased by her. *Frank et al. v. Carter,* (N. Y. 1916) 113 N. E. 549.

For a discussion of this case, see NOTES, p. 257.

INTERNATIONAL LAW—PRIZE—NEUTRAL VESSEL—CONTRABAND CARGO—CONDEMNATION OF VESSEL—WHETHER KNOWLEDGE NECESSARY?—A Danish steamship, Maracaibo, loaded with a cargo of divi-divi at Maracaibo, Venezuela, bound for Amsterdam, was seized by a British warship as carrying contraband of war. The ultimate destination of the cargo was an enemy port, and the master and owners of the vessel knew its destination. *Held,* the vessel must be condemned as a prize. *The Maracaibo,* (1916) 33 T. L. R. 48.

The court also declared that even if the owners of the vessel had not known of the ultimate destination of the cargo, under the Declaration of London the ship would be condemned.

For a discussion of this pronouncement, see NOTES, p. 269.

LIBEL AND SLANDER—WORDS IMPUTING MORAL MISCONDUCT—SCHOOL TEACHER.—Defendant spoke words imputing that the plaintiff, a schoolmaster, had been guilty of adultery with a married woman employed by the janitor of the school. No special damage was alleged. The jury found that the slanderous words injured the plaintiff in his profession of teacher. The trial court then concluded that the words are actionable per se without proof of special damage and gave judgment for the plaintiff. The Court of Appeal set aside the verdict on the ground that the words were not actionable per se, not having been spoken of the plaintiff in connection with his profession. The House of Lords affirmed the holding of the Court of Appeal. *Jones v. Jones,* [1916] 2 App. Cas. 481.

Slanderous words are actionable per se in three classes of cases: (1) Where the words impute a crime; (2) Imputing that plaintiff is suffering from a loathsome or contagious disease; (3) Where the words are spoken of the plaintiff or tend to damage him by way of his calling, office, trade, or profession; but the case must come directly under one or more of these classes in order to allow recovery without proof of special damage. Adultery is not a crime in England, and, therefore, plaintiff in order to recover had to bring his case under the third class. The decision of the principal case follows the English rule that the declaration ought to show how the slanderous imputation is connected with plaintiff's professional conduct. In the following English cases it was held that the words did not injure plaintiff in his profession: *Ayre v. Craven,* (1834) 2 Ad. & E. 2, 4 L. J. K. B. 35 (physician); *Lumby v. Allday,* (1831) 1 Cr. & J. 301, 1 Tyrwh. 217 (clerk); *James v. Brook,* (1846) 9 Q. B. 7, 16 L. J. Q. B. 17, 10 Jur. 541 (attributing questionable actions to superintendent of police); *Gallwey v. Marshall,* (1853) 9 Ex. 294 (stating that minister was father of illegitimate child). Words were held slanderous per se in the following instances: Imputing that a governess was guilty of improper conduct and adultery. *Quinn v. Wilson,* (1850) 13 Ir. L. R. 381. Charging a physician with incontinence in his professional relations. *Martin v. Strong,* (1836) 5 Ad. & El. 535, 6 L. J. K. B. 48. Imputing that

a minister, who was in charge of a clerical preferment, was the father of an illegitimate child. *Payne v. Beuwmorris,* (1868) 1 Lev. 248, 1 Sid. 376, 2 Keb. 400.

In most jurisdictions in the United States adultery is a crime by statute. Charging one with having committed adultery would, therefore, be actionable per se. The only question would be whether the language sufficiently imputed the crime. *Schaefer v. Schoenborn,* (1907) 101 Minn. 67, 111 N. W. 843. But, aside from statute the American courts do not apply so strict a rule in the class of cases, where the words are calculated to injure plaintiff in his trade or calling. Words imputing adultery to a minister were held actionable per se. *Ritchie v. Widdemer,* (1896) 59 N. J. L. 290, 35 Atl. 825. Contra, *Breeze v. Sails,* (1863) 23 U. C. C. B. 94 (charging minister with keeping company with a prostitute). Imputing adultery to a physician held likewise actionable per se. *Rice v. Cottrel,* (1858) 5 R. I. 340. Only a few American cases involve a school teacher. The law is quite clear that an imputation of adultery or improper conduct by a school teacher with his or her pupils is actionable per se. *Barth v. Hanna,* (1910) 158 Ill. App. 20 (charging schoolmistress with improper conduct with boys in her class); *Spears v. McCoy,* (1913) 155 Ky. 1, 159 S. W. 610, 49 L. R. A. (N. S.) 1033. In the following cases imputation of adultery or improper conduct with persons other than pupils was held actionable per se: *Nicholson v. Dillard,* (1911) 137 Ga. 225, 73 S. E. 382; *Kidder v. Bacon* (1900) 74 Vt. 263, 52 Atl. 322. It would seem, therefore, that the principal case would probably be decided differently in the United States even in jurisdictions where adultery is not a crime. It is a little difficult to see how charges of adultery against a schoolmaster, as in the principal case, even though not with one of his pupils, can be construed as not tending to damage him by way of his profession.

MASTER AND SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT—TIME FOR BRINGING ACTION.—In an action under the Federal Employers' Liability Act, the defendant pleaded that the action was not brought within two years as required by the Act. Plaintiff alleged that defendant made certain fraudulent representations and was thereby estopped from setting up the defense. The trial court gave judgment for defendant. *Held,* the ruling was correct. *Bement v. Grand Rapids & I. Ry. Co.,* (Mich. 1916) 160 N. W. 424.

If the limitation as to time were considered a mere statute of limitations the plaintiff could have maintained the action. *Holman v. Omaha, etc., Ry. Co.,* (1902) 117 Ia. 268, 90 N. W. 833, 62 L. R. A. 395, 94 Am. St. Rep. 293; *Renackowsky v. Board of Water Commissioners of Detroit,* (1900) 122 Mich. 613, 81 N. W. 581. The court in the instant case took the position that the Act created a new cause of action, and that since the limitation is contained in the Act itself, it is a limitation on the right and not on the remedy. When so interpreted, the fact that the action is not brought within the prescribed period is of itself sufficient to bar the action. The rule of the instant case is founded on a strict and narrow interpretation of a statutory right and works a hardship in a case like the one at hand, or where the plaintiff was under a disability. For a further discussion of the point involved in the instant case, see 1 MINN. L. REVIEW, 186.

THE MINNESOTA STATE BAR ASSOCIATION.

The Editor welcomes pertinent communications from members of the Bar.

THE DESIRABILITY OF ADOPTION OF THE UNIFORM BILLS OF LADING ACT.

The introduction of the Uniform Bills of Lading Act in the Minnesota legislature by Senator Gjerset[1] raises the question of the present condition of the law in Minnesota on bills of lading, a condition which is typical of the law in other states that have not passed the Uniform Act.

A. Condition of the Law on Bills of Lading in Minnesota.

The Minnesota law is in a state of great confusion and is out of date. This is due to two facts. First, Congress, recognizing the need on the part of business and trade for having bills of lading made fully negotiable[2] by the law, so as to facilitate their use as a means of credit, passed an Act of forty-five sections[3] substantially following in form the Uniform Bills of Lading Act, establishing the negotiability of the bill, and governing all interstate commerce. As a result, the law for interstate shipments is in a clear and up-to-date form while the law for intrastate shipments, which are not covered by the Federal Act, is in a very different condition. A person holding two bills of lading which are exactly the same on their face, except that one is for a shipment to a point within the state and the other for a shipment to a point outside the state, will, nevertheless, be governed by different laws on the two bills, and have substantially different rights. Thus shippers, carriers and bankers must all be familiar with two different sets of rules.

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1. Introduced Feb. 5, as S. F. 358, and referred to Senate Committee on Railroads.

2. The word "negotiable", when used in regard to bills of lading and warehouse receipts, does not include certain features that are attached to bills and notes:—It does not include the idea that the bailee, whether carrier or warehouseman, is absolutely bound to deliver goods as described, as a maker of a promissory note is bound to pay the amount stated in the note; and it does not include the idea that one who indorses a bill of lading, guarantees that the carrier will deliver the goods, as an indorser of a note guarantees payment. A bill of lading by its very nature represents a bailment or agreement to turn over specific goods, and not an absolute promise to pay. Therefore, if the goods are destroyed by Act of God, or other cause for which the carrier is not liable, or if the person delivering the goods to the carrier had no title to them, the carrier is excused from liability to the holder of the bill. If another person wrongfully takes goods and delivers them to a carrier in return for a bill of lading, the owner does not lose his right to goods. The Uniform Act specifically provides this, Sections 12 and 13. It is general mercantile usage that indorsing a bill of lading does not guarantee that the carrier will perform, and this is provided in the Uniform Act, Section 36.

3. Act of Congress Aug. 29, 1916, Chap. 415, 39 Statutes at Large, 538.

Second, the law of the state governing bills of lading on intrastate shipments, is in an undesirable state of uncertainty, and retains the old rule which regards bills of lading as symbols of the property, not recognizing their full negotiability. There was a statute, consisting of a few sections, passed in 1909,[4] which settled a few points; but in other ways it merely added to the uncertainty of the law. Further, there are but few decisions of the Minnesota court on the subject. When a shipper presents a bill of lading on an intrastate shipment, with draft attached for discount, the banker knows that the bill of lading is not fully negotiable; and just how far it protects the holder—as for instance against attaching creditors of the shipper—he cannot say. As a result, he must investigate the circumstances of the shipment or refuse the loan. A bill of lading is, therefore, not the effective means of credit that it should be. It should be easier for the shipper to borrow on his shipment.

B. What is the Uniform Bills of Lading Act?

The Uniform Bills of Lading Act is proposed as a remedy for this situation, to make the state law clear and free from doubt and bring it into harmony with the Federal law. It is one of the Uniform Commercial Acts approved by the National Conference of Commissioners on Uniform State Laws and recommended for passage in all the states. It was prepared for the National Conference by Professor Samuel Williston, of Harvard Law School, author of the treatise on Sales, a leading authority on the subject, and subjected to several years of general criticism before final approval. Since its approval in 1909 it has been passed in fifteen states, including most of the large commercial states.[5] It has been endorsed by the American Bar Association and recommended for passage in Minnesota by the Minnesota State Bar Association. The Minnesota Board of Commissioners on Uniform State Laws has also recommended it for passage in Minnesota.[6] This Act, with some modifications, was passed by Congress in 1916 and is the law above referred to as governing bills of lading on interstate shipments. It is very similar to the Uniform Warehouse Receipts Act, which was passed in Minnesota in 1913,[7] making

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This Act took effect Jan. 1, 1917. It is referred to in this article as "Federal Act"; it is merely the "Uniform Act" with amendments.

A history of the efforts made to get through Congress the Uniform Act, which was finally consummated in August, 1916, may be found in American Bar Association Reports as follows: 1911 Report, pp. 391, 395; 1912 Report, pp. 438-453, 1102; 1913 Report, pp. 477 to 498; 1914 Report pp. 447-465; 1915 Report, p. 384.

4. Session Laws 1909, Chap. 414, G. S. 1913, Secs. 4322-4329.

5. The states in which the Act has been passed, together with the year of its passage, are as follows: Massachusetts and Maryland, 1910; Connecticut, New York, Pennsylvania, Ohio, Illinois, Michigan and Iowa, 1911; Louisiana, 1912; New Jersey, 1913; Rhode Island, 1914; Idaho, Vermont and Washington, 1915; also Alaska, 1913.

6. See the Report of this Board to the Minnesota Legislature for 1917, pages 9 and 10. This report contains on page 12, an interesting table showing in what states each of the Uniform Acts has been passed, together with the year of passage. It shows at a glance the progress of the movement for Uniform State Laws.

7. G. S. 1913, Secs. 4514-4575.

warehouse receipts negotiable, over eighty per cent of its provisions being the same except that the wording is changed to apply to bills of lading instead of warehouse receipts.

C. EFFECT OF THE UNIFORM ACT ON THE STATE LAW IN MINNESOTA.

This Uniform Act, if passed, in addition to its advantage of uniformity, will affect the present law in Minnesota, governing intrastate shipments, in several important ways.

On some points the present law is adequate, and the Uniform Act makes no change. Thus the old rule that a carrier is not liable to one who takes for value an order bill of lading, where the agent of the carrier issued the bill of lading without actually receiving any goods, which rule the Minnesota court followed in an early case,[8] was changed by statute to render the carrier liable;[9] and the carrier is similarly liable under the Uniform Act for the misrepresentation to one who holds for value and in good faith a negotiable bill of lading.[10] Other provisions in which the Uniform Act follows the present law are: In requiring an order bill to be taken up or cancelled by the carrier when the goods are delivered, and thus avoiding the danger of "spent" bills;[11] in forbidding the issue of duplicate bills unless they are so marked;[12] in providing that alteration of a bill shall not affect its validity;[13] and in making it a crime for one to ship goods and fraudulently negotiate a bill of lading therefor, when he has no title to the goods or they are encumbered.[14]

But the present statutes do not go far enough in defining the law and protecting the bill of lading; the Uniform Act goes much farther.

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8. Nat'l Bank of Commerce v. Chicago, etc., R. Co., (1890) 44 Minn. 224, 46 N. W. 342, 560, 20 Am. St. Rep. 566, 9 L. R. A. 263. For a discussion of this point see note in 1 MINN. LAW REV. 70, Jan. 1917. In an authoritative article on the subject, "Liability for the Unauthorized Torts of Agents," by Wm. R. Vance in 4 MICH. LAW REV. 199, Jan. 1906, it is shown that the courts, in not holding the carrier for the act of its agent in issuing a fraudulent bill of lading, were wrong at common law, and that the statutes in changing this, state the correct rule.

9. G. S. 1913, Secs. 4325, 4326 and 8922.

10. Uniform Bills of Lading Act, Secs. 23, 44, 49. The present statute in this case does not distinguish between order bills and bills not to the order of the consignee, known as "straight" bills, but makes the carrier liable for a fraudulent bill to the person acquiring the bill in either case. The Uniform Act in the case of the straight bill, also called "non-negotiable" bill, makes the carrier liable only to "the consignee named" in the bill. Congress in adopting the Uniform Act changed it in this particular, making the carrier liable on a fraudulent bill to "the owner of goods covered by a straight bill subject to existing right of stoppage in transitu"; and it is a question if the change is not a desirable one.

11. G. S. 1913, Sec. 4328; Ratzer v. Burlington R. Co., (1896) 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530; Uniform Bills of Lading Act, Secs. 14 and 15.

12. G. S. 1913, Secs. 4325-6; Uniform Act, Secs. 7 and 46. In the Uniform Act this prohibition applies only to negotiable or order bills; while the present statute makes no distinction between straight and order bills.

13. G. S. 1913, Sec. 4329; Uniform Act, Sec. 16.

14. G. S. 1913, Sec. 4327; Uniform Act, Sec. 47. Here again the Uniform Act applies only to order bills.

To take up some of the more important points:—In the first place, the Uniform Act draws a sharp distinction between a bill of lading in which the carrier agrees to deliver goods to the order of the consignee, known as an "order" bill or "negotiable" bill, and one in which the agreement is to deliver to the consignee, omitting the words "order of", known as a "straight" bill or "non-negotiable" bill.[15] Under the Act only the former is negotiable, and the measures of protection for the bill and its holder center around it. The holder of a non-negotiable bill has no rights as against creditors of the person who transfers the bill to him, who attach the goods, or against anyone who buys the goods even after he has secured the bill, until he notifies the carrier of the transfer;[16] and the carrier, before notification, is justified in delivering the goods to the consignee named without requiring surrender of the bill of lading.[17] To protect the holder against any mistake as to the nature of the bill, the Act provides that all non-negotiable bills must be marked plainly, "non-negotiable,"[18] and makes it criminal to issue fraudulently such a bill of lading without so marking it.[19]

This sharp distinction follows the actual practice of carriers and shippers of the present day; it is now recognized by the Federal law on interstate shipments; and confusion is caused by not having it recognized by the state law. The present law of Minnesota, although it defines "straight" and "order" bills, does not appear to apply different rules to them. It has been held that a carrier must secure the surrender or cancellation of a straight bill before delivering the goods;[20] and all bills of lading are classed together in the latest case on the subject.[21] The fact that other states have made the distinction, and that the Minnesota court may change its view to correspond with business usage, only adds to the confusion on this point. The Uniform Act substitutes for this confusion a rule that is clear, and that corresponds with mercantile usage.

It is in its provisions with regard to negotiable or order bills that the Uniform Act assumes special importance.[22] Just how far an order bill of lading is negotiable, and how far the holder is protected at the present time, is uncertain. It clearly is not fully negotiable, as the Minnesota court has said that it is not negotiable in the sense of a bill of exchange, and that it is merely a symbol of the goods.[23] Delivery of the bill is not more than an equivalent of delivery of the goods. It is quite

15. Uniform Act, Secs. 4 and 5.
16. Uniform Act, Sec. 33.
17. Uniform Act, Secs. 12 and 13.
18. Uniform Act, Sec. 8.
19. Uniform Act, Sec. 50.
20. Ratzer v. Burlington R. Co., (1896) 64 Minn. 245, 66 N. W. 988, 58 Am. St. Rep. 530.
21. Barnum Grain Co. v. Great Northern Ry. Co., (1907) 102 Minn. 147, 112 N. W. 1030, 1049.
22. For a discussion of the negotiability of a Bill of Lading under the Federal Act, see 1 MINN. LAW REV. 68.
23. Security Bank v. Luttgen, (1882) 29 Minn. 363, 13 N. W. 151; Nat'l Bank of Commerce v. Burlington Ry. Co., (1890) 44 Minn. 224, 236, 46 N. W. 342, 560, 20 Am. St. Rep. 566, 9 L. R. A. 263.

clear that a person taking a bill of lading today would not prevail against creditors of the person who transferred the bill, if the creditors attached the goods prior to the negotiation of the bill.[24]

It is also probable that if the person transferring proved to be a factor or agent without authority to transfer, the person securing the bill would not be protected; certainly a thief or a finder of an order bill endorsed in blank could not give a good title.

These and a number of other doubtful points are covered by a considerable number of sections in the Uniform Act, protecting the holder of a negotiable bill, and making it an effective means of credit. It is provided that anyone in possession of a negotiable bill can negotiate it, if the goods are deliverable to his order or if it is endorsed in blank, and that the transferee gets not only the title that the transferor could convey, but also the title of the consignee and consignor;[25] and it is no objection that the bill had been lost or stolen or was negotiated without authority, or that the goods had been sold after the bill of lading was issued but before it was negotiated.[26]

It is also provided that there can be no attachment by creditors of goods in the hands of a carrier when a negotiable bill of lading for the goods has been issued, unless possession of the bill itself is obtained or its negotiation prevented by court injunction.[27] Similar in effect is the provision that no seller's lien or right of stoppage in transitu can be asserted against one to whom an order bill of lading has been negotiated for value in good faith, although the negotiation was subsequent to the assertion of the right.[28] It is also settled that the insertion of the words "Notify——" in an order bill does not interfere with its negotiability or constitute notice of any rights in the person to be notified.[29] Another section settles the question raised in a Minnesota case,[30] as to when a bank must demand payment of an accompanying draft, and when it need demand merely acceptance thereof, before turning over the bill of lading. It provides that in the absence of special agreement, if the draft is on more than three days time, acceptance is enough; otherwise payment is necessary.[31] The Uniform Act also adds to the value of the order bill as security, by requiring the carrier, if it claims a lien for any charges other than freight, storage, demurrage and terminal charges, to specify on the face of the bill what other charges are claimed.[32]

24. For a case showing on what principles the courts treat such a situation in the absence of a statute like the Uniform Act, see Kentucky Refining Co. v. Bank of Morilton, (1905) 28 Ky. Law Rep. 486, 89 S. W. 492.

25. Uniform Act, Secs. 31 and 32.

26. Uniform Act, Secs. 38 and 39.

27. Uniform Act, Secs. 24, 25.

28. Uniform Act, Sec. 42.

29. Uniform Act, Sec. 9. That these words in a bill should not affect its negotiability, see National Bank of Commerce v. So. Ry. Co., (1909) 135 Mo. App. 74, 115 S. W. 517.

30. Security Bank v. Luttgen, (1882) 29 Minn. 363, 13 N. W. 151.

31. Uniform Act, Sec. 41.

32. Uniform Act, Sec. 26.

D. AMENDMENTS MADE BY THE FEDERAL ACT IN THE UNIFORM ACT.

In view of the volume of interstate commerce it is well to note the more important changes which the Federal Act makes in the Uniform Act; and it might be desirable, in the interest of uniformity between interstate shipments and intrastate shipments, to adopt these changes to a certain extent where other circumstances are the same. Of course, the states above mentioned as having already adopted the Uniform Act, would not have these changes, since the Federal Statute was passed subsequent to their adopting the Act; but the law of these states governs only shipments which are entirely within their own boundaries.

In the first place section 2 of the Uniform Act, prescribing certain facts that must be stated in a bill of lading, is omitted in the Federal Act. This appears to be because Congress in 1910[33] gave the Interstate Commerce Commission power to regulate the issuance, form and substance of bills of lading. This reason does not apply to Minnesota, where the Railroad and Warehouse Commission does not appear to have authority over the form of bills of lading.[34] It is to be noted that this section of the Uniform Act adds to the value of a negotiable bill as a means of credit, because it provides that a carrier shall be liable to any one injured by reason of its omitting from a negotiable bill any of the facts which the section requires to be stated.

Again, the Uniform Act provides that the carrier may not insert in the bill any provision limiting its liability for negligence,[35] which is substantially the present law of Minnesota.[36] This provision is omitted in the Federal Act, because by separate statutes,[37] Congress had provided that carriers could not limit their liability except as allowed by the Interstate Commerce Commission.

Section 10 of the Uniform Act provides that if a bill of lading is received without objection, any holder thereof cannot deny that he is bound by its terms. This is different from the present Minnesota law, which allows the circumstances to be shown to indicate that there was no assent by the shipper.[38] This section is not contained in the Federal Act.

The Federal Act[39] contains an important provision, not found in

33. Act of June 18, 1910, 36 Statutes at Large, 539, amending Act to Regulate Commerce.

34. The provisions of the Minnesota Statute, G. S. 1913, Secs. 4322-3, that bills of lading shall be of a certain color and size, are omitted by the Uniform Act.

35. Uniform Act, Sec. 3 (b).

36. Dunnell, Minn. Digest, Secs. 1312-19; Boehl v. Chicago, etc. Ry. Co., (1890) 44 Minn. 191, 46 N. W. 333. It is to be noted, however, that G. S. 1913, Sec. 4322, provides that a carrier may not insert in an order bill of lading any provision limiting its liability for actual loss, whatever that may mean.

37. Act of March 4, 1915, 38 Statutes at Large, 1197, known as Cummins Amendment, as amended by Act of August 9, 1916, 39 Statutes at Large, 441.

38. Dunnell, Minn. Digest, Sec. 1316; O'Malley v. Great Northern Ry. Co., (1902) 86 Minn. 380, 90 N. W. 974.

39. Act of Congress, August 29, 1916, Secs. 20 and 21.

the Uniform Act,[40] but desirable as an aid to the use of bills of lading as security for loans. Where the words "shipper's weight, load and count" are found in a bill, the carrier is not liable if the goods are not as described; and doubt arises thereby as to the value of the bill. The Federal Act forbids the use of these words where the carrier loads the goods, or where facilities are furnished by the shipper for weighing bulk freight; the carrier must then ascertain for itself the weight and quality of the goods, and insert the description in the bill of lading. On the other hand, the Federal Act[41] omits the provision of the Uniform Act requiring the carrier to enumerate charges for which it claims a lien, thereby detracting from the value of the bill of lading as security.[42]

E. Summary.

To summarize the situation, the Minnesota law on bills of lading is uncertain and out of date; and this throws doubt on the security of bills on intrastate shipments, and interferes with their use as a means of credit; and it also leads to other difficulties, which naturally result where the law does not correspond to business usage and is in doubt. The Minnesota law causes further confusion because it is radically different from the Federal law which governs bills of lading on interstate shipments. The whole situation would be remedied by the passage of the Uniform Bills of Lading Act, which is the work of the best legal talent in the country and is endorsed by a large number of associations; and which has been passed by Congress with some amendments. This act would give Minnesota a clear and up-to-date law on bills of lading, making them a more effective means of credit, and would bring the state law into harmony with the Federal law.

On the question of how far Minnesota should follow Congress in its amendment of the Uniform Act, it appears that in the interest of uniformity itself it would be desirable to adopt some of them, so that the law governing interstate and intrastate shipments may be identical; but, that it would be unwise to adopt others, because of differences in surrounding conditions. Among such differences are the facts that, there are other federal laws on some of these points which do not exist in the

40. See Uniform Act, Sec. 23.

41. Federal Act, Sec. 25.

42. There are certain other changes made by the Federal Act. Thus, it uses, throughout, the words "order bill" in place of "negotiable bill," and "straight bill" in place of "non-negotiable bill". The first section in the Federal Act is changed so that it applies only to bills of lading on interstate or foreign shipments or on shipments from one point in a state to another point in the same state where the shipment passes through an outside state or country. Wherever "Alaska" appears in the Uniform Act, "Panama" is added.

The Federal Act adds to section 5 that any provision in any notice, contract, rule, regulation or tariff that a negotiable bill is non-negotiable shall be void, but on the other hand adds that such a provision on the face of such a bill and in writing agreed to by the shipper may make it non-negotiable. The words, "or a connecting carrier," are omitted from the second paragraph of section 23.

The Federal Act makes certain additions which appear to be merely for the purpose of additional clearness and to prevent any possible doubt, and not intended to change the meaning of the Act. Thus, it adds to

state, and that Congress is limited in its action to matters concerning interstate commerce.

My conclusion is that the Uniform Bills of Lading Act should be adopted, because:—

1. It renders Bills of Lading negotiable, adopting the modern "mercantile theory" of such instruments.

2. It codifies the law of Bills of Lading by reducing to a statute those principles that are now unsettled and uncertain.

3. It makes the law of Bills of Lading uniform with the Federal Act and with the law of all states that have already codified or will hereafter codify the subject.

4. It is a companion bill to the Warehouse Receipts Act, enacted in Minnesota in 1913 (and passed in 31 other states), more than four-fifths of its sections being similar to sections in that Act.

5. Its provisions have already been passed upon in many decisions of other states, where the Act has worked satisfactorily for a number of years. Legislation is cheaper than Litigation.

DONALD E. BRIDGMAN.*

MINNEAPOLIS.

*Member of Committee on Uniform State Laws of Minnesota State Bar Association.

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section 11 (b) that possession of the bill is required as well as an offer to surrender a negotiable bill, in order to oblige the carrier to deliver the goods; it makes the provisions of section 17 apply when the bill is "stolen" as well as when it is "lost"; it adds in the same section that a voluntary bond shall be binding on the parties; it adds "themselves" after "goods" in the fourth line of section 27; it adds, "free from existing equities," after "negotiated" in the second paragraph of section 30; it makes the provisions of section 38 apply where the owner is deprived of a negotiable bill by "loss" or "theft" as well as by "accident" or "conversion". On the other hand, it omits from section 35 the words "including one who assigns for value a claim secured by a bill," a change which seems to make for lack of clearness; it also omits from the same section the provision that such an assignor shall not be liable to exceed the amount of the claim.

Sections 40 and 41, dealing with the form of a bill of lading as indicating the rights of buyer and seller, and with the question whether a draft should be paid or accepted before surrender of the bill, are omitted by the Federal Act, probably as being topics connected with commercial dealings, which do not directly affect interstate commerce; although they are provisions suitable to an Act passed by a state. The six sections of Part IV of the Uniform Act, creating criminal offenses, are omitted, and a single and different section is substituted. Section 51, which provides that the rules of law and equity, including the law merchant, shall apply to cases not covered by the Act, is omitted from the Federal Act, as is section 52. These sections are better suited to state statutes. In section 53, containing definitions, the words "covered by this Act" are added to the definition of "bill"; and the definitions of "owner", "purchaser", "value" and "good faith" are omitted; a definition of "state" is added. A new section is added to the Federal Act (sec. 44) providing that if any part of the Act is declared unconstitutional, it shall not affect the validity of the remainder.

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BELLIGERENT INTERFERENCE WITH MAILS.

THE doctrine of the inviolability of the mails is a distinctly modern tenet. During the Napoleonic wars, the English authorities regularly exercised a general supervision over all correspondence that fell into their hands.[1] The carriage of official documents for the enemy was regarded as a particularly reprehensible act which might subject the neutral vessel to condemnation.[2] With the growth of international communication, the practice gradually arose of exempting mails on neu-

1. The writer is indebted to Professor W. E. Lingelbach for the following reference:

"American Consulate, London.
February 14, 1812.

"The enclosed letter was on board the Ship Vigilant (Joshua Coombs, Master) bound from Amsterdam to Boston, which vessel having been sent into Yarmouth by a British Ship of War, for adjudication, all the Letters on board were opened and examined under the authority of the Court of Admiralty, as is usual in such case. The Vigilant being now released, the Letters have been returned to me; and I have deemed it my duty to enclose them to Persons to whom they are addressed.

"I am,
"Your most obedient and humble servant,
(Signed) "R. G. Beasley."

2. The Atalanta, (1808) 6 C. Rob. 440, 1 Roscoe, Prize Cases 607; The Rapid, (1810) Edw. 228, 2 Roscoe, Prize Cases 45.

tral merchant ships from visitation or detention.[3] The United States set an excellent example in this respect during the Mexican War[4] and pursued a like liberal policy during the Civil[5] and Spanish-American wars.[6]

This question was the occasion of an interesting correspondence between the United States Secretary of State and the British government during the Civil War.[7] The British Ambassador at Washington endeavored to induce the United States to concede that "Her Majesty's mail on board a private vessel should be exempt from visitation or detention." Mr. Seward took the position that "the public mails of any friendly or neutral power, duly certified or authenticated as such, shall not be searched or opened, but be put as speedily as may be convenient on the way to their designated destinations." He added, however, that this concession was not to protect "simulated mails verified by forged certificates or counterfeited seals." This opinion was duly communicated to the British Ambassador at Washington with the full approval of the President. But Mr. Welles, Secretary of the Navy, paid no attention to this communication. The dispute was brought to a head over the disposition of the mails which were found on the Peterhoff. The court directed that the mails should be opened in the presence of the British consul who should "select such letters as seemed to him to relate to the culpability of the cargo" and reserve the remainder to be forwarded to their destination. But the British consul refused to act and Lord Lyons appealed to the Secretary of State for the protection of the mail. The President thereupon directed that the mails should not be opened but forwarded at once to their original destination. Instructions to this effect were subsequently issued to the United States naval officers.

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3. Oppenheim, Int. Law, II, p. 453. Lawrence, Law and Neutrality in the Far East, p. 185.

The Postal Treaty of 1848 between the United States and Great Britain provided that in case of war between the two nations, the mail packets should be unmolested for six weeks after notice by either government that the mail service was to be discontinued, in which case the packets should have safe conduct to return.

4. During the Mexican War, the United States forces permitted British mail steamers to pass in and out of Vera Cruz without molestation. Wheaton, Int. Law (Dana Ed.) p. 504, note 228, p. 659. Moore, Dig. Int. Law, VII, p. 479.

5. Moore, Dig. Int. Law, VII, pp. 481-84.

6. Naval War College, Int. Law Topics, 1906, p. 91.

7. Moore, Dig. Int. Law, VII, p. 481.

On the outbreak of the war with Spain the United States government issued the following proclamation:[8]

"The right of search is to be exercised with strict regard for the rights of neutrals, and the voyages of mail steamers are not to be interfered with except on the clearest grounds of suspicion of a violation of law in respect of contraband or blockade."

This proclamation, it will be observed, did not grant complete immunity to mail ships. In the case of *The Panama*,[9] a vessel belonging to the Spanish naval reserve, the Supreme Court held that "the mere fact that the Panama was a mail steamer or that she carried mail of the United States . . . does not afford any ground for exempting her from capture."

The instructions of the Spanish Admiralty provided that a ship might be captured:[10]

"If she carries letters and communications of the enemy, unless she belong to a marine mail service, and these letters or communications are in bags, boxes or parcels, with the public correspondence, so that the captain may be ignorant of their contents."

The United States Naval War Code is much more generous in its treatment of mail steamers and mail matter. It provides:

"That mail steamers under a neutral flag carrying hostile despatches in the regular and customary manner, either as a part of their mail in their mail bags or separately as a matter of accommodation and without special arrangement or remuneration, are not liable to seizure and should not be detained, except upon clear grounds of suspicion of a violation of the laws of war with respect to contraband, blockade, or unneutral service, in which case the mail bags must be forwarded with seals unbroken."[11]

But the exemption so granted has not been recognized by any nation as absolute or obligatory: it has existed of grace rather than as of right and has been subject to such limitations as the belligerent might lay down.[12] During the Franco-Prussian War, for example, the French government exempted the mail bags of neutral vessels from search in case there was an

8. Naval War College, Int. Law Topics, 1906, p. 91.
9. (1899) 176 U. S. 535, 20 S. C. R. 480, 44 L. Ed. 577.
10. Naval War College, Int. Law Topics, 1906, p. 91.
11. The United States Naval War Code, 1900, Article 20.
12. Moore, Dig. Int. Law, VII, p. 482; Lawrence, War and Neutrality in the Far East, p. 189.

agent of the neutral state on board who was prepared to declare that there were no dispatches of the enemy among the correspondence.[13] In subsequent wars, the belligerents have shown a decided tendency to exercise their full legal rights over mail ships and correspondence. During the blockade of Venezuela in 1902,[14] the British and German fleets stopped all neutral mail ships and after overhauling the correspondence and detaining what seemed noxious sent the rest ashore in boats belonging to the blockading squadron." This action was perfectly justifiable according to the British Manual of Naval Prize Law which provides that: "The mail bags carried by mail steamers will not, in the absence of special instructions, be exempt from search for enemy dispatches."[15] The regulation of the Japanese government on the outbreak of war in 1904, expressly authorized its naval officers to examine all enemy correspondence in case of suspicion of the carriage of contraband papers.[16] The Russian instructions went even further and directed its officers to "search for the correspondence of the hostile government and generally speaking all packages addressed to the enemy's ports."[17] This order was carried out by Russian cruisers on several occasions in respect to both English and German mail steamers.[18] In the case of *The Calchas,* the prize court of Vladivostock asserted its right to examine the contents of the mail bags found on board that ship.[19] The United States government entered a

13. Oppenheim, Int. Law, II, p. 453.

14. Lawrence, War and Neutrality in the Far East, p. 191.

15. Manual of Naval Prize Law, Article 102.

16. Article 34. "In visiting or searching a neutral mail ship, if the mail officer of the neutral country on board the ship swears in a written document that there are no contraband papers in certain mail bags, those mail bags shall not be searched. In case of grave suspicion, however, this rule does not apply."

Article 68. "When a mail steamer is captured, mail bags considered to be harmless shall be taken out of the ship without breaking the seal, and steps shall be taken quickly to send them to their destination at the earliest date." Naval War College, Int. Law Topics, 1906, p. 92.

17. Ibid.

18. Oppenheim, Int. Law, II, p. 454; Lawrence, War and Neutrality in the Far East, p. 185.

19. Hurst and Bray, Russian and Japanese Prize Cases, I, p. 138.

The instructions issued to the naval officers of the United States during the Civil War, likewise provided "That to avoid difficulty and error in relation to papers which strictly belong to the captured vessel, and mails that are carried or parcels under official seals, you will in the words of the law 'preserve all the papers and writings found on

protest in that case against the seizure and detention of United States mail as opposed to the more "liberal tendency of recent international usage,"[20] but it did not venture to declare that the act itself was expressly illegal. The rules of the Japanese prize court likewise recognized the right of a belligerent court to examine any letters and correspondence which might be brought before it in the course of prize proceedings.[21]

In short, it may safely be said that up to the time of the Hague Convention there was no principle of international law, prohibiting the search and even confiscation if need be, of postal correspondence carried by sea in time of war.[22] "The utmost that we can venture to assert," says Lawrence,[23] "is that such a usage is in process of formation and is in itself so convenient that it ought to become permanent and obligatory, due security being taken against its abuse."[24]

The resolutions of the second Hague Conference on the subject of postal correspondence mark a decided step in advance. The resolutions run as follows:[25]

"Article I. The postal correspondence of neutrals or belligerents, whatever its official or private character may be, found on the high seas on board a neutral or enemy ship, is inviolable. If the ship is detained, the correspondence is forwarded by the captor with the least possible delay.

"The provisions of the preceding paragraph do not apply, in case of violation of blockade, to correspondence destined for or proceeding from a blockaded port.

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board and transmit the whole of the originals unmolested to the judge of the district to which such prize is ordered to proceed.'"

20. United States Foreign Relations, 1904, p. 772.

21. Takahashi, International Law applied to Russo-Japanese War, p. 568.

It is interesting to observe that Secretary Seward recommended in the case of the Peterhoff that if "the district attorney has any evidence to show that the mails are simulated and not genuine, it shall be submitted to the court. If there be no reasonable grounds for that belief, then that they be put on their way to their original destination." Moore, Dig. Int. Law, VII, p. 482.

22. Oppenheim, Int. Law, II, 454; Hershey, Essentials of International Public Law, note 423.

23. Lawrence, War and Neutrality in the Far East, p. 185.

24. Dr. Lushington declared that "to give up altogether the right to search mail steamers and bags when destined to a hostile port is a sacrifice which can hardly be expected from belligerents." Naval Prize Law, Introduction, p. XII.

25. Scott, Hague Conventions and Declarations of 1899 and 1907, p. 182.

"Article II. The inviolability of postal correspondence does not exempt a neutral mail-ship from the laws and customs of maritime war as to neutral merchant ships in general. The ship, however, may not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible."

The object of the resolutions, as set forth by Herr Kriege,[26] the German delegate, was to promote the interests of innocent commerce.

"Postal relations have at our epoch such importance—there are so many interests commercial or other, based on the regular service of the mail—that it is highly desirable to shelter it from the perturbations which might be caused by maritime war. On the other hand, it is highly improbable that the belligerents who control means of telegraphic and radio-telegraphic communication would have recourse to the ordinary use of the mail for official communications as to military operations. The advantage to be drawn by belligerents from the control of the postal service therefore bears no prejudicial effect of that control on legitimate commerce."

It was the general opinion of the Convention that the rapid extension of telegraphic communication had practically eliminated any danger of the surreptitious use of the mails for the carriage of contraband papers.[27] Only the ordinary correspondence, it was thought, would be entrusted to the slow and somewhat precarious conveyance by mail: all important political or military information would be transmitted by a safer and more expeditious method. The result, however, has turned out to be quite otherwise than was anticipated by the conference of international jurists.[28] The argument of the German delegation bears little relation to the existing state of international commerce during war.[29] In view of the surprising change of conditions, both the neutral and belligerent governments have found it necessary or expedient to readjust their

26. Hershey, The so-called Inviolability of Mails. 10 Am. J. Int. Law, p. 580.

27. A similar view was expressed in the discussion at the United States Naval War College in 1906. Naval War College, International Law Topics, 1906, p. 93.

28. Commander von Usler, Maritime Responsibility in Time of War. 181 N. Am. Rev., p. 186; Naval War College, International Law Topics, 1906, p. 93.

29. For a statement of the amount of contraband carried through the mails on various steamers, see Allied memorandum relative to postal correspondence on the High Seas, Feb. 15, 1916. 10 Am. J. Int. Law, (Special Supplement) 406.

postal theories of inviolability to the new commercial facts and to place a more restrictive interpretation upon the generality of the language of the postal convention than had originally been intended or anticipated.

This convention, it should be stated at the very outset, is of doubtful applicability to the controversy now going on between the United States government on the one hand and the French and English on the other, over the so-called inviolability of mails.[30] The Hague resolutions are binding only as between the contracting parties and when all the belligerents are parties to the convention; and it so happens in this case that several of the belligerent nations have failed to ratify the convention.[31] Fortunately the Allied Governments have not attempted as yet to take advantage of this omission. They are, however, fully alive to their own special rights and interests in the matter and have expressly reserved the right to repudiate its provisions "in case enemy abuses and frauds, dissimulations and deceits should make such a measure necessary."[32]

It is equally fortunate that the Allied Governments have not seen fit to raise the questions of blockade or continuous voyage.[33] It might have been expected that the Allies would attempt to justify their interference with neutral mails on the ground that the mail matter in question "was destined for or proceeding from a blockaded port."[34] But no such attempt has been made to confuse the issue. Throughout the correspondence between the Allied Governments and the United States there has been a marked effort to discuss the various points at issue in a liberal and fairminded spirit with a view to the determination of true legal principles; and it is a tribute to the sense of justice and moderation of both parties that they have

30. Hershey, The so-called Inviolability of Mails, 10 Am. J. Int. Law 580.

31. Bulgaria, Italy, Montenegro, Russia, Serbia and Turkey have not yet ratified the convention. Many neutral countries are in the same position.

32. Memorandum of the British Ambassador to the Secretary of State, Oct. 12, 1916. 10 Am. J. Int. Law, (Special Supplement) 421.

33. Memorandum of the Secretary of State to the British Ambassador, May 24, 1916. Ibid. 413.

34. Professor Hershey expresses the opinion that this plea might have been entered "with entire justice and propriety." 10 Am. J. Int. Law 581.

been able to arrive at the same general conclusions so far at least as the fundamental principles of law are concerned.

The correspondence between the United States and the Allied Powers raises a number of important legal questions.[35] First, what is the nature of post parcels? Are they mail or merchandise? Upon this point the respective governments are in agreement; and there can be no doubt as to the correctness of their decision that parcels post should properly be treated as merchandise and as such are subject to the general exercise of belligerent rights as recognized by international law.[36] To place any other interpretation upon the words "postal correspondence" would not only transform their original meaning but would also be equivalent in effect to a material modification of the general principles of law in respect to the carriage of contraband. Under the guise of "postal correspondence" the neutral would be free to carry on an unlimited trade in contraband articles. It was certainly not the intention of the delegates at the Hague to revolutionize the generally accepted rules of maritime law by means of a postal joker. The same observation may be made in regard to "merchandise hidden in the wrappers, envelopes or letters contained in mail bags." Inasmuch as the United States government does not contest the validity of the English contention on this matter it is safe to conclude that as between the United States and the Allied Governments at least, the principle is clearly established that the provisions of the Hague Convention were intended to cover genuine correspondence only and not articles of trade which may be consigned through the mails. The English prize court had already laid down in the case of *The Simla*,[37] that the provisions of the Hague Convention in respect to the immunity

35. Copies of the correspondence in convenient form may be found in 10 Am. J. Int. Law (Special Supplement, Oct. 1916) 404-26.

36. The United States government, however, was not willing to admit the English claim that such parcels are subject to "the exercise of the rights of police supervision, visitation and eventual seizure which belong to belligerents as to *all* cargoes on the high seas." Ibid. p. 413.

It is interesting to observe in this connection that the Swedish government detained all parcels post from England in transit across Sweden as a measure of reprisal against Great Britain for removing from neutral ships bags of parcels mail bound to and from Sweden. The Swedish government later released the detained parcels upon the understanding that the dispute should be submitted to arbitration. 11 Am. J. Int. Law, Supplement, 22-54.

37. 1 Trehern, British and Colonial Prize Cases 281.

of postal correspondence did not apply to parcels sent by parcel post. The correspondence of the two governments merely lends political sanction to that decision.

The Allied Governments also concur with the United States in recognizing the inviolability of "genuine correspondence," by which they mean "despatches or missive letters," but they contend that this immunity does not extend to any other form or kind of mail matter.[38] The United States, however, looks upon this suggested limitation with considerable suspicion as affording a possible ground for unwarrantable interference with the mails. This government is not prepared "to admit that belligerents may search other private sea-borne mails for any other purpose than to discover whether they contain articles of enemy ownership carried on belligerent vessels or articles of contraband transmitted under sealed cover as letter mail" except in case of blockade.[39] The official declarations of both parties upon the question of what constitutes "genuine correspondence" are exceedingly hazy. Nor are the governments any more clear or definite as to the specific methods by which the authenticity of innocent correspondence may be determined. Both parties are apparently anxious to avoid a breach or afraid to commit themselves to any distinct proposition which might later prove embarrassing in case of a conflict with other powers. All that can be asserted at present is that the respective governments are in "substantial agreement" upon the general principle of the immunity of innocent correspondence. "The method of applying the principle" is, in the opinion of the United States "the chief cause of difference."

The real struggle between the two parties centers about the "mode in which the Allied Governments exercise the right of visitation and search," particularly in respect to the improper assumption of jurisdiction over vessels and cargoes which are carried into or are found in Allied ports. The United States government most strongly objects to the unjustifiable practice of the Allies in bringing neutral vessels into Allied ports for the purpose of exerting a more effective supervision over their mails and cargo than is possible on the high seas. Economic or political pressure is employed in order to secure jurisdiction

38. 10 Am. J. Int. Law (Special Supplement) 409.
39. Ibid. 413.

over neutral ships. In the words of the United States memorandum:

"They [the Allies] compel neutral ships without just cause to enter their own ports or they induce shipping lines, through some form of duress, to send their mail ships via British ports, thus acquiring by force or unjustifiable means an illegal jurisdiction. Acting upon this enforced jurisdiction, the authorities remove all mails, genuine correspondence as well as post parcels, take them to London, where every piece, even though of neutral origin and destination, is opened, and critically examined to determine the 'sincerity of their character', in accordance with the interpretation given that undefined phrase by the British and French censors. Finally the expurgated remainder is forwarded, frequently after irreparable delay, to its destination. Ships are detained en route to or from the United States, or to or from other neutral countries and mails are held and delayed for several days and in some cases, for weeks and even months, even though routed to parts of North Europe via British ports. . . . The British and French practice amounts to an unwarranted limitation on the use by neutrals of the world's highway for the transmission of correspondence."[40]

To the first of these indictments the Allies enter a plea of not guilty. They emphatically declare that they "have never subjected mails to a different treatment according as they were found on a neutral vessel on the high seas or on neutral vessels compelled to proceed to an Allied port." The same general principles of visit and search they admit are equally applicable in both cases and it would not be possible to extend the legal authority of the belligerent by bringing a neutral ship within the local jurisdiction. The Allies, however, fail to meet the specific criticisms of the United States in respect to the mode in which the right of visit and search has been exercised. They endeavor to justify their action first by an appeal to the practise of other nations in previous wars and second, by resorting to the familiar device of condemning the much more reprehensible conduct of the Central Powers in destroying neutral mails. The precedents cited,[41] however, are concerned almost entirely with the general principle of the validity of the examination of mails; they throw little light upon the real question at issue, viz., the legitimacy of the methods employed by the Allies. The principle may be fully admitted but that admis-

40. Ibid. 413-14.
41. Ibid. 422-25.

sion does not lend any justification to the arbitrary methods employed in exercising the right of search.[42] Upon this point, at least, the United States government has decidedly the better of the argument.

This phase of the controversy, upon its face, resolves itself into a pure question of fact as to the methods employed by the belligerents, but in reality there is an important legal principle at stake. In theory, the Allies admit the inviolability of innocent correspondence, but in practice they examine all correspondence on suspicion to determine the genuineness of its private character. The fact that contraband articles have been found in what appeared to be personal communications has been considered sufficient warrant for subjecting all doubtful mail matter to examination. Mere "suspicion" has been substituted for the sounder test of "reasonable ground for belief."[43] In the case of the Bundesrath during the Boer War, the English government issued an order that mail steamers should not be stopped and searched on suspicion only.[44] But this precedent has now been thrown to the winds and the Allied governments are applying to mail ships and mail matter the same general principle that they have laid down for merchant ships in general, viz., that "neutrals may be held up in cases where there are good grounds to suspect that their ostensible destination is not the genuine destination."[45] In short, the presumption of innocence has been materially modified. The postal authorities proceed to examine the whole correspondence in case they come across anything that appears to them to be suspicious. The neutral may now find himself called upon to

42. The United States gives specific instances of the seizure both of parcels post and "of entire mails including sealed mails and presumably the American diplomatic and consular pouches." It is almost needless to say that any interference with the diplomatic and consular mails of neutral states, with the correspondence of belligerent governments with their diplomatic and consular officers in neutral states or of the latter with the home state, would be a flagrant violation of international law. The Caroline, (1808) 6 C. Rob. 461, 1 Roscoe, Prize Cases 615; The Madison, (1810) Edw. 224, 2 Roscoe, Prize Cases 42; Lawrence, War and Neutrality in the Far East, p. 198.

43. Despatch of Mr. Seward, Secretary of State, to Mr. Welles, Secretary of the Navy, April 15, 1863. Moore, Dig. Int. Law, VII, p. 482.

44. Stowell and Munro, International Cases, War and Neutrality, p. 413.

45. The Wico, Ibid. 499.

prove the legitimate character of his correspondence and trade.[46]

A recent case, *Rex. v. Garret—ex parte Scharfe*,[47] throws an interesting side-light upon the general attitude of the English courts towards the question of visit and search. This case arose out of the arrest of certain Russian subjects who were forcibly removed from a Danish ship in a British port for a violation of the Defence of the Realm regulations. The captain had brought his ship into Kirkwall under the terms of an international arrangement by which neutral ships were to call at that port for examination in order to avoid the danger and delay of a visit and search at sea. It was contended on behalf of the defendants that since the ship had come into port as a mere act of international courtesy, the English government ought not to take advantage of that fact to assert an authority over the prisoners which it could not have legally exercised on the high seas. So far at least as the prisoners were concerned, the ship ought properly to be considered as still upon the high seas. But the court quickly brushed aside the objection. The defendants, it declared, "had utterly failed to bring the case within any principle of law."

The court in this case laid considerable emphasis upon the fact that neither the Danish nor the Russian governments had entered a complaint against the action of the local authorities. It is exceedingly doubtful, however, if a protest on the part of a foreign government would have affected the ruling of the court in any way. Such a protest would have been a diplomatic matter with which the court would have had no concern. The court had only to look to the immediate facts. A foreign ship had come into a British port of its own free will to be examined. The court would not go back of that fact to inquire into the naval, political or economic considerations which had induced or compelled the Danish authorities to enter into the convention.

The Allies are able to present a much stronger case in respect to their treatment of neutral merchant ships which "voluntarily" enter belligerent ports.[48] In actual practice, it is

46. The London Times, Dec. 12, 1916, gives an interesting description of the working of the censorship in England. See also a memorandum, "The Mails as a German War Weapon," 1916.

47. The London Times, Feb. 2, 1917.

48. 10 Am. J. Int. Law (Special Supplement) 420.

exceedingly difficult to draw the line in the present war between the voluntary and involuntary entrance of merchant vessels, but the difference, nevertheless, is clearly recognized in law. Both the English and American courts have freely exercised jurisdiction over foreign vessels in the case of a voluntary entrance, whereas in the latter class of cases, they have regularly exempted such ships from the operation of the local law.[49] In *United States v. Diekelman*,[50] the Supreme Court laid down that ships which voluntarily enter a foreign port "thereby place themselves under the laws of that port whether in time of war or of peace." In the light of this important precedent, the Allies contend it is perfectly legitimate for the belligerent governments "to make sure" that any merchant vessel entering an Allied port "carried nothing inimical to their national defence before granting its clearance."[51]

The validity of the Allied contention upon this point can scarcely be gainsaid. The English government has always been jealous of its authority over all persons and things voluntarily within the local jurisdiction. The English courts have uniformly maintained their jurisdiction over criminal offences committed on foreign vessels in British ports.[52] The courts

49. The Industria, Forsyth, Cases and Opinions on Constitutional Law, p. 399; The Fortuna, (1803) 5 C. Rob. 27, 1 Roscoe, Prize Cases, 417; The Brig Short Staple v. U. S., (1815) 9 Cranch 55, 3 L. Ed. 655; The Brig Concord, (1815) 9 Cranch 387, 3 L. Ed. 768; The Diana, (1868) 7 Wall. 354, 19 L. Ed. 165; The Comet, Enconium, Enterprise, Hermosa and Creole, Moore, Dig. Int. Law, II, Sec. 208.

The Merchant Shipping Acts furnish an excellent illustration of the tendency of the English government to extend its jurisdiction to foreign vessels in English ports. See also The British Territorial Waters Act of 1878. Westlake, International Law, Part I, Peace, pp. 259-62.

50. (1875) 92 U. S. 520, 23 L. Ed. 742.

51. 10 Am. J. Int. Law (Special Supplement) 420.

52. Regina v. Cunningham, (1858) 8 Cox C. C. 104, Bell C. C. 72, 7 W. R. 179, 5 Jur. (N. S.) 202; Regina v. Anderson, (1868) 11 Cox C. C. 198, 204.

"So complete is the authority of the lex loci over all persons and property on board of private vessels, that if a vessel under the British Mercantile Flag were to enter the port of Charleston, having free negro sailors amongst her crew, the mercantile flag will not protect those sailors from the operation of the territorial law of the state of South Carolina, which forbids a free negro to be at large within the limits of that state. It has thus frequently happened that negroes, or persons of color, though free subjects of her Britannic Majesty, and duly entered on the muster roll of the crew of a British merchant vessel, have, on such vessel entering the port of Charleston, been taken out of her by the officers of the port under the authority of the local law, and have been detained in custody until the vessel has

and political department of the United States likewise have not hesitated to assert the doctrine of territorial sovereignty in the most sweeping terms in respect to foreign ships. In the case of *Exchange v. McFadden*[53] Chief Justice Marshall declared that the merchant vessels of one country entering the ports of another for the purposes of trade subject themselves to the laws of the port they visit so long as they remain. And in the subsequent case of *United States v. Diekelman*[54] Chief Justice Waite laid down that a foreign vessel which entered the port of New Orleans, at that time under martial law, was amenable to the law of the port and "voluntarily assumed all the chances of war into whose province she came." Secretary of State Bayard in 1885 declared "that when a merchant vessel of one country visits the ports of another for the purposes of trade, it owes temporary allegiance and is answerable to the jurisdiction of that country . . . unless otherwise provided by treaty."[55] Many other official declarations might be cited to a like effect.[56] In view of these precedents, it is submitted that the privileges of neutral mail ships in belligerent ports must be construed in strict subordination to the rights of the sovereign state to take such measures as may be necessary to secure the state against the designs of its enemies. Mails, it has been held, in time of peace, are subject to the quarantine laws of the state for reasons of public safety;[57] in time of war, when the safety of the state may be in even greater

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cleared outwards, when they have been again placed on board of the ship with permission to leave the country. On the other hand, if a merchant ship under the flag of the United States, or under the Palmetto flag of South Carolina, were to enter a British port with one or more negro slaves on board, her mercantile flag would not avail to exclude the jurisdiction of the British Courts, if their territorial authority should be invoked to vindicate the personal liberty of a human being who is within British territory." Twiss, Law of Nations in Time of Peace, pp. 229-30.

53. (1812) 7 Cranch 116, 3 L. Ed. 287.

54. (1875) 92 U. S. 520, 23 L. Ed. 742; The Wildenhus Case, (1886) 120 U. S. 1, 7 S. C. R. 385, 30 L. Ed. 565; The Kestor, (1901) 110 Fed. 432. In the case of Patterson v. Bark Eudora, (1903) 190 U. S. 169, 23 S. C. R. 821, 47 L. Ed. 1002, the Supreme Court laid down that no one within the jurisdiction could escape liability for a violation of the law in respect to the prepayment of wages of seamen "on the plea that he was a foreign citizen or an officer of a foreign merchant vessel." Charles Noble Gregory, Jurisdiction over Foreign Ships in Territorial Waters, 2 Mich. Law Rev. 334.

55. Moore, Dig. Int. Law, II, p. 278.

56. Ibid. 272-86.

57. Ibid. 145.

danger from enemy correspondence, it can scarcely be expected that the belligerents will exempt the mails and mail ships from the operation of the laws of contraband and unneutral service.

To the charge of violating the Hague postal convention, the Allied Governments enter an elaborate rejoinder.[58] They point out quite correctly that the convention in question deals only with correspondence "found on the high seas" and has no application whatever to mail which may be found on board ships within the local jurisdiction. And even this exemption of mails "found on the high seas" rests, as we have seen, on a precarious foundation since the Allied Powers are under no legal obligation to carry out the provisions of the convention in the absence of express ratification. In short, so far as the positive provisions or prohibitions of international law are concerned, they are free to repudiate the convention and to revive the former arbitrary rights of search and seizure as they have threatened to do.[59]

As a strict matter of law, it must again be admitted that the Allies' argument is probably correct. But notwithstanding this admission, the neutral nations would nevertheless be justified in considering any attempted enforcement of the allied threat as a grave breach of the comity of nations. Under modern social and economic conditions it would be manifestly unjust to subject "genuine correspondence" to the same belligerent restrictions that are placed on ordinary merchandise.[60] The two things cannot properly be assimilated. Any arbitrary interference with the mails could only be justified as a measure of reprisal.[61] It is sincerely to be hoped that the Allies may not find occasion to put this dangerous obsolescent war power into practical use. In such an eventuality the United States government would have special ground of complaint in view of its own liberal policy in the past toward neutral and even belligerent mail.

Even more interesting from the standpoint of international law and commerce is the discussion of the specific articles of

58. 10 Am. J. Int. Law (Special Supplement) 420.

59. Hershey, The so-called Inviolability of Mails, 10 Am. J. Int. Law, 581.

60. Lawrence, War and Neutrality in the Far East, p. 198.

61. The critical question may easily arise as to whether Great Britain would be justified in detaining all mails to and from Germany by way of retaliation for the German destruction of British mails.

international exchange which can or cannot be recognized as possessing the character of postal correspondence. The two parties are agreed in recognizing that stocks "bonds, coupons and similar securities" together with money orders, checks, drafts, notes and other negotiable instruments which may pass as the equivalent of money "may be considered as of the same nature as merchandise or other articles of property and subject to the same exercise of belligerent rights."[62] The United States insists, however, that "correspondence, including shipping documents, money order lists and papers of that character even though relating to enemy supplies or exports unless carried on the same ship as the property referred to" should be regarded as general correspondence and entitled to unmolested passage.[63] The Allies declare that they do not intend to stop "shipping documents and commercial correspondence found on neutral vessels, even in an allied port and offering no interest of consequence as affecting the war," but would see to it that such mail matter is forwarded to its destination with as little delay as possible.[64] But they take decided objection to the United States classification of lists of money orders as ordinary mail. These lists, they point out, are for all practical purposes "actual money orders transmitted in lump in favor of several addressees" and as such are a most effective means of strengthening the financial resources of the enemy.

The position of the Allied Governments, it is submitted, is the stronger and more reasonable in the matter of the money order lists. In form these lists may appear as "innocent correspondence" but in fact they are an instrument of international exchange. The Allies cannot overlook the fact that in modern war financial credit is almost as important a factor as men or munitions. It is interesting to observe in this connection that the British have included "all negotiable instruments and realizable securities" in the list of absolute contraband.[65] The money order lists have not yet been placed in this forbidden category but it must be recognized that they may be made to serve on a small scale somewhat the same commercial purpose.

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62. 10 Am. J. Int. Law (Special Supplement) 417, 425.
63. Ibid. 417.
64. Ibid. 425.
65. Ibid. 52.

A review of the correspondence leads inevitably to the conclusion that the differences between the two parties have been primarily differences of form or method of proceeding rather than fundamental differences of principle. The real crux of the whole controversy has been the question of visit and search. The arbitrary removal and censorship of the mails has been but one phase though the most important one, of the question of the right of the belligerent to bring a neutral ship into a home port for the purpose of making a more careful examination of the mail and cargo. The Allied Governments, in brief, have attempted to give a broad construction to the general right of visit and search. They have sought to exercise the right in a mode most convenient and advantageous to themselves as belligerents and the United States has challenged the legality of the whole procedure. In the language of Professor Hershey:[66]

"It is a question as to whether the right of visit and search must continue to be exercised on the high seas; or whether, under the circumstances of changed methods of transportation, of improved modern devices for evading discovery, and of the dangers from submarines, the rules pertaining to the mode of exercising the right of search must not be modified so as to meet present day conditions. On this point the Allies would seem to have the best of the argument. The attitude of the United States appears to be needlessly obstructive, legalistic and technical. We stand upon the letter rather than the spirit of our rights."

With this conclusion, the writer finds himself in general agreement. During the course of the Civil War, the Supreme Court of the United States found it necessary to modify some of the principles of international law so as to bring them into accord with the changing economic conditions of the time; and time has abundantly justified the justice of these decisions. An examination of the naval records of the Civil War, as A. Maurice Low[67] has pointed out, will afford numerous precedents for the recent practice of the English naval and judicial authorities. It was the common practice for American naval officers to seize neutral vessels on suspicion or for probable cause and send them in to a prize court in order that they might there have a more thorough examination. In the

66. Hershey, The so-called Inviolability of Mails, 10 Am. J. Int. Law, 583.

67. Low, American Precedents for all British dealings with Neutrals at Sea. 5 N. Y. Times Current History 911.

case of the British ship Adela, for example, Commander Frailey in reporting the capture to the Secretary of the Navy, wrote:[68]

"I did not examine her hold, being under the impression at that time that I had no authority to open her hatches but having a *suspicion* of her character, I deemed it my duty to send her into port and hand her over to the judicial authority for examination."

And in the subsequent case of the *Olinde Rodrigues*[69] during the Spanish War, the Supreme Court said:

"Probable cause exists when there are circumstances sufficient to warrant suspicion, though it may turn out that the facts are not sufficient to warrant condemnation. And whether they are or are not cannot be determined unless the customary proceedings of prize are instituted and enforced. Even if not found sufficient to condemn, restitution will not necessarily be made absolutely, but may be decreed conditionally, as each case requires. And an order of restitution does not prove lack of probable cause."

In fact, so far as naval measures are concerned, it must be confessed that the methods now employed do not differ materially in principle from those which were successfully used during the Civil War. The Allies have simply developed the system of inquisitorial examination and supervision so as to secure a maximum of belligerent efficiency; and the neutral nations of today as of the time of the Civil War, are naturally kicking hard against the pricks.

If then, the right of the belligerents to examine suspicious correspondence for contraband of war or military despatches be admitted, the question arises as to mode in which this right should be exercised. Only the most general propositions can be laid down upon this point. The power, it will be recognized at the outset, must be exercised in a reasonable manner. The belligerent must show the largest measure of consideration to neutral correspondence that is compatible with the effectual exercise of belligerent rights. As to what is reasonable, the naval and postal authorities must judge in the first instance, but from this decision there will always lie an appeal to the belligerent courts and government for redress. The English courts have held that when a ship has been seized without reasonable cause, she must be restored to the neutral owner

68. Ibid. 914.
69. (1898) 174 U. S. 510, 19 S. C. R. 851, 43 L. Ed. 1065.

with compensation.[70] In the case of *The Wilhelmsberg*,[71] it was laid down that the captor was liable to be condemned in costs and damages for not taking a vessel to a convenient port for adjudication. Any delay on the part of the captor or government to enter an appearance or exercise the right of preemption in respect to captured property, it has been determined, will likewise entitle the neutral claimant to indemnification.[72] The same principles, it is submitted, are equally applicable to any arbitrary or unreasonable exercise of the right of search and detention of the mails. The neutral claimant should first prosecute his suit for damages before the prize courts of the belligerent, and should he fail to secure justice there, he can then proceed through diplomatic channels.

The right, it is almost needless to add, must be used for belligerent purposes exclusively. It must be confined to the discovery and detention of noxious communications only. To subject innocent correspondence to an examination for commercial purposes with a view to discovering the business secrets of a rival nation would be a grave breach of the principles of international law.[73] The distinction is clear in principle even though it may sometimes be difficult to draw the line in practise. This is after all a question of good faith and credit as between nations. It is not primarily a matter of law but of morality.

The right of search, it is further submitted, in the case of mail steamers, should be subject to the limitation suggested by Commander von Usler of the German Navy,[74] that neutral mail steamers should (a) "be stopped and seized only in the neighborhood of the actual seat of war and only when strong suspicion rests on them; (b) outside the actual seat of war, the mails, including those of the belligerents, ought not to be touched." These limitations have not yet been incorporated

70. The Triton, (1801) 4. C. Rob. 78. 1 Roscoe, Prize Cases 352.

71. The Wilhelmsberg, (1804) 5 C. Rob. 142, 1 Roscoe, Prize Cases 437.

72. The Peacock, (1802) 4 C. Rob. 183. 1 Roscoe, Prize Cases 381; The Zacheman, (1804) 5 C. Rob. 152, 1 Roscoe, Prize Cases 439; The Madonna del Burso, (1802) 4 C. Rob. 169, 1 Roscoe, Prize Cases 370.

73. There have been numerous complaints from the American press and business men that the British authorities have taken advantage of the right of search to help out English trade at the expense of neutral competitors. The New York Evening Mail, July 26, 1916. The English government has replied to these criticisms in a short brochure "Censorship and Trade," setting forth the mode in which the censorship has been exercised.

74. Maritime Responsibility in Time of War, 181 N. Am. Rev. 186.

in the law of nations. According to the existing practice, a neutral vessel is liable to search anywhere on the high seas or in belligerent waters;[75] and no exception is made in the case of mail ships. It would be a great convenience, however, to the neutral world, if an international agreement could be reached which would limit the radius of activity of belligerent warships in respect to mail steamers. During the Boer War the British government entered into an agreement with Germany that neutral vessels should not be examined at Aden or "at any other point at an equal or greater distance from the seat of war."[76] But great practical difficulties stand in the way of the general acceptance of this salutory principle. Unfortunately, the neutral is unable to guarantee that any such concession will not be put to a fraudulent use. The natural tendency in the circumstances would be for the neutral nation or the weaker belligerent to direct all obnoxious correspondence to a distant neutral port instead of sending it by the war zone route.

In the proposed code of maritime law, the Institut de Droit International recommended the adoption of a rule to the effect that a mail boat should not be visited when an official of the government whose flag she flew declared in writing that she was carrying neither despatches nor troops for the enemy nor contraband of war.[77] But this last condition, as Lawrence[78] has pointed out, will be difficult of attainment.

"No government agent on board a mail steamer can be aware of the contents of the letters for which he is responsible. There would be a terrible outcry if he took means to make himself acquainted with them. His assurance, therefore, as to the innocence of the communications in his bags can be worth but little, even though it is given in good faith. States must face the fact that to grant immunity will mean that their adversaries in war will use neutral mail boats for the conveyance of noxious despatches made up to look like private correspondence."

The prophecy of Professor Lawrence has come true. The privilege of the mails was sorely abused by interested parties. The belligerent governments soon discovered the fact and immediately proceeded to act accordingly.

75. The Resolution, (1781) 2 Dall. 19, 1 L. Ed. 271; The Eleanor, (1817) 2 Wheat. 345, 4 L. Ed. 257; Moore, Dig. Int. Law, VII, p. 473; Lawrence, War and Neutrality in the Far East, p. 186.
76. The Bundesrath, Stowell and Munro, International Cases, War and Neutrality, p. 409.
77. Lawrence, War and Neutrality in the Far East, p. 195.
78. Ibid. 192.

In truth, the situation today is similar to that of the time of the Civil War. There is the same general need that Secretary Seward[79] pointed out for an international arrangement by which mails on neutral ships may be forwarded to their destination without unnecessary interruption. At the same time, there is the clear recognition that this privilege must be accompanied by adequate assurance to the belligerent that the ships and mails in question shall not be used "as auxiliaries to unlawful designs of irresponsible persons." Until this guarantee is forthcoming, it is safe to conclude that the belligerent nations will decline to forego their existing rights. The experience of the present war does not hold out much hope that the conflicting interests of the neutral and belligerent nations upon this point can be easily reconciled.

In conclusion there is one other aspect of the controversy to which a brief reference should be made. The discussion up to the present has been confined to the United States and the Allied Nations only. The Central Powers have not been drawn into the discussion. Nevertheless they also have been parties to the most unwarranted interference with neutral mails.

The Allied memorandum points out:[80]

"Between Dec. 31, 1914, and Dec. 31, 1915 the German or Austro-Hungarian naval authorities destroyed without previous warning or visitation, thirteen mail ships with their mail bags on board, coming from or going to neutral or Allied Countries, without any more concern about the inviolability of the dispatches and correspondence they carried than about the lives of the inoffensive persons aboard the ships. It has not come to the knowledge of the Allied Governments that any protest touching postal correspondence was ever addressed to the Imperial Governments."

The Allies have neatly turned the tables on the United States. The government of this country is now called upon to offer an explanation of the apparent inconsistency in its policy toward the two belligerent groups. Has not this government, Professor Hershey well asks, "been straining at a gnat and swallowing a camel?"[81]

C. D. ALLIN.

UNIVERSITY OF MINNESOTA.

79. Moore, Dig. Int. Law, VII, p. 482.
80. 10 Am. J. Int. Law (Special Supplement) 408.
81. 10 Am. J. Int. Law 584.

JURISDICTION FOR INHERITANCE TAXATION.

The scope of this article is necessarily limited to brief statements of the various theories upon which a state imposes an inheritance tax. The citations are not exhaustive. While there have been many theories advanced, and sometimes adopted, as the basis of inheritance taxation, the now generally accepted one is that the inheritance tax imposed by the states in this country is a tax on the *transfer* of the property from dead hands to living ones.[1] It is not considered a tax on the property involved in the transfer, nor is it a tax upon the person to whom the property devolves, although it has sometimes been said to be a tax upon the right to have property transmitted after death; neither is it a tax upon the use of the privilege of making a will, because it is imposed even though there be no will. The later discussions and the expressed theory of the newer statutes are practically in unison in declaring that it is the transfer that is taxed.

At first glance it would therefore seem to be an easy matter to determine what state or jurisdiction had the right to impose a tax in any given case, for the jurisdiction in which the transfer is effected would be the logical place to impose the tax. But this is true only in a most limited sense. In the first place taxing officials and courts too, will differ as to the place where the property is transferred in contemplation of law, and it is a peculiar anomaly that it really makes no difference where the legatee or heir actually obtains possession of his property. The place of getting actual physical possession is an impotent fact and apparently has no bearing on the question. So, although the tax is in theory a tribute levied by the state on the transfer from the dead to the living, the right to impose is based primarily on whether the state has *any* jurisdiction of any of the property involved.

Most of the inheritance tax statutes use as broad and as general language as possible in describing the property, "the transfer" of which is to be taxed: "All property within the

1. Knowlton v. Moore, (1900) 178 U. S. 41, 20 S. C. R. 747, 44 L. Ed. 969.

jurisdiction of the Commonwealth;"[2] "All estates, real, personal and mixed of every kind whatsoever;"[3] "Property shall be within this state;"[4] "Property within the state or within its jurisdiction,"[5] are typical of the scope of the legislative enactments, and these the courts have uniformly held are as broad as the jurisdiction of the state that enacted them. Thus, the question of legislative intent is superseded by the question of whether under *any* theory it can be said that the property under consideration is within the state. Neither the policy adopted by the state, nor as limited by the courts as to the jurisdiction to impose general property taxes on property, is the guide to follow in solving the problem of inheritance tax jurisdiction.[6]

In the very nature of the tenure of real property there can be little or no question as to where its situs is for inheritance taxation. Such taxation must necessarily be limited to the state where the land is located, no matter where the domicile of the owner may have been. Attempts have been made to indulge in theories that might lead to its taxation in another state. These have usually failed. The doctrine of equitable conversion has been invoked to induce the court of decedent's domicile to consider his land in another state as being converted into personalty and thus taxable at the domicile, but the courts have rejected the theory as untenable, one court saying, "The question of jurisdiction of the state is one of fact and cannot turn upon theories of fiction which, as have been observed, have no place in a well adjusted system of taxation."[7] It will be seen later that the courts do not have the same hesitancy in adopting theories in imposing such taxes on personalty.

All personal property, tangible and intangible, no matter where actually located, and whether it has ever been within the state or not, is subjected to an inheritance tax in the state of the domicile of the decedent. This proceeds upon the prin-

2. Mass. Acts 1909 Chap. 527 Sec. 1.
3. Pa. Statutes 1887 Chap. 37 Sec. 1.
4. Ill. Laws 1909 p. 312.
5. Minn. G. S. 1913 Sec. 2271 (3).
6. Estate of Stanton, (1905) 142 Mich. 491, 105 N. W. 1122.
7. Estate of Swift, (1893) 137 N. Y. 77, 32 N. E. 1096. See also, Estate of Curtis, (1894) 142 N. Y. 219, 36 N. E. 887; Connell v. Crosby, (1904) 210, Ill. 380, 71 N. E. 350; McCurdy v. McCurdy, (1908) 197 Mass. 248, 83 N. E. 881, 16 L. R. A. (N. S.) 329.

ciple, which is theory only, that movables follow the person of the owner, and are therefore to be considered as being where the owner lives. A Minnesota resident dies owning a steam yacht in Florida or a herd of cattle in Texas, and the value thereof is taken into consideration in determining the Minnesota inheritance tax. The probate court of the domicile has undoubted jurisdiction over such personalty, and the domiciliary representative would administer that property and effect a transfer of the title to the living owners. The state of the domicile is where the transfer in theory takes place; that is, where the rule of succession is established. But it is plain that such tax rests wholly upon theory for its justification, if the property is permanently physically absent from the domicile.

The determining that the state of the domicile has jurisdiction does not lead to the conclusion that the taxable situs has been located there to the exclusion of any other situs. Finding it in one place does not mean that it is not at the same time in another place. The state where tangible personal property is found also has jurisdiction to impose a tax, though the late owner was a non-resident. This is based upon fact and not upon theory. A ground for the exercise of such jurisdiction is that the property has the protection of the laws of the state where it is located and such laws are invoked "for the reducing of it to possession when the change of ownership is to be effected."[8] The new owner or the representative of the decedent must go to such state to get the property and perchance use the courts of that state to obtain the beneficial use and enjoyment thereof. If the state where the property of a non-resident decedent is found has such jurisdiction of the property as would enable a resident creditor, for instance, to have the property subjected to the payment of his debt against the estate through probate proceedings, such property can there be subjected to an inheritance tax. It must be conceded though, that such a tax is not in reality a tax on the transfer of the property in the same sense that the tax is imposed on the transfer of the property of a resident decedent. It really becomes analogous to a tax on the property itself for the transfer takes place in the state of the domicile and the laws of descent of that state determine the succession, and other laws

8. Callahan v. Woodbridge, (1898) 171 Mass. 595, 51 N. E. 176.

of that state determine the validity and legal effect of any testamentary disposition. Some courts assert that it is only by the law of comity that this is true and that any state has the right and power to determine the succession of all property within its borders upon the death of the owner.

When intangible personalty of a non-resident is considered, still other theories and arguments are used to legally justify the tax. Corporate stock, or the transfer of it, is taxed in the state of the domicile of the corporation and the fact that the office of the transfer agent or registrar is in the state of the late owner's domicile, probably would make no difference. The tax is here imposed upon the theory that such stock represents an interest in property within the taxing state,[9] but whether the corporation has any property within the state of its creation is not a factor in determining the taxability of the transfer of its shares. The taxing officials of some states, particularly Illinois and Wisconsin, assert the right to impose a tax on the transfer of property owned by the estate of a non-resident in a *foreign* corporation, if any of the tangible property of the corporation is within that state. No reported case has as yet confirmed such right. If the corporation is incorporated in more than one state as are many railroad companies, each state of incorporation imposes a tax on the transfer of the stock owned by a non-resident decedent, but here again another theory is used, for instead of taking the full value of the stock into consideration, only such proportion of the value is used as equals the proportion of the tangible property of the company within that state, as compared with all of its tangible property everywhere; and this is true, no matter where the transfer office may be. This division of the value of the stock is probably a concession toward substantial justice rather than a logical conclusion. Such a corporation is doubtless a domestic corporation in every state in which it is incorporated and it does not detract from that character by being incorporated in more than one commonwealth.

Stock in a national bank is subjected to an inheritance tax in the state where the bank is located, although the owner lives in another state.[10] This is upon the theory that such a cor-

9. State ex rel. Graff v. Probate Court, (1915) 128 Minn. 371, 150 N. W. 1094.

10. State ex rel. Graff v. Probate Court, supra. Greeves v. Shaw, (1899) 173 Mass. 205, 53 N. E. 372.

poration is in a sense a citizen of the state where its place of business is fixed by the law of its creation, though the state has nothing to do with granting the franchise.

The situs of a book account or promissory note due the estate of a non-resident is considered to be at the domicile of the debtor, no matter where the evidence of the debt may be kept. The familiar principle that such claims have a situs at the domicile of the creditor fails here, for the theory is that while the claim followed the creditor in his life time, immediately upon his death the debt follows the debtor. It is where the debtor lives that the claim is enforcible. This reasoning places this class of property on the same basis as tangible personalty and the "transfer" is taxable where the property is found, or can be sued for, if it cannot be reduced to possession by other means.[11] But a state can impose a tax on the indebtedness evidenced by a note even if the owner of the note and the maker thereof are non-residents and the note was never in that state, if it is secured by a mortage on real property in such state.[12] It can be safely said that this right has not yet been established beyond all question and it may be that where a mortgage does not pass title to the land that the mortgage lien will not finally be considered sufficient to justify a tax in the state where the land only is located.

A divided court in a recent Minnesota case[13] held that where the creditor's estate could enforce a corporate bond secured by real estate without going into the state where the real property is located and where the corporation is domiciled, that neither such domicile of the debtor nor location of the realty gave sufficient jurisdiction to sustain a tax. This would seem to make jurisdiction depend wholly upon whether the debt could be enforced or the security realized upon in any other state, and if it could, then the state of the debtor's domicile or of the location of the mortgaged property must yield its jurisdiction to the stronger claims of the other states. But this probably does not go to the extent of introducing a doctrine of "comparative jurisdiction" nor of any reciprocal yielding by one state to the stronger claims of another state.

11. Blackstone v. Miller, (1903) 188 U. S. 189, 23 S. C. R. 277, 47 L. Ed. 439.

12. Rogers Estate, (1907) 149 Mich. 305, 112 N. W. 931.

13. State v. Chadwick, (1916) 133 Minn. 117, 157 N. W. 1076.

Intangible property of some classes such as bonds, notes and mortgages have been discovered to have still another situs for inheritance tax purposes. If they are kept habitually within a state for investment or safe-keeping in a state that is not the domicile of the owner, nor of the debtor, they become subject to a tax in the state where so kept. This view has the effect of giving such evidences of intangible property a sort of independent situs of their own.[14]

There is still another though somewhat rare condition of affairs to legally justify the state in imposing an inheritance tax on the transfer of property where it may also be taxed by other jurisdictions. The exercise of a power of appointment by will, no matter where the property is situate, nor where the donor of the power resided, nor where the beneficiaries of the donor of the power lived, is taxable at the domicile of the testator exercising the power.[15] This is upon the theory that it is the exercise and not the creation of the power that actually makes the "transfer", hence the tax is imposed where the transfer takes place,—and that takes this discussion back "to the point of beginning".

These more or less inconsistent theories necessarily lead to the taxation of legacies and inheritances in two or more states involving the same property, thus making double or repeated burdens of taxation though not legally considered as double taxation in the constitutional sense.[16] There is no difference of opinion about the real injustice of these conditions; there is much difference as to the best way to remedy it. Mutually satisfactory reciprocating statutes or a uniform law as to "which situs" should control are the only classes of remedies yet suggested. A discussion of the variations within such classes and their apparent merits or defects would be beyond the scope of this article.

WILLIAM J. STEVENSON.

MINNEAPOLIS.

14. Estate of Tiffany, (1911) 143 N. Y. App. Div. 327, 128 N. Y. Supp. 106, Wheeler v. New York, (1914) 233 U. S. 434, 34 S. C. R. 607, 58 L. Ed. 1030.

15. State ex rel. Smith v. Probate Court, (1914) 124 Minn. 508, 145 N. W. 390.

16. Blackstone v. Miller, supra.

THE RULES OF THE CONFLICT OF LAWS APPLICABLE TO BILLS AND NOTES

III. Interpretation and Obligation*

A. The Governing Law.

2. Relationship of the Different Contracts.

a. *Theory of the Independence of the Different Contracts.* Whichever rule is adopted as the governing law the question will be whether the obligation of the maker's, acceptor's, drawer's and indorser's contracts entered into in different jurisdictions shall be subjected to different laws, or whether all of the parties must be presumed to have contracted with reference to a single law.

(1) *English Law:* Section 72, Bills of Exchange Act provides:

"(2) Subject to the provisions of this Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill, is determined by the law of the place where such contract is made." . . .

"(3) The duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured."

(2) *American Law:* The great weight of authority applies the law of the place of performance to each of the contracts on a bill or note, and holds that the drawer and indorser do not promise to pay at the place of payment of the principal obligation, but at the place where their contract is entered into.[46] A few cases take the contrary view.[47]

(3) *French Law:* The contracts of the drawer and indorser are subject to the law of the place where they are

*Continued from 1 Minnesota Law Review, p. 256.

46. Crawford v. Bank, (1844) 6 Ala. 12, 41 Am. Dec. 33; Hunt v. Standart, (1860) 15 Ind. 33, 77 Am. Dec. 79; National Bank v. Green, (1871) 33 Ia. 140; Short v. Trabue, (1863) 4 Met. (Ky.) 301; Wood v. Gibbs, (1858) 35 Miss. 559; Price v. Page, (1856) 24 Mo. 67; Briggs v.

entered into, unless an intention to the contrary appears.[48]

(4) *German Law:* The German law agrees with the majority rule in the United States.[49]

(5) *Italian Law:* The law of Italy agrees in general with that of France.[50] When the parties are subjects of the same country they will be deemed to have contracted with reference to their national law.[51]

The law of the above countries is thus agreed upon the principle of the independence of the different contracts on a bill or note. They regard the law of the place where the contract of a drawer or indorser is entered into as controlling the obligation of the contract. France and Italy do so in conformity with the doctrine of the applicability of the lex loci contractus, while Germany and the United States reach the same result by virtue of the application of the lex loci solutionis, which they regard as coinciding with the lex loci contractus.

In the words of Story:

"The drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn; but only to guarantee its acceptance and payment in that place by the drawee; and in default of such payment they agree upon due notice to reimburse the holder in principal and damages at the place where they respectively entered into the contract."[52]

Latham, (1887) 36 Kan. 255, 59 Am. Rep. 546; Kuenzli v. Elvers, (1859) 14 La. Ann. 391, 74 Am. Dec. 434; Freese v. Brownell, (1871) 35 N. J. L. 285, 10 Am. Rep. 239; Mackintosh v. Gibbs, (1911) 81 N. J. L. 577, 80 Atl. 554, Ann. Cas. 1912D 163; Trabue v. Short, (1866) 18 La. Ann. 257; Powers v. Lynch, (1807) 3 Mass. 77; Williams v. Wade, (1840) 1 Met. (Mass.) 82; Aymar v. Sheldon, (1834) 12 Wend. 439, 27 Am. Dec. 137; Spies v. National City Bank, (1903) 174 N. Y. 222; 66 N. E. 736; 61 L. R. A. 193; Amsinck v. Rogers, (1907) 189 N. Y. 252, 82 N. E. 134, 121 Am. St. Rep. 858, 12 L. R. A. (N. S.) 875; Lenning v. Ralston, (1854) 23 Pa. St. 137; Read v. Adams, (1821) 6 Serg. & R. (Pa.) 356; Douglas v. The Bank of Commerce, (1896) 97 Tenn. 133, 36 S. W. 874; Warren v. Citizens Bank, (1894) 6 S. D. 152, 60 N. W. 746; Raymond v. Holmes, (1853) 11 Tex. 54.

47. Dunn v. Welsh, (1879) 62 Ga. 241; Hibernian National Bank v. Lacombe, (1881) 84 N. Y. 367; Peck v. Mayo, (1842) 14 Vt. 33, 39 Am. Dec. 205.

48. Cass. Feb. 6, 1900 (S. 1900. 1. 161).

49. 9 RG 431 (March 28, 1883); 24 RG 112 (Nov. 5, 1889); 44 RG 431 (Oct. 4, 1889).

50. Cass. Florence April 8, 1895 (S. 1896. 4. 7); Cass. Florence Jan. 16, 1888 (15 Clunet 735).

51. Art. 9. Prel. Disp. Civil Code; Cass. Naples, Jan. 4, 1898 (La Legge, 1898. 1. 617).

52. Sec. 315.

The same view is expressed by Chancellor T. Pemberton Leigh in the case of *Allen v. Kemble*.[53] He says:

"It is argued, that this bill, being drawn payable in London, not only the acceptor, but the drawer, must be held to have contracted with reference to the English law. This argument, however, appears to us to be founded on a misapprehension of the obligation which the drawer and indorser of a bill incurs. The drawer, by his contract, undertakes that the drawee shall accept and shall afterwards pay the bill, according to its tenor, at the place and domicile of the drawee if it be drawn and accepted generally: at the place appointed for payment, if it be drawn and accepted, payable at a different place from the place of domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with his interest, damages, and costs, as the law of the country where he contracted may allow."

As for the English law, it is difficult to harmonize subdivisions (2) and (3) of Section 72 of the Bills of Exchange Act. For an explanation of the subdivisions see the beginning of Part III. As it stands, the interpretation and obligation of the different contracts would be governed by the law of the place where such contracts are made, while the necessity of presentment, protest and notice are controlled "by the law of the place where the act is done or the bill is dishonoured."

b. *Theory that a Single Law Should Govern.* Under the doctrine of the independence of the different contracts there is a possibility that one party may be liable under the law governing his contract, and yet because of a difference in the law governing the other contracts, have lost, without any personal fault of his own, all rights of recourse against the prior parties. Such a contingency is avoided if all parties can be deemed to have contracted with reference to a single law (Einheitstheorie). Some of the older authors[54] were of the opinion that all of the parties must be deemed to have contracted with reference to the law of the domicile of the drawee which they regarded as the place at which the exchange contract had its seat, but this theory is now completely abandoned on the con-

53. (1848) 6 Moore P. C. 314.

54. Pothier, Traité du Contrat de Change, Sec. 155; Brocher, Cours, II, pp. 315-16.

tinent, where the doctrine of the independence of the different contracts is admitted on principle by all at the present day.[55]

In this country the old view is still entertained by a few authors. Minor does so upon grounds of expediency. He says:[56]

"Expediency would seem to pronounce in favor of the latter view, and it is believed to be the better. To give every indorsement its own separate locality would impair most seriously the value of all negotiable instruments, even those which are in fact purely domestic, since the holder could not know where the prior indorsements were made and hence could not tell what the liabilities of the prior indorsers are, nor what steps he must take to secure that liability. The tendency of this rule is to destroy or impair the negotiability of such instruments. On the other hand, to hold the locus solutionis of each indorsement to be identical with the locus solutionis of the original contract creates one single law by which the liabilities of all the indorsers are to be ascertained, and would prevent the inconvenience (to use a mild term) to the holder of having to ascertain and comply with a number of different laws as to protest, notice of dishonor, and other steps to be taken in order to fasten responsibility upon the indorsers."

Daniel[57] reaches the same conclusion on principle. His view is set forth in the following words:

"This doctrine that the drawer and indorser are bound according to the law of the place of drawing or indorsing, although sustained by great weight of opinion, and an overwhelming current of authorities, has not escaped criticism and dissent, and rests, as it seems to us, rather upon the sanction of decisions than upon clear and well-defined principles. If A, in New York, draws a bill on B, in Richmond, directing him to pay $1,000 at the First National Bank, in Raleigh, N. C., he thereby guarantees to C, the payee, that the money shall be there paid by B on the day of its maturity. He is as clearly bound as B is, although secondarily, that the money shall be paid at the time and at the place named. If either tenders the amount at the time and place, it would be a good tender. And, although A's liability is contingent upon due notice of dishonor, the liability is, nevertheless, for breach of his contract

55. Asser, p. 210; Audinet, pp. 612-18; von Bar, p. 677; Champcommunal, Annales de Droit Commercial, 1894, II, p. 155; Despagnet, p. 990; Diena, III, p. 601; Principi, II, p. 212; Fiore I, p. 178; Esperson, p. 38; Grünhut, II, pp. 578-79; Jitta, II, p. 76; Lyon-Caen et Renault, IV, pp. 558-59; Meili, II, p. 334; Ottolenghi, p. 165; Schäffner, p. 121; Valéry, p. 1283; Weiss, IV, p. 459.

56. P. 396.

57. Sec. 901.

that B should pay at Raleigh. He has contracted that the amount shall be there paid by the hand of B, and yet his contract is regarded as being governed by the law of New York; while B's contract to pay by his own hand is governed by the laws of North Carolina. This seems to us an inconsistency of the law; and while the doctrine is now perhaps too well settled to be disturbed, it does not bear the test of searching analysis."

c. *Resolutions of the Institute of International Law.* The Institute adopted the theory of the independence of the different contracts in the following resolution:[58]

"II. The effect and validity of a bill of exchange and a promissory note, of the indorsements, acceptance, and aval shall be governed by the law of the country in which these different acts occurred, without prejudice to the rules relative to the capacity of the parties. . . ."

The theory is abandoned, however, in important respects. The following resolutions show the extent to which the law of the place of issue is to control.[59]

"II. . . . The effect of the supervening contracts however, shall not be greater in extent than that resulting from the creation of the instrument itself.

"III. The time allowed for presentment of bills of exchange and promissory notes payable at sight or after sight is determined by the law of the place where the original instrument was issued.

"IV. The duties of the holder with respect to presentment for acceptance and payment are fixed by the law of the place where the bill or note has been issued.

"VI. The defence of accident and vis major is allowed only if it is recognized by the law of the place of issue of the original instrument.

"VII. The time within which the right of recourse may be exercised against the indorsers or the other guarantors and against the drawer, or within which a direct action may be brought against the acceptor, is fixed by the law of the country in which the act which gives rise to the action took place.

"However, as against the indorsers and the other guarantors, the time can never exceed that laid down for the right of recourse against the drawer."

In some respects the law of the place of payment governs. Resolution V provides:[60]

58. Annuaire, VIII, p. 121.
59. Id., pp. 121-22.
60. Id., p. 122.

"The law of the place where payment is to be made determines the mode of showing default of acceptance or payment and the form of protest, as well as the time within which it may be made.

"The notices to be given to the guarantors for the preservation of the right of recourse in case of default of acceptance or payment and the time within which such notices may be given, are governed by the law of the place from which these notices are to be sent."

d. *Discussion of Foregoing Theories.* The theory that a single law should govern the obligations of the various parties to a bill or note has obvious advantages over that of the independence of the different contracts. In case of recourse no difficulties can arise under the former theory from a possible difference in the law of the states in which the contracts of the different parties may have been entered into. If in the framing of the Uniform Law a single law were to be chosen to regulate the rights and obligations of all parties, such a result might be reached by one of two courses. The law of the place of payment might be accepted as the rule governing the obligation of contracts with a provision that the contracts of the drawer and indorser shall imply a promise to pay at the place where the principal obligor agrees to pay, instead of being regarded as contracts of indemnity. The other course would be to recognize the lex loci contractus as the controlling law and then to provide that all parties must be deemed to have contracted with reference to the law of the place of issue of the original instrument. The writer of this article is not able to recommend the adoption of either of these courses. He cannot accept the view underlying the resolutions of the Institute of International Law because there is no reason to assume that when the different parties entered into their respective contracts they had in contemplation the law governing the drawer's contract. In so far as the nature of the original contract is concerned such a presumption is perfectly fair and necessary. For example, where the original instrument is negotiable under the law of the place of issue an indorser by the very act of becoming a party to such instrument may be presumed to have intended to incur the liability of an indorser of a negotiable bill or note. However, an assumption that the contract of the acceptor and the indemnity contracts of the indorsers were all entered into with reference to the law creating

the original instrument is quite another matter and does not rest upon a reasonable basis. Every probability favors the presumption that each of them at the time of entering the contract had in mind the lex loci of his own contract.

The alternative first suggested rests upon two assumptions: First, that the lex loci solutionis determines the obligation of contracts; second, that the drawer and indorser promise to pay at the place of payment of the bill or note.[61] As the writer of this article is of the opinion that the Uniform Law should adopt the lex loci contractus as the governing rule and not the lex loci solutionis, it is impossible for him to approve the solution suggested by Minor and Daniel. If, contrary to the author's recommendation, the Uniform Law should adopt the lex loci solutionis, the question would be whether the law of the place of payment of the bill or note should not be chosen also as the law controlling all supervening contracts. This could be done by accepting the view that the drawer and indorser promise to pay at the place of payment of the bill or note and not where they entered their respective contracts. Such a rule would run, however, counter to the overwhelming weight of authority on this point in this country. It would be opposed also to the law of England,[62] France and Italy and to that of Germany, notwithstanding the fact that the lex loci solutionis controls the obligation of contracts in Germany. As for the text writers, most of them feel that the traditional rule should be retained.[63] The author is not satisfied that any deviation from strict principle is necessary. It is true that under the doctrine of the independence of the different contracts it is possible for one party to be held under the lex loci of his contract although all means of recourse may be cut off against all prior parties. But such a contingency would not be removed

61. The phrase "place of payment of the bill or note" is used here to designate the place where the maker of a note or the acceptor of a bill of exchange agrees to pay, and the residence of the drawee, where the bill is not accepted.

62. See Gibbs v. Fremont, (1853) 9 Exch. 25; Chalmers, pp. 244-45.

63. Asser, p. 210; Audinet, p. 620; Beauchet, Annales de Droit Commercial, 1888, II, p. 63; Diena, III, p. 209; Fiore, Elementi, p. 459; Ottolenghi, p. 472; Surville et Arthuys, p. 690; Staub, Art. 86, Sec. 8.

A good many writers, however, feel that, inasmuch as the creditor is being kept out of his money at the place of payment of the original instrument, the law of that state should govern the measure of damages with respect to all parties. Von Bar, p. 681; Champcommunal, Annales de Droit Commercial, 1894, II, p. 259; Chrétien, p. 213; Esperson, p. 75; Lyon-Caen et Renault, IV, p. 561; Valéry, p. 1288; Weiss IV, p. 467.

completely, even if the view of Daniel and Minor were accepted, unless the Statute of Limitations were regarded as relating to the substance rather than to procedure and were governed by the lex loci solutionis instead of by the law of the forum, as is the established rule in England and the United States, and it is doubtful whether the American law is ready to adopt the continental rule in this respect. With the reasonable limitations that should be placed upon the doctrine of the independence of the different contracts on a bill or note, as will appear below, it is believed that cases of actual hardship will arise only under exceptional circumstances. In the estimation of the writer there are thus no sufficient grounds for the adoption by the Uniform Law of the theory of a single law governing all of the contracts, in either of the forms above suggested. The author would recommend, therefore, the adoption of Article 72 (2) paragraph 1 of the Bills of Exchange Act, notwithstanding the fact that this particular provision may have found its way into the English law as the result of a misunderstanding of Story.

e. *Limits of the Theory of the Independence of the Different Contracts.* All authorities supporting the doctrine of the independence of the different contracts on a bill or note are forced to admit that there are necessary limitations to the operation of this rule. These limitations result from the fact that there is but one original instrument and contract, all the other contracts being superimposed or accessory. The courts, however, have not always borne in mind that the doctrine of the independence of the different contracts cannot be reasonably carried to the point of affecting the nature or interpretation of the original instrument. In the absence of an express qualification the reasonable assumption must be that each party accepting or indorsing a bill or note must have done so upon the basis of the original contract.

There is universal agreement that everything affecting the manner of presentment for acceptance and payment and the mode of protesting a bill or note must be done in accordance with the law of the state in which such presentment and protest must be made. This rule is the only practicable one. Hence all other parties are deemed to have intended, as reasonable men, that the acts which have to be done in a particular place should be carried out in the mode prescribed by the law or usage prevailing at such place.

Beyond this there is conflict. Most of the problems will be considered separately later in this article. They will raise the question whether one law should determine, with respect to all parties (1) the maturity of the instrument; (2) the time within which the presentment of bills of exchange, payable at sight or after sight, must be made; (3) the amount of recovery; (4) the necessity of presentment, protest and notice; (5) the time within which notice must be given; (6) the defence of accident or vis major.

One of the problems that may be discussed to advantage in this place relates to the negotiability of the instrument. We must assume in the present discussion that the instrument is a bill or note, for we are considering here the obligation of a contract and not the validity of the instrument as a bill or note. The latter question was discussed in Part II of this article. The present problem may be suggested by means of the following cases:

1. Suppose that Jones executes in London to Smith of New York, a promissory note in which he promises to pay Smith $500. Smith indorses the note in New York to Adams. Neither the original instrument nor the indorsement contain words of negotiability. Under the Bills of Exchange Act the note is fully negotiable; under the law of New York it is not, for want of words indicating that it is payable "to order or bearer." Has Smith indorsed a negotiable or a non-negotiable note?

2. Suppose that a note is made and payable in the state of X to "Smith or order", that it is indorsed by Smith in the state of Y and that the note is not commercial paper under the law of the state of Y, although it is fully negotiable under the law of the state of X, can Smith be held as the indorser of commercial paper?

3. Suppose that the note in the first case was issued in New York and was indorsed in London, the instrument and the indorsement having the same form as before.

4. Suppose that the note in the second case was executed in the state of Y and was indorsed in the state of X, the instrument and the indorsement having the same form as before.

There are cases[64] in this country similar to the second one, of which *Hyatt v. The Bank of Kentucky*[65] is typical. In that case a note, executed and payable in Louisiana, was indorsed in Kentucky. It was held that the quality of the instrument as commercial paper should be determined, as regards the Kentucky indorser, in accordance with the law of Kentucky. The reasoning of the court was as follows:

"Those, however, who become parties to it in Kentucky by indorsement, the legal effect of this indorsement, so far as it applies to them, must be determined by Kentucky law; nor will the existence of extrinsic circumstances, such as the knowledge on the part of the indorser of the legal character of the paper where it was enacted, change the character or degree of his liability. A party may know when he indorses a paper in Kentucky executed in Louisiana, that the law of the latter state imposes a different liability from the law of Kentucky, and still his assignment, being of itself an independent contract, must be regulated by the law where the contract is made, and no presumption should be indulged in to change its legal effect; and if presumptions are to determine these questions, it would be equally as just to presume that the party intended to be bound by the law of the place or state where the contract was made as that he intended to make himself liable under another and different law.

"It is to the interest of trade and commerce that there should be some fixed and permanent rule governing contracts of this character; and, with this rule established, no mere circumstances or presumptions should be permitted to fix a liability upon such paper other than the liability imposed by the law of the place where the contract is made."

Not only may the law governing the contracts of the different parties to a bill or note determine whether, with respect to such parties, the instrument shall be deemed negotiable, but the law of the forum also may control this question, for example, when the right of the assignee or indorsee to sue in his own name is involved.[66]

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64. Hyatt v. The Bank of Kentucky, (1871) 8 Bush. (Ky.) 193; Nichols v. Porter, (1867) 2 W. Va. 13. 94 Am. Dec. 501. See also Baker Company v. Brown, (1913) 214 Mass. 196, 100 N. E. 1025.

65. (1871) 8 Bush. (Ky.) 193.

66. See Roads v. Webb, (1898) 91 Me. 406; 40 Atl. 128; Haker v. Nat. Bank, (1895) 61 Ill. App. 501; Woods v. Ridley, (1850) 11 Humph. (Tenn.) 194; Lodge v. Phelps, (1799) 1 Johns. Cas. 139; Warren v. Copelin, (1842) 4 Met. (Mass.) 594.

In the last edition of Wharton,[67] the following summary statement is made concerning the law governing the negotiability of instruments.

"The cases, however, are by no means agreed that the question as to the negotiability of a particular instrument is always to be determined by the law of the same jurisdiction, without reference to the particular quality or incident involved in the case. For this reason the question of the governing law with respect to negotiability cannot be satisfactorily treated in a general and abstract manner, and without reference to the particular quality or incident dependent upon the character of the instrument in that respect. . . .

"It may be pointed out in this connection, however, that according to the weight of authority, although there is some conflict upon the point, the negotiability of an instrument, as affecting the respective rights of one who has been fraudulently deprived of it, and one who has obtained the same from or through a third person who had no authority to transfer it, depends upon the law of the place where the transfer to the present holder took place, and not necessarily upon the substantive law of the original contract."

Lack of space precludes a thorough treatment of this question at the present time. It may be, that the English cases cited in support of the last paragraph quoted from Wharton,[68] relating as they do to foreign government bonds and to certificates of stock in foreign corporations, laid down a rule which is dictated by sound considerations of policy, especially in a place like England which has been the leading financial center of the world. Whatever attitude policy may dictate in this regard, it is submitted that the same considerations are not necessarily applicable to bills and notes. On the continent it is generally assumed that the law of the place of issue must fix the character of the instrument throughout its life, and that all parties, in the absence of an express declaration to the con-

67. By Parmele, II, p. 966.

68. The cases relied upon are the following: Gorgier v. Mieville, (1824) 3 Barn. & C. 45, 4 Dowl. & R. 641, 2 L. J. K. B. 206; Lang v. Smyth, (1831) 7 Bing, 284, 5 Moore & P. 78, 9 L. J. C. P. 91; Goodwin v. Robarts, (1876) L. R. 1 App. Cas. 476, 45 L. J. Exch. N. S. 748, 35 L. T. N. S. 179, 24 W. R. 987; Picker v. London & County Bkg. Co., (1887) L. R. 18 Q. B. Div. 515, 56 L. J. Q. B. N. S. 299, 35 W. R. 469; Williams v. Colonial Bank, (1888) L. R. 38 Ch. Div. 388, 57 L. J. Ch. N. S. 826, 59 L. T. N. S. 643, 36 W. R. 625; affirmed in L. R. 15 App. Cas. 267, 60 L. J. Ch. N. S. 136, 63 L. T. N. S. 27, 39 W. R. 17.

See also Baker Co. v. Brown, (1913) 214 Mass. 196, 100 N. E. 1025 Compare Wylie v. Spever, (1881) 62 How. Pr. 107; Savings Bank v. Nat. Bank of Commerce, (1889) 38 Fed. 800.

trary, must be deemed to have contracted upon that basis.[69] The writer of this article is of the opinion that this represents the correct view, at least with regard to the supposititious cases (1) and (2) above. Why should a party, accepting or indorsing a bill or note, executed in another state or country, be allowed to question the character of the instrument? Such a right is certainly not in furtherance of the security of dealings in negotiable paper. The very object of the law of bills and notes is to facilitate the circulation of these instruments. Unless considerations of justice to the acceptor and indorser make it imperative that the character of the original instrument be determined in accordance with his own law, the law of the original place of issue should certainly control. Otherwise a bill or note intended to be negotiable and so created by the law of the place of issue would cease to be such with respect to the acceptor or any one of the indorsers if the lex loci of their respective contracts should regard the instrument as non-negotiable. However true the doctrine of the independence of the different contracts may be in general, the fact remains that there is one original contract and that the rest are superimposed upon and have for their purpose the carrying out of the original contract. It is difficult to see how an acceptor or an indorser can complain if he is charged with knowledge of the law of the state or country in which the instrument is issued. His willingness to become a party to such an instrument implies, of itself, a readiness to contract on the basis of its original character. Based upon commercial convenience, because of its tendency to facilitate the circulation of bills and notes, and the security of dealings with respect thereto, a presumption to this effect is, to say the least, reasonable.

It does not follow, however, that the same principle must, of necessity, be applied to the supposititious cases (3) and (4). Just as in the matter of formality where the original instrument is void for want of compliance with the law of the place of issue, but is valid under the lex loci contractus governing the acceptor's or the indorser's contract, liability is imposed by the English and German acts on mere grounds of policy, having for its object the security of local dealings in bills and notes, for like reasons it may be provided in the supposititious

69. See Diena, Principi, II, p. 312; Ottolenghi, p. 211; von Bar, p. 676, note 47.

cases (3) and (4) that the indorser of a note, which is non-negotiable under the law of the place of issue, but is negotiable under that of the place of indorsement, shall be deemed to have assumed the liability of a regular indorser of commercial paper.

The attitude of the American courts, determining the negotiability of bills and notes now by one law, now by another, according to the nature of the question before them, or the party that is being sued, is responsible for much of the confusion now to be found in the law of bills and notes, and cannot be condemned too severely.

B. Specific Questions.

1. Effect of Negotiation in Another State.

The contracts of the maker and acceptor, in accordance with the foregoing conclusion, are subject to the law of the place of contracting.[70] This law should determine the nature, interpretation and obligation of the contract, the conditions upon which liability is assumed and the defenses, legal and equitable, which may be available.[71] As regards the contracts of the drawer and indorser it has been pointed out that they are independent contracts, the interpretation and obligation of which should be governed by the lex loci contractus.[72] This law should determine, therefore, the nature and obligation of the drawer's and indorser's contracts in general, the conditions upon which their liability depends and the defences which they may have.

The liability of each party to a bill or note is fixed once for all by the proper law and is unaffected by a transfer of the instrument in another state. If the law governing his contract allows a certain defence, even as against a holder in due course, it will be available to him notwithstanding the fact that the bill or note was negotiated in a jurisdiction under the law of

70. See the cases collected in 61 L. R. A. pp. 206-12, 19 L. R. A. (N. S.) pp. 670-72.

71. On the continent the lex loci of the acceptor's contract will determine also the question whether an acceptance of a bill of exchange raises a presumption in favor of the existence of a "cover." Audinet, p. 615; Diena, III, p. 126; Lyon-Caen et Renault, IV, p. 558; Ottolenghi, p. 194.

72. See the cases collected in 61 L. R. A. pp. 215-22, 19 L. R. A. (N. S.) pp. 672-74.

As regards the regular indorser, see 61 L. R. A. pp. 200-02, 19 L. R. A. (N. S.) pp. 668-70.

which a holder in due course is protected against such a defence.[73] All courts admit also that the character of the instrument as a negotiable or non-negotiable instrument cannot be affected, as regards each party, by a transfer of the bill or note in another state or country where the law is different.[74]

2. Law Governing Plaintiff's Title.

Each party promises to pay the sum specified in the instrument in accordance with the tenor of his contract, which presupposes that the holder has acquired a valid title to the bill or note. The question now is whether the title must be good according to the municipal law of bills and notes of the country in which the party to be charged assumed liability or does the promise to pay embrace any person who has acquired a valid title under the law of the place where the transfer occurred?

a. *English Law:* The Bills of Exchange Act provides as follows:[75]

"Subject to the provisions of this Act the interpretation of the drawing, indorsement, acceptance, or acceptance suprà protest of a bill, is determined by the law of the place where such contract is made.

"Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payor, be interpretated according to the law of the United Kingdom."

According to this section the acceptor of an order bill promises to pay the same to a party who has acquired title thereto by an indorsement which is valid under the law of the place of indorsement, but the contract of the acceptor of an inland bill, which is indorsed in a foreign country, is to pay to any order or upon any indorsement which is valid by the mercantile law of England. Before the Bills of Exchange Act the English law was in an uncertain state.[76]

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73. Ory v. Winter, (1826) 4 Mart. (N. S.) 277. See also Diena, III, p. 88; Jitta, II, p. 176; Lyon-Caen et Renault, IV, p. 559; Ottolenghi, p. 219; Weiss, IV, p. 461.

74. Krieg v. Palmer Nat. Bank, (Ind. App. 1911) 95 N. E. 613.

75. B. E. A. Sec. 72 (2).

76. In Lebel v. Tucker, (1867) L. R. 3 Q. B. 77, action was brought against the acceptor of a bill of exchange which was drawn, accepted and payable in England, but was indorsed in blank in France. The court held that "the acceptor having contracted in England to pay in England, the contract must be interpreted and governed by the law of England." There being nothing on the face of the instrument to indicate that the parties contemplated that it might come under the operation of a foreign law

b. *American Law:* There are no American cases which are helpful in the matter now under consideration.[77]

c. *Continental Law:* The Continental law seems to apply the law of the place of indorsement without recognizing a qualification like that laid down by the English Act.

The English courts before the Bills of Exchange Act operated seemingly with the intention theory. If the negotiation of the instrument abroad was, or must be deemed to have been, within the contemplation of the maker or acceptor, liability would exist in favor of an indorsee who had acquired title under the law of the place of indorsement; whereas if no such negotiation was contemplated, the indorsee's title would be determined by the law governing the maker's or acceptor's contract. Notwithstanding a contemplated negotiation abroad, the transfer need not conform, however, to the law of the place of indorsement whenever it clearly appears from the terms of the instrument that the parties contracted with reference to the law of England.

The intention theory, as appears from the English cases, leads to very uncertain results. This is inevitable because of the absence of fixed criteria from which the intention of the parties can be ascertained. The English cases, before the

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the English law was deemed to express the presumptive intention of the parties. The argument that the indorsement was not sufficient between the indorser and the indorsee and could not transfer, therefore, to the latter, rights against the acceptor was held to be immaterial.

In Bradlaugh v. De Rin, (1868) L. R. 3 C. P. 538 a bill was drawn in Belgium on England. It was accepted in England and was indorsed in blank in Belgium. By a divided court it was held that the law of Belgium must determine the right of the indorsee to sue the acceptor. The court assumed that the indorsee could have no rights against the acceptor unless the indorsement transferred such rights to him under the law of the state where the indorsement was made, the reason being that if the drawer cannot be made liable, the acceptor paying the instrument cannot charge the sum against him. The court overlooked the fact, seemingly, that the argument would apply equally to Lebel v. Tucker. The real explanation of the two cases lies probably in the fact that in Lebel v. Tucker an indorsement abroad was not deemed within the contemplation of the parties while it must have been in Bradlaugh v. De Rin.

In the latest English case on the subject, In re Marseilles Extension Railway & Land Company, (1885) 30 Ch. D. 598, a bill was drawn in France by a Frenchman in the French language but in the English form on a company in England. It was both accepted and payable in England, and was indorsed in blank in France. In an action against the acceptor it was held that English law must govern because the special facts in the case showed an intention that it be an English bill.

77. See Everett v. Vendryes, (1859) 19 N. Y. 436; Brook v. Vannest, (1895) 58 N. J. L. 162, 33 Atl. 382.

passing of the Bills of Exchange Act, were cases where the English law was more liberal than the foreign law in the matter of negotiation. All involved the question of blank indorsements and it was erroneously assumed that the law of the foreign country denied to the indorsee under such an indorsement the right to sue in his own name. As the Convention of the Hague has accepted the Anglo-American law in regard to blank indorsements,[78] it is improbable that cases similar to the above will be presented to an English or American court in the future.

A wide difference between Anglo-American law and that of the Hague Convention continues to exist concerning the genuineness of the indorsements. Under Anglo-American law title cannot be acquired through a forged indorsement.[79] According to the Convention of the Hague the chain of indorsements need only be regular; the indorsements are not required to be genuine.[80] Supposing now that a party has taken a bill or note under such a forged indorsement in a country where it will not affect his title, will he be able to recover as against an English or an American maker or acceptor? This situation was presented in the case of *Embiricos v. Anglo-Austrian Bank*.[81] In that case a Roumanian bank drew a check on a London bank payable to the order of A. A indorsed the check in Roumania specially to B in London. The check was stolen by A's clerk and was cashed in good faith and without gross negligence by a bank in Vienna. At the time of such payment the indorsements were apparently regular and in order, although B's signature was forged. The Vienna bank indorsed the check to C in London, who presented it to the bank on which it was drawn and received payment. In an action by A against C for conversion, Walton, J., gave judgment for the defendant on the ground that the Vienna bank had got title to the check under Austrian law which the English courts were bound to recognize, and had assigned that title to C. The judgment was affirmed by the court of appeal. In the lower court the conclusion was based upon the ground that under the decision of *Alcock v. Smith*[82]

78. Art. 12 of Uniform Law.
79. Arts. 15 and 39 of Uniform Law.
80. N. I. L. Sec. 23; B. E. A. Sec. 24.
81. [1905] 1 K. B. Div. 677 (C. A.), 74 L. J. K. B. 326.
82. [1892] 1 Ch. 238.

the English law would recognize a title to a bill which had been validly acquired under the lex rei sitae. The court seemed to be of the opinion, also, that the judgment could be based upon Section 72 of the Bills of Exchange Act if the word "interpretation" of the indorsement included the legal effect of the transfer by indorsement. The court of appeal accepted the first ground and held that Section 72 of the Bills of Exchange Act contained nothing to prevent the English courts from recognizing the title acquired under Austrian law. Although the action was between the payee and the indorsee it would seem that the same result should follow where suit is brought against the acceptor or the maker. Says Vaughan Williams, L. J.:[83]

"But it would manifestly be an unsatisfactory state of the law if the legal result is that the indorsement is effective to give the indorsee of a bill a good title as against the payee, but not effective according to English law to give that indorsee a good title against the drawer or the acceptor. And it would be convenient, as well from a legal as from a commercial point of view, that it should be established that the title by such an indorsement is good as against the original parties to a negotiable instrument, having regard to the contractual liability incurred by them thereby. I do not think that *Alcock v. Smith* [1892] 1 Ch. 238, decides this question; on the contrary, it seems to me that the judgments of Romer, J., and the Court of Appeal both disclaim so doing; and, further, it seems to me that the law as laid down by Pearson, J., in *In re Marseilles, etc., Land Company*, 30 Ch. D. 598, and by Lush, J., in *Lebel v. Tucker*, L. R. 3 Q. B. 77, 83 is, in effect, authority to the contrary. At all events, it has never been decided that the liability of an acceptor in England of a bill drawn abroad or of the drawer of a cheque payable in England amounts to a contract to pay on a forged indorsement valid by the foreign law, but invalid by the law of England. It may, however, be that the contract of the drawer or acceptor is to pay on any indorsement recognized by the law of England, even though that indorsement be invalid according to what I will call for convenience the local law of England. I am disposed to think that this is the true contract. If the contract of the drawer of a cheque or acceptor of a bill were limited to payment on the indorsements valid by the English local law an argument might be raised that, even though the indorsement abroad was valid to legalize the possession by the indorsee claiming under the foreign indorsement, yet he would

83. [1905] 1 K. B. Div. 677, 684-85.

be guilty of a conversion if he used a negotiable instrument to the possession of which he was entitled for the purpose of obtaining and did obtain payment from an original party to the negotiable instrument from which he could not have recovered by process of law."

The transfer of chattels is governed today in England in accordance with the following rules:

"Rule 143. An assignment of a movable which can be touched (goods) giving a good title thereto according to the law of the country where the movable is situate at the time of the assignment (lex situs) is valid.

"Rule 145. . . . The assignment of a movable, wherever situate, in accordance with the law of the owner's domicile is valid."[84]

In so far as they are consistent with Section 72 (2) of the Bills of Exchange Act these rules can be applied in England to bills and notes. As the Bills of Exchange Act adopts on principle the lex loci contractus as the law governing the transfer of bills and notes, instead of the lex domicilii, Rule 145 can, of course, not be applied. But there is no reason why Rule 143 should not be extended so as to embrace bills and notes. In a case like *Lebel v. Tucker*[85] the law of the situs will be excluded, however, under the positive provision of the Bills of Exchange Act,[86] according to which the contract of the acceptor of an English bill is to be interpreted as requiring an indorsement in the sense of the English Act.

Which rule should be incorporated into the Uniform Law? The writer would submit that the promise of the acceptor or maker of a negotiable bill or note must be deemed to include any party acquiring title to the instrument in accordance with the law governing the contract of such maker or acceptor. As the lex loci contractus determines the extent of the liability of the maker and acceptor in general, a transfer satisfying such law should be sufficient. The case of *Embiricos v. Anglo-Austrian Bank*[87] makes it clear, however, that the law of the situs cannot be ignored. As a party executing a negotiable instrument, or on becoming a party thereto, may be reasonably charged with notice that the bill or note may be transferred in a state other than the state where it was issued or is payable, it would seem but fair to hold that he must

84. Dicey, pp. 519, 525.
85. (1867) L. R. 3 Q. B. 77.
86. B. E. A. Sec. 72 (2) par. 2.
87. [1905] 1 K. B. Div. 677 (C. A.), 74 L. J. K. B. 326.

have submitted to the law of such state as regards the transfer of title. The adoption of an alternative rule in this instance would promote the negotiability of bills and notes and subserve the ends of justice. In the opinion of the writer the Uniform Law should provide, therefore, that each party be held if the holder of the instrument has acquired title thereto in accordance with the municipal law of the state where such party's contract was made, and also if the title is unimpeachable under the law of the place of transfer or the lex rei sitae. The provisions of the Bills of Exchange Act on this point are inadequate.

3. HOLDER IN DUE COURSE.

According to Anglo-American law the equities attaching to a bill or note will be cut off when the instrument passes into the hands of a holder in due course. On the continent, where the holder in due course is unknown, full legal title will be acquired if the purchaser acted in good faith. The Negotiable Instruments Law aimed to unify the law of this country with respect to the question of what constitutes value, but failed to accomplish its purpose, for the New York courts adhere still to their former doctrine that a transfer of a bill or note by way of collateral security for an antecedent debt does not constitute value.[88] Assuming that a bill or note is transferred in a jurisdiction where the holder in due course is unknown to the law, or in a jurisdiction where the term "holder in due course" is defined differently than it is under the lex loci of the maker's or acceptor's contract, which law is to control? The American courts apply now the law of the place of indorsement,[89] but more generally the law of the place of payment,[90] that is, the law governing in their opinion, the obligation of the maker's and acceptor's contract. On principle the question relates clearly to the tenor of the contract of the different parties and should be determined, therefore, in accordance with the lex loci of each contract.

(To be concluded.)

UNIVERSITY OF MINNESOTA. ERNEST G. LORENZEN.

88. The appellate division of the supreme court of New York has held so on a number of occasions. See Sutherland v. Mead, (1903) 80 App. Div. 103, 80 N. Y. Supp. 504; Roseman v. Mahony, (1903) 86 App. Div. 377, 83 N. Y. Supp. 749; Bank of America v. Waydell, (1905) 103 App. Div. 25. The court of appeals has not yet passed uponthe question.

89. Brook v. Vannest, (1895) 58 N. J. L. 162, 33 Atl. 382.

90. Woodruff v. Hill, (1874) 116 Mass. 310; Webster v. Howe Machine Co., (1886) 54 Conn. 394, 8 Atl. 482; Allen v. Bratton, (1872) 47 Miss. 119; Limerick National Bank v. Howard, (1901) 71 N. H. 13, 15 Atl. 641.

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LIABILITY OF LANDLORD FOR PERSONAL INJURIES TO TENANT WHERE LANDLORD HAS FAILED TO PERFORM HIS COVENANT TO REPAIR. A question of interest to the bar and of especial interest to landlords in Minnesota arises in cases where the landlord has expressly covenanted to repair the premises, has neglected to make repairs, and the tenant has sustained personal injuries through the resulting defective condition of the premises, the question being as to whether under such circumstances the tenant may recover damages in a tort action or is confined to his remedy for the breach of the contract to repair. The vital importance of the question to property owners rests in the fact that if a recovery in a tort action is allowed the landlord is subjected to a much greater liability than would be

the case were the recovery confined to an action ex contractu, it being generally held that in the latter form of action damages for personal injuries are too remote as not being within the contemplation of the parties and hence are not recoverable.[1] An examination of the decided cases reveals a sharp conflict of authority upon the subject and a considerable amount of hair-splitting in the opinions. It seems safe to say, however, that the weight of authority supports the view that for breach of his covenant to repair the leased premises, possession of which is in the tenant, the landlord cannot be held liable in tort for personal injuries received by the tenant as the result of the defect in the premises.[2] The contrary view prevails in a number of jurisdictions, however, the courts working out a tort liability on various grounds, but probably in no jurisdiction has the landlord's liability been carried to a greater extreme than it has in Minnesota, where it is said that where the landlord by the terms of the lease expressly contracts to keep the leased premises in repair, a legal duty thereby arises on his part toward third persons lawfully upon the premises to perform the contract, and a negligent failure to do so, which results in injury to such third person, renders him liable for such damages as may have been suffered in consequence.[3] It may therefore be not unprofitable to consider the fundamental principles applicable in order to test the soundness of the Minnesota and minority views.

In approaching the problem it is necessary to keep in mind certain elemental principles in the law of landlord and tenant. The first of these is that the relation of landlord and tenant alone creates no duty on the part of the landlord to make repairs upon the leased premises, and in the absence of any agreement by the landlord he is not liable to the tenant or any other person for injuries resulting from the premises being out of repair, when he is not guilty of any fraud or concealment and the defects in the premises are equally obvious to all parties. This is a rule of universal application.[4] As to third

1. See notes in 11 L. R. A. (N. S.) 504; 34 L. R. A. (N. S.) 804.
2. L. R. A. 1916D, 1224, at p. 1227, note.
3. Glidden v. Goodfellow, (1913) 124 Minn. 101, 144 N. W. 428. Here the landlord, who had contracted to keep the leased premises properly heated, was held liable to an employee of the tenant, who caught a cold which developed into tuberculosis in consequence of the landlord's negligent failure to perform the contract.
4. Harpel v. Fall, (1896) 63 Minn. 520, 65 N. W. 913; Barron v. Lied-

persons lawfully upon the premises, the tenant, if he is the occupant of the premises, owes a duty to keep the premises in a reasonably safe condition, regardless of the question as to whose duty, as between landlord and tenant, it is to make repairs thereon.[5] And in this connection it is necessary to observe certain points of possible confusion, which, it is believed, have misled many of the courts into making many hasty and ill-considered decisions which have paved the way for subsequent difficulty. It has been stated that the above rules are subject to the exception that if there is some hidden defect in the premises, or danger thereon, known to the lessor at the time of making the lease, but which is not apparent to the tenant, he is liable for injuries to the tenant resulting therefrom.[6] It seems obvious that this is not, strictly speaking, an exception to the rule, but falls within the well settled principle that where there has been a breach of a recognized common law duty owing to the plaintiff, which has resulted in injury to the plaintiff, a tort action for negligence arises in favor of the injured party.[7] Within the same principle must be included certain other instances in which the courts are agreed that the landlord is liable in a tort action, as where the "Hidden Trap" doctrine[8] is applicable, where the premises are leased for a quasi-public use,[9] where the landlord retains control of a portion of the premises,[10] and, perhaps, where the doctrine of the "stepladder" cases is applicable.[11] That the liability in these cases is due to the existence of a common law duty is apparent from the fact that a recovery is allowed even though there be no agreement by the landlord to repair.[12] And in

loff, (1905) 95 Minn. 474, 104 N. W. 289; 1 Tiffany, Landlord and Tenant, Sec. 86; 24 Cyc. 1114.

5. 24 Cyc. 1125.

6. 1 Tiffany, Landlord and Tenant, p. 562.

7. 1 Shearman & Redfield, Negligence, sixth ed., Sec. 3.

8. Groves v. Western Mansions, Ltd., (1916) 33 T. L. R. 76; Harpel v. Fall, supra, (semble); Daley v. Towne, (1914) 127 Minn. 231, 149 N. W. 368.

9. L. R. A. 1915B, 364, note.

10. Morse v. Houghton, (1913) 158 Ia. 279, 136 N. W. 675; Williams v. Dickson, (1913) 122 Minn. 49, 141 N. W. 849.

11. Miller v. Steinfeld, (1916) 160 N. Y. Supp. 800.

12. Nash v. Minneapolis Mill Co., (1878) 24 Minn. 501, 31 Am. Rep. 349; Mesher v. Osborne, (1913) 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917, 923. "The duty to disclose such latent defects and dangers when actually known to the landlord exists without regard to any covenant or lack of covenant to repair."

like manner, where a duty is imposed on the landlord by statute, breach of that duty will be sufficient upon which to base a tort action.[13] The important points are that the relation of landlord and tenant alone gives rise to no such duty on the part of the landlord to repair as will form the basis of a tort action; but that under certain conditions, governed by the fundamental principles of the law of torts, the landlord may owe a common law duty to the tenant and others lawfully on the premises, wholly irrespective of the relation of landlord and tenant.

How, then, is the situation changed where the landlord has expressly agreed to repair, but has failed to do so? It is evident that if the tenant is to be allowed to recover damages from the landlord in an action ex delicto, he must base his action upon the landlord's negligence, and in determining whether the landlord has been guilty of such negligence as will give the tenant the right to a tort action, the settled principles of the law of torts must govern. It is fundamental law that where the sole relation between the two parties is contractual in its nature, a breach of the contract does not usually create a liability as for negligence. In such a case the liability because of negligence is based upon either the breach of some duty which is implied as the result of entering into the contractual relation, or the improper manner of doing some act which the contract provided for; but the mere violation of a contract, where there is no general duty, is not the subject of a tort.[14] However, whenever a negligent breach of a contract is also a violation of a common law duty, an action ex delicto will lie.[15] But it is clear that in such case the contract is mere inducement for the purpose of establishing the relation of the parties. Now accompanying every contract is a common law duty to perform the thing agreed to be done with care, skill, reasonable expedition, and faithfulness, and this is the only legal duty arising out of the relation created by the ordinary contract.[16] Of course there are special cases, as contracts entered into by a common carrier, contracts made by professional men, and like contracts, where on grounds of public

13. Wardwell v. Cameron, (1914) 126 Minn. 149, 148 N. W. 110.

14. Frank v. Mandel, (1902) 76 N. Y. App. Div. 413, 78 N. Y. Supp. 855. See 12 L. R. A. (N. S.) 924, note.

15. See 12 L. R. A. (N. S.) 924, 925 note.

16. See 12 L. R. A. (N. S.) 924, 925 note.

policy a duty is imposed by law as a concomitant to the contract relation, but these are clearly defined cases and are not at all exceptions to the rule. It will be observed, also, that the common law duty raised in connection with the ordinary contract relates only to the manner of performance, and in no wise raises a duty to perform. Hence the importance of the distinction between mere nonfeasance, failure to perform, which does not constitute negligence, and misfeasance or malfeasance, performance in a negligent manner, which does furnish the basis for an action of tort for negligence.[17] It is on this ground that it is held uniformly that where a landlord undertakes to make repairs and enters upon performance he is liable for personal injuries sustained by the tenant as a result of the landlord's negligence in making the repairs, whether there was any contract to repair or the repairs were merely gratuitous.[18] It is clear, therefore, that the breach of the contract, as such, gives no right of action in tort in any case, although where the breach is at the same time a breach of a legal duty, collateral to the contract, as to the manner of performance, a tort action may lie according to the ordinary rules of the law of torts, such action being in no way *based* on the contract. And it is equally clear that the law will imply no duty to perform a contract, such that a failure to perform will constitute negligence, unless by the contract the parties are brought into such relationship that public policy requires that such legal duty be imposed, as in the familiar case of master and servant, and then the legal duty grows out of the relationship and not out of the contract, which is mere inducement.

Applying these principles to the case where the landlord has failed to perform his contract to repair, by reason of which failure the tenant has sustained injuries, and brushing aside those cases where the landlord would be liable in tort in the absence of any undertaking by him to repair, it seems impossible to find any sound basis for imposing a tort liability on the landlord for the mere failure to perform a contract duty. The only duty arising from the relation of landlord and tenant, to make repairs, is from an express contract. The breach of that

17. Tuttle v. Gilbert Mfg. Co., (1887) 145 Mass. 169, 13 N. E. 465; Thorne v. Deas, (1809) 4 Johns. (N. Y.) 84.

18. Good v. Von Hemert, (1911) 114 Minn. 393, 131 N. W. 466.

duty makes a contract debt. It does not constitute negligence and make the landlord liable in tort for the tenant's damages. Any other rule would cast upon a landlord a duty to repair in addition to his contract duty, which is inconsistent with the universally recognized rule that the relation of landlord and tenant raises no duty, on the part of the landlord, to repair.

In *Kohnle v. Paxton,*[19] a recent decision of the Missouri supreme court, the opinion of the court contains a careful and painstaking consideration of the present question and the conclusion is there reached that the view imposing a tort liability upon the landlord for failure to perform his convenant to repair cannot be sustained. The court says, "a duty imposed upon the landlord to make repairs does not arise out of the relation created by the contract, but rests upon an express stipulation in the contract. Being a duty assumed by the contract, its breach does not constitute a tort." The contrary doctrine, says the court, "necessitates the holding that the landlord in failing to repair has been guilty of something more than a breach of the contract, viz. negligence. Upon no other theory can a basis be established for an action sounding in tort. To sustain the rule as thus announced it is necessary to determine when the contractual obligation ends and the liability for negligence begins. They cannot be coexistent as to matters within the purview of the contract. . . . The contract not only defines the time and terms of the rental, but it measures as well the obligations of the parties. Thus complete within itself, it cannot be reasonably said that upon a failure to comply with its conditions a right of action authorized by its terms and within the contemplation of the law can be supplanted by another not based upon or growing out of the contract, but having its origin purely in a process of reasoning."

There is another class of cases, of which a recent Maryland decision, *Robinson v. Heil,*[20] is a representative, in which the clearly defined view is taken that a tenant can maintain an action of tort for personal injuries for the landlord's *negligent* failure to make repairs agreed upon if the injury results from

19. (Mo. 1916) 188 S. W. 155.

20. (Md. 1916) 98 Atl. 195. See also Thompson v. Clemens, (1903) 96 Md. 196, 53 Atl. 919, 60 L. R. A. 580; Pinkerton v. Slocomb, (1915) 126 Md. 665, 95 Atl. 965; 24 Cyc. 1115. This doctrine apparently prevails in Minnesota. Barron v. Liedloff, supra; McColl v. Cameron, (1914) 126 Minn. 144, 148 N. W. 108; Keegan v. Heileman Brewing Co., (1915) 129 Minn. 496, 152 N. W. 877.

such failure, it being held that if the landlord has knowledge of the defective condition of the premises a failure to make such repairs is a *negligent* failure. These cases recognize the fact that the basis of the action is negligence and that the contract to repair is mere matter of inducement.[21] Hence these decisions seem manifestly unsound, since they say that the relation of the parties gives rise to the duty, which is equivalent to denying the fundamental rule, recognized even in those jurisdictions, that the relation of landlord and tenant raises no duty on the part of the landlord to repair.

The supreme court of Washington, in the case of *Mesher v. Osborne*,[22] attempts to work out a tort liability on the part of the landlord in a slightly different way. It states the rule as to latent defects, recognizing that in the absence of any covenant the landlord is under no duty to inspect the premises, and then holds, on the analogy of the case of master and servant, that where the landlord has contracted to repair, there is such duty to inspect and hence the landlord is charged with notice of defects existing at the time of the letting of which he did not know, but which a reasonable inspection on his part would have disclosed, so as to render him liable in tort to a guest of the tenant for injuries caused by such defect, if it was unknown to the tenant and was so obscure that he was not chargeable with notice of it. The fallacy of this reasoning lies in the fact that there is a clear distinction between the duty of a landlord and the duty of a master. The relation of landlord and tenant imposes no duty upon the landlord to make repairs. The relation of master and servant does impose such duty.

It seems clear that the liability of the landlord in tort is no greater as to third persons lawfully on the premises than it is

21. In Barron v. Liedloff, supra, the court says, "The landlord, however, is not a guarantor of the safety of the premises, for, as suggested, his liability does not rest upon contract, but upon his negligence; the contract to repair being mere matter of inducement, from which arises his affirmative duty to exercise care as to the condition of the leased premises. It is not necessary to show that he had actual notice of the unsafe condition of the premises in order to charge him with negligence, for it is sufficient if it be shown that he knew, or *by the exercise of ordinary care he might have known, their condition.*"

22. (1913) 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917. See 48 L. R. A. (N. S.) 917, note.

to the tenant.[23] And it seems that the same principle of law should govern, viz. that there must have been some legal duty owing from the landlord to the third person, wholly independent of any express agreement by the landlord to repair. But there are numerous authorities wherein it is broadly stated that the landlord is liable directly to the servants and patrons of the tenant, the theory being that since the tenant is liable to his servant or patron, and the landlord is in turn liable over to the tenant, a circuity of action is avoided by permitting the injured third person to proceed against the landlord direct.[24] But this is not sound, since clearly the third party cannot sue on the contract but must sue the tenant in tort, and the tenant, as pointed out above, cannot sue the landlord in tort, but must sue in contract, where the measure of damages is radically different. The Minnesota court recognizes this difficulty in *Glidden v. Goodfellow*[25] and arbitrarily implies a legal duty from the contract to repair. In view of the established principles of law set forth above, it seems, therefore, that the rule announced in the *Glidden* case is not sound.

It may be said that, nevertheless, the rule announced in the *Glidden* case is good public policy for the reason that it is wise to hold landlords to a strict performance of their covenants, and for the reason that, although in the absence of any agreement the tenant is ordinarily liable to third persons upon the premises by his request for injuries sustained by reason of defective conditions in the premises, yet the landlord, having expressly agreed to repair, should, as between landlord and tenant, bear the loss occasioned by his failure to repair. In answer to this it may be said that if a legal duty to perform the contract is implied in this case, there is no reason why it should not be implied in all cases of contracts between private parties. No duty to repair arising by virtue of the relation of landlord and tenant, when the landlord contracts to repair his situation is no different than that of any third person contracting to make the repairs, and surely it cannot be said that the landlord contracted to assume the liability of the tenant to third persons. If it is deemed advisable to shift the responsi-

23. 24 Cyc. 1119. In Glidden v. Goodfellow, supra, the court says, "The employee cannot, of course, in any such case, have any greater right than the contract confers upon the tenant."

24. 1 Tiffany, Landlord and Tenant, Sec. 107.

25. Glidden v. Goodfellow, supra.

bility of making repairs onto the landlord, the common law rule can be changed by appropriate legislation and the duty to repair be imposed upon the landlord as a result of the relation of landlord and tenant by statutory enactment, and this, it seems, would be the wiser policy to adopt.

WATER RIGHTS—INALIENABLE RIGHTS OF THE PUBLIC IN NAVIGABLE WATERS.—Two recent New York decisions involving water rights are important and are of especial interest in Minnesota where the subject has been so frequently before the courts. A review of the authorities in New York is necessary to a complete understanding of these two cases for the court in each instance uses language which, taken literally, might be misleading.

According to the common law of England, navigable rivers are those in which the tide ebbs and flows. Title to the bed of such waters is in the King. Non-navigable rivers are those not affected by the ebb and flow of the tide. Title to the beds of these rivers is in the riparian owner, subject however, if the rivers are navigable in fact, to the rights of the public for the purposes of navigation and commerce.[1] This distinction was adopted by the New York courts at an early date,[2] and has been consistently followed by them since that time.[3] Thus in New York, the beds of navigable or tidal waters belong to the state, and the beds of waters not navigable, freshwater rivers and lakes, belong to the riparian owner, subject if navigable in fact to the servitude of the public. Cases involving

1. 1 Farnham, Waters & Water Rights, Sec. 36. Lord Hale says, "There be some streams or rivers, that are private, not only in propriety and ownership, but also in use, as little streams or rivers that are not a common passage for the King's people. Again, there be other rivers as well fresh as salt, that are of common or public use for the carriage of boats and lighters, and these, whether they are fresh or salt, whether they flow or reflow, or not, are, prima facie, publici juris, common highways for a man or goods, or both, from one inland town to another." Lord Hale, De Jure Maris, Hargrave, 849.

2. Palmer v. Mulligan, (1805) 3 Cai. (N. Y.) 307, 2 Am. Dec. 270.

3. People v. Platt, (1819) 17 Johns. (N. Y.) 195, 8 Am. Dec. 382; Ex parte Jennings, (1826) 6 Cow. (N. Y.) 518, 16 Am. Dec. 447; Varick v. Smith, (1835) 5 Paige (N. Y.) 137, 28 Am. Dec. 417; Canal Fund Comm'rs. v. Kempshall, (1841) 26 Wend. (N. Y.) 404; Smith v. Rochester, (1883) 92 N. Y. 463, 44 Am. Rep. 393; Brookhaven v. Smith, (1907) 188 N. Y. 74, 80 N. E. 665, 9 L. R. A. (N. S.) 326; Angell, Watercourses, seventh ed., Sec. 535.

the Hudson and Mohawk rivers must be distinguished as they were decided under the doctrines of the civil law.[4]

The rights of the riparian owner in the case of streams non-navigable, in the sense that the tide does not ebb or flow, are quite clear, for as his ownership is absolute he may use the stream and its bed as he wishes so long as he does not violate the rights of the other riparian owners or interfere with navigation if the stream is public.[5] These rights once vested are private property and their destruction by legislative enactment or constitutional amendment falls within the prohibition of the federal constitution forbidding the taking of private property without due process of law.[6]

The power of the state over navigable streams, those affected by the ebb and flow of the tide, has been the subject of much controversy in New York. Primarily the state must have regard for the rights of the riparian owner and cannot deprive him of these except for a public purpose and upon payment of due compensation. Among these rights are free access to the navigable part of the stream, and the right to make a landing, wharf, or pier for his own use or for the use of the public.[7] Such a right was denied in an early New York deci-

4. Canal Appraisers v. Tibbets, (1836) 17 Wend. (N. Y.) 571; Canal Fund Comm'rs. v. Kempshall, supra.

5. Canal Fund Comm'rs. v. Kempshall, supra; 3 Kent Comm. 427.

6. Hobart v. Hall, (1909) 174 Fed. 433; Gardner v. Newburgh, (1816) 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; Brown v. Bowen, (1864) 30 N. Y. 519, 86 Am. Dec. 406; Bigelow v. Draper, (1896) 6 N. D. 152, 69 N. W. 570; Hanford v. St. Paul etc., R. Co., (1890) 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722; State ex rel. Wausau Street R. Co. v. Bancroft, (1912) 148 Wis. 124, 134 N. W. 330. In Chenango Bridge Co. v. Paige, (1880) 83 N. Y. 178, 185, 38 Am. Rep. 407, the court said: "The legislature, except under power of eminent domain, upon making compensation, can interfere with such streams [fresh water], only for the purpose of regulating, preserving and protecting the public easement. Further than that, it has no more power over these freshwater streams than over other private property."

7. Dutton v. Strong, (1861) 1 Black. (U. S.) 23, 17 L. Ed. 29; Railroad Co. v. Schurmeier, (1868) 7 Wall. (U. S.) 272, 19 L. Ed. 74; Yates v. Milwaukee, (1870) 10 Wall. (U. S.) 497, 19 L. Ed. 984.

The rule laid down in these cases, that the riparian owner must receive compensation when deprived of his riparian rights for a public purpose, does not apply when the public purpose for which the riparian rights are taken, is the improvement of navigation. As the right of the state for purposes of navigation is paramount to the rights of the riparian owner, the state may exercise that right without making any compensation even though the riparian owner's access to the navigable part of the stream is absolutely destroyed thereby. Gibson v. United States, (1897) 166 U. S. 269, 17 S. C. R. 578, 41 L. Ed. 996; Scranton v.

sion,[8] but that case was later overruled.[9] On the other hand the state is limited by the rights of the public for navigation and commerce. Any power it may have other than such as may be incident to navigation depends on the character of the title which the state holds. The statement is generally made that the state holds the title in a sovereign capacity in trust for the public.[10] But in New York, the state holds the absolute fee to the soil under tidewaters, and this carries with it the power of granting the fee to such land. But the granting of the fee must be sharply distinguished from a destruction by grant, of the public easement in the waters. In England, the riparian owner, even where he held the fee, could not interfere with navigation.[11] Parliament, however, had absolute control over the waters and could extinguish the rights of the public in them.[12] It was early decided by the New York courts that the state succeeded to all the powers of Parliament, subject to the constitutional restrictions.[13] In some of the cases an extreme view was taken in saying, usually by way of dicta, that the state could destroy the rights of the public in navigable waters if it so desired.[14] This view, however, was soon modified so as to accord with the generally accepted rule that

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Wheeler, (1900) 179 U. S. 141, 21 S. C. R. 48, 45 L. Ed. 126; United States v. Chandler-Dunbar Co., (1913) 229 U. S. 53, 33 S. C. R. 667, 57 L. Ed. 1063; Fish v. Chicago Gt. W. Ry., (1914) 125 Minn. 380, 147 N. W. 431.

8. Gould v. Hudson River R. Co., (1852) 6 N. Y. 522.

9. Rumsey v. New York, etc., R. Co., (1892) 133 N. Y. 79, 30 N. E. 654, 15 L. R. A. 618, 28 Am. St. Rep. 600. In Gardner v. Newburgh, (1816) 2 Johns. Ch. (N. Y.) 162, 166, Chancellor Kent said, "A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseised." To the same effect Varick v. Smith, supra; Brown v. Bowen, supra.

10. Hobart v. Hall, supra; Commonwealth v. Alger, (1851) 7 Cush. (Mass.) 53. "The sovereign is trustee for the public and the use of navigable waters is inalienable." 3 Kent, Comm. 427.

11. Hale, De Jure Maris, Chap. 6. "For the jus privatum of the owner or proprietor, is charged with, and subject to that jus publicum which belongs to the king's subjects; as the soil of the highway is, which though in point of property it may be a private man's freehold yet it is charged with a public interest of the people, which may not be prejudiced or damnified." 1 Hargrave's Law Tracts 36.

12. Rex v. Montague, (1825) 4 B. & C. 598; Williams v. Wilcox, (1838) 8 Ad. & El. 314. This rule was later modified in Buccleuch v. Metropolitan Board of Water Works, (1872) L. R. 5 Eng. & Ir. App. 418.

13. Lansing v. Smith, (1829) 4 Wend. (N. Y.) 9, 21 Am. Dec. 89.

14. Gould v. Hudson River R. Co., supra; People v. New York, etc. Ferry Co., (1877) 68 N. Y. 71. In Langdon v. Mayor, (1883) 93 N. Y. 129, 156, the court said, "The right to grant the navigable waters is as absolute and uncontrollable (except as restrained by constitutional

the rights of the public are inalienable.[15] But in the case of *People v. Steeplechase Park Co.*,[16] the power of the state to grant the unrestricted, unqualified fee to soil under tidewater between high and low water mark was reaffirmed. The city of New York had granted to a riparian owner off Coney Island, the fee to the bed opposite her tract.[17] The defendant, under this grant, maintained obstructions which interfered with the public use of and access to this foreshore. The court upheld the grant and refused to enjoin the interference with the public access to the water. The question of the extent to which the rights of the public could be thus surrendered by the state, was not determined but it appeared that the inconvenience to the public was slight. The main point raised was the power to make an unrestricted grant in fee. This point was already well settled by the authorities referred to, but the complete surrender of the rights of the public is not so easily explained.

In the case of *Matter of Long Sault Development Co.*,[18] affirmed recently by the United States Supreme Court,[19] this point was squarely raised. The state legislature in 1907 passed an act incorporating the plaintiff company, and granted it a franchise authorizing it to maintain and operate dams in the St. Lawrence River for the development of water power. The act further purported to grant to the company the title and interest of the people of the state in and to the lands under the waters. These rights were granted on condition that they should never be used to impair navigation but that, on the contrary, "such navigation shall be preserved in as good condition as, if not better than, the same is at present." The company

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checks) as its right to grant the dry land which it owns. It (the state) holds all the public domain as absolute owner, and is in no sense a trustee thereof, except as it is organized and possesses all its property, functions and powers for the benefit of the people." And in Stevens v. Paterson, etc., R. Co., (1869) 34 N. J. L. 532, 3 Am. Rep. 269, a case decided on the English law and on the New York cases, it was said, "Unless in certain particulars protected by the Federal constitution, the public right in navigable waters can to any extent be modified or absolutely destroyed by statute."

15. Smith v. Rochester, (1883) 92 N. Y. 463, 44 Am. Rep. 493; Rumsey v. New York, etc. R. Co., supra; Brookhaven v. Smith, supra.

16. (1916) 218 N. Y. 459, 113 N. E. 521.

17. The portion of the seashore within the corporate limits of the city between high and low water mark had been granted to the city of New York by the early charters.

18. (1914) 212 N. Y. 1, 105 N. E. 849, Ann. Cas. 1915D 56.

19. Long Sault Development Co. v. Call, (1916) 37 S. C. R. 78.

accepted, and expended large sums in the erection of its works in the river. An act repealing the grant was passed in 1913. The court of appeals of New York held that the grant was invalid, not because of the subsequent repealing act but because the act of 1907 was unconstitutional in that it virtually turned over to the plaintiff company all control of navigation at that point. All that was required of the company was that it maintain navigation "as good as it is at present." If at any future time the state wished to resume control it would have been barred by this franchise. The act of 1907, said the court, was in excess of legislative powers because as long as the river remained navigable the state was bound to retain control over it for the public interest. The United States Supreme Court refused to review the decision because it was based on the unconstitutionality of the act of 1907 and did not depend on the subsequent repeal of that act. The decision is well sustained by authorities.[20] This case involves the power of the legislature to grant away the public rights in a freshwater river, the fee to the bed of which appears to have been in the plaintiff company, unless the fact that the river was an international boundary placed the fee in the state. The court seems to assume that the state had title to the bed although this is not necessary to the decision. Under this assumption the court lays down the rule that the state has the power to grant land under water, in fee or conditionally, to private persons or corporations for beneficial enjoyment. The contemplated use, however, must be reasonable and must be such that it can fairly be said to be for the public benefit and not injurious to its rights. According to the previously decided cases, this rule is applicable only to tidewaters and it is to be observed that all the cases cited as establishing this rule[21] involved land under tidewaters.

In the light of this decision it would seem that the law of New York was settled that the rights of the public are paramount and that any act by an individual or by the state in derogation of those rights could not be sustained. The trend of

20. Illinois Central R. Co. v. Illinois, (1892) 146 U. S. 387, 13 S. C. R. 110, 36 L. Ed. 1018; Morris v. United States, (1899) 174 U. S. 196, 19 S. C. R. 649, 43 L. Ed. 946; United States v. Mission Rock Co., (1903) 189 U. S. 391, 23 S. C. R. 606, 47 L. Ed. 865.

21. Lansing v. Smith, supra; People v. New York, etc., Ferry Co., supra; Langdon v. Mayor, supra; Coxe v. State, (1895) 144 N. Y. 396, 39 N. E. 400.

the decisions is apparent. At the time of the first decisions the state was in its infancy and the pressing need was the development of the natural resources while the rights of the public were of minor importance. Later, however, as the state became more thickly settled, the great value of these gifts to riparian owners became apparent and the courts began to construe them more strictly in favor of the public. While vested rights could not be taken away, extensions of the riparian owner's privileges were frowned upon and the courts questioned the power of the state to grant certain of these rights. The *Long Sault Development Co.* case seems to indicate the highwater mark of the cases guarding the interests of the public. The *Steeplechase Park Co.* case, coming soon after the case of *Long Sault Development Co.* is difficult to harmonize with the decision in that case and evidently represents a reaction toward the previous views.

In Minnesota there is a different basis for decisions in regard to riparian rights. The waterways are divided into public and private, according to whether they are navigable in fact or not. The state holds the title to the bed of navigable streams in trust for the public for all purposes connected with navigation and commerce, and the riparian owner has all the rights of beneficial enjoyment subject to the paramount right of the state. The riparian owner holds the fee to the bed of non-navigable streams.[22] As the title and rights in the bed of navigable waters is fixed by the law of each state,[23] the decisions in one state are not strictly applicable in another jurisdiction. However, it would seem that the property right of a riparian owner to the beneficial use of the stream and of its bed are the same whether the title to the bed is held by the state or by the individual, and the same is true to a lesser degree of the rights of the public.[24] The New York decisions

22. Morrill v. Saint Anthony Falls Water Power Co., (1879) 26 Minn. 222, 2 N. W. 842, 37 Am. Rep. 399; Hanford v. St. Paul, etc., R. Co., supra; Water Power Co. v. St. Paul Water Board, (1894) 56 Minn. 485, 58 N. W. 33; In re Lake Minnetonka Improvements, (1894) 56 Minn. 513, 58 N. W. 295; Minnesota Loan & Trust Co. v. St. Anthony Falls Water Power Co., (1901) 82 Minn. 505, 85 N. W. 520.

23. Barney v. Keokuk, (1876) 94 U. S. 324, 24 L. Ed. 224; Packer v. Bird, (1891) 137 U. S. 661, 11 S. C. R. 210, 34 L. Ed. 819; Water Co. v. Water Board, (1897) 168 U. S. 349, 18 S. C. R. 157, 42 L. Ed. 497.

24. Hobart v. Hall, supra. Lamprey v. State, (1893) 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Willow River Club v. Wade, (1898) 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305.

reflect the judicial attitude at the present time and form a possible basis for holdings on as yet unsettled questions in Minnesota.[25]

SPLITTING A CAUSE OF ACTION IN TORT.—There is perhaps no rule of law more universally recognized than that a single cause of action in tort cannot be split and independent actions brought upon each separated part. A judgment based upon a part of a cause of action bars any further recovery for the injury.[1] The application of this rule to particular cases, however, has led to difficulty and confusion and a review of the decided cases reveals a sharp conflict of authority.

Where a single wrongful act damages the plaintiff both in his person and his property, the question arises as to how many causes of action are created. The solution of this question depends on what constitutes a cause of action. Is it the wrongful act of the defendant or is it the violation of the plaintiff's primary right by the defendant's wrong? The Minnesota court has said, "We are of the opinion that the cause of action consists of the negligent act which produced the effect, rather than in the effect of the act in its application to different primary rights."[2] Here, it will be observed, the question is deter-

25. See article by Justice Oscar Hallam, "Rights in Soil and Minerals under Water," 1 MINNESOTA LAW REVIEW, 34, for a full discussion of Minnesota law on this subject.

1. Columb v. Webster Mfg. Co., (1898) 84 Fed. 592, 43 L. R. A. 195; Knowlton v. New York, etc., Ry. Co., (1888) 147 Mass. 606; McKnight v. Minneapolis Street Ry. Co., (1914) 127 Minn. 207, 149 N. W. 131; 1 R. C. L. 341; 1 Sutherland, Damages, third ed., Sec. 106.

2. King v. Chicago, etc., Ry. Co., (1900) 80 Minn. 83, 82 N. W. 1113, 81 Am. St. Rep. 238, 50 L. R. A. 161. In the earlier case of Skoglund v. Minneapolis St. Ry. Co., (1891) 45 Minn. 330, 47 N. W. 1071, the Minnesota court seems to have taken an opposite view. The plaintiff and his wife had been injured by the same negligent act of the defendant and it was held that the recovery of a judgment for his own personal injuries did not bar a subsequent suit to recover for the loss of his wife's services and for expenses incurred in effecting her cure. The court there said that the action was not barred, "not because one action was to recover for an injury to what are termed the absolute rights of the plaintiff, and the other for injury to his relative rights, or rights he possessed by reason of his relation to his wife, but because his right to recover in this case will depend on a different state of facts from those which would sustain a recovery in the other case." In commenting on the Skoglund case, the court in the King case said, "We cannot accept the reasoning of the court in that case as applicable to the one before us. The facts were different, and it is not necessary at this time to review it. The rule there applied should certainly not be extended."

mined with reference to the act or acts done rather than the effect of the act, the different injuries occasioned by the act being considered merely as items of damage proceeding from the same wrong. Hence, but one action is allowed in which to recover damages for the injuries to both person and property. The majority of American courts reach the same result,[3] though not necessarily on the same reasoning. The theory on which the Minnesota court proceeds seems faulty. If the negligent act constituted the cause of action, then two or more persons injured by the same negligent act would have but one cause of action between them. But this is nowhere the law. Moreover, a negligent act in and of itself will not give rise to a cause of action unless injury results. The English courts reach a different result,[4] but the exact basis for their decisions is not clear. They seem to determine the question of what constitutes a cause of action with reference to whether one or more rights of the plaintiff are violated. New York[5] and a minority of American jurisdictions[6] hold that damage to property and to person by the same wrongful act gives rise to two causes of action on the theory that the violation of a primary right creates a cause of action, and that the right to personal safety is distinct and different from the right to the enjoyment of property.[7] It is pointed out by the New York court that the two rights are treated differently at common law, in that a cause of action for breach of the former is not assignable

3. Cassidy v. Berkovitz, (Ky. 1916) 185 S. W. 129; Knowlton v. New York, etc., Ry., Co., supra; Greer v. Western Union Telegraph Co., (S. C. 1916) 89 S. E. 782; Mobile, etc., Ry. Co. v. Matthews, (1906) 115 Tenn. 172, 91 S. W. 194.

4. Brunsden v. Humphrey, (1884) L. R. 14 Q. B. Div. 141, 51 L. T. (N. S.) 529, 32 W. R. 944. The plaintiff and his cab in which he was driving were injured through the negligence of the servant of the defendant. It was held that a suit to recover damages for his bodily injuries was not barred by a former recovery for damages to his cab. The court, per Bowen, L. J., said, "Two separate kinds of injury were in fact inflicted, and two wrongs done. . . . One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. . . . The wrong consists in the damage done without lawful excuse, not the act of driving, which (if no damage had ensued) would have been legally unimportant."

5. Reilly v. Sicilian Asphalt Paving Co., (1902) 170 N. Y. 40, 62 N. E. 772, 88 Am. St. Rep. 636, 57 L. R. A. 176.

6. Ochs v. Public Service Ry. Co., (1911) 81 N. J. L. 661, 80 Atl. 495, 36 L. R. A. (N. S.) 240, Ann. Cas. 1912D 255; Watson v. Texas, etc., Ry. Co., (1894) 8 Tex. Civ. App. 144, 27 S. W. 924.

7. 2 Black, Judgments, second ed., Sec. 740.

either voluntarily or by operation of law, whereas the latter is so assignable. Furthermore the legislatures have treated them differently in providing different periods of limitations, and limiting the right of joinder. The New York view, from a theoretical standpoint, seems correct and its logic unanswerable. If the Minnesota doctrine is to be adopted, it should be on grounds of practical convenience and policy.

Since the basis for the rule that only one cause of action is created when injury is done to person and property by the same act, is policy and convenience in procedure,[8] where procedural rules conflict with substantive rights, those rules should, other things being equal, give way. The decision of the Mississippi supreme court in the case of *Underwriters at Lloyd's Insurance Co. v. Vicksburg Traction Co.*,[9] affords an instance of such an exception. An automobile owner and his car were injured by the defendant's wrongful act. The insurance company which had insured the car discharged its liability under the policy and took an assignment from the owner of his claim for injury to the car. The owner sued for personal injuries and recovered. Thereafter, the insurance company brought action under its assignment for the damage to the car. The court held that the action was not barred by the former recovery of the owner, as there were really two causes of action created by the one wrongful act. It is to be observed that this decision was rendered in a jurisdiction where the majority rule is applied in the normal case,[10] but when confronted with the situation set forth above the court disregarded that rule.

Whatever view is adopted with regard to a case where a single negligent act causes injury to the person and property of the plaintiff, there can be no doubt that where the negligent act results in personal injuries alone there can be but one cause of action and that the plaintiff must recover all items of his damage in that action.[11] The recent decision of the Minnesota supreme court in the case of *Vineseck v. Great Northern Ry. Co.*,[12] shows that even in such a case the proce-

8. See Rowland v. McLaughlin Bros. (1910) 110 Minn. 398, 125 N. W. 1019.
9. (1913) 106 Miss. 244, 63 So. 455, 51 L. R. A. (N. S.) 319.
10. Kimball v. Louisville, etc., R. Co., (1908) 94 Miss. 396, 48 So. 230.
11. 1 R. C. L. 344.
12. (Minn. 1917.) 161 N. W. 494.

dural rule against the splitting of a cause of action is subject to exceptions. The plaintiff received injuries through the negligence of the defendant resulting in the loss of one leg and in an impairment of his eyesight. The defendant's physician assured the plaintiff that the latter injury was merely temporary. The plaintiff commenced action to recover for the loss of his leg, making no claim for the injury to his eyes. A settlement was effected and the plaintiff, relying on the assurance of the defendant's physician that the injury to his eyes was merely temporary, signed a release expressly discharging the defendant from all claims on account of the injuries received and plaintiff's attorneys entered into a stipulation for a dismissal of the action with prejudice. Subsequently the plaintiff became totally blind as a proximate result of the negligence of the defendant and commenced another action for damages. The defendant pleaded the former judgment as a bar to a recovery. The trial court dismissed the action on the opening statement of counsel. In reversing the decision of the trial court the supreme court held that if the plaintiff was led to omit this item of damage from his complaint in the former action by the fraud of the defendant or the mutual mistake of the parties the former judgment was not a bar to the present action.

While the usual rule against splitting a cause of action will be applied where the plaintiff, with full knowledge of all the facts or with means at hand to ascertain them, misconceives his proper remedy,[13] there seems to be an exception to that rule where the plaintiff at the time of bringing his first action was ignorant of the true amount or items of his claim, or of the full extent of the injuries received.[14] The cases, however, in which this exception has been actually applied to actions of tort are few in number. Manifestly the case should be the same where the plaintiff has been led to omit an item of his

13. 1 C. J. 1109.

14. Cheatham Electric Switching Device Co., v. Transit Development Co., (1913) 203 Fed. 285 (judgment at law for infringement of patent not a bar to a subsequent suit in equity against the same defendant for other acts of infringement committed prior to the commencement of the law action, but not known to complainant at that time, and not included in the judgment); Wilson v. Colorado Mining Co., (1915) 227 Fed. 721; Moran v. Plankinton, (1876) 64 Mo. 337 (replevin); Cunningham v. Union Casualty, etc., Co., (1900) 82 Mo. App. 607 (personal injuries); Morgan v. St. Louis, etc. R. Co., (1905) 111 Mo. App. 721 (damage to property caused by fire); Risley v. Squire, (1869) 53 Barb. (N. Y.) 280 (claim and delivery.)

damage from his complaint in his first action through the fraud of the defendant unmixed with his own fault.[15] Since the rule against splitting a cause of action is designed, in large part, for the benefit of the defendant, to protect him against vexatious litigation, clearly he may estop himself from insisting upon the rule when he has misled the plaintiff.[16]

COVENANTS RUNNING WITH THE LAND IN LEASEHOLD ESTATES.—It is greatly to be deplored that in a subject of such practical importance as that of covenants running with the land the law should be in such a state of confusion and uncertainty that the more one delves into the decided cases and into the very technical and abstruse learning of the books the more bewildered he becomes. Nevertheless, it seems clear that the rules of the common law upon the subject, couched in regrettably general terms, have become so bent and warped by seemingly irreconcilable judicial decisions, that it would take a court of great strength to so reshape the law that some degree of uniformity might be attained.

In general, it may be said that at law no covenants will run with the land except real covenants, and that not even real covenants will run with the land so as to render the holder of the land liable or to enable him to sue upon the covenant, unless it was the intention of the original parties to the covenant that it should run, and, as is said, unless there is privity between the covenantor and the covenantee.[1] Considerable difficulty is met with at the outset in attempting to find a satisfactory explanation of what is meant by the term "real covenant". The definition frequently given, that "a real covenant is one which runs with the land" is manifestly worthless in this connection. Equally unhelpful is the definition more often encountered, that those covenants "so closely connected with the realty that their benefit or burden passes with the realty are construed to be covenants real,"[2] since this is de-

15. 1 Van Fleet, Former Adjudication, 206. Contra, McCaffrey v. Carter, (1878) 125 Mass. 330 (conversion).

16. In Vineseck v. Great Northern Ry. Co., (Minn. 1917) 161 N. W. 494, the court said, "If the rule of res judicata is one primarily for the benefit and protection of the defendant, and he may waive the same, he may, a fortiori, estop himself from insisting upon the rule when he has misled the plaintiff by actual fraud, or by misrepresentations amounting to fraud as a matter of law."

1. 11 Cyc. 1081 et seq.

2. 11 Cyc. 1052.

scribing the effect of a real covenant, rather than describing its nature. It would probably be more accurate to say that a real covenant is one which so intimately touches or concerns the land, that its benefits can only be enjoyed, or its obligations performed by the owner for the time being of the land affected.[3] It must touch or concern the thing granted or demised, and the act covenanted to be done or omitted must concern in some way the land or estate conveyed.[4] The rule itself, that the covenant must touch or concern the land demised or granted, appears to be uniformly recognized by the courts; the great difficulty lies in its application, and as to the many conflicting decisions it can only be said that each court seems to have decided each case on its particular facts, coming to its own conclusions as to whether the covenant in question did touch or concern the land, or was only collateral. It would seem that the proper test to be applied should be as to whether the benefit of the covenant could be enjoyed, or its obligation performed, solely by the owner for the time being of the land, by virtue of his ownership. It must be admitted, however, that it is practically impossible to lay down any rule of interpretation which will reconcile or harmonize all the cases. The Minnesota supreme court has said that "with reference to the subject matter of the covenant, it is sufficient that it be for something to be done, or refrained from, about, touching, concerning, or affecting the covenantee's land, (though not upon it) if the thing covenanted for be for the benefit of the same, or tend to increase its value in the hands of the holder".[5]

It seems to be well settled in England and in some of the states of the Union, that while benefits may run with the land, burdens will not, except in the case of covenants in leases.[6] There does not seem to be any good reason why burdens should not run as well as benefits, and the English courts have in the case of party wall agreements frequently worked out a liability upon the part of the assignee upon the ground of implied contract, and have thus avoided the rule.[7] A recent writer upon the subject of real covenants, after concluding that real covenants were an outgrowth of the ancient idea of war-

3. Sims, Covenants, 27.
4. Sims, Covenants, 59.
5. Shaber v. St. Paul Water Co., (1883) 30 Minn. 179, 183, 14 N. W. 874.
6. 1 Smith's Lead. Cas., 9th Am. ed., 188-9.
7. Irving v. Turnbull, [1900] 2 Q. B. 129. See criticisms of this case in 14 H. L. R. 296; 1 Col. L. R. 257.

ranties, says "Regarding warranty as a basis, it may be tentatively expressed that the benefits and burdens of covenants should run alike so far as heirs and assigns are mentioned in the covenant, the lands themselves always being assets to meet the claim".[8] He then discusses the matter upon theory, and from the standpoint of practical advantage or disadvantage, and concludes that burdens should run as readily as benefits.

The requirement of privity between the covenantor and covenantee, the idea that some estate must be transferred to which the covenant may attach,[9] is highly technical and, it seems might well be dispensed with, as has been done by the Minnesota court in the case of covenants conferring a benefit upon the land.[10] Indeed, those courts insisting upon the strict requirement of privity have gone far to find an easement or quasi-easement created, to which they may attach the covenant, and have held that a covenant may run as well with an incorporeal as with a corporeal hereditament.[11]

In the case of covenants in leases, however, less difficulty is encountered, since there is always the requisite privity of estate, and it is well settled that burdens as well as benefits will run.[12] The only difficulty then encountered is as to whether the covenant is of a nature to run with the land. It seems to be the prevailing opinion that at the common law real covenants ran with the land but not with the reversion.[13] The reason for this, in all probability, was that although no contract was entered into between the landlord and the assignee of the lessee, yet as the latter became the tenant of the former, a privity of estate arose between them, by virtue of which the covenants running with the land entered into when the lease was granted, became mutually binding and might be enforced by the one against the other; while in the case of an

8. Sims, Covenants, 59, 173.

9. Kettle River R. Co. v. Eastern Ry. Co. of Minnesota, (1889) 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111 (semble); 11 Cyc. 1081. "In all cases it is believed that there must pass between the covenantor and the covenantee, at or about the time of the covenant, land or some interest in land, and this is what is meant by saying there must be some privity of estate." 1 Smith's Lead. Cas., 9th Am. ed., 217.

10. Shaber v. St. Paul Water Co., supra.

11. Sims, Covenants, 212, 215.

12. 1 Smith's Lead. Cas., 9th Am. ed., 188, 189, 208.

13. 1 Tiffany, Real Property, 116, note 255. A recent able writer is, however, of the opinion that the statute 32 Hen. VIII, c. 34 is in the main but declaratory of the common law. Sims, Covenants, 66, 77, 80.

assignment of the reversion an attornment was necessary, by which the tenant agreed to become the tenant of the new landlord.[14] The assignee of the lessee was held to be liable on covenants which touch and concern the thing demised, and entitled to bring an action on such covenants against the lessor, but the assignee of the lessor could neither sue nor be sued on such covenants. This was remedied, however, by the statute 32 Hen. VIII, c. 34.[15] Section I of that Act provided that the assignee of the lessor should have the same advantages, benefits, and remedies as the lessor might have had. Section 2 was added, purporting to create rights in lessees which they already had so far as covenants running with the land were concerned, probably to give the statute the appearance of providing for the rights of tenants as well as of landlords.[16] The words of this Act were very general, and, taken literally, would seem to comprehend every covenant expressed in the lease, but it was pointed out in *Spencer's Case*,[17] which was decided more than forty years after the enactment of the statute, that it was meant to extend only to covenants which touch and concern the thing demised, and not to collateral covenants.

Spencer's Case has long been considered as determining the construction of the statute. The decision as reported by Lord Coke was that where the covenant related to something not in esse at the time the lease was executed it would not run with the land so as to bind the assigns unless they were named. Perhaps no decision has caused more comment and controversy than that one, and the correctness of the report has been disputed.[18] However, its correctness is maintained by eminent

14. 1 Sheppard's Touchstone, 1st Am. ed., 255.

15. English law accepted in Minnesota. Cf. Leppla v. Mackey, (1883) 31 Minn. 75, 16 N. W. 470.

16. 2 Sugden, Vendors and Purchasers, 8th Am. ed., 248. This is on the theory that at common law covenants ran with the reversion, and that the statute, except for doing away with the necessity of privity in the case of leases, was merely declaratory of the common law. 1 Tiffany, Real Property, 116, note 255.

17. 5 Coke, 16a, 1 Smith's Lead. Cas., 9th Am. ed., 174.

18. In Minshull v. Oakes, (1858) 2 H. & N. 793, the court of exchequer threw doubts upon Spencer's Case and directed attention to the circumstance that the resolutions were never acted upon, and that according to Moore the decision was to the contrary (Moore, K. B. 159), as was the decision in Smith v. Arnold, 3 Salk. 4, and the declaration of the court by way of dicta in Bally v. Wells, 3 Wils. C. P. 25.

authority,[19] and the decision has been generally adhered to.[20]

According to the first resolution in *Spencer's Case*, if the covenant relates to a thing in esse, parcel of the demise, and which directly touches or concerns the thing demised, it binds the assignee, although he be not named; and by the second resolution, if the covenant relates to a thing not in esse, but the thing is to be done upon the land demised, the assignee, if named, will be bound by the covenant, but not otherwise. Criticism of the rule in *Spencer's Case* as to things in esse and things not in esse was indulged in by the court in *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.*,[21] where it was said that, like other arbitrary ancient rules, the resolutions in *Spencer's Case* had been given such flexibility by so many later decisions that, without overruling later decided cases, it was impossible rigidly to apply them at this day, even in common law actions. Undeniably, many of the authorities have clung tenaciously to the strict rule in *Spencer's Case*, and have held it to be necessary to use the word "assigns" in order to make a covenant concerning a thing not in esse run with the land.[22] But in view of the tendency of later decisions it ought not to be said that the use of "assigns" as a technical word is or ever has been essential to the running of a covenant with the land at the common law.[23] The modern tendency

19. The matter is discussed in the American notes to Spencer's Case in Smith's Leading Cases, and the conclusion is there reached that Spencer's Case, and the Anonymous Case in Moore, although strikingly similar, are not the same case. "The following is a translation of the important part of the Anonymous Case in Moore: 'In the same term' (Hil. 26 Eliz.) 'Gawdy moved on the statute of 32 H. 8, whether, if lessee for life' (It will be observed that in Spencer's Case the lease was by Spencer and his wife for twenty-one years) 'covenants for himself, his executors and administrators, to build a wall during his term, and then he assigns over his estate, the grantee of such reversion or the grantor shall have covenant against the assignee; and they all agreed that he should: for Meade said that the statute is that the grantees shall have the like remedies by entry or actions against the assignees, etc., as they ought to have had against the lessees themselves. And notwithstanding that the covenant wants the word assigns, yet each assignee, by the acceptance of possession, has made himself liable to all covenants concerning the land, but not to collateral covenants; and covenants to repair or build walls or houses are covenants inherent to the land, with which the assignee shall, without special words, be charged'." 1 Smith's Lead. Cas., 9th Am. ed., 186.

20. Sims, Covenants, 108.

21. (1895) 171 Pa. 284, 33 Atl. 239, 29 L. R. A. 423, 50 Am. St. Rep. 807.

22 Hansen v. Meyer, (1876) 81 Ill. 321, 25 Am. Rep. 282; Fort Wayne, etc., Co. v. Board of Commissioners of Allen County, (1900) 24 Ind. App. 514, 57 N. E. 146; Cronin v. Watkins, 1 Tenn. Ch. 119.

23. Sexauer v. Wilson, (1907) 136 Ia. 357, 113 N. W. 941, 15 Ann. Cas. 54, 14 L. R. A. (N. S.) 185.

seems to be to favor the rule that the intention of the parties, as gathered from the whole instrument, is the controlling factor, and not the use or omission of mere technical words, although the absence of such word, or other words of like import, might be considered in connection with the context of the instrument in arriving at the intent of the parties in this connection.[24]

It has been said that, in the case of a covenant relating to a thing in futuro to be done upon the land, "the covenant may well be said to be annexed, not to the thing not in esse, but to the land itself upon which the thing is to be made or done, and in respect of which, and not of the thing not in esse, there is the privity of estate, which is the foundation of the running of covenants".[25] The recent decision of the Illinois supreme court in the case of *Purvis v. Shuman*[26] seems to have been based on substantially those grounds. The court after criticising the rule in *Spencer's Case*, and approving the language used in the case of *Sexauer v. Wilson*,[27] says, "Neither the *Hansen* case[28] nor *Spencer's Case* is authority for the doctrine that if the lessee is restricted to a particular use of the lands demised, requiring improvements without which the land could not be used for the special purpose, a covenant relating to such improvements does not run with the land and bind assigns not expressly named. . . . Whether there was ever any rational ground for a distinction between things which are or are not in esse when the covenant is made where they do not concern the use and enjoyment of the demised premises, there certainly is none where the covenant directly concerns such use and enjoyment." *Spencer's Case* itself does not suggest any such limitation of the rule there announced, in favor of a covenant relating to a thing not in esse which concerns the use and enjoyment of the demised premises, and it is not apparent why the rule would not apply to such a case as well as to a case where the covenant does not concern such use or enjoyment. It would seem that the Illinois court might well have entirely repudiated the distinction between things in esse

24. See Brown v. Southern Pac. Co., (1899) 36 Ore. 128, 58 Pac. 1104, 47 L. R. A. 409, 78 Am. St. Rep. 761.
25. 1 Smith's Lead. Cas., 9th Am. ed., 187.
26. (Ill. 1916) 112 N. E. 679.
27. Sexauer v. Wilson, supra.
28. Hansen v. Meyer, supra.

and things not in esse, rather than avoid the application of the rule by drawing this somewhat fine distinction.

It is submitted that in determining whether a covenant will run with the land so as to bind assigns, in the case of leases, regard should be given first of all to the question as to whether the covenant touches or concerns the land or its use or enjoyment, a question to be determined by the court upon the particular facts of the case; secondly, as to whether the parties meant to charge the land so as to bind assigns (and in this connection the use of the word "assigns" or words of like import is persuasive of such intent, although its omission should not be considered conclusive of an absence of such intent); and thirdly, as to whether the burden is one that can be imposed consistently with policy and principle.[29] If all these questions be answered in the affirmative, it would seem that the covenant would be binding upon the assignees.

RECENT CASES

BILLS AND NOTES—INDORSEMENT—MAKER RELIEVED FROM LIABILITY.—A note secured by a mortgage was assigned back to one of the makers who reissued the same to a new obligee by means of an indorsement stating that the transfer is without recourse upon either of the makers individually and that the assignee "assumes and agrees to pay the said note as between the makers thereof." The assignee assigned to another and through subsequent assignments plaintiff got possession after maturity. *Held,* makers were relieved from all personal liability by the indorsement. *Security State Bank of Rosedale v. Clarke,* (Kan. 1916) 160 Pac. 1149.

Courts are not agreed as to whether the transfer of a note to its maker before it is due effects a discharge so as to prevent further negotiation. 4 Am. & Eng. Enc. of Law 500, 501. By statute in Kansas the note is discharged when the principal debtor becomes the holder at or after maturity. G. S. 1909, Sec. 5372. But a maker to whom a note has been assigned may reissue it in such manner as to make it binding upon himself. *Currey v. Lafon,* (1908) 133 Mo. App. 163, 113 S. W. 246. In the instant case the maker issued the note so that he and his co-maker, his wife, would not be liable. That raises the interesting question whether a maker can so issue or reissue a note as not to be liable personally thereon. In the instant case, the holder received the note after maturity and with knowledge of the indorsement plainly written on the back, which was, as the court says, "a special contract, which, being shown by the indorsement, was binding upon subsequent assignees, and should be enforced according to its obvious meaning." If the note were negotiable and there could have been an innocent holder, it would seem that under the Ne-

29. Kettle River R. Co. v. Eastern Ry. Co. of Minnesota, supra.

gotiable Instruments Law there would be some liability on the part of the maker as an assignor. N. I. L. Secs. 38, 39, 40. But that Law does not apply to non-negotiable paper, and the result is that a note has been reissued with no liability on the maker.

BROKERS—LICENSES — ILLEGAL CONTRACTS — ORDINANCES — CONSTRUCTION.—An ordinance required merchandise brokers to obtain a license and made the carrying on of the business without a license a misdemeanor, punishable by fine. An unlicensed broker brought an action for commissions for sales effected. *Held,* he may maintain the action. *Reichardt v. Hill, et al.,* (C. C. A., sixth circuit, 1916) 236 Fed. 817.

The court in the principal case concedes that if the object of the ordinance was to render illegal the contracts made by the broker, there could be no recovery under the facts; but holds that such is not the case; that the ordinance in effect lays a tax on persons engaging in such business, and that no question of public policy is involved because the ordinance is merely a revenue law. The decision is based on the law of Missouri. *Tooker v. Duckworth,* (1904) 107 Mo. App. 231, 80 S. W. 963. The same rule has been adopted in many other jurisdictions. *Walker v. Baldwin,* (1906) 103 Md. 352, 63 Atl. 362; *Larned v. Andrews,* (1871) 106 Mass. 435, 8 Am. Rep. 346; *Jones v. Berry,* (1856) 33 N. H. 209; Ruckman v. Bergholz, (1874) 37 N. J. L. 437. But the courts are not agreed. Many cases not distinguishable on the facts hold that to allow a broker to recover compensation in such case would be permitting him to profit by an act which he is prohibited from doing, and that the claim is based on an illegal foundation. *Hustis v. Pickands,* (1888) 27 Ill. App. 270; *Pratt v. Burdon,* (1897) 168 Mass. 596, 47 N. E. 419; *Buckley v. Humason,* (1892) 50 Minn. 195, 52 N. W. 385, 16 L. R. A. 423. It has been stated that if the object of the law is primarily to prevent improper persons from engaging in certain trades, the contracts are void. *Randall v. Tuell,* (1897) 89 Me. 443, 36 Atl. 910, 38 L. R. A. 143. But very few ordinances of this kind do not have some element of the protection of the public. Whether the sale or contract executed by a broker who acts without a license contrary to law is valid and binding upon the parties other than the broker would again depend on the jurisdiction. According to the cases agreeing with the instant case the parties would be bound. It is not certain just what would be the situation in other jurisdictions, as in most of the decided cases the broker was the plaintiff. It is stated to be the general rule that where a statute makes a particular business unlawful generally, or for unlicensed persons, any contract made in such business by one not authorized is void. Bishop, Contracts, second ed. Sec. 472; *Buckley v. Humason,* supra, semble. But Illinois has held that the fact that the broker is transacting business without a license does not invalidate the contract negotiated by him. *Murray v. Doud & Co.,* (1897) 167 Ill. 368, 47 N. E. 717, 59 Am. St. Rep. 297. Yet the same court has held that the broker cannot recover compensation. *Hustis v. Pickands,* supra.

CONSTITUTIONAL LAW—PRIVILEGES OF CITIZENS OF ANOTHER STATE—RIGHT TO MAINTAIN ACTION—ACTION FOR PERSONAL INJURY INFLICTED IN ANOTHER STATE.—Plaintiff, a resident of Wisconsin, brought an action in Minnesota to recover for injuries received on defendant's line of railway in the former state. The defendant sought to restrain the plaintiff from further prosecuting his action in Minnesota. The Minnesota court had jurisdiction of the parties and of the subject-matter. *Held*, the courts of Minnesota cannot decline jurisdiction. *Davis v. Minneapolis, etc., Ry. Co.*, (Minn. 1916) 159 N. W. 1084.

The question involves the constitutional right of a citizen of the United States, not a resident of a certain state, to sue in its courts a person who is also a non-resident, upon a cause of action not arising therein, when the cause of action is one upon which a resident of that state would be allowed to sue the same defendant in its courts. It has frequently been decided that such non-resident has such a constitutional right. *Cofrode v. Circuit of Wayne Co.*, (1890) 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511; *State ex rel. Prall v. District Court*, (1914) 126 Minn. 501, 148 N. W. 463; *Eingartner v. Illinois Steel Co.*, (1896) 94 Wis. 70, 68 N. W. 664, 34 L. R. A. 503, 59 Am. St. Rep. 859; *Deatrick's Adm'r v. State Life Ins. Co.*, (1907) 107 Va. 602, 59 S. E. 489. The federal Supreme Court has never directly determined the question, but dicta may be found in several of its decisions, and it is upon these dicta that the foregoing decisions are founded. *Corfield v. Coryell*, (1823) 4 Wash. C. C. 371, 380; *Ward v. Maryland*, (1870) 12 Wall. 418, 430; *Chambers v. B. & O. Ry. Co.*, (1907) 207 U. S. 142, 28 S. C. R. 34, 52 L. Ed. 143, 148, 149. A contrary doctrine is maintained by the New York courts. That state has a statute respecting suits against foreign corporations which discriminates between residents and non-residents. Code of Civil Procedure, Sec. 1780. The New York courts hold this statute not in conflict with the privileges and immunities clause of the federal constitution. *Adams v. The Penn Bank of Pittsburg*, (1885) 35 Hun (N. Y.) 393; *Robinson v. Ocean Steam Navigation Co.*, (1889) 112 N. Y. 315, 19 N. E. 625, 2 L. R. A. 636; *Hoes v. New York, etc., Ry. Co.*, (1903) 173 N. Y. 435, 66 N. E. 119. These cases advance two grounds for their position. The first is that the privileges and immunities clause is not applicable to this class of cases. Cases cited in support of this ruling are cases adopting the rule that discriminations in favor of residents in matters not touching fundamental rights as citizens are not in violation of the federal constitution. *McCrady v. Virginia*, (1876) 94 U. S. 391, 24 L. Ed. 248. But that case turned upon the point that the privileges and immunities clause does not vest in citizens of one state any interest in the common property of citizens of another state. The federal Supreme Court has said that the right to sue and defend in the courts of a state is an essential privilege of citizenship. *Chambers v. B. & O. Ry. Co.*, supra. The other ground for the New York decisions is that the discrimination is between residents and non-residents, and not between citizens. The distinction seems unsubstantial. It is true that citizenship and residence are not identical. There are citizens who are not residents, and the converse. But as applied to the mass of inhabitants the terms are interchangeable. An exclusion of non-residents would be

certain to exclude citizens of other states. "A citizen of the United States, residing in any state of the Union, is a citizen of that state." Marshall, C. J. in *Gassies v. Ballon,* (1832) 6 Pet. 761, 8 L. Ed. 573.

The question is of peculiar interest to Minnesota lawyers at this time, for the Minnesota State Bar Association has provided for the introduction of a bill in the present session of the legislature which, in effect, would limit the jurisdiction of the courts to cases where one party or the other is a resident of the state, or the cause of action arose within the state, except where the cause of action is upon a contract made within the state or involving real or personal property therein. Whatever may be said of the desirability of such a statute, it would seem, in the light of the decisions of the Minnesota court and the language of the federal Supreme Court, that its constitutionality would be doubtful.

CONTRACTS—UNILATERAL—CONSIDERATION.—Plaintiff's testate transferred to defendants certain shares of corporate stock in exchange for defendant's promise to pay over to plaintiff's testate dividends received from said stock to the amount of the par value thereof and interest. Defendants reserved the right but assumed no obligation to pay from other sources. Plaintiff seeks to set aside the transfer for lack of consideration. *Held,* the plaintiff cannot recover. *Peavey v. Wells,* (Minn. 1917) 161 N. W. 508.

The district court of Hennepin County specifically found that there was no fraud, mistake, undue influence, or sharp dealing in the transaction and set aside the transfer on the sole ground that there was no consideration to support it. The theory of the trial court was that property may be transferred in two ways only: first, by way of gift, and, secondly, pursuant to a contract. Since it was not disputed that no gift was intended, the trial court concluded that it was necessary to find a valid contract; and found that the defendant made no promise to collect the dividends, to assume any responsibility, or to give the plaintiff's testate anything to which he was not already legally entitled; and that, while the defendants might possibly have actually assumed certain additional liabilities and duties by becoming owners, yet these were not assumed in exchange for testator's transfer. The court then concluded that there was no consideration to support a contract and, hence, there was no valid transfer. It may be conceded that this reasoning would be valid had the agreement for the transfer remained unexecuted on both sides. But, as soon as the testator transferred the stock to the defendants, the bilateral contract was transformed into a unilateral contract and the only unexecuted promise was that of the defendants. For this promise there was, of course, abundant consideration in the transfer of the stock to them. For the transfer of the stock no consideration was necessary, for it is elementary that a consideration is necessary to support a promise but not to support an act, the doctrine of consideration being, at its basis merely one of policy against the enforcement of gratuitous promises. This proposition is so elementary that but few decisions can be found dealing with it. In fact, the principal case seems to be one of first impression upon the exact point although there are a few decisions from which that conclusion might be

readily deduced. *Dean v. Nelson,* (1869) 10 Wall. 158, 19 L. Ed. 926; *White v. Cooper Co.,* (1903) 7 Ohio Cir. Ct. (N. S.) 114, affirmed without opinion in 72 Ohio St. 615, and on rehearing in 72 Ohio St. 691; *Fowler v. Fowler,* (1905) 135 Fed. 405, affirmed in 140 Fed. 986, 71 C. C. A. 344.

CORPORATIONS—STOCKHOLDER'S LIABILITY—EXTENSION OF TIME.—An action was brought against the transferor of stock in a corporation to enforce his liability under Art. 10 Sec. 3 of the state constitution for an indebtedness which existed at the time of the transfer. *Held,* defendant was in the position of a surety and therefore would have been released by an extension of time granted by the creditor to the corporation had he shown that he did not consent to such extension. *Way v. Mooers,* (Minn. 1917) 160 N. W. 1014.

Suretyship, in its broadest sense, is the relation occupied by a person secondarily liable for the payment of money, or the performance of an act, by another. Such liability is collateral, in the sense that the surety is liable in the event of the failure of such other person to pay or perform, his liability being terminated at once if such other person does pay or perform. *Smith v. Shelden,* (1876) 35 Mich. 42, 24 Am. Rep. 529; *Wendlandt v. Sohre,* (1887) 37 Minn. 162, 33 N. W. 700. In a stricter sense a surety is one bound with his principal by the same instrument, executed at the same time and on the same consideration. Brandt, Suretyship third ed. Sec. 2. But whether the term is used in the narrower or broader sense, the rights of the surety so far as they are dependent upon the relation of creditor and principal are the same. *Jamieson v. Holm,* (1896) 69 Ill. App. 119. Thus, a release of the principal will release the surety in either case. *First National Bank of Hastings v. Rogers,* (1868) 13 Minn. 407, 97 Am. Dec. 239; *Paine v. Jones,* (1879) 76 N. Y. 274. Likewise, an extension of time to the principal without the consent of the surety releases the latter. *Union Mutual Life Ins. Co., v. Hanford,* (1891) 143 U. S. 187, 12 S. C. R. 437, 36 L. Ed. 118; *Allis v. Ware,* (1881) 28 Minn. 166, 9 N. W. 666; *Ducker v. Rapp,* (1876) 67 N. Y. 464. The suretyship relation may be created by operation of law, as where a partner assumes the liabilities of the retiring members of the firm. *Wendlandt v. Sohre,* supra; *Leithauser v. Baumeister,* (1891) 47 Minn. 151, 49 N. W. 660; *Sizer v. Ray,* (1881) 87 N. Y. 220. But some authorities hold that in such case the creditor must consent. *Rawson v. Taylor,* (1876) 30 Ohio St. 389. And where the vendee of mortgaged land assumes and agrees to pay the mortgage, the mortgagor becomes a surety. *Flagg v. Geltmacher,* (1881) 98 Ill. 293; *Union Mutual Life Ins. Co. v. Hanford,* supra. Sometimes the land or property itself may stand as surety. *Travers v. Dorr,* (1895) 60 Minn. 173, 62 N. W. 269. A stockholder, before he transfers his stock, is a surety for debts contracted while a stockholder, the constitution (or statute) making him such. *Shearer v. Christy,* (Minn. 1917) 161 N. W. 498, semble. And, as here, his transfer does not relieve him of his suretyship liability nor destroy the relation. *Pacific Elevator Co. v. Whitbeck,* (1901) 63 Kan. 102, 64 Pac. 984; *Hanson v. Donkersley,* (1877) 37 Mich. 184; *Harpold v. Stobart,* (1889) 46 Ohio St. 397, 21 N. E. 637, 15 Am. St. Rep. 618; *Dauchy v. Brown,* (1852) 24

Vt. 196. Minnesota cases have dicta to the same effect. *Willis v. Mabon,* (1892) 48 Minn. 140, 156, 50 N. W. 1110, 16 L. R. A. 281; *Minneapolis Baseball Co. v. City Bank,* (1896) 66 Minn. 441, 444, 69 N. W. 331. Some courts have expressly refused to hold a stockholder a surety. *Mokelumne Hill Canal & Mining Co. v. Woodbury,* (1859) 14 Cal. 265; *Appeal of Aultman et al.,* (1881) 98 Pa. St. 505. But it would seem that these cases are wrong, for contribution is allowed between stockholders. *Putnam v. Misochi,* (1905) 189 Mass. 421, 75 N. E. 956. And, stockholders are relieved by the statute of limitations. *Pacific Elevator Co. v. Whitbeck,* supra. Such attributes of stockholders' liability indicate a suretyship relation. If that be true, it would seem to follow that an extension of time to the corporation without the consent or knowledge of the stockholder would release the latter. *Hanson v. Donkersley,* supra; contra, *Harger v. McCullough,* (1846) 2 Denio (N. Y.) 119, 123. It would seem then, that a holding that a stockholder is in the position of a surety, and that he is released from his statutory liability by an extension of time to the corporation can be justified. On the other hand, the doctrine of release of sureties is highly technical. It originated out of consideration for the gratuitous nature of the surety's promise. *N. K. Fairbank Co. v. American Bonding & T. Co.,* (1902) 97 Mo. App. 205, 70 S. W. 1096. It has been carried to the extreme length of holding the surety released by a change which could operate only to his benefit. *Board of County Commissioners v. Greenleaf,* (1900) 80 Minn. 242, 83 N. W. 157. But the courts, by refusing to extend the doctrine to cases of compensated sureties, have indicated a reluctance to broaden the field of its application. *Lakeside Land Co. v. Empire State Surety Co.,* (1908) 105 Minn. 213, 117 N. W. 431, 33 L. R. A. (N. S.) 513, note. And it might well be argued that so technical a doctrine should never be applied to new situations such as that found in the principal case.

EVIDENCE—OPINION EVIDENCE—EXISTENCE OF AGENCY.—An action was brought for injuries caused by the breaking of a wheel of an automobile on the ground that the defendant, from whose agent plaintiff alleged he purchased the automobile, did not use proper material in its construction. The alleged agent was allowed to testify over objection that he acted as sub-agent of defendant in making the sale. *Held,* the admission of the testimony constituted prejudicial error because it was a mere conclusion of the witness, with the alternative reason that it violated the best evidence rule. *Ford Motor Co. v. Livesay,* (Okla. 1916) 160 Pac. 901.

As a general rule a witness must state facts, not opinions. *Reid v. Ladue,* (1887) 66 Mich. 22, 32 N. W. 916, 11 Am. St. Rep. 462. The danger involved in receiving the conclusion of a witness is that the jury may substitute it for their own. *Hames v. Brownlee,* (1879) 63 Ala. 277, 278. It is well recognized that the opinion of an expert is admissible. And opinion evidence will be received when it is the best that can be had or the circumstances cannot be described. The usual difficulty is in deciding what is an opinion and what is a fact. *Healy v. Visalia, etc., R. Co.,* (1894) 101 Cal. 585, 589, 36 Pac. 125. It is said that the line between the two is to be drawn according to which will be most helpful to the jury,

and the two may be so blended that it is necessary to admit or reject both. *Graham v. Pennsylvania Co.*, (1891) 139 Pa. St. 149, 21 Atl. 151, 12 L. R. A. 293. Constituent facts may lead to a conclusion which is substantially one of fact and part of the common stock of knowledge. *State v. Buchler*, (1890) 103 Mo. 203, 15 S. W. 331. Conclusions or opinions may be either of fact or of law. As examples of the former, a witness has been permitted to state that blood was fresh. *People v. Loui Tung*, (1891) 90 Cal. 377, 27 Pac. 295. That a liquor was lager beer. *Commonwealth v. Moinehan*, (1886) 140 Mass. 463, 5 N. E. 259. Same as to whisky. *Marschall v. Laughran*, (1892), 47 Ill. App. 29. Though based upon complex details, the statement that one is a foreman has been held susbstantially one of fact. *Southern Cotton-Oil Co. v. Wallace*, (1899) 23 Tex. Civ. App. 12, 54 S. W. 638. Likewise a statement as to the system of a church government. *Bird v. St. Mark's Church*, (1883) 62 Ia. 567, 17 N. W. 747. That a person held a certain public office. *State v. Haskins*, (1899) 109 Ia. 656, 80 N. W. 1063, 77 Am. St. Rep. 560, 47 L. R. A. 223. Numerous impressions may be blended into one collective or composite fact, as that there was "an unusually hard jerk". *Birmingham Mineral R. Co. v. Wilmer*, (1892) 97 Ala. 165, 11 So. 886. That there was "more force than necessary". *Louisville, etc., R. Co. v. Watson*, (1890) 90 Ala. 68, 8 So. 249. A bookkeeper may state the result of an examination of voluminous books and give summaries and balances. *State v. Clements*, (1901) 82 Minn. 434, 85 N. W. 229. Conclusions of law are generally held inadmissible. So, as in the principal case, it has been held that a witness may not state that he acted as an agent for another, or that another acted as agent for a third person. *Goddard & Sons v. Garner Bros.*, (1895) 109 Ala. 98, 19 So. 513; *Young v. Newark Fire Ins. Co.*, (1890) 59 Conn. 41, 22 Atl. 32; *Southern Home Building Ass'n v. Winans et al.*, (1900) 24 Tex. Civ. App. 544, 60 S. W. 825; *McCornick v. Queen of Sheba Mining Co.*, (1900) 23 Utah 71, 63 Pac. 820. Or that he is a partner. *Alexander v. Handley*, (1892) 96 Ala. 220, 11 So. 390; *Maurer v. Miday et al.*, (1889) 25 Neb. 575, 41 N. W. 395. Where the witness had set forth all the facts, he was allowed to conclude that he was an agent. *Talladega Ins. Co. v. Peacock*, (1880) 67 Ala. 253. A witness was allowed to state that a business was a partnership, the other side then being allowed to cross-examine. *McGrew v. Walker*, (1850) 17 Ala. 824. And that certain men were members of a partnership. *Gates v. Manny*, (1869) 14 Minn. 13, 21; *Rosenbaum v. Howard*, (1897) 69 Minn. 41, 71 N. W. 823. It is to be noted that the courts are more liberal in admitting opinions when the matter is but collaterally involved. *Wimber v. Iowa Central R. Co.*, (1901) 114 Ia. 551, 87 N. W. 505; *Paul v. Conwell*, (1893) 51 Ill. App. 582. A witness has been allowed to state that another person was an agent of a third party. *Huesinkveld v. St. Paul Fire & Marine Ins. Co.*, (1898) 106 Iowa 229, 76 N. W. 696; *Service v. Deming Investment Co.*, (1899) 20 Wash. 668, 56 Pac. 837. It was held that a statement by a witness that he was "working for" another in selling a horse was not prejudicial error, if error at all. *Jones v. Burgess*, (1914) 124 Minn. 265, 144 N. W. 954. The liberal view that opinion evidence should be excluded only when it would not be helpful to the jury has been approved. *Jones v. Burgess*, supra; *Hardy v. Merrill*, (1875) 56 N. H. 227, 241, 22

Am. Rep. 441. When an opinion is admitted it may be held without prejudice if the facts show that the conclusion was well founded. *People's Bank of Minneapolis v. Howes,* (1896) 64 Minn. 457, 67 N. W. 355; *Larson v. Lombard Investment Co.,* (1892) 51 Minn. 141, 53 N. W. 179. The decision of the principal case is supported by authority, yet the views of text writers and the trend of decisions would justify a contrary holding.

HUSBAND AND WIFE—HUSBAND'S PERSONALTY—RIGHT TO TRANSFER. —A husband conveyed an interest in certain leasehold property to his mother in order to secure the property to his daughter instead of to his wife, with whom he had had several disagreements. After his death, the wife brought an action against the mother, the grantee, to have the deed set aside claiming it was in fraud of her rights. *Held,* the deed must be sustained although made to defeat the wife's claims. *Poole v. Poole,* (Md. 1916) 99 Atl. 551.

At common law a husband had a right against everyone save a creditor to dispose of his personalty in any manner he thought proper during his lifetime, and the wife had no interest in such property during her coverture except insofar as the husband might be liable for her support and maintenance during his life. *Cameron v. Cameron,* (1848) 10 Smed. & M. (Miss.) 394, 48 Am. Dec. 759; *Holmes v. Holmes,* (1832) 3 Paige (N. Y.) 363. This common law rule has been considerably modified. When a gift made by the husband is only colorable, i. e., when it is a gift in form, but not in fact, and it is a mere contrivance by which the husband retains the use and benefit of the property during his life, intending to deprive the wife of her distributive share upon his death, the gift is invalid. *Smith v. Smith,* (1896) 22 Colo. 480, 46 Pac. 128, 34 L. R. A. 49; *Brown v. Crafts,* (1903) 98 Me. 40, 56 Atl. 213. In their attempts to avoid the frequently harsh results of the common law rule, courts have advanced doctrines which are difficult to sustain in order to invalidate the transfer of the personalty. One court held that a wife, because she is a wife, has a tangible and valuable interest in her husband's estate, real and personal, springing from the marriage itself, which the law recognizes and protects during coverture. *Nichols v. Nichols,* (1889) 61 Vt. 426, 18 Atl. 153. Another court held that a wife's distributive share in the personalty of the husband could not be defeated by a transfer of title as a mere device for that purpose while he keeps absolute dominion and enjoyment of the property during his life, because a wife is within the class of "creditors and others," in a statute against fraudulent conveyance. *Walker v. Walker,* (1890) 66 N. H. 390, 31 Atl. 14. But the great weight of authority is to the effect that the wife has no vested interest in her husband's personal property. *Robertson v. Robertson,* (1905) 147 Ala. 311, 40 So. 104, and cases cited therein. The privilege of alienating one's personal property during coverture is not one sided. Since the passing of the statutes allowing a married woman to dispose of her property during her coverture, she is free to dispose of her personalty as she may see fit and deprive her husband of his distributive share. *Wright v. Holmes,* (1905) 100 Me. 508, 62 Atl. 507; *Marshall v. Berry,* (1866) 13 Allen (Mass.) 43.

The weight of authority, accordingly, is with the principal case, to the effect that the law places no restriction on the husband's power to dispose of his personal property by gift, or otherwise, though his wife is deprived of her distributive share, providing the transaction is not colorable, or purely a fraud on the rights of the wife. As one court has stated it, "he may even beggar himself and his family if chooses to do such an act of folly." *Lines v. Lines,* (1891) 142 Pa. St. 149, 21 Atl. 809. It is submitted that the principal case is also supportable on reasoning and policy. Legislatures generally have limited the right of a spouse to dispose of his or her realty without the consent of the other spouse, but have not so provided as regards personalty. This shows more than negatively an intent to leave the common law rule unchanged. Judicial encroachment on the logical application of the common law rule may ultimately involve the courts in hopeless difficulty, if every grant of personalty is to be scrutinized and the doctrine adjusted to meet new situations as they come up. Special caution is needed here as it works harshly in some cases, and it is trite but true that hard cases make bad law.

HUSBAND AND WIFE—NECESSARIES—WHAT CONSTITUTES.—An action was brought by an attorney to recover from the husband for services rendered to the wife in divorce proceedings instituted by her, and which she later dismissed. *Held,* if the facts were such that the wife was entitled to the relief asked, the attorney may recover. *Maddy v. Prevulsky,* (Ia. 1917) 160 N. W. 762.

Counsel is entitled to recover of the husband reasonable fees for services rendered the wife in a suit against the husband for divorce a mensa et thoro, if it be made to appear affirmatively that the suit was reasonably and justifiably instituted. *McCurley v. Stockbridge,* (1884) 62 Md. 422, 50 Am. Rep. 229; *Peck v. Marling's Adm'r,* (1883) 22 W. Va. 708, semble. But where there is statutory provision for allowance by a divorce court of the reasonable expenses of the wife in the prosecution or defense of an action for divorce, the husband is not liable in an action by the wife's attorney for counsel fees in a separate action. *Yeiser v. Lowe,* (1897) 50 Neb. 310, 69 N. W. 847; *Zent v. Sullivan,* (1907) 47 Wash. 315, 91 Pac. 1088, 15 Ann. Cas. 19, 13 L. R. A. (N. S.) 244; *Clarke v. Burke,* (1886) 65 Wis. 359, 27 N. W. 22, 56 Am. Rep. 631. On the question of the liability of the husband for legal services rendered the wife in prosecuting for a divorce a vinculo matrimonii, in the absence of statute, as in the principal case, the courts are not agreed. In this country, by the prevailing view, the common law liability of the husband does not cover charges for such legal services. *Shelton v. Pendleton,* (1847) 18 Conn. 417; *Dow v. Eyster,* (1875) 79 Ill. 254; *Wolcott v. Patterson,* (1894) 100 Mich. 227, 58 N. W. 1006, 43 Am. St. Rep. 456, 24 L. R. A. 629. These charges are not considered necessaries, because necessaries are to be provided by the husband for the wife to sustain her as his wife and "not to provide for her future and ultimate convenience, or the supposed happiness of a divorced woman." *Morrison v. Holt,* (1861) 42 N. H. 478, 80 Am. Dec. 120. The English and some American courts have held the husband liable for legal services as for necessaries, when the wife prose-

cuted a well grounded or successful proceeding. *Stocken v. Pattrick,* (1873) 29 L. T. R. 507; *Naumer v. Gray,* (1899) 41 App. Div. 361, 58 N. Y. Supp. 476; *Varn v. Varn,* (Tex. Civ. App. 1910) 125 S. W. 639. The liability in these cases is limited to actions brought in good faith, and where there was no reasonable or probable cause for the action or when the wife acted from motives of malice, the husband is not liable. *McLean v. Randell,* (Tex. Civ. App. 1911) 135 S. W. 1116. The doctrine of the principal case follows the minority rule. This is open to the objection that in order to prove that the action by the wife was well grounded, the attorney must air the domestic grievances, and this may conceivably lead to further domestic discord. But that such conjectural results are not controlling is shown by the more recent cases, which are tending to abandon the absolute rule of the non-liability of the husband.

INSURANCE — MUTUAL BENEFIT — WARRANTIES — MATERIALITY. — The plaintiff secured a policy of insurance in a mutual benefit association, issued on the assessment plan. In the application, the plaintiff made an untrue statement as to an immaterial matter and warranted his statements to be true. Plaintiff suffered an accident covered by the policy, but the company refused to pay on the ground of breach of warranty. *Held,* such a warranty, if false, will defeat the policy taken on the assessment plan in a beneficial association, regardless of its materiality. *Hill v. Business Men's Accident Ass'n,* (Mo. 1916) 189 S. W. 587.

The doctrines of warranty and representation as applied to insurance law were developed during the time of Lord Mansfield. Under his decisions, the following rules were established. A representation is a statement which induces the contract of insurance, but is collateral to it and forms no part of the contract. Representation may be either promissory or affirmative. A promissory representation will avoid a policy of insurance only if it is false and fraudulent. *Flinn v. Tobin,* (1829) Moody & M. 367. An affirmative representation will avoid the policy when the fact is material and false. *Maynard v. Rhode,* (1824) 1 Car. & P. 360. A warranty is a part of the contract and must be in writing included in the policy, or expressly incorporated in it. Since a warranty is an essential term of the contract by agreement of the parties, it must be performed as a condition precedent to recovery, whether material or immaterial. Vance, Insurance, p. 287. A representation need be only substantially true. Joyce, Insurance, Sec. 1924. A warranty must be strictly or literally true. Joyce, Insurance, Sec. 1970. These doctrines as developed by Lord Mansfield have been recognized as the settled rules of the common law both in England and in America. *Anderson v. Fitzgerald,* (1853) 4 H. L. C. 484; *Jeffries v. Life Ins. Co.,* (1874) 22 Wall. (U. S.) 47, 22 L. Ed. 833. Whether a warranty or representation is intended is to be determined from the whole contract of insurance, even though there be words expressly stating that a warranty is intended. *Fitch v. American Popular Life Ins. Co.,* (1875) 59 N. Y. 557, 17 Am. Rep. 372. The abuse to which American insurance companies subjected the doctrine of warranties often brought about unjust and seemingly absurd results. After the decision of *Jeffries v. Life Ins. Co.,* supra, in which the court held that a warranty that the insured was single when in

fact he was married, would avoid the policy, even though it did not affect the risk, the legislature of Missouri, where the case had its origin, enacted a statute abolishing the strict rule as to warranties in life insurance. Mo. Rev. St. 1909, Sec. 6937. In many states warranties in insurance policies have been placed upon substantially the same basis as representations. Minn. G. S. 1913, Secs. 3300, 3477 (4). The Minnesota statute has been construed to provide that a material representation made in bad faith avoids the policy, although a material representation innocently made will not avoid the policy unless it increases the risk of loss. In the last case the policy will be avoided regardless of the intention with which the representation was made. *Johnson v. National Life Ins. Co.,* (1913) 123 Minn. 453, 144 N. W. 218. Since the state of Missouri was among the first to abolish the strict rule as to warranties, it may seem surprising that it should apply the common law doctrine to policies issued by insurance companies doing business on the assessment plan. This, however, may be explained by the oversight of the Missouri legislature in its piecemeal insurance legislation, common to a good many states. See *Aloe v. Fidelity Mutual Life Ass'n,* (1901) 164 Mo. 675, 55 S. W. 993. Through this omission, the court in the instant case was obliged to hold that assessment companies were excluded from the provisions of the statute covering warranties.

JUDGMENT—FOREIGN JUDGMENTS—CONSTITUTIONAL PROVISION—FULL FAITH AND CREDIT CLAUSE.—In a divorce action, an Illinois court, having personal jurisdiction of both parties, granted a divorce, issued a decree for alimony, and directed that the husband convey Wisconsin land to the wife in satisfaction thereof. The wife then brought suit in Wisconsin to set aside an alleged fraudulent conveyance of said land by the husband to third parties during the pendency of the divorce action, basing her action on the Illinois decree. *Held,* the Illinois decree is entitled to full faith and credit; the conveyance by the husband is set aside; and the land is given to the plaintiff. *Mallette v. Carpenter,* (Wis. 1916) 160 N. W. 182.

The question involved is whether a decree of a court of one state ordering a party to convey land in another state must be recognized by the second under the full faith and credit clause. We have, first, the general proposition that the courts of one state cannot affect the titles to land in another state. The control of real estate is solely within the sovereign powers of the state wherein it is situated. *Watts v. Waddle,* (1832) 6 Pet. (U. S.) 389, 8 L. Ed. 437. On the other hand, however, it is well established that a court of equity, having full jurisdiction of all the parties, may decree that land situated in another state be conveyed. The reason is that equity acts in personam. *Massie v. Watts,* (1810) 6 Cranch. (U. S.) 148, 3 L. Ed. 181. But where the parties attempt to enforce the decree in the state where the land is situated these two seemingly elementary propositions come into conflict by reason of the full faith and credit clause of the federal constitution. If the decree ordering the conveyance may be construed as merely collateral to the substance of the suit, in the nature of execution, there is no difficulty in avoiding the conflict. It is then remedial, a procedure adopted to effect the essence of the decree. A sister state is under no obligation to recognize the means which prevails in the original state for carrying out its judgment. Thus,

where a New York court ordered the complainant's husband to execute a mortgage upon New Jersey lands as security for the payment of alimony, the New Jersey court refused to compel the husband to execute the mortgage, Justice Garrison assigning for his reason that the decree was merely ancillary to the judgment for money. *Bullock v. Bullock,* (1894) 52 N. J. Eq. 561, 30 Atl. 676, 27 L. R. A. 213, 46 Am. St. Rep. 528. Again, where a defendant in another state was ordered to give a bond for the payment of alimony, a New York court recognized the decree as far as it allowed alimony, but refused to compel the defendant to give the bond. In this the court was sustained by the United States Supreme Court, on the ground that, "The provisions for bond, sequestration, receiver, and injunction, being in the nature of execution and not of judgment, could have no extra-territorial operation." *Lynde v. Lynde,* (1900) 181 U. S. 183, 21 S. C. R. 555. In the instant case the conveyance was ordered in payment of a fixed amount of alimony. Perhaps, had the court been anxious to avoid compelling the conveyance, the decree might have been construed as procedural, as in the cases last cited. It has been maintained that the foreign decree is determinative of the equities of the parties, and, just as in the case of equities arising out of contract, such equities may be interposed as a defense or used as a basis for affirmative relief in another state. *Dunlap v. Beyers,* (1896) 110 Mich. 109, 67 N. W. 1067; *Burnley v. Stevenson,* (1873) 24 Ohio St. 474, 15 Am. Rep. 621. It happened that in those cases the equities declared were based upon broad principles recognized in all jurisdictions. Where the lex rei sitae would not have granted similar relief, there is more serious difficulty. The lex rei sitae should govern, but the court which rendered the decree has applied its own law. Must the court of the state in which the land lies recognize this decree? If it must, then the foreign court is seriously interfering with the soverign rights of another state with regard to land within the boundaries of the latter. It might be said that the full faith and credit clause demands that the decree be recognized only if it be given according to the lex rei sitae. The difficulty with such a proposition is that the Supreme Court of the United States has ruled that a sister state cannot look behind a judgment to see whether her law has been applied correctly. *Fauntleroy v. Lum,* (1908) 210 U. S. 230, 28 S. C. R. 641, 52 L. Ed. 1039. On the above facts, viz., where the equities were not determined as they would have been under the lex rei sitae, the Supreme Court held that a decree ordering a conveyance need not be recognized. *Fall v. Eastin,* (1909) 215 U. S. 1, 30 S. C. R. 3, 23 L. R. A. (N. S.) 924; see also 5 Ill. L. Rev. 1. It would seem that the full faith and credit clause was not intended to interfere with the sovereign rights of states with regard to their land even by this indirect method; and that a court of the state wherein the land is located need not recognize equities declared by a foreign court, although, in order to work out substantial justice, it may recognize them on the ground of comity. In the principal case it is pointed out that the law of both states was the same. Therefore, there could be no reasons of policy for refusing to extend comity to the foreign decree. Insofar as the court felt itself obligated under the full faith and credit clause, it adopted an alternative ground for its decision which seems of questionable soundness.

LANDLORD AND TENANT—ANTICIPATORY BREACH OF LEASE—DISSOLUTION OF CORPORATION LESSEE—BANKRUPTCY.—A corporation holding a lease, before the commencement of its term voted to dissolve and had a state receiver appointed. The receiver repudiated the lease; bankruptcy proceedings against the corporation ensued; the lessor filed his claim for damages. *Held,* the dissolution of the corporation and the repudiation of the lease amounted to an anticipatory breach, giving the lessor a provable claim. *In the Matter of Mullings Clothing Co.,* (C. C. A. second circuit, 1916) 238 Fed. 58, 38 A. B. R. 189.

As the breach was caused by the dissolution and the repudiation of the lease by the receiver, and not by the bankruptcy, this decision does not touch the question whether the bankruptcy of the lessee is an anticipatory breach of the covenant to pay rent, so as to make a claim provable in bankruptcy proceedings, and a debt barred by the discharge. This question hinges upon the construction to be given to Sec. 63a of the Bankruptcy Act of 1898, under which debts may be proved that are "(1) a fixed liability . . . absolutely owing at the time of the filing of the petition; . . . (4) founded upon a contract." It is urged that the bankruptcy of the tenant operates to sever the relation of landlord and tenant; that after the adjudication there is no obligation on the part of the tenant growing out of the lease, and no rent can accrue after the adjudication in such a way as to make it a debt of the bankrupt. *In re Jefferson,* (1899) 93 Fed. 948, 2 A. B. R. 206. *In re Hays,* (1902) 117 Fed. 879, 9 A. B. R. 144. But it is held that the bankruptcy of the tenant does not sever the relation of landlord and tenant, and that the rent obligation is not discharged as to future rent unless the trustee elects to retain the lease as an asset. Rent is a sum stipulated to be paid for the use and enjoyment of land; the occupation of the land is the consideration for the rent. Consequently, a covenant to pay rent creates no debt until the time stipulated for the payment arrives. Any number of acts—eviction, untenantability, release, novation, etc.,—may occur, after which there is no further liability for rent. The obligation upon the rent covenant is entirely contingent and therefore not provable in bankruptcy. *Watson v. Merrill,* (1905) 136 Fed. 359, 14 A. B. R. 453, 69 C. C. A. 185, 69 L. R. A. 719; *In re Roth,* (1910) 181 Fed. 667, 24 A. B. R. 588, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270; *In re Arnstein,* (1899) 101 Fed. 706, 4 A. B. R. 247; *In re Mahler,* (1900) 105 Fed. 428, 5 A. B. R. 453. In all the above cases it was urged unsuccessfully that the bankruptcy of the lessee constituted a breach of the contract and made the claim for future rent provable. The principal case, while approving the decision in the *Roth Case,* supra, holds that the dissolution of the corporation, etc., prior to the bankruptcy proceedings, gave the lessor a claim for damages provable in bankruptcy. It is not easy to perceive a distinction between an anticipatory breach caused by dissolution under the state law, and a similar breach caused by bankruptcy. The Supreme Court of the United States has settled the rule that "where a party bound by an executory contract repudiates his obligations or disables himself from performing them before the time of performance, the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an

action at once for the damages caused by such anticipatory breach." *Central Trust Co. v. Chicago Auditorium Asso.*, (1916) 240 U. S. 581, 36 S. C. R. 412. To this rule the court states there are exceptions; and referring to the landlord and tenant cases, it says that they are distinguishable because of the "diversity betweene duties which touch the realty, and the meere personalty"—quoting Co. Litt., 292, b, Sec. 513. This appears to be a very shadowy distinction, but the result of the cases seems to leave the lessee liable for the rent accruing after his bankruptcy notwithstanding his discharge. For full discussion of the subject of anticipatory breach of contract, see 1 MINNESOTA LAW REVIEW, 163.

PAYMENT—RECOVERY—MISTAKE OF FACT—QUASI CONTRACT.—One O'Donnell, a swindler, representing himself as the agent of A to negotiate a loan on A's behalf, borrowed from defendant $2,500, giving as security therefor a note and mortgage of land owned by A, such note and mortgage purporting to have been executed by A, but in fact having been forged by the swindler. The swindler, subsequently, making the same false representations as to his authority, arranged with plaintiff for a loan of $5,000 upon the security of the same land, in pursuance of which plaintiff gave his check for $2,500 to defendant, in discharge of the supposed note and mortgage held by the latter, and delivered to the swindler his check for $2,500 payable to the order of A. At the same time the swindler gave plaintiff, as security for such loan, a note and mortgage of the land of A above referred to, which note and mortgage, though seemingly executed by A, were in fact forged by the swindler. Both plaintiff and defendant, as well as A, were innocent and equally free from negligence. The fraud having been exposed and the swindler having absconded, plaintiff sued to recover the $2,500 so paid by him to defendant. *Held*, that restitution should be allowed, on the ground that this was a payment of money by plaintiff to defendant under mutual mistake of fact as to the validity of defendant's mortgage, and that neither of the defenses of purchase for value and change of position had been made out by defendant. *Grand Lodge v. Towne*, (Minn. 1917) 161 N. W. 403.

The court declined to follow *Walker v. Conant*, (1888) 69 Mich. 321, 37 N. W. 292, 13 Am. St. Rep. 391, where a similar transaction was treated as a mistaken payment by plaintiff to the swindler, followed by the discharge by the swindler of his own debt to defendant, and the defense of purchase for value accordingly allowed; and distinguished *Russell v. Richard*, (1912) 6 Ala. App. 73, 60 So. 411, 180 Ala. 580, where the payment was in fact made by the plaintiff to the swindler and by him to the defendant. Had the defendant held a genuine mortgage, the court recognized that the payment might well have been considered in legal contemplation as made to defendant by plaintiff in the capacity of an agent of the mortgagor, and constituting defendant a purchaser for value; "but here," said the court, "we have a payment of a mortgage that never existed, which strikes us as nothing more or less than a payment made by plaintiff to a third person, on the strength of false representation of O'Donnell that such person was entitled to it." In accord with this view is *Strauss v. Hensey*, (1896) 91 App. D. C. 541, and the dissenting opinion in *Walker*

v. Conant, supra. See, also, *Hathaway v. Delaware County,* (1906) 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909. The conflict of opinion on this question results not from any divergence of judicial opinion of the law of the subject, but from differing interpretations put upon the facts. Inasmuch as no valid security was ever obtained by defendant, it seems hardly fair to consider that defendant's receipt of money from plaintiff, or even from the swindler, in discharge of a void obligation supposedly owed by one who was in fact a stranger to the entire transaction, should amount to a purchase for value of the money thus received. It was also urged that there had been a change of position by defendant, since if defendant's "note" and "mortgage" had not been prematurely paid, he would, at their maturity, have discovered the forgery and would have obtained payment from the swindler. The court seemingly approved of the doctrine of change of position, but dismissed defendant's contention as being too uncertain and speculative, the evidence as to the dealings of the swindler warranting no inference that he would have paid the mortgage, but, on the contrary, indicating that he would either have forged a new mortgage in renewal of the old one, or, if he feared discovery of his crime, would have left the country, as he did a little later. "He was not in the business of paying his debts, but of obtaining money through forgery and fraud, and it is not shown that he could have been forced to pay." As the burden of proving a change of position rests upon the defendant, *Ball v. Shepard,* (1911) 202 N. Y. 247, 254, 95 N. E. 719, Keener, Quasi Contracts, 73, it seems clear that defendant had not gone far enough to make out this defense.

PERPETUITIES—VALIDITY OF TRUST.—A testator owned large tracts of land containing rich deposits of iron ore. Mines had been opened on part of such land, and the opening of other mines was contemplated at the time of testator's death. He devised the property to trustees upon trust to receive the income from the royalties of the mines, invest the same, pay a portion of the income annually to certain persons during their lives, and accumulate the remainder and the income therefrom, the total accumulated fund not to be distributed until twenty years after the death of the last survivor of six named persons then in being. *Held,* the trust violates the statute as to accumulations and is void. *In Re Pettit's Estate,* (Minn. 1917) 161 N. W. 158.

The rule against perpetuities, at common law, applies to and regulates both legal and equitable future interests in realty and personalty, whether they be created by will or deed. *Ferguson v. Ferguson,* (1876) 39 U. C. Q. B. 232. The common law rule against perpetuities allowed the accumulation of rents and profits from realty and personalty for the period of any number of lives in being at the time of the creation of such future estate and twenty-one years thereafter. *Thellusson v. Woodford,* (1805) 4 Ves. 221; 11 Ves. 112. In England the common law rule regulating provisions for accumulations of rents and profits of land has been modified and further restricted by the statute known as the Thellusson Act, Stat. 39 & 40 Geo. III c. 98, passed in 1800. In this country the majority of states have modified the common law rule against perpetuities by statu-

tory enactments. Gray, Rule against Perpetuities, second edition, Sec. 747. In Minnesota the common law rule has been modified by statute: G. S. 1913. Secs. 6687-88; See 1 MINNESOTA LAW REVIEW, 158. These statutes have been held to abrogate the common law rule regulating future interests in realty. *Buck v. Walker,* (1911) 115 Minn. 239, 132 N. W. 205. It is very doubtful, at the present time, just what rule is to be applied to future interests in personalty. It has been held that the common law rule against perpetuities still applies in Minnesota to future interests in personalty. *In Re Tower's Estate,* (1892) 49 Minn. 371, 52 N. W. 27. However in a later decision it was held that a perpetual trust in personalty was valid. *Young Men's Christian Asso. v. Horn,* (1913) 120 Minn. 404, 139 N. W. 806. However the later decision is peculiar to the facts of the case, and is generally not regarded as overruling the doctrine expressed in *Re Tower's Estate.* It would seem that if the same question decided in the *Tower's Estate* case were to come before the court again, the doctrine of that case would again be followed and the common law rule against perpetuities be applied. Since the common law rule against perpetuities treated alike both provisions for the vesting of future estates in personalty and provisions for the accumulation of the income thereof, it is submitted that the common law rule should be applied to accumulations of income from personalty in Minnesota. The main contention in support of the will in the principal case was that the royalties from the mineral leases constituted personalty and not realty. If such were the case the common law rule should be applied and the will sustained as vesting within the period of the common law rule. It would certainly be upheld under the doctrine of the case of *Young Men's Christian Asso. v. Horn,* cited supra. By the great weight of authority it is held that royalties from mines that have already been opened constitute rents and profits from realty and are to be treated as such. *Von Baumbach v. Sargent Land Co.* (U. S. 1917) 37 S. C. R. 201; *State v. Evans,* (1906) 99 Minn. 220, 108 N. W. 958; *Boeing v. Owsley,* (1913) 122 Minn. 190, 142 N. W. 129; *State v. Royal Mineral Asso.* (1916) 132 Minn. 232, 156 N. W. 128. The majority of cases hold that the same rule should apply where a lease is given for the purpose of opening up a mine. *Koen v. Bartlett,* (1895) 41 W. Va. 559, 23 S. E. 664, 31 L. R. A. 128, 56 Am. St. Rep. 884.

In the principal case the court held that since it was known that vast deposits of ore existed under the lands in question, the returns from leases to these lands, whether as ground rent or royalties, were to be treated as rents and profits from realty and not personalty. Since the royalties were to be considered as rents and profits from realty, and the trust fund was to be derived from the accumulation of these royalties, the trusts violated the statute regulating accumulations of rents and profits in realty by providing for such accumulation during a period exceeding that permitted by the statute.

PHYSICIANS AND SURGEONS—REGULATION OF PRACTICE—PRACTICING TENETS OF A CHURCH.—Defendant, Christian Science practitioner, was indicted for practicing medicine without a license contrary to the provisions of the public health laws requiring all persons who practice medi-

cine to be registered and licensed except those who practice the religious tenets of any church. *Held,* that the exception is broad enough to include defendant. *People v. Cole,* (N. Y. 1916) 113 N. E. 790.

This decision is in accord with the majority of states in holding that the practice of treating the sick according to the religious tenets of a church is not the practice of medicine within the meaning of the statutes regulating the practice of medicine and surgery. *Bennett v. Ware,* (1908) 4 Ga. App. 293, 61 S. E. 546; *Kansas City v. Baird,* (1902) 92 Mo. App. 204; *State v. Mylod,* (1898) 20 R. I. 632, 40 Atl. 753. The decision in each case depends fundamentally on the wording of the particular statute which defines the "practice of medicine." It has been held that one who advertises himself as a magnetic healer and who gives treatment by rubbing or kneading the body for the purpose of freeing the nerve force, in the nature of osteopathic treatment, is not within the exception in favor of those treating the sick by mental or spiritual means, even though he accompanies his treatment by mental suggestion. Such treatment is practice of medicine within the meaning of a statute which states that a person shall be regarded as practicing medicine who treats or professes to treat, operate on, or prescribe for, any physical ailment of another. *People v. Trenner,* (1908) 144 Ill. App. 275. One who held himself out as being able to cure disease by suggestive therapeutics, and treated diseases by laying his hands on the sick person, was held to be within the meaning of the statute forbidding the practice of medicine without a license although he did not use drugs or surgery. The statute in this case defined the practice of medicine as announcing to the public a readiness to attempt to cure, heal, or relieve disease of mind or body. *Witty v. State,* (1910) 173 Ind. 404, 90 N. E. 627, 25 L. R. A. (N. S.) 1297; *State v. Pratt,* (Wash. 1916) 158 Pac. 981. A few courts have given their statutes such a liberal construction as to include a practitioner of Christian Science within its terms. In *State v. Buswell,* (1894) 40 Neb. 158, 58 N. W. 728, 24 L. R. A. 68, defendant, a Christian Science practitioner, was held to be within the terms of a statute which provided that, "Any person shall be regarded as practicing medicine within the meaning of this act, who shall operate on, profess to heal, or prescribe for, or otherwise treat, any physical or mental ailment of another." The Ohio court reached the same conclusion. *State v. Marble,* (1905) 72 Ohio St. 21, 73 N. E. 1063. In analogy with these cases, it has been held that obtaining the ministrations of a Christian Science practitioner or persons holding like views concerning the treatment of sick persons, is no defence to a prosecution under a statute making it an offense wilfully to refuse or neglect to furnish medical aid for a sick child. *Rex v. Lewis,* (1903) 6 Ont. L. Rep. 132, 1 B. R. C. 732; *People v. Pierson,* (1903) 176 N. Y. 201, 68 N. E. 243. Such statutes do not violate the constitutional provisions guaranteeing to all persons the free exercise and enjoyment of their religious tenets (Ibid). The United States Supreme Court has recently held a statute constitutional which makes a distinction in prescribing regulations for those who use drugless treatments and those who use prayers only. *Crane v. Johnson,* (1917) 37 S. C. R. 176. In this case, plaintiff, a drugless practitioner or chiropractor, brought action against the Governor and Attorney Gen-

eral of California to enjoin them from enforcing a statute providing that all drugless practitioners should be examined and licensed the same as physicians and surgeons. The statute stated that it should not be construed so as to discriminate against any particular school of medicine or surgery, nor to regulate, prohibit, or apply to any kind of treatment by prayer, nor to interfere in any way with the practice of religion. Plaintiff claimed the statute was unconstitutional in that it made a distinction between treatment by prayers and other drugless methods including his own, which consisted of the use of faith, hope, and the process of mental adaptation without the aid of prayer. The court held that a distinction, for the purpose of legislation, between plaintiff's drugless practice and the use of prayer is not arbitrary and is constitutional. Very few cases have as yet arisen involving the status of Christian Science healers. The question while ostensibly one of legislative intent is in the last analysis one of public policy, whether in the absence of an express legislative prohibition, the courts shall classify such healers as persons practicing medicine and thereby in effect prevent them from practicing the tenets of their religion. As might be expected, the cases are divided on the question, as indicated above. The recent Supreme Court decision gives a working basis for the passing of statutes which may clarify the subject and indicate clearly the policy of the state.

PROCESS—SERVICE BY PUBLICATION—DUE PROCESS OF LAW.—Defendant was a resident of Minnesota and at the time action was begun, was secreting himself within the state and his whereabouts were unknown and could not be ascertained by the plaintiff. These facts were stated in the affidavit for publication and were found by the court in the order for service by publication. Defendant did not appear. *Held,* the court acquired jurisdiction to render a personal judgment for alimony. *Roberts v. Roberts,* (Minn. 1917) 161 N. W. 148.

There is clear distinction between service by publication on a non-resident, or a resident, who can be found, and service on a resident, who is secreting himself. The court in the instant case clearly makes this distinction. See *Thurston v. Thurston,* (1894) 58 Minn. 279, 59 N. W. 1017; *Bardwell v. Collins,* (1890) 44 Minn. 97, 46 N. W. 315, 9 L. R. A. 152, 20 Am. St. Rep. 547. The principal case, while of first instance in Minnesota, is in accord with the great weight of authority. See notes to *Raher v. Raher,* 35 L. R. A. (N. S.) 292; *Stallings v. Stallings,* 9 L. R. A. (N. S.) 593; *Pinney v. Providence Loan & Investment Co.,* 50 L. R. A. 577.

SPECIFIC PERFORMANCE—MUTUALITY—AGREEMENT TO GIVE FIRST CHANCE TO PURCHASE LAND.—The defendant, for consideration, agreed to give the plaintiff first chance to purchase certain land if the defendant should decide to sell. Defendant offered to sell to a third party. Plaintiff then offered to purchase, but defendant refused to convey. *Held,* there was not such mutuality of obligation as to warrant a decree for specific performance. *Monroe v. Crabtree,* (Ia. 1916) 159 N. W. 979.

The doctrine of mutuality as applied in actions for specific performance of contracts has been confused because of its peculiar development.

It has been stated by text writers that before a court of equity will grant specific performance, the contract must be such that there was mutuality of relief at the time the contract was entered into. Fry, Specific Performance, fourth ed. Sec. 460. The rule is supported by early decisions, but there are so many exceptions to it that it has been seriously doubted by modern writers whether it can properly be said that mutuality of remedy must exist at the time the contract was made. 3 Col. L. Rev. 1. Under more recent decisions specific performance is granted when there is mutuality of remedy at the time the action is brought, even though there was no such mutuality when the contract was entered into. *Lamprey v. St. Paul, etc., Ry. Co.*, (1903) 89 Minn. 187, 94 N. W. 555. But where the party seeking specific performance has fully performed his part of the agreement, equity does not require that there be mutuality of remedy. *Howe v. Watson*, (1902) 179 Mass. 30, 60 N. E. 415. Nor is mutuality required when a unilateral agreement is sought to be enforced. *Borel v. Mead*, (1884) 3 N. M. 39, 2 Pac. 222. But many American courts have applied the rule of the old English cases with its many exceptions and still require that there be mutuality of remedy at the outset in order to obtain specific performance of a contract. *Norris v. Fox*, (1891) 45 Fed. 406; *Cooper v. Pena*, (1863) 21 Cal. 404; *Luse v. Dietz*, (1877) 46 Ia. 205. Courts of equity will grant specific performance of agreements to buy or sell land. *Austin v. Wacks*, (1883) 30 Minn. 335, 15 N. W. 409. Moreover contracts creating a right of option to purchase land will be specifically enforced in equity, when such agreements are supported by consideration and are fair and reasonable. *O'Brien v. Boland*, (1896) 166 Mass. 481, 44 N. E. 602. Although equity will not grant specific performance of some agreements, as, e. g., those calling for personal service, it will prevent by means of injunction breach of a negative covenant contained in such contracts. *Singer Sewing Machine Co. v. Union Buttonhole & Embroidery Co.*, (1873) 1 Holmes (U. S. C. C.) 253; *Phila. Baseball Club v. Lajoie*, (1902) 202 Pa. St. 210, 51 Atl. 973, 90 Am. St. Rep. 627, 58 L. R. A. 227. The same doctrine has been applied where a party attempting to sell land to a third party when he had already agreed to give another person the first chance to purchase such land. *Manchester Canal Co. v. Manchester Racecourse Co.*, [1901] 2 Ch. 37. The agreement in that case was similar to the one in the principal case and amounted to a conditional option. The condition upon which the plaintiff could exercise his option having happened, it would seem that the ordinary rules of equity governing option agreements should be applied. In all such cases protection from injustice is all that the defendant is entitled to ask from a court of equity and he should not be allowed to use a defense invented by equity for his protection in order to work an injustice upon another party. The plaintiff gave consideration for his option; the contingency upon which he was to exercise his option has happened; there is, therefore, no good reason apparent why specific performance should be denied.

SUBROGATION—SURETY—RIGHTS AGAINST CREDITOR.—The treasurer of a union presented forged checks upon its bank of deposit. The bank paid them and debited the account of the union. The union instead of suing

the bank brought an action against the surety on the treasurer's bond. The surety filed a cross-bill praying that the bank be brought in, claiming that the surety is entitled to subrogation to the rights of the union against the bank. *Held,* the cross-bill was properly stricken. *Baker v. American Surety Co. of N. Y.,* (Ia. 1916) 159 N. W. 1044.

Subrogation has been defined as the equity by which a person who is secondarily liable for a debt and has paid the same is put in the place of the creditor in order to enforce exoneration as against the principal debtor. *Sand's Adm. v. Durham,* (1900) 98 Va. 392, 36 S. E. 472, 54 L. R. A. 614. This doctrine is not founded on contract, or privity, or strict suretyship, but is a device adopted by equity to compel the ultimate discharge of the debt or obligation by him who in good conscience ought to pay it. *Arnold v. Green,* (1889) 116 N. Y. 566, 23 N. E. 1. The application of this doctrine to facts similar to the instant case causes difficulty, the question being whether subrogation should be limited to the rights of the creditor against the principal, or be extended to all the rights the creditor has to make good the loss. The cases are agreed that where the misappropriation occurred with the knowledge of the bank in which the funds were kept, the surety, on payment of the bond of the defaulter, is subrogated to the creditor's right against the bank. *U. S. Fidelity & Guaranty Co. v. Union Bank & Trust Co.,* (1915) 228 Fed. 448; *Carroll County Bank v. Rhodes,* (1900) 69 Ark. 43, 63 S. W. 68. When, however, there is no collusion or knowledge on the part of the bank, there is a conflict of authority. The principal case would allow the surety to be subrogated only to the rights of the creditor as against the principal debtor. *American Bonding Co. v. State Savings Bank,* (1913) 47 Mont. 332, 133 Pac. 367, accord. The majority of cases are opposed to this doctrine, holding that upon paying the principal's debt, the surety is not restricted in his right of subrogation to the rights and remedies which the creditor has against the principal, but has his rights against all other persons, who were liable for the debt paid. *National Surety Co. v. State Savings Bank,* (1907) 156 Fed. 21, 84 C. C. A. 187, 14 L. R. A. (N. S.) 155; *American Bonding Co. v. National Mechanics Bank,* (1903) 97 Md. 598, 55 Atl. 395, 99 Am. St. Rep. 466; *Northern Trust Co. v. First National Bank,* (1913) 25 N. D. 74, 140 N. W. 705. In insurance cases, where the loss by fire or other agency is caused by the negligent act of a third party, it is uniformly held that the insurance company, having paid the loss, is subrogated to the rights of the insured against such third party. *Hall & Long v. The Railroad Companies,* (1871) 13 Wall. (U. S.) 367, 20 L. Ed. 594; *Railway Co. v. Fire Ass'n,* (1891) 55 Ark. 163, 18 S. W. 43. In these cases the courts place the insurance company in the position of a surety and hold that as such it should be entitled to all the means of indemnity which the injured party had. The better reasoning seems to be with the cases contra to the instant case. The court in the instant case might also have concluded that since the bank wrongfully debited the account of its depositor, no actual loss occurred at all. The surety guaranteed the defalcation of the treasurer, and not the wrongful act of the bank.

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BENEFIT TO THE PROMISOR AS CONSIDERATION FOR A SECOND PROMISE FOR THE SAME ACT

NUMEROUS theories have been advanced to explain the origin of the common law doctrine of consideration. It has been denominated a modification of the Roman causa, adopted by courts of equity and borrowed therefrom by the courts of common law.[1] It has been said to be derived from the requirement of a quid pro quo in the action of debt.[2] It has been declared to have its antecedent in the requirement of damage to the plaintiff in the action on the case for deceit.[3] And finally it has been asserted to have evolved from both of the last mentioned requirements.[4] But whatever its source, it is certain that from the beginning of the seventeenth century, if not from an earlier time, benefit to the promisor received by him from the promisee in exchange for the promise has been at least as efficacious a support for such a promise as detriment suffered by the promisee.[5] Some modern com-

1. Salmond, Essays in Jurisprudence and Legal History, IV. But see Pollock, Principles of Contract, third Am. ed. 191.
2. Holmes, The Common Law, 285. But see Pollock & Maitland, History of English Law, II, p. 212.
3. Hare, Contracts, Ch. VII.
4. Ames, Lectures on Legal History, 129; 2 Harv. L. Rev. 1.
5. Pickas v. Guile, (1609) Yelv. 128. See also Riches v. Brigges, (1601) Yelv. 4.

mentators, however, have attempted to simplify the definition of consideration by making detriment to the promisee suffered in exchange for the promise, the exclusive test,[6] partly because this test is historically more accurate,[7] and partly because a benefit to the promisor involves a detriment to the promisee.[8] It is not, and indeed, could not be, contended that the courts have consciously discarded benefit to the promisor as a test of consideration, for not only has no case been cited which declares detriment to the promisee to be the only test, but, on the contrary, practically every modern court which attempts to give a definition of consideration includes benefit to the promisor as an alternative test.[9]

The fact that the test of detriment may preserve "the historic connection between the modern simple contract and the ancient

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6. "At the present day, it is doubtless just and expedient to resolve every consideration into a detriment to the promisee incurred at the request of the promisor." Ames, Lectures on Legal History, 129; 2 Harv. L. Rev. 1.

"This definition makes what the promisee gives—that is, the detriment suffered by him—the universal test of the sufficiency of consideration, . . ." Williston, 8 Harv. L. Rev. 33.

7. "Professor Langdell has pointed out the irrelevancy of the notion of benefit to the promisor, and makes detriment to the promisee the universal test of consideration. This simplified definition has met with much favor. It is concise, and it preserves the historic connection between the modern simple contract and the ancient assumpsit in its primitive form of an action for damage to a promisee by a deceitful promisor." Ames, Lectures on Legal History, 323; 12 Harv. L. Rev. 515.

8. "It is said that any benefit conferred by the promisee on the promisor, or any detriment incurred by the promisee may be a consideration. It is also thought that every consideration may be reduced to a case of the latter sort, using the word 'detriment' in a somewhat broad sense." Holmes, The Common Law, 289, 290.

"The fact is, however, that the cases in which there is a benefit to the promisor invariably involve a detriment to the promisee." 6 R. C. L. 655.

9. "'Consideration,' says Mr. Justice Patterson in Thomas v. Thomas, (1842) 2 Q. B. 851, 'means something which is of some value in the eye of the law moving from the plaintiff; it may be some benefit to the defendant, or some detriment to the plaintiff.' At any rate, it must be some benefit to the plaintiff, or detriment to the person from whom it moves, and of some value in the eye of the law." Wilson, C. J., in New York, etc., Co. v. Martin, (1868) 13 Minn. 417, 419 (386, 388).

"To be a sufficient consideration it is necessary that plaintiffs' promise be a benefit to defendant, or an injury to plaintiffs." Berry, J., in Bailey v. Austrian, (1873) 19 Minn. 535, 538 (465).

"That consideration may consist of detriment or disadvantage to plaintiff, or waiver of a right by him, as well as of a benefit to defendant." Canty, J., in Grant v. Duluth, etc., Ry. Co., (1895) 61 Minn. 395, 397, 398, 63 N. W. 1026.

See also 6 R. C. L. 654, and cases cited in note 12; 2 Words and Phrases, 1444-47; 1 id. (N.S.) 902-6; Bennett, 10 Harv. L. Rev. 257; Williston, 27 Harv. L. Rev. 503, 522-4.

assumpsit in its primitive form" is interesting but not, in any sense, controlling. Of course, if benefit to the promisor invariably results in detriment to the promisee, brevity and conciseness would dictate the adoption of detriment to the promisee as the exclusive test. But if situations may arise in which there is benefit to the promisor without detriment to the promisee, then the universally accepted definition of consideration should not be further limited. For however the doctrine of consideration came into our law, the justification for its retention lies in the general policy of refusing to enforce gratuitous promises.[10] And certainly a promise paid for by benefit to the promisor has as sound a basis, in policy and reason, for its enforcement as one resting upon detriment to the promisee.[11]

Before entering upon a discussion of the cases where the decision will turn upon the inclusion or exclusion of benefit to the promisor as a test of consideration, it will be expedient to clear the ground by establishing or admitting a few preliminary propositions. First, by benefit and detriment are meant legal benefit and legal detriment as distinguished from actual benefit and actual detriment. The terms are not synonymous. In fact, actual benefit may constitute legal detriment and vice versa.[12] The theory of Mr. Ames would make actual detriment as effectual as legal detriment, for he defined consideration as any act, promise or forbearance given in exchange for a promise.[13] But no courts have gone so far. Second, in bilateral contracts the contract is complete at the moment when the promises are exchanged, but not every exchange of promises will consummate a contract, for the courts look at the content and not at the form of the promise. Commentators have engaged in a spirited controversy concern-

10. "Form and consideration are two alternative conditions of the validity of contracts and of certain other kinds of agreements . . . They are intended as a precaution against the risk of giving legal efficacy to unconsidered promises and to levities of speech." Salmond, Jurisprudence, fourth ed., 316.

11. It must be admitted that the English rule which requires the consideration to move from the promisee is opposed to this conclusion. Dunlop, etc., Co. v. Selfridge Co., (1915) A. C. 847. But this rule does not prevail in America. Palmer Savings Bank v. Insurance Co., (1896) 166 Mass. 189, 44 N. E. 211; Rector, etc., of St. Mark's Church v. Teed, (1890) 120 N. Y. 583, 24 N. E. 1014.

12. Talbott v. Stemmon's Ex., (1889) 89 Ky. 222, 12 S. W. 297, 5 L. R. A. 856, 25 Am. St. Rep. 531; Devecmon v. Shaw, (1888) 69 Md. 199, 14 Atl. 464, 9 Am. St. Rep. 422; Hamer v. Sidway, (1891) 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 463, 21 Am. St. Rep. 693; White v. Bluett, (1853) 23 L. J. Ex. 36, 2 W. R. 75.

13. Ames, Lectures on Legal History, 323; 12 Harv. L. Rev. 515.

ing the definition of consideration in such contracts. That suggested by Leake and amplified and explained by Mr. Williston makes the character of the act or forbearance promised, rather than the mere promise, the criterion; generally speaking, when the act promised would, if performed, constitute consideration, the promise to perform it will be consideration, unless such promise is made void by some rule of law other than that relating to consideration.[14] This, it is submitted, squares best with the decisions. It avoids the artificiality of the test of Mr. Ames,[15] and it is not open to the objection of question begging urged against the view of Mr. Langdell.[16] Third, whether benefit to the promisor be excluded from the definition of consideration or not, the same result will be reached in most cases, including that class of cases where A, in exchange for C's promise does, or promises C to do, something which A is already under legal obligation to C to do.

On account of the confusion by some courts of this class of cases, viz., those in which the previous obligation is from A to C, with those where A's previous obligation is to B, it will be advisable to examine them in some detail. They may be separated into three subdivisions: (1) Where the previous obligation of A to C is under a bilateral contract, which has not yet been fully performed on either side; (2) where the previous obligation of A to C is under a unilateral contract, or under an originally bilateral contract which has become unilateral by performance on C's part; (3) where the previous obligation of A to C is owed to C as a member of the public.

In cases of the first subdivision, it has been suggested that the second agreement between A and C amounts to a dissolu-

14. Williston, 27 Harv. L. Rev. 503, 527, 528. As pointed out by Mr. Williston, it is difficult to bring within any reasonable definition of consideration bilateral contracts in which one of the promises is voidable at the option of the promisor.

15. "The act of each promisee in the case of mutual promises is obviously the giving of his own promise animo contrahendi in exchange for the similar promise of the other. And this is all that either party gives to the other. This, then, must be the consideration for each promise; and it is ample on either of the two theories of consideration under discussion. For the giving of the promise is not only an act, but an act that neither was under any obligation to give. This simple analysis of the transaction of mutual promises is free from arbitrary assumptions and from all reasoning in a circle." Ames, Lectures on Legal History, 342, 343; 13 Harv. L. Rev. 31, 32.

16. See Williston, 8 Harv. L. Rev. 27, 34, 35; 27 id. 503, 505, 506. Langdell, 14 id. 496; Ames, 13 id. 30-32.

tion of the first contract, whereby A relinquishes all his rights against C in consideration of C's relinquishing all his rights against A, and the formation of a new contract wherein A and C assume new mutual obligations. The only difficulty with this theory is that frequently it does not accord with the facts. As well said by the Minnesota Supreme Court:

"The doctrine of these cases as it is frequently applied does not commend itself either to our judgment or our sense of justice, for where the refusal to perform and the promise to pay extra compensation for performance of the contract are one transaction, and there are no exceptional circumstances making it equitable that an increased compensation should be demanded and paid, no amount of astute reasoning can change the plain fact that the party who refuses to perform, and thereby coerces a promise from the other party to the contract to pay him an increased compensation for doing that which he is legally bound to do, takes an unjustifiable advantage of the necessities of the other party. To hold, under such circumstances, that the party making the promise for extra compensation is presumed to have voluntarily elected to relinquish and abandon all of his rights under the original contract, and to substitute therefor the new or modified agreement is to wholly disregard the natural inference to be drawn from the transaction, and invite parties to repudiate their contract obligations whenever they can gain thereby.

"There can be no legal presumption that such a transaction is a voluntary rescission or modification of the original contract, for the natural inference to be drawn from it is otherwise in the absence of any equitable considerations justifying the demand for extra pay. In such a case the obvious inference is that the party so refusing to perform his contract is seeking to take advantage of the necessities of the other party to force from him a promise to pay a further sum for that which he is already legally entitled to receive. Surely it would be a travesty on justice to hold that the party so making the promise for extra pay was estopped from asserting that the promise was without consideration. A party cannot lay the foundation of an estoppel by his own wrong. If it be conceded that by the new promise the party obtains that which he could not compel, viz. a specific performance of the contract by the other party, still the fact remains that the one party has obtained thereby only that which he was legally entitled to receive, and the other party has done only that which he was legally bound to do. How, then, can it be said that the legal rights or obligations of the party are changed by the new promise? It is entirely competent for the parties to a contract to modify or to waive their rights under it, and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but where the promise to the one is simply a repetition of a subsisting legal promise there can be no

consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract."[17]

In other words, the alleged dissolution is a mere fiction. The fact is, that usually neither party for a single instant releases the other so as to leave him entirely free; but one of the parties, C, merely assumes additional obligations.

Curiously enough, the Minnesota court is willing to give this fiction validity in certain cases.

"But where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which place upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule that a promise to do that which a party is already legally bound to do is not a sufficient consideration to support a promise by the other party to the contract to give the former an additional compensation or benefit."[18]

If the unforeseen difficulties were such as to constitute a mutual mistake of fact, or were of such character as to form a basis for equitable relief from the terms of the contract, then, of course, by performing or promising to perform, A would undergo legal detriment and C would obtain a legal benefit; and there would be no question as to the sufficiency of the consideration. But this is not the basis of the court's dictum.

"What unforeseen difficulties and burdens will make a party's refusal to go forward with his contract equitable, so as to take the case out of the general rule and bring it within the exception, must depend upon the facts of each particular case. They must be substantial, unforeseen, and not within the contemplation of the parties when the contract was made. They need not be such as would legally justify the party in his refusal to perform

17. King v. Duluth, etc., Ry. Co., (1895) 61 Minn. 482, 63 N. W. 1105, per Start, C. J. The great weight of authority is in accord. The cases are collected in Pollock, Principles of Contract, third Am. ed., 203, note 15.
18. (1895) 61 Minn. 487, 488.

his contract, unless promised extra pay, or to justify a court of equity in relieving him from the contract; for they are sufficient if they are of such a character as to render the party's demand for extra pay manifestly fair, so as to rebut all inference that he is seeking to be relieved from an unsatisfactory contract, or to take advantage of the necessities of the opposite party to coerce from him a promise for further compensation. Inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact, is not sufficient.

"The cases of Meech v. City of Buffalo, 29 N. Y. 198, where the unforeseen difficulty in the execution of the contract was quicksand, in place of expected ordinary earth excavation, and Michaud v. MacGregor, supra, p. 198, 63 N. W. 479, where the unforeseen obstacles were rocks below the surface of the lots to be excavated, which did not naturally belong there, but were placed there by a third party, and of the existence of which both parties to the contract were ignorant when the contract was made, are illustrations of what unforeseen difficulties will take a case out of the general rule."[19]

Since the court recognizes that in the usual cases any presumption as to dissolution of the first contract is a mere fiction, and in the extraordinary case raises such presumption out of the equity and justice of the situation it would seem to follow that the presumption would be irrebuttable, and an actual refusal to agree to a rescission or dissolution would be immaterial. Clearly there is no basis in logic or precedent for any such exception to the doctrine of consideration. It is merely a modification of the doctrine on so-called equitable grounds. It has been adopted in Maryland.[20]

In cases of the second subdivision,[21] there is no room for the operation of any fiction of dissolution or rescission, for C has fully performed. And it does not aid the situation to state it in terms of waiver, for if waiver and not estoppel is meant, there is still need for consideration. Yet the equity and justice of the situation are just the same whether C has fully, or only partially performed. It is difficult to see how any distinction could reasonably be drawn between the cases in the two subdivisions, where the Minnesota dictum prevails. Where the mere dissolution theory obtains, clearly no consideration for C's second promise can be found.[22]

19. Id. 488.
20. Linz v. Schuck, (1907) 106 Md. 220, 67 Atl. 286, 11 L. R. A. (N.S.) 789.
21. See page 386, supra.
22. But see Peck v. Requa, (1859) 13 Gray (Mass.) 407.

Cases of the third subdivision[23] present no difficulty, for C's promise is unenforceable not only for lack of consideration, but also on grounds of public policy.[24]

It must be apparent that in this entire class of cases, neither detriment to A, the promisee, nor benefit to C, the promisor, is exchanged for the promise. A does nothing, forbears nothing, which he is not legally obligated to do or forbear; C receives nothing which he is not legally entitled to receive from A. Hence, these cases would furnish no basis for objecting to the exclusion of benefit to the promisor as a criterion of consideration.

From these cases has been drawn the rule that doing or promising to do what one is already legally bound to do is not sufficient consideration to support a promise. And it should constantly be borne in mind that this rule is not a statement of a primary principle, but merely a deduction from a particular class of cases, where the context remedies the obvious incompleteness of the statement. Legally bound to whom? To the other contracting party, C, or to the community of which C is a member, so that performance of the obligation or a promise to perform it results in no legal detriment to the promisee and in no legal benefit to the promisor, C. The idea intended to be emphasized by this phrasing is the distinction between actual benefit and detriment on the one hand, and legal benefit and detriment on the other. The majority of American courts, however, have failed or refused to recognize the limitations of this secondary rule, and have applied it to cases where the previous obligation of A was owed to B, and the later promise is made by C.[25] A respectable minority of our courts and the English courts do make a distinction and hold C's promise supported by a sufficient consideration.[26] Most of the commentators agree with the Eng-

23. See page 386, supra.

24. Cases of this class are collected in notes in 11 L. R. A. (N.S.) 1170, 48 id. 392, (rewards); Pollock, Principles of Contract, third Am. ed. 205, note 16, (rewards); Ames, 12 Harv. L. Rev. 517, note 1, (refraining from tort); Cyc., IX, 347, 348, notes 40, 41, 43, 46.

25. Havana, etc., Co. v. Ashurst, (1893) 148 Ill. 115, 35 N. E. 873; Harris v. Cassady, (1886) 107 Ind. 158, 8 N. E. 29; Newton v. Chicago, etc., Ry. Co., (1885) 66 Ia. 422, 23 N. W. 905; Schuler v. Myton, (1892) 48 Kan. 282; Putnam v. Woodbury, (1878) 68 Me. 58; Gordon v. Gordon, (1875) 56 N. H. 170; Arend v. Smith, (1897) 151 N. Y. 502, 45 N. E. 872; Sherwin v. Brigham, (1883) 39 Oh. St. 137; Wimar v. Overseers, (1883) 104 Pa. St. 317; Hanks v. Barron, (1895) 95 Tenn. 275, 32 S. W. 195; Kenigsberger v. Wingate, (1868) 31 Tex. 42; Davenport v. Congregational Society, (1873) 33 Wis. 317; Cyc., IX, 353, 354, note 73.

26. Bagge v. Slade, (1616) 3 Bulstr. 162; Shadwell v. Shadwell, (1860)

lish decisions and attempt to explain them by finding detriment to C.

Mr. Ames finds detriment in "any act or forbearance given in exchange for a promise."[27] The difficulty with this definition is that it includes too much; it takes no account of the character of the act; the sole question is whether the act is referable to the promise. If the agreement between A and C is bilateral, then Mr. Ames would regard A's physical exertion in expressing the words of promise as constituting a detriment in that A was under no obligation to express them.[28] As pointed out above, the courts look to the content and not to the form of the promise. And what the parties desire is the thing promised, not the mere expression of promise. Of course, if what C really desired was to have A undergo this physical exertion, and to exchange his promise therefor, Mr. Ames' position would be unanswerable. Mr. Anson explains the situation by saying that A abandons or agrees to abandon his right to make an arrangement with B, whereby A and B shall put an end to their contract "by mutual waiver of promises" and "the abandonment of a right has always been held to be a consideration for a promise."[29] That is, Mr. Anson finds detriment to A in his abandoning his right to rescind the contract with B. The objection to this explanation is obvious. It does not fit the facts. So long as the final result bargained for by C is effectuated, C cares nothing about the existence or non-existence of contractual relations between A and B. How could this theory be applied where C had no knowledge of the contract between A and B, or where B had actually refused to rescind the contract with A, or where B had by a previous agreement with D expressly covenanted not to rescind his contract with A, or where there was no possibility of rescission? Yet in all these situations, so far as C is concerned, the thing which he

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9 C. B. N. S. 159, 7 Jur. N. S. 311, 30 L. J. C. P. 145, 3 L. T. N. S. 628, 9 W. R. 163; Scotson v. Pegg; (1861) 6 H. & N. 295, 30 L. J. Exch. 225, 3 L. T. .N. S. 753, 9 W. R. 280; Humes v. Decatur, etc., Co., (1892) 98 Ala. 461, 473, 13 So. 368; Hirsch v. Chicago, etc., Co., (1899) 82 Ill. App. 234; Donnelly v. Newbold, (1901) 94 Md. 220; Abbott v. Doane, (1895) 163 Mass. 433, 40 N. E. 197; Day v. Gardner, (1881) 42 N. J. Eq. 199, 203, 7 Atl. 365; Bradley v. Glenmary Co., (1902) 64 N. J. Eq. 77, 53 Atl. 49; Cyc., IX, 354, notes 74 and 75.

In Minnesota the point is still undecided. Grant v. Duluth, etc., Ry. Co., (1895) 61 Minn. 395, 398, 63 N. W. 1026.

27. 12 Harv. L. Rev. 531.

28. 13 id. 29, 32.

29. Anson, Law of Contracts, twelfth ed., 109.

calls for in exchange for his promise is the same. And if that thing is furnished by C, could it be said that he had broken his promise by rescinding or modifying his contract with B? In short, while there can be no doubt that A would be undergoing a legal detriment by refraining from rescinding or promising so to refrain, he would not be doing so in exchange for C's promise. Mr. Justice Holmes begins his exposition of the problem by assuming that when A and B enter into their contract, A has the option of breaking his contract and paying damages therefor or of fulfilling its terms. If he gives up the former choice in exchange for C's promise, he undergoes a legal detriment. "A brilliant paradox," says Sir Frederick Pollock. And such it clearly is, since it asserts that to be a legal right for the doing of which the law will compel one to pay damages.

Where the contract between A and C is unilateral with C as promisor, Mr. Langdell supported the American cases; but where it was bilateral, he found consideration for C's promise in the detriment which A incurs by giving C the right to compel him to act or forbear, "or the right to recover damages against him for not doing it. One obligation is a less burden than two (*i. e.* one to each of two persons) though each be to do the same thing."[30] Anson[31] and Williston[32] both point out the obvious begging of the question in these statements. A comes under a legal obligation to C only in case the bilateral agreement is binding. It is true C promises to do something which he is not bound to A to do, and thereby prima facie incurs detriment. But C's promise is binding only if it is supported by consideration. Is A's promise consideration for C's promise? If A comes under a legal obligation to C, the answer must be in the affirmative. But A will not come under any obligation to C unless C's promise is supported by a consideration. Hence to say that A does come under a new obligation to C is to assume the very point at issue. The only judicial support of this theory is a dictum of the supreme court of the District of Columbia.[33]

From the standpoint of detriment to the promisee, then, it would seem impossible to find consideration either in A's promise or in A's performance. A does nothing, forbears nothing

30. Langdell, Summary of Contracts, Sec. 84.
31. Anson, Law of Contracts, twelfth ed., 110.
32. 8 Harv. L. Rev. 34, 35.
33. Merrick v. Giddings, (1882) 1 Mack. 394, 411 per James, J.

which he is not legally bound to do or forbear. He parts with nothing which he is legally free to keep, does nothing which he is legally free to refrain from doing, refrains from doing nothing which he is legally free to do and consequently suffers no legal detriment.

Does C receive a legal benefit? When A becomes bound to B to act or to refrain from acting, B secures a chose in action against A. So exclusively does this chose in action belong to B, that originally it lacked the essential element of a property right, namely, transferability. Consequently, C has absolutely no rights in the contract between A and B, it matters not how much he may benefit or suffer by the performance thereof. His gain or loss in such case will be purely incidental or accidental. So far as C is concerned, A may break his contract with B with impunity. In other words, C has no right by virtue of the contract between A and B to have effectuated the act or forbearance stipulated for in such contract. If in exchange for C's promise, C does secure the effectuation of that act or forbearance, then C has secured something to which he was not theretofore entitled, in other words, a legal benefit. And if a legal benefit received in exchange for a promise by the promisor from the promisee constitutes sufficient consideration to support a promise, then C's promise is enforceable.

The only possible question is whether A's act or forbearance is properly referable to C's promise, that is, whether A's act or forbearance has been in reliance upon and in exchange for C's promise. This is, of course, a question of fact, which in the ordinary case is very easy of solution. It is, obviously, not essential that A's act be done solely in exchange for C's promise. It cannot be doubted that if X, Y and Z each separately promised A to pay him a fixed and separate compensation for doing a single designated act, A might earn the three separate compensations by one performance, for the single promise of X or Y or Z, or the combined promises of any two of them might not have been sufficient inducement. And if A is under legal obligation to B to complete a building or to do any other act, and is upon the point of breaking his contract with B, there can be no doubt in fact that when C promises him additional compensation if he will complete the building or do the other act, his action in so doing is actually partly in exchange for C's promise, and partly in exchange for the consideration furnished

by B. In the dissenting opinion in *Shadwell v. Shadwell*,[34] Byles, J. suggested that A could not be permitted to say that his act was referable to C's promise, when he was already bound to B. This is merely saying that the policy of the law will estop A from showing the truth of the matter. Contracts of this sort are frequently made and generally performed by business men in the usual course of legitimate business; in the absence of fraud, duress or sharp dealing there is nothing immoral in them. Hence no considerations of public policy would seem to weigh against them, and Byles' suggestion should not be controlling. Where the latter agreement between A and C is bilateral, the referability of A's act or forbearance to C's promise is all the more apparent. And if the legal benefit conferred by such act or forbearance constitutes consideration, then the promise to confer it would likewise constitute consideration.

Here, then, is a class of cases in which legal benefit to the promisor may exist without legal detriment to the promisee, in which no sound reason of policy militates against the validity of the later promise, and in which the inclusion of benefit to the promisor as a test of consideration is essential to the enforceability thereof. It is, therefore, submitted that no reason exists for modifying the traditional definition of consideration by phrasing it in terms of detriment only.

EDMUND M. MORGAN.

UNIVERSITY OF MINNESOTA.

34. Shadwell v. Shadwell, supra, note 26.

THE SUPREME COURT ON THE ADAMSON LAW

THE Act of Congress commonly called the "Adamson Law" was sustained by the Supreme Court in an opinion of the Chief Justice delivered March 19, 1917. Five Justices concurred in the judgment, the Chief Justice and Justices Holmes, McKenna, Brandeis and Clarke. Justice McKenna delivered a separate concurring opinion. Justice Day delivered a dissent based upon one point. Justice Pitney delivered a dissent, in which Justice Van Devanter concurred, agreeing with Justice Day but resting also on additional grounds. Justice McReynolds dissented separately.

The title and text of the Act so far as material are:

"An Act to establish an eight-hour day for employees of carriers engaged in interstate and foreign commerce, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That beginning January first, nineteen hundred and seventeen, eight hours shall, in contracts for labor and service, be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning the compensation for services of all employees who are now or may hereafter be employed by any common carrier by railroad, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, which is subject to the provisions of the Act of February fourth, eighteen hundred and eighty-seven, entitled 'An Act to regulate commerce,' as amended, and who are now or may hereafter be actually engaged in any capacity in the operation of trains used for the transportation of persons or property on railroads, except railroads independently owned and operated not exceeding one hundred miles in length, electric street railroads, and electric interurban railroads, . . .

"Sec. 2. That the President shall appoint a commission of three, which shall observe the operation and effects of the institution of the eight-hour standard work day as above defined and the facts and conditions affecting the relations between such common carriers and employees during a period of not less than six months nor more than nine months, in the discretion of the commission, and within thirty days thereafter such commission shall report its findings to the President and Congress; . . .

"Sec. 3. That pending the report of the commission herein provided for and for a period of thirty days thereafter the compensation of railway employees subject to this Act for a standard eight-hour workday shall not be reduced below the present standard day's wage, and for all necessary time in excess of eight hours such employees shall be paid at a rate not less than the pro rata rate for such standard eight-hour workday.

"Sec. 4. That any person violating any provision of this Act shall be guilty of a misdemeanor and upon conviction shall be fined not less than $100 and not more than $1,000, or imprisoned not to exceed one year, or both."

The pivotal question was, whether Congress had power to pass the act, and no power of Congress was suggested in any of the opinions except its power to regulate commerce with foreign nations, among the states and with the Indian tribes.

The typical contract between railroad companies and their employees affected by the act is a contract basing pay on one hundred miles or less, ten hours or less; ten hours' pay is given for a one hundred miles or less and overtime is paid *pro rata*. This contract may be thus summarized: one hundred miles or less, ten hours or less, shall constitute a day. During the year 1916 the labor unions of employees demanded of the railways an eight-hour basis of pay and extra overtime pay beyond eight hours, overtime at fifty per cent above normal rate. The railways and labor unions having failed to reach any agreement and a strike having been called, Congress passed the act above quoted.

It having been frequently decided and being conceded that, in order to be within the power of Congress to regulate commerce, legislation must have some real or substantial relation to or connection with commerce, the inquiry was whether this legislation had a real or substantial relation to commerce.

It will be seen that the first section of the act says only that in contracts for labor and service eight hours shall be deemed a day's work and the measure or standard of a day's work for the purpose of reckoning compensation of employees. Unless the ordinary sense of this language may be enlarged by reference to the title of the act, or by considering the facts leading up to the passage of the act, or by reference to the statements of legislators in committee or in debate, it would seem to be a mere rule for the interpretation of contracts. But apparently the majority of the court holds that it imposes an obligatory standard of pay on both the railways and their employees.

The more essential controversy was the validity of section 3. Section 2 having provided for a commission to observe during a period of not less than six months or more than nine months the operation and effect of the eight-hour standard workday and the facts and conditions affecting the relation between railways and their employees during that period, section 3 provides that until thirty days after this commission shall report to Congress the compensation of railway employees subject to the act for the standard eight-hour day shall not be less than standard day's wage then existing, with overtime beyond eight hours *pro rata.* In other words, pending the report of the commission and for thirty days thereafter each railway company was required to pay for eight hours at least as much wages as it then paid for its standard day.

It is obvious and not disputed that the act contains no prohibition against employees working more than eight hours and leaves in effect the sixteen-hour law. On this ground the railways urged that the whole effect of the act is to fix a scale of wages. But the court said the act establishes a standard day as well as a scale of wages; a standard day permanently, a scale of wages during a period not exceeding ten months. Apparently the court holds that as to the employees governed by the act, both they and their employers are prohibited from contracting on any other basis than that of a standard day of eight hours.

Touching the validity of section 3, the fixing of a wage scale during the temporary period, the argument of the opinion of the Chief Justice is, that the business of common carriers is public, that society has an interest in the continued operation and rightful conduct of the business, and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it; that on failure of the railways and their employees to agree, thus threatening interruption of interstate commerce and great injury of public interests, the power of Congress arises to make this agreement for the parties; to provide for a standard of wages to fill the want caused by the failure to agree. The court argues that this is a proper part of governmental regulation, because necessary to prevent the stoppage of commerce resulting from failure of the railway companies and their employees to agree on wages. To what purpose, the court asks, is governmental regulation if it cannot secure to the public an efficient and reasonable service and prevent service from being destroyed?

"To what derision it would reduce the power of government" if that power did not extend to doing what is essential to prevent railway operation from being stopped.

Pursuing this argument, the court said that the act of Congress amounts in substance and effect to exertion of its authority compulsorily to arbitrate between the parties wage disputes by establishing a legislative standard of wages—exercised in this case by direct legislation—but the same power involved in establishment by Congress of other means of compulsory arbitration.

As to the carrier, the court said that it engaged in the business of interstate commerce, a business charged with a public interest, subject to the power of Congress to regulate; and that the very absence of a scale of wages by agreement called for the appropriate legislative remedy. As to the employee, the court said it was again obvious that he engaged in a business charged with a public interest which subjects his right to leave the employment to the regulative power of Congress.

Mr. Justice McKenna concurring said that when one enters into interstate commerce he enters a service in which the public has an interest and subjects himself to that public interest and to the regulation thereof as a condition attaching to the employment.

Mr. Justice Day dissenting said he was not prepared to deny the power of Congress to regulate wages of railway employees engaged in commerce among the states. On the question of congressional power to fix wages he agrees with the majority opinion. Conceding that every presumption exists in favor of legitimate exercise of legislative power and that the courts have no authority to inquire into motives of legislators, conceding that ordinarily every enactment pre-supposes proper motives and sufficient information and knowledge of the legislature to warrant the action taken, Mr. Justice Day said that this law on its face shows Congress had no knowledge or information of the facts, did not pass on the facts, and expressed in the law itself inability to fix in advance of investigation a just and proper wage; that the act, unlike most legislation, professes on its face to provide an experiment for the very purpose of determining what is a proper wage. Consequently he said that the act, fixing a wage during the period of experiment and for the purposes of experiment, and imposing on the carriers and the public the very large cost of the experiment with no provision for recoupment should the temporary

wage be found unjust, is a taking of property without due process, contrary to the fifth amendment. He said that no emergency, whatever its character, can justify the unlawful appropriation of private property.[1] In this view Justices Pitney and Van Devanter concurred.

The reader will determine for himself whether the opinion of the court answers Mr. Justice Day. The opinion of the court, in asserting the supremacy of the public right of control over the private right of agreement on wages, said:

"Nor is it an answer to this view to suggest that the situation was one of emergency and that emergency cannot be made the source of power. *Ex parte Milligan*, 4 Wall. 2. The proposition begs the question, since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce may be by anticipation legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce."

Justices Pitney and Van Devanter were of opinion that fixing wages of train employees has no such real or substantial relation to or connection with commerce as to be a regulation of commerce; and therefore that fixing wages is beyond the power of Congress. In this Mr. Justice McReynolds apparently concurs, but six members of the court expressed the opinion that fixing wages is so pertinent and closely related to transportation as to be a regulation of commerce and within the power of Congress.

Mr. Justice Day says he is not prepared to admit that Congress may coerce employees to continue in service in interstate commerce, and he thinks this question not involved in the case. But the views of the majority opinion as to this question certainly are not *obiter*. The whole majority opinion proceeds upon the argument that both carriers of commerce and their employees engage in a business which is subject to a public use and to public regulation, and that both employer and employees engaging voluntarily in such a business surrender their private rights to the extent necessary to make public regulation effective; and that, as a vital part of public regulation is to prevent the stoppage of

1. Ex parte Milligan, (1867) 4 Wall. (U. S.) 2, 18 L. Ed. 281.

commerce and to secure its continued flow, Congress has a right to arbitrate between employer and employee and to force agreement between them on wages and terms of service. There would appear to be no good answer to Mr. Justice McReynolds, who dissented but said:

"But, considering the doctrine now affirmed by a majority of the Court as established, it follows as of course that Congress has power to fix a maximum as well as a minimum wage for trainmen; to require compulsory arbitration of labor disputes which may seriously and directly jeopardize the movement of interstate traffic; and to take measures effectively to protect the free flow of such commerce against any combination, whether of operatives, owners, or strangers."

CHARLES W. BUNN.

ST. PAUL.

THE RULES OF THE CONFLICT OF LAWS APPLICABLE TO BILLS AND NOTES.

III. Interpretation and Obligation.*

B. Specific Questions.

4. Maturity.

The difference between the Anglo-American law and that of the Hague Convention relating to maturity or to the day of payment concerns, in the main, legal holidays and days of grace.[91] Between countries having different calendars a question may arise also regarding the law that shall fix the maturity of the instrument.

Whatever difference of opinion there may be concerning the doctrine of the independence of the different contracts, all are agreed that the date of maturity must be determined alike with respect to all parties. The time of payment being a term of the original contract, all supervening parties must be deemed to have contracted upon the basis of that contract. The question is therefore whether the lex loci contractus or the lex loci solutionis of the bill or note shall govern.

a. *English Law*: Article 72 (5) provides:

"Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable."

b. *American Law*: It has been uniformly held that the existence of days of grace is to be determined in accordance with the place of payment of the bill or note.[92]

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*Continued from 1 Minnesota Law Review, p. 338.

91. Days of grace are still allowed in England. B. E. A. Sec. 14.

92. Bank of Washington v. Triplett, (1828) 1 Pet. 25, 7 L. Ed. 37; Vaughan v. Potter, (1907) 131 Ill. App. 334; Thorp v. Craig, (1860) 10 Ia. 461; Vidal v. Thompson, (1822) 11 Mart. (La.) 23; Hammond v. American Express Co., (1908) 107 Md. 295, 68 Atl. 496; Burnham v. Webster, (1841) 19 Me. 232; Cribbs v. Adams, (1859) 13 Gray 597; Bank of Orange County v. Colby, (1842) 12 N. H. 520; Bowen v. Newell, (1855) 13 N. Y. 290; Pawcatuck Nat. Bank v. Barber, (1900) 22 R. I. 73, 46 Atl. 1095; Bryant v. Edson, (1836) 8 Vt. 325; 30 Am. Dec. 472; Walsh v. Dart, (1860) 12 Wis. 709; Second Nat. Bank v. Smith, (1903) 118 Wis. 18, 94 N. W. 664.

c. *German Law*: The law of the place of payment governs in general.[93] Article 34 of the General Exchange Law contains an express provision on the subject of calendars, which has the following wording:

"If a bill, payable after date within the Empire (Inland), be drawn in a country reckoning by the old style, and there be no statement thereon, that the bill is dated after the new style, or, if such bill be dated according to both styles, the date of maturity is to be reckoned according to the day of the calendar of the new style which corresponds with the day of drawing according to the old style."

This article applies the calendar of the place of issue but it deals only with the case where a bill is drawn on Germany from a country having the old style and is payable after date. If the bill is payable on a particular day, the German calendar controls.[94] Where a bill payable after date is drawn in Germany on a country with the old style, the rule contained in Article 34 is not applied by way of analogy and the date of maturity is determined in accordance with the calendar at the place of payment.[95]

d. *Italian Law*: There is no provision in the Italian codes on the subject. Most of the Italian authors[96] apply the law of the place of issue where the calculation of the date of maturity depends upon the question of a difference in the calendars.

The law and juristic opinion of the different countries agree that the law of the place of payment should determine the day of payment when the day of maturity falls on a Sunday or a legal holiday.[97] The same agreement exists also in the matter of days of grace, which are controlled by the same law.[98] Most

93. R.G. Dec. 11, 1895 (6 Niemeyer 429). In this case a bill was drawn from Germany on Portugal, payable three months after date. The question involved was whether the three months should be understood as calendar months or as ninety days.

Art. 35 of the German Exchange Act has the following provision:

"Bills payable at a fair or market become due in accordance with the local law of the fair or market place, and, failing such fixed date, on the day before the legal close of the fair or market. If the fair or market lasts for one day only, the bill becomes due on that day."

94. Staub, Art. 34, Sec. 4.

95. Staub, Art. 34, Sec. 5.

96. See Ottolenghi, p. 276.

97. Von Bar, p. 674; Diena, III, p. 147; Champcommunal, Annales, 1894, II, p. 204; Esperson, p. 90; Grünhut, II, p. 585; Lyon-Caen et Renault, IV, p. 563; Ottolenghi, p. 268.

98. Audinet, p. 614; von Bar, p. 674; Champcommunal, Annales, 1894, II, pp. 204-205; Beauchet, Annales, 1888, p. 69; Chrétien, p. 148;

of the authors feel the question involved in the above cases does not affect the maturity of the instrument in any true sense whatever, but only the precise day or incidents of payment, and like all matters affecting payment, should be subject to the law of the place of payment.[99] As the question is closely connected with the business usages and policies existing at the place of payment, the law of the place of payment should control in the nature of things and every party must be regarded as having contracted with reference to the law there existing.[100]

Great diversity of opinion exists, however, in regard to the question of calendars. Some authors are of the opinion that the question affects the substance of the original contract so that the law of the place of issue should control.[101] Others bring it within the operation of the lex loci solutionis of the bill or note on the alleged ground that it relates to the performance of the contract.[102] The law of the place of payment of the bill or note has been accepted also by the Bills of Exchange Act and by the Convention of the Hague.[103] As this rule appears to conform also to the practice of bankers, it should be adopted by the Uniform Act.[104]

5. PRESENTMENT FOR ACCEPTANCE.

a. *English Law*: The Bills of Exchange Act provides that "the duties of the holder with respect to presentment for accept-

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Despagnet, p. 994; Esperson, p. 90; Diena, III, p. 150; Grünhut, II, p. 585; Lyon-Caen et Renault, IV, p. 563; Massé, I, p. 571; Rolin, II, No. 963; Surville et Arthuys, pp. 680-81; Ottolenghi, pp. 290-91; Weiss, IV, p. 465.

99. See, for example, Grünhut, II, p. 585; Ottolenghi, p. 290.

100. Contra, Staub, Art. 86, Secs. 1, 9, who contends that the allowance of days of grace would change the day of maturity.

101. Audinet, p. 614; Champcommunal, Annales, 1894, II, p. 201; Chrétien, p. 142; Jitta, II, pp. 81, 111; Surville et Arthuys, pp. 676-77; Despagnet, p. 994.

102. Von Bar, p. 675; Esperson, p. 89; Grünhut, II, p. 585; Lyon-Caen et Renault, IV, p. 563; Massé, I, pp. 570-71; Weiss, IV, pp. 465-66. Compare Diena, III, pp. 144-46; Ottolenghi, pp. 265-66.

103. Art. 36, Uniform Law.

104. Where the day of payment is a certain time after date the actual date must, of course, be understood.

"As regards the calendar," says von Bar, "we must start with this consideration, that the person who issues the bill imposes its conditions, and these he must express in the way in which they will be most easily understood at the place of payment. That is effected by fixing the day of payment according to the calendar that is in use at the place of payment. The matter stands otherwise if the day of payment is fixed at the expiration of a particular period from the date of the bill. The date is the day on which the bill is truly completed,

ance . . . are determined by the law of the place where the act is done or the bill is dishonoured."[105]

b. *American Law*: It has been held that the right of immediate recourse for non-acceptance is subject to the law governing the contract of the party sought to be charged.[106] While no cases have been found respecting the duty of presentment for acceptance, the same law will doubtless apply.

c. *French Law*: The provisions of the French code are admitted by the French writers themselves to be illogical and indefensible.[107] According to Article 160 of the Commercial Code the time for presentment of drafts payable after sight drawn in France on a foreign country is determined by French law, which governs likewise where a draft is drawn in a foreign country on France.

d. *Italian Law*: The only relevant provision of the Italian law is contained in Section 261 of the Commercial Code which provides that when, during times of maritime war, a sight draft is drawn in Italy on a foreign country, the time of presentment for acceptance shall be double the ordinary period. Ottolenghi[108] is of the opinion that this section accepts the law of the place where the contract is made as controlling the time within which presentment for acceptance must be made.

Of the text writers the older authors regarded the duty of the holder to present the instrument for acceptance and the time of such presentment as a part of the performance of the exchange contract, and as subject, therefore, to the law of the place where the presentment was to be made.[109] Today the jurists generally agree in looking upon the question as one affecting the obligation of the various contracts, as distinguished from their performance. According to this view the lex loci contractus of the individual contracts would determine the duties of the holder.[110]

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not the day, which is described by the same title in another calendar, but is, of course, a different day altogether." P. 675.

105. B. E. A. Sec. 72 (3).

106. Aymar v. Sheldon, (1834) 12 Wend. (N. Y.) 439, 27 Am. Dec. 137.

107. See Despagnet, p. 994; Lyon-Caen et Renault, IV, p. 562.

108. P. 183.

109. Pothier, Du Contrat de Change, No. 155.

110. Audinet, p. 615; Champcommunal, Annales, 1894, II, p. 152; Diena, III, pp. 110, 113-14; Jitta, II, p. 91; Lyon-Caen et Renault, IV, p. 562; Ottolenghi, pp. 165-66.

Fiore still favors the law of the place of payment of the bill or note. Fiore, I, p. 164.

A number of authors, in a desire to have one law govern this question, suggest, however, that the law of the drawer's contract should control.[111] This is also the recommendation of the Institute of International Law.[112] As each party is free to stipulate in regard to the question before us, it would seem clear upon principle that it affects the obligation of contracts, that is, the conditions upon which each individual contract was made. The lex loci contractus of the different parties should be adopted, therefore, by the Uniform Act as the rule governing the necessity and time of presentment for acceptance, unless considerations of policy require a deviation from strict theory. A strict adherence to the doctrine of the independence of the different contracts may lead here to the result that the presentment may be sufficient as to some parties and insufficient as to others, so that the rights of recourse of the former against the latter may be cut off. Because of this fact a single law has been advocated. Many authors, as well as the Institute of International Law, favor, as we have seen, the lex loci contractus of the drawer's contract. The Bills of Exchange Act, on the other hand, has adopted "the law of the place where the act is done, or the bill is dishonoured." Massé[113] would distinguish between the necessity and the time of presentment and would apply the lex loci contractus of each contract with regard to the necessity of presentment and the lex loci contractus of the drawer's contract as regards the time of presentment.

If a single law must be found the author would prefer the rule of the Bills of Exchange Act. A comparative study of the law of Bills and Notes of England and the United States and that of the Convention of the Hague has not convinced him, however, of the necessity of a departure from principle. The two systems agree as to the necessity of presentment except that the Bills of Exchange Act[114] and the Negotiable Instruments Law[115] require a presentment for acceptance also in the relatively infrequent case where the bill is drawn payable elsewhere than at the residence or place of business of the drawee. As regards the time within which presentment must be made, the Anglo-

111. Audinet. p. 612; Champcommunal, Annales, 1894, II, p. 152; Chrétien, p. 122; Esperson, pp. 41-45; Surville et Arthuys, p. 677.
112. Annuaire, VIII, p. 122, Resolution IV.
113. I, p. 570.
114. Sec. 39 (2).
115. N. I. L. Sec. 143 (3).

American law prescribes a reasonable time,[116] while that of the Convention of the Hague[117] lays down the definite period of six months. No serious differences exist, therefore, between the two systems from which untoward results might be feared in consequence of the strict application of the doctrine of the independence of the different contracts. Under these circumstances no actual hardship is imposed upon the holder.

The lex loci contractus of the different contracts determines also the question whether the holder can safely accept a qualified acceptance.[118] The point involved is again whether the drawer or indorser has agreed to be responsible in such a case. The same law must control the right of recovery for non-acceptance.[119]

Everything connected with the mode of presentment for acceptance is governed, on the other hand, by the law of the place where such presentment is to be made. The question also whether an acceptance, once given, may be revoked is determined by this law.[120] It will decide likewise, in the nature of things, the duty of the drawee to accept.[121]

6. PRESENTMENT FOR PAYMENT AND NOTICE.

Important differences continue to exist between Anglo-American law and that of the Hague Convention as regards the requirements of protest and notice. What is the law that should govern in this matter?

a. *The Necessity of Presentment, Protest and Notice.* The law governing the necessity of presentment for acceptance has been discussed already.[122] The requirement of protest and notice

116. N. I. L. Sec. 144; B. E. A. Sec. 40 (1)

117. Art. 22, Uniform Law.

118. Diena, III, p. 124; Grünhut, II, p. 580; Ottolenghi, p. 199. Contra: Champcommunal, Annales, 1894, II, p. 156, who applies the lex domicilii of the acceptor.

119. Aymar v. Sheldon, (1834) 12 Wend. (N. Y.) 439; 27 Am. Dec. 137; Diena, III, p. 133; Esperson, p. 67; Ottolenghi, No. 79.

120. Chrétien, p. 129; Ottolenghi, p. 197.

121. Audinet, p. 612; Diena, III, pp. 118-119, 193; Lyon-Caen et Renault, IV, p. 558; Ottolenghi, p. 191; Weiss, IV, pp. 442, 460.

122. A wide difference existed formerly between Anglo-American and Continental law in the right of recourse upon the non-acceptance of a bill. Such a right was denied generally upon the continent, the holder being entitled only to security that the bill would be paid at maturity. The Convention of the Hague has accepted the Anglo-American view in this regard.

The question was regarded as relating to the obligation of the different parties and as subject, therefore, to the lex loci contractus of the drawer's or indorser's contract. Audinet, pp. 620-21; Chrétien,

of dishonor in case of non-acceptance may be considered in this connection.

Three different views have been expressed concerning the law governing the necessity of presentment for payment and the necessity of protest and notice upon dishonor, for non-acceptance or non-payment.

First view: These requirements are to be regarded as a part of the obligation of the contract of the different parties, that is, as conditions upon which they have agreed to pay. According to this view the lex loci of each contract should govern the question. This rule has the sanction of the French,[123] German[124] and Italian[125] courts. It represents also the majority doctrine in this country[126] and is supported by the great weight of judicial opinion everywhere.[127]

Second view: The law of the place of payment controls as to all parties. This is the view of the Bills of Exchange Act. Section 72 (3) reads as follows:

"The duties of the holder with respect to presentment for acceptance or payment and the necessity for, or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act[128] is done or the bill is dishonoured."

With respect to protest the view expressed in the above section was followed by some of the old authors, who regarded the question as relating to the performance of the original contract

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p. 135; Diena, III, p. 133; Esperson, pp. 67-68; Lyon-Caen et Renault, IV, pp. 559-60.

123. Trib. de Com. de la Seine, Apr. 6, 1875 (3 Clunet 103).

124. Staub, Art. 86, Secs. 5-9.

125. Cass. Florence, Apr. 8, 1895 (S. 1896, 4, 7), cited by Audinet, p. 618, note.

126. Holbrook v. Vibbard, (1840) 2 Scam. (Ill.) 465; Allen v. Merchants Bank of New York, (1839) 22 Wend. (N. Y.) 215; 34 Am. Dec. 289; Amsinck v. Rogers, (1907) 189 N. Y. 252; 82 N. E. 134; 121 Am. St. Rep. 858, 12 L. R. A. (N.S.) 875; Read v. Adams, (1821) 6 Serg. & R. (Pa.) 356; Warner v. Citizens Bank of Parker, (1894) 6 So. Dak. 152, 60 N. W. 746; Douglas v. Bank of Commerce, (1896) 97 Tenn. 133, 36 S. W. 874; Raymond v. Holmes, (1853) 11 Tex. 54; Guernsey v. Imperial Bank of Canada, (1911) 188 Fed. 300.

127. Von Bar, p. 677; Asser, p. 210; Beauchet, Annales, 1888, II, p. 66; Audinet, pp. 618, 620; Despagnet, pp. 994-95; Diena, III, p. 170; Principi, II, p. 315; Grünhut, II, p. 581; Massé, I, p. 569; Meili, II, p. 347; Ottolenghi, pp. 366-67; Schäffner, p. 122; Valéry, p. 1288.

128. Westlake suggests that the word "acts" includes also "omissions." P. 330.

and as subject, therefore, to the law of the place of payment.[129] A few of the modern writers also favor the law of the place of payment.[130]

Third view: The law of the place of issue of the original contract governs as to all parties. This view is supported by a number of authors[131] and is accepted by the Institute of International Law as regards the necessity of presentment.[132]

In accordance with the principle of the independence of the different contracts upon bills and notes there can be no doubt that on principle the law governing the different contracts must determine the conditions upon which each party has assumed liability. The necessity of presentment, protest and notice belongs clearly to the obligation of the contracts of the different parties, constituting the conditions upon which they have assumed liability, and must be subject, therefore, to the law of the place which controls the liability of the different parties. An abandonment of this rule in favor of the law of the place of payment or of the law of the place of issue of the original contract, is tantamount to a rejection of the whole doctrine of the independence of the different contracts. The author has taken the position that there is no sufficient reason for a complete departure from this fundamental principle in the law of bills and notes. To his mind the convenience of complying with a single law instead of satisfying the law of different jurisdictions does not justify an overthrow of the traditional rule which regards the contracts of the drawer and of the indorsers as indemnity contracts, performable in the state where they were made.

From the standpoint of practicability the lex loci contractus of the several contracts is free from objection in so far as the necessity of presentment, protest and notice is concerned. Each one of these acts is customarily done without regard to the legal necessity for so doing, so that a rule which might impose such a necessity by virtue of the lex loci contractus of a particular contract would constitute no real burden.

Shall the same law determine also the question whether some substitute for the customary protest may be allowed? Under the

129. Brocher, Cours, II, pp. 317-18; Pothier, Traité du Contrat de Change, No. 155.
130. Lyon-Caen et Renault, IV, p. 563.
131. Esperson, p. 151.
132. Annuaire, VIII, p. 122, Resolution IV.

law of the Hague Convention each contracting state may prescribe that with the assent of the holder, protests to be drawn within its territory may be replaced by a declaration dated and written upon the bill itself, signed by the drawee, and transcribed in a public register within the time fixed for protest.[133] This practice appears to exist in Italy and in Belgium. Some authors would apply again the lex loci contractus of the different contracts.[134] Others are of opinion that the law of the place where the presentment is to be made should control.[135] According to this view the contract is interpreted as requiring only that the dishonor of the bill or note shall be indicated in some authentic manner, the mode of authentication being left to the law of the place where the act is to be done. The latter view is also that of the Institute of International Law.[136] The balance of convenience is in its favor.

b. *The Time and Mode of Presentment, Protest and Notice.* All courts and authors as well as legislative provisions agree that the law of the place where the presentment and protest is to be made should determine the formalities with which such acts should be executed. All parties, including the drawer and indorser, will be deemed to have contracted with reference to the law of that state. This law clearly controls the manner of presentment and protest. It determines for example, the persons by whom presentment and protest may be made; the place where and the time of day when such presentment may be made; and whether a "noting" on the day of maturity is sufficient. We have seen in connection with the maturity of bills and notes that the precise day of payment, where the day of maturity falls on a Sunday or a legal holiday, or where days of grace are allowed, is ascertained with reference to the law of the place of payment. The same rule would hold, no doubt, where the law of the place of payment does not recognize days of grace, but permits presentment and protest on one of the two business days following the day of maturity as is the case under the Convention of the Hague.[137]

133. Art. 9 of Convention.
134. Champcommunal, Annales, 1894, II, p. 216.
135. Diena, III, p. 175; Grünhut, II, p. 578; Ottolenghi, pp. 368-69.
136. Annuaire, VIII, p. 122. Resolution V provides that the law of the place where payment is to be made determines the mode of showing default of acceptance or payment, and the form of protest.
137. Art. 37, Uniform Law.

There is no harmony, however, concerning the law governing the mode of notification, as to which wide differences exist between the Anglo-American law and that of the Hague Convention.[138]

(1) *English Law*: Section 72 (3) of the Bills of Exchange Act provides that "the sufficiency of a protest or notice of dishonour" . . . is "determined by the law of the place where the act is done or the bill is dishonoured." This provision follows the decisions of *Rothschild v. Currie*[139] and *Hirschfield v. Smith.*[140] .

(2) *American Law*: The American cases are divided upon the question. The majority[141] hold that the law governing the different contracts should control. A minority[142] apply the law of the place of payment of the bill or note.

(3) *German Law*: Article 86 of the General German Exchange Law provides expressly:

"As regards the form of the proceedings for the exercise or maintenance of exchange rights on a bill at a foreign place, the local law in force decides."

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138. Article 44 of the Uniform Law provides as follows:

"The holder must give notice of non-acceptance or non-payment to his indorser and to the drawer within the four business days which follow the day of protest or, in case of the stipulation 'return without costs,' within the four business days which follow the presentment.

"Each indorser must within two days give notice to his indorser of the notice which he has received, indicating the names and addresses of those who have given the preceding notices, and thus in succession back to the drawer. The limit of time above indicated shall run from the receipt of the preceding notice.

"In a case where an indorser has not indicated his address or has signed in an illegal manner, it shall suffice if notice is given to the preceding indorser.

"A party who has to give notice may do so in any form, even by the simple return of the bill of exchange. He must prove that he has done this within the time prescribed.

"This time limit shall be deemed to have been observed if an ordinary letter giving the notice has been mailed within the said time.

"The party who does not give notice within the time above indicated shall not lose his right of recourse; he shall be responsible for the injury, if any has occurred, caused by his negligence, but the damages shall not exceed the amount of the bill of exchange."

139. (1841) 1 Q. B. 43, 4 P. & O. 737.

140. (1866) L. R. 1 C. P. 340.

141. Snow v. Perkins, (1851) 2 Mich. 238; Thorp v. Craig, (1860) 10 Ia. 461; Raymond v. Holmes, (1853) 11 Tex. 55; Aymar v. Sheldon, (1834) 12 Wend. (N. Y.) 439, 27 Am. Dec. 137.

142. Wooley v. Lyon, (1886) 117 Ill. 248, 6 N. E. 885, 57 Am. Rep. 867; Guernsey v. Imperial Bank of Canada, (1911) 188 Fed. 300.

This section is held applicable to the form and sufficiency of notice.[143]

Which of the above rules should be adopted by the Uniform Law?

The reasoning of *Rothschild v. Currie* in favor of the law of the place of payment of a bill or note must be rejected for the reason that it is based upon the theory that the drawer and indorsers agree to pay at the place of payment of the bill or note. The case of *Hirschfield v. Smith*, however, advanced a second reason in support of the law of the place of payment. Erle, C. J., says:[144]

"If the reason assigned in that case (*Rothschild v. Currie*) be not now adopted, and if the contract of an indorser in England of a bill accepted payable in France be held to be a contract governed by the law of England, and so the holder be not entitled to sue in England such an indorser unless he has given due notice of dishonour according to the law of England, then the question is, what notice, under such circumstances, amounts to due notice? . . . The indorser of a bill accepted payable in France, promises to pay in the event of dishonour in France, and notice thereof. By his contract he must be taken to know the law of France, relating to the dishonour of bills; and notice of dishonour is a portion of that law. Then, although his contract is regulated by the law of England relating to indorsement, and although he may not be liable unless reasonable notice of dishonour has been sent to him, yet the notice of dishonour according to the law of France may be, and we think ought to be, deemed reasonable notice according to the law of England, and be sufficient in England to entitle the plaintiff to recover according to that law.

"It is reasonable to hold that the foreign holder should have time to make good his right of recourse against all the parties to the bill, in whatever country they may be. Here the holder was a Frenchman, in France. The indorsement to him was by the plaintiff, a Frenchman, in France. The indorsement to the plaintiff was by the defendant, an Englishman in England; and the indorsement to that Englishman by Lion, the payee, may have been in any country. The inconvenience would be great if the holder was bound to know the place of each indorsement, and the law of that place relating to notice of dishonour, and to give notice accordingly, on pain, in case of mistake, of losing his remedy; whereas there would be great convenience to the holder if notice valid according to the law of the place should be held to be reasonable notice for each of the countries of each of

143. Staub, Art. 86, Sec. 3; Beauchet, Annales, 1888, II, p. 67, note.
144. (1866) L. R. 1 C. P. 340, 352.

the parties, unless an exceptional case should give occasion for an exception."

In the opinion of the learned Chief Justice, therefore, even if the indorser's contract is subject to the law of the place where he entered the contract, the indorser must be regarded as having contracted, as regards the sufficiency of notice, with reference to the law of the place where the bill is payable. The same view is strongly advocated by a late federal case, in which Judge Sanborn uses the following language:[145]

"The rule that the manner of giving and the sufficiency of the notice of dishonor are governed by the law of the place of indorsement, is impractical, unfair, and unjust, because the notary at the place of payment must give the notice, and it is often impossible in the time allowed to him by the law for him to find out where each indorsement was made and what the law of the place of each indorsement is upon the subject of notice of dishonor. On the other hand, commercial paper shows on its face where it is payable. Each indorser, when it is presented to him for his indorsement, has time and opportunity before he signs it, to learn where it is payable to ascertain if he desires the law of that place, and to decide for himself with full knowledge and upon due consideration whether or not he will agree to pay the amount specified therein if the maker fails to do so and the paper is presented, the payment is demanded, the protest is made, and the notice of dishonor is given according to that law. In the decisions upon this question there is a direct and irreconcilable conflict. The established rule in England, the rule in Illinois, and the stronger and better reasons are that, where an indorsement is made in one jurisdiction, and the commercial paper is payable in another, the manner of giving notice of dishonor and the sufficiency thereof are governed by the law of the place where the paper is payable."

The majority view in this country looks upon the sufficiency of notice as an implied condition upon which the liability of the drawer and indorser is to attach and which is subject, therefore, to the law governing their respective contracts. The foreign writers are divided on this point. Most[146] of them seem to feel that the sufficiency of notice, like the mode of presentment and protest, should be controlled by the law of the place of payment of the bill or note. From the standpoint of strict theory the question differs from that touching the mode of

145. (1911) 188 Fed. 300, at p. 302.

146. Asser, p. 210; Beauchet, Annales, 1888, II, pp. 67-68; Grünhut, II, p. 578; Meili, II, p. 346.

Contra and in favor of the lex loci of each contract, von Bar, p. 677; Diena, III, pp. 196-97; Ottolenghi, pp. 452-53.

presentment and protest in that it relates not so much to the manner of doing the prescribed act as to its sufficiency as notice to the drawer and indorser. It would affect, therefore, the obligation of their contracts, that is, the conditions upon which liability was assumed. It must be admitted, however, that the difference between the conditions of liability and matters affecting the mode of performance is ultimately one of degree. As no absolute line can be drawn, considerations of convenience may well be invoked in the solution of the question. The writer is strongly of the opinion that the considerations advanced by Chief Justice Erle and Judge Sanborn are entitled to the greatest weight and that the law of the place of payment, which is accepted by the law of England and Germany, and by the Institute of International Law, should be approved by the Uniform Act. The other view, which makes it incumbent upon each holder to notify a party whom he seeks to charge with legal liability in strict accordance with the law governing the latter's contract, is unreasonable. As far as the drawer and indorser is concerned the suggested rule would not operate more to his disadvantage than the rule now prevailing in Anglo-American law which extends the liability of the drawer or indorser in case of delay in giving notice of dishonor when such delay is caused by circumstances beyond the control of the holder which are not imputable to his default, misconduct or negligence.[147] It will follow that if the last holder is authorized to notify all the prior parties, and he does so, according to the law of the place of payment, their liability will be fixed. But suppose that the holder of the instrument at the time of maturity notifies only his immediate indorser, which law is to determine the time and manner of notice to be given by such indorser to the antecedent parties? The Bills of Exchange Act, Section 72 (3), appears to say that the sufficiency of notice by *any* holder is governed by the law of the place where the bill is dishonored. But this would be opposed to the English law as stated by the court of appeal in *Horne v. Rouquette*.[148] Westlake[149] believes that this subdivision should be applied only to the last holder, and that in all other cases, in conformity with the general rule governing the interpretation of the drawing and indorsement,[150] the lex loci contractus of the drawer's or in-

147. N. I. L. Sec. 115; B. E. A. Sec. 50 (1).
148. (1878) L. R. 3 Q. B. D. 514.
149. P. 321.
150. B. E. A. Sec. 72 (2).

dorser's contract must be satisfied. Daniel,[151] on the other hand, is of the opinion that each intermediate indorser could notify any prior indorser or the drawer, in accordance with the law of his own land. The most convenient rule would be, no doubt, to allow each party to give notice in the manner prescribed by the law of the state where such notice is to be given. This appears to be the meaning also of Resolution 5, paragraph 2 of the Institute of International Law.[152] The author would recommend that the Uniform Act adopt this rule.

7. Vis Major.—Moratory Laws.

a. *Vis Major.* In Anglo-American Law any delay in presentment, protest and notice is excused[152a] when caused by circumstances beyond the control of the holder and not imputable to his fault, misconduct or negligence, and such requirements are dispensed with,[153] if, after the exercise of reasonable diligence, they cannot be made. The Convention of the Hague allows such an excuse only in case presentment or protest is prevented by an insuperable obstacle (vis major).[154] Matters purely personal to the holder or to the person intrusted with the presentment of the instrument or with the drawing of the protest are not regarded as constituting cases of vis major.

Which is the law governing the question whether a delay in presentment, protest or notice is excusable?

Most authors[155] regard the question as relating to the obligation assumed by the drawer and indorser and as subject, therefore, to the lex loci contractus of their respective contracts. Others[156] are of the opinion that any delay in presentment, protest or notice

151. P. 1093.

152. Annuaire, VIII, p. 122. The resolution provides as follows:
"The notices to be given to the guarantors for the preservation of the rights of recourse in case of default of acceptance of payment, and the time within which such notices must be given, are governed by the law of the country from which such notices must be sent."

152a. N. I. L. Sec. 81, 113, 147, 159; B. E. A. Secs. 46 (1), 50 (1), 39 (4), 51 (9).

153. N. I. L. Secs. 82 (1), 112, 148 (2), 159; B. E. A. Secs. 46 (2) (a), 50 (2) (a), 41 (2) (b) 51 (9).

154. Art. 53, Uniform Law. The German Bills of Exchange Law of 1849 does not excuse any delay on account of vis major. Staub, Art. 41. Sec. 3.

155. Von Bar, p. 684; Champcommunal, Annales, 1894, II, p. 218; Chrétien, pp. 184-185; Despagnet, p. 996; Lyon-Caen et Renault, IV, p. 567; Ottolenghi, p. 430; Surville et Arthuys, p. 686; Weiss, IV, pp. 463-64.

156. Diena, III, pp. 183, 185; Jitta, II, p. 139; Massé, I, pp 569-70.

caused by vis major should be controlled by the law of the place of payment of the bill or note. The Institute of International Law considers the law of the place of the original issue of the instrument to be the appropriate law.[157]

The principle of the independence of the different contracts on a bill or note makes it impossible to accept the view recommended by the Institute of International Law, for there is no reasonable basis for the assumption that the different parties contracted with reference to the lex loci contractus of the drawer's contract as regards the defense now under consideration. The defenses which each party can interpose in an action against him are controlled by the lex loci contractus of the individual contract, except when they relate to the nature of the interpretation of the original contract or to the mode of performance. As the defense of vis major has no connection with the nature of interpretation of the original bill or note, it will be controlled necessarily by the lex loci contractus of each contract unless it can be said to belong to the incidents of performance. When the vis major operates to excuse presentment, protest or notice altogether, the question relates clearly to the substance of the obligation of the different contracts, that is, to the conditions upon which the parties assumed liability, and is controlled, therefore, by the law governing their respective contracts. On the other hand, when the vis major is relied upon solely for the purpose of excusing a delay in the presentment, protest or notice, it would seem that the law of the place where the acts are to be done should control the question. This law determines the precise day on which these acts must be done with respect to days of grace, Sundays and holidays, and the time for protesting in general, and should control whenever conditions constituting vis major under the law of such state exist.

b. *Moratory Laws.* Does the rule governing the defense of vis major apply where by reason of some great public necessity or calamity the time of payment or the time for protesting the instrument is postponed by legislation? This question has been discussed a great deal as a result of the French moratory legislation during the Franco-Prussian war. There can be no doubt concerning the validity of such legislation as regards persons who were subject to French law. Most of the countries upheld the French legislation even with respect to foreign in-

157. Annuaire, VIII, p. 122, Resolution VI.

dorsers.[158] A vast literature has arisen upon the subject which has been collected in Goldschmidt's Zeitschrift für das gesammte Handelsrecht.[159] Much of the controversy arose from the nature of the specific legislation involved, which postponed the time of payment of bills payable in France from month to month for a period aggregating eleven months. The legislation spoke now of the postponement of the maturity, now of the postponement of the time for protesting, and finally forbade the protesting. No attempt will be made here to discuss the French legislation. The problem can be considered only in its general aspects. Where the moratory legislation takes the form of an extension of the time within which presentment and protest may be made, it has been contended with great force that the law of the place of payment of the bill or note should control by virtue of the rule universally recognized as regards days of grace.[160] Diena[161] holds the view that the day of maturity remains unaffected by such moratory legislation as the French and that there has been in reality only "a postponement of the day on which payment can be demanded." Von Bar[162] maintains, on the other hand, that "it is merely playing with words to say that days of grace may just as well last for seven or eleven months as for two to ten days." The writer agrees with the view that the law of the place of payment of a bill or note should govern with respect to the moratory legislation of the type now under consideration. Days of grace exist on grounds of policy whose object is the protection of the

158. England: Rouquette v. Overman, (1875) L. R. 10 Q. B. 525. Austria: OGH May 28 & June 13, 1872, cited by Jettel, p. 119. See also Austro-Hungarian Court at Constantinople, Apr. 15, 1872 (1 Clunet 100). Belgium: Brussels, Apr. 29, 1872 (1 Clunet 209) Ghent, May 15, 1873 (1 Clunet 213). France: App. Aix Apr. 9, 1872 (D. 1872. 2. 202). Italy: Cass. Turin, March 6, 1872 (Annali 1872. 1. 107); App. Rome, June 12, 1872 (Annali 1872. 2. 266); Cass. Florence, Jan. 16. 1873 (Annali 1873. 1. 47); App. Milan, Apr. 4, 1873 (1 Clunet 138); Cass. Turin, May 20, 1879 (Annali 1897. 1. 405). Sweden: Sup. Court of Sweden, May 14, 1873 (1 Clunet 149). Switzerland: Court of Geneva, March 25, 1872 (Rev. de Dr. Int. 1872, p. 660).

A few courts, however, reached a different conclusion, notably the Supreme Commercial Court of the German Bund in its decision of February 21, 1871 (1 ROHG 288); also App. Milan, April 16, 1872 (Annali 1872. 2. 139).

159. XVII, pp. 294-09, XVIII, pp. 625-43.

160. That days of grace may be allowed by the law of the place of payment after the contract of the drawer or indorser has been entered into, is generally conceded. Von Bar, p. 683, note; Chrétien, p. 192; Lyon-Caen et Renault, IV, p. 568.

161. Diena, III, p. 189; Principi, II, pp. 316-17.

162. P. 683.

debtor against the serious consequences of loss of credit, immediate execution and possible bankruptcy which may follow upon the dishonor of commercial paper. Moratory laws aim to protect the credit or financial interests of a nation in the case of public crisis by giving to its people time within which to pay obligations which are conceded to be due. The difference in the length of time during which such grace is allowed cannot affect the principle.[163]

The law of the place of payment should govern equally when the moratory legislation prohibits the protesting of bills and notes during a specified period. Such legislation creates a situation of vis major operating merely as an extension of the time within which the protest can be made. In accordance with the ordinary rules governing vis major which have been laid down above, the law of the place of payment of a bill or note should control.[164]

The moratory legislation should be regarded as invalid, however, if it takes the form of an extension of the date of maturity. Even in the absence of constitutional limitations no state can be regarded as having the power to effectuate such a change in the contract of the parties, except with respect to persons that are subject to its jurisdiction. The legislation cannot bind parties to bills and notes who assumed their obligations in a foreign country.[165] Some of the writers are of the opinion that even in this case the legislation might be sustained on the theory that it constitutes, so far as the holder is concerned, a case of vis major.[166] In order that a case of vis major in any true sense can be made out, the protesting of the instrument on the day of its original maturity must be rendered impossible, or at least illegal. If a protest can be lawfully made on the day of the original maturity of the bill or note, there is no reason why the holder who wants to preserve his right or recourse against a foreign drawer or indorser should not make the presentment and protest in accordance with the strict terms of the contract of such drawer or indorser. When the moratory legislation purporting

163. Diena, III, pp. 190-91. See also Ottolenghi, p. 436; Despagnet, p. 997; Weiss, IV. p. 466.

164. Chrétien, p. 192; Despagnet, pp. 997-98; Lyon-Caen et Renault, IV, p. 568.

165. Chrétien, p. 193; Lyon-Caen et Renault, IV, p. 568.

166. Weiss IV, p. 466, note; Champcommunal, Annales, 1894, II, p. 250.

to extend the date of maturity allows a recovery of interest from the original date of maturity the substance of the contract would not, in reality, be affected but solely the time and mode of its performance, so that the law of the place of payment of the bill or note should govern.[167]

The English case of *Rouquette v. Overman*,[168] which sustained the French legislation, gives three reasons for the application of the law of the place of payment of a bill or note. First—the question affects the "incidents of presentment and payment" and is subject, therefore, to the law of the place of payment. Second—the indorser's contract calls for performance at the place of payment of the bill or note and is controlled therefore by that law. Third—a contrary doctrine, which might allow recourse against the drawer and indorsers before the obligation of the principal debtor has become due, would constitute a startling anomaly.

In an earlier part of this article it has been shown that the contract of the drawer and indorser is one of indemnity, which is to be performed in the place where it is entered into and not at the place of payment of the bill or note. The second ground set forth in the above opinion cannot, therefore, be accepted. The third argument, namely, that the application of the lex loci contractus of the different parties would lead to the anomaly that recourse might be taken against the drawer and the indorsers before the obligation of the principal debtor has become due, is of no conclusive character, as anomalies, in the nature of things, must result from such anomalous legislation. The extent to which the reason first advanced, namely, that the question affects the incidents of presentment and payment, can be accepted, has been shown above.

There is no reasonable basis for the assumption that all parties contracted with reference to the lex loci contractus of the original contract and for that reason the recommendation of the Institute of International Law, which favors that rule,[169] must be disapproved.

8. PAYMENT.

There is perfect agreement in the law of the different countries concerning the rule governing the mode of payment. In the

167. Diena, III, pp. 189-90. See also Jitta, II, p. 140.
168. (1875) L. R. 10 Q. B. 525.
169. Annuaire VIII, p. 122, Resolution VI.

nature of things the law of the place of payment controls. Unless the bill or note specifies that payment is to be made in a particular coin, the law of the place of payment will determine the kind of currency in which the instrument may be paid.[170]

The above rule is regarded as controlling also certain other matters relating to payment; for example, whether a party liable on a bill or note may discharge his liability by payment of the amount into court,[171] and when payment through a clearing house[172] becomes irrevocable.

Shall the same rule be applied also where the amount of a bill or note is indicated in a kind of money having the same designation in the country of issue and in the country where the payment is to be made, but there is a difference in its value? Suppose, for example, that a bill is drawn in New York on the city of Mexico for $1,000. If the bill calls for Mexican dollars it will represent only half the value it would possess if it were interpreted to mean dollars of the United States. Most authors[173] answer the question in the affirmative. Others[174] maintain that the law of the place of payment controls only the *mode* of payment, and that the question under consideration relates to the interpretation of the principal contract. The law of the place of payment is adopted as the governing law by the Convention of the Hague,[175] and this law would appear to be entitled to preference. As the amount is payable at the place of payment it would seem as if the money current at such a place must have been intended by the parties, in the absence of a clear expression to the contrary. All parties to the instrument must be regarded as having con-

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170. Diena, Principi, II, pp. 253-54; Audinet, p. 616; Jitta, II, p. 110; Lyon-Caen et Renault, IV, p. 554; Ottolenghi, pp. 305-06; Surville et Arthuys, pp. 682-83; Valéry, p. 1287; Weiss, IV, p. 466.

Many authors would apply the same rule though paper money has been substituted as legal tender since the making of the contract. Chrétien, pp. 159-62; Ottolenghi, pp. 313-14; Surville et Arthuys, pp. 682-83.

171. Diena, III, p. 154; Grünhut, II, p. 585; Lyon-Caen et Renault, IV, 563.

172. Lyon-Caen et Renault, IV, p. 563.

173. Von Bar, p. 674; Esperson, p. 97; Fiore, I, p. 223; Lyon-Caen et Renault, IV, p. 262; Massé, I, p. 546; Rolin, II, p. 543. See also, Ottolenghi, pp. 308-09.

174. Champcommunal, Annales, 1894, II, p. 208; Chrétien, p. 153; Lyon-Caen et Renault, IV, p. 262; Surville et Arthuys, p. 676.

175. Art. 40, par. 2, Uniform Law.

tracted upon this basis, so that the question is unaffected by the lex loci contractus of the drawer's or indorser's contract.[176]

Under the Convention of the Hague the holder of a bill of exchange must accept partial payment.[177] According to Anglo-American law he is not required to do so. It has been suggested that the duty of the holder in this regard should be regarded as relating not to the mode of payment but to the obligation of the different contracts and should be governed, therefore, by the lex loci contractus of each contract.[178] This view point would lead, however, to totally impracticable results and must be rejected, if for no other reason, on that ground alone. The holder must either accept part payment or not accept it, and he is not in a position to comply with conflicting laws. One law must control, and inasmuch as the question relates to payment the law of the place of payment is the logical rule to adopt.[179]

9. Amount of Recovery.

Much conflict may arise with respect to the amount of recovery. Anglo-American law differs from that of the Hague Convention in that it does not allow a commission, nor a deduction for a discount where suit is brought before maturity. The English law on the subject of damages was settled by the Bills of Exchange Act. In this country great uncertainty continues to exist with regard to the amount of recovery not only in the matter of damages (re-exchange, charges and expenses) but also as regards the principal amount specified in the instrument.[180] The Negotiable Instruments Law has not attempted to regulate the subject. In many states fixed damages are prescribed by statute in lieu of the ordinary damages, charges and expenses.

In the light of such conflicting rules in the municipal law, which is the rule which shall control the rights of the holder in the Conflict of Laws?

(a) *English Law:* Before the Bills of Exchange Act the English law governing interest and damages for the non-fulfillment of the contract of the maker and acceptor, drawer and indorser,

176. Ottolenghi, p. 311.

177. Art. 38, par. 2, Uniform Law. The Convention permits each contracting state, however, to authorize the holder to refuse partial payment of instruments payable within its own territory. Art. 8 of Convention.

178. Diena, III, p. 156; Ottolenghi, pp. 303-04.

179. Chrétien, p. 173; Esperson, p. 107.

180. See Norton on Bills and Notes, 4th edition, pp. 229-35.

was that of the place where each party undertook that he himself would pay.[181] The matter is now covered substantially by Section 57 of the Act. Although subdivision 1 of Section 57 is couched in general terms,[182] it appears to apply only to bills dishonored in England.[183] The subdivision is not exhaustive, however. A foreign drawer of a bill dishonored in England by nonpayment, who has paid re-exchange, may recover it from the English acceptor, and, if he is liable for re-exchange, may prove it in bankruptcy against the acceptor's estate before actual payment.[184] Where the bill is dishonored in England and the action is brought in an English court[185] not only indorsers in England but also persons who indorsed the instrument abroad would appear to be subject to the above provisions. Where the bill is dishonored abroad, subdivision 2 of Section 57 of the Bills of Exchange Act applies.[186]

(b) *American Law:* The lex loci solutionis governs both as to interest and damages.[187] As the contracts of the drawer and indorsers are regarded as independent contracts, according to which these parties do not agree to pay at the place of payment of the bill or note, interest and damages as against them are determined by the lex loci contractus et solutionis of their respective con-

181. Cooper v. Earl of Waldegrave, (1840) 2 Beav. 282: Gibbs v. Fremont, (1853) 9 Exch. 25. See also Chalmers, pp. 244-45; Dicey, pp. 598-99; Mayne, Damages, Sec. 308.

182. Section 57 of the Bills of Exchange Act, subdivision 1, provides as follows: "The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor, or from the drawer, or from a prior indorser—(a) The amount of the bill; (b) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case; (c) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest."

183. Chalmers, p. 195.

184. Ex parte Roberts, (1886) L. R. 182. B. D. 286 (C. A.), 56 L. J. Q. B. 74, 56 L. T. 599; 35 W. R. 128. See also Chalmers, p. 195; Dicey, p. 599.

185. Dicey, p. 599.

186. Section 57, subdivision 2 of the Bills of Exchange Act provides: "In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer, or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment."

187. Scofield v. Day, (1822) 20 Johns, (N. Y.) 102; Hawley v. Sloo, (1857) 12 La. Ann. 815; Austin v. Imus, (1851) 23 Vt. 286.

tracts.[188] The same rule applies where a fixed amount is payable by way of damages in lieu of re-exchange charges and expenses.[189]

(c) *French Law:* Interest by way of damages is recoverable in accordance with the lex fori.[190]

(d) *German Law:* The amount of recovery by the holder and by the indorsers who may have taken up the bill, is specified in Articles 50 and 51 of the General German Exchange Law. Subdivision 1 of each of these sections allows interest at the rate of six per cent from the date of maturity or payment, and subdivision 3, a commission of one-third per cent. According to Article 52 the provisions of Articles 50 and 51, subdivisions 1 and 3, do not exclude "in cases of recourse on a foreign place, . . . the higher rates permissible at such place." Though Article 52 refers specifically to the foreign law only when it prescribes higher rates than are laid down by the German law, the principle underlying the provision is deemed to have a general operation.[191]

A thorough discussion of the subject of damages would cover many pages and cannot be undertaken in this place and only the principal points of view can be mentioned.

First view. The law of the forum should govern. This view has been accepted by Massachusetts as regards interest by way of damages,[192] and also by the French Court of Cassation.[193] The doctrine is condemned by all modern jurists because it rests upon the false theory that non-contractual interest arises from the institution of the action, instead of from the non-performance of the contract.

188. Slacum v. Pomeroy, (1810) 6 Cranch. (U. S.) 221, 3 L. Ed. 205; Ex parte Heidelback, (1876) 2 Lowell 526, Fed. Cas. No. 6322; Crawford v. Branch Bank of Mobile, (1844) 6 Ala. 12, 41 Am. Dec. 33; Bailey v. Heald, (1856) 17 Tex. 102.

A few courts hold that the drawers and indorsers agree to pay at the place of payment of the bill of note. Bank of Illinois v. Brady, (1843) 3 McLean 268, Fed. Cas. No. 888; Mullen v. Morris, (1845) 2 Pa. 85; Peck v. Mayo, (1842) 14 Vt. 33, 39 Am. Dec. 205.

189. Slacum v. Pomeroy, (1810) 6 Cranch. (U. S.) 221, 3 L. Ed. 205; Lenning v. Ralston, (1854) 23 Pa. 137.

190. Cass. June 10, 1857 (S. 1859. 1. 751), cited by Weiss, IV, p. 391, note; Cass. April 13, 1885 (13 Clunet 459).

191. See von Bar, p. 682; Diena, III, p. 211, note; Grünhut, II, p. 580, note 40.

192. Ayer v. Tilden, (1860) 15 Gray (Mass.) 178, 77 Am. Dec. 355.

193. Cass. June 10, 1857 (S. 1859. 1. 751), cited by Weiss, IV, p. 391, note; Cass. April 13, 1885 (13 Clunet 459).

Second view. The law of the place of performance should control. This view is held by the majority of countries and jurists. The old writers reached the result by reason of the application of the distinction which they made between the direct and indirect effects of a contract.[194] Under the intention theory, which underlies the modern law of obligations in the Conflict of Laws, the above conclusion is generally justified upon the ground that inasmuch as the breach occurred at the place where the payment is due, the parties must be deemed to have that law in mind.[195]

Third view. The law of the place where the contract is entered into should determine the question. A number of writers maintain that there is no sufficient basis for a distinction between contractual and non-contractual interest. According to these writers the non-performance of the contract must have been also within the contemplation of the parties and should be governed, therefore, by the lex loci contractus,—the law controlling the obligation of the contract.[196]

The writer is not convinced of the correctness of the reasoning just stated. From the mere fact that the law may assume, in the absence of evidence to the contrary, that the parties contracted with reference to the law of the place where the contract is entered into, it does not follow that all matters touching the obligation of the contract must be controlled by that law. We have seen that by common consent all matters relating directly to the mode of performance are subject to the law of the state where the performance is to take place. And it would seem most natural to assume that where the contract is broken by non-performance, the amount of interest due by way of damages should be determined by the rate prevailing at the place agreed upon for performance. The value of the performance at the time and place of performance controls generally the measure of damages in the municipal law for the reason that this rule compensates the plaintiff most nearly for the actual loss sustained. The same rule should govern in the Conflict of Laws. And this rule should control not only with reference to non-contractual interest but also with respect to the question of damages in general.

194. See, for example, Boullenois, Traité de la Personnalité et de la Réalité des Loix, II, pp. 477 fg.

195. Von Bar, pp. 584-85; Fiore, III, p. 258; Weiss, IV, pp. 391-92.

196. Asser, p. 81; Diena, II, pp. 81-84; Diena, III, p. 209; Ottolenghi, p. 469.

In the law of bills and notes the question remains, however, whether the damages should be determined as regards all parties by one and the same law. A number of authors are of this opinion, notwithstanding the doctrine of independence of the different contracts which they approve in general, and hold that the law of the place of payment of the bill or note should control.[197] They advocate this rule on grounds of convenience in order that the right of recourse between the parties may be adjusted more harmoniously than it is possible to do if the measure of damages with respect to each party is subject to the lex loci contractus of his particular contract. The Institute of International Law desired to reach the same end but was unwilling to sacrifice the doctrine of the independence of the different contracts in the matter of damages. It resolved, therefore, that while the different contracts are to be governed by the law of the state in which each contract is entered into, the obligation of the contracts placed upon the bill or note after its inception, should not be more extensive than that of the drawer or maker, respectively.[198] In this way it was sought to prevent the possibility that a party to a bill or note might be held without having a right to recover the full amount from the party creating the instrument. To the writer the solution of the problem suggested by the Institute of International Law appears wholly impracticable, and if uniformity in the amount of damages must be attained at all costs, he would prefer the law of the place of payment of the bill or note as the law governing non-contractual interest and damages with respect to all parties. He is of opinion, however, that the doctrine of the independence of the different contracts should not be abandoned in the matter of damages. In strict theory, as has been pointed out by Dean Ames,[199] the interest payable by the drawer or indorser in fulfillment of his contract of indemnity should run from the dishonor of the instrument to the time when it should, according to mercantile custom, be presented to the drawer or indorser, and ought to be computed at the rate prevailing at the place of dishonor; while interest payable by the drawer or indorser by way of damages for the non-fulfillment of his contract of indemnity should run only from the presentment

197. Von Bar, p. 681; Champcommunal, Annales, 1894, II, p. 259; Chrétien, p. 213: Esperson, p. 75; Lyon-Caen et Renault, IV, p. 561; Valéry, p. 1288; Weiss, IV, p. 467.

198. Annuaire, VIII, p. 121.

199. Ames, Cases on Bills and Notes, II, pp. 819-20.

of the instrument to the drawer or indorser and his failure to pay, and should be computed according to the rate prevailing at the place where the contract of the drawer or indorser is to be performed. This distinction is not made, however, by the American cases.

10. Acceptance and Payment for Honor.

Considerable difference exists in matters of detail between the Anglo-American law and that of the Convention of the Hague as regards acceptance and payment for honor. The principles of the Conflict of Laws that should control the questions which may arise from such a difference in the municipal law, would appear to be plain. In conformity with the conclusions reached in this article the contract of the acceptor for honor, as regards his capacity, the form of the contract, and the nature, conditions and extent of his liability assumed should be subject to the law of the place where the contract is entered into. The duty of the holder of a bill of exchange to allow acceptance for honor, and the effect of such acceptance upon his rights against the different parties to the instrument should be governed, on the other hand, by the lex loci contractus of the different parties.[200] This law determines likewise the duty of the holder to accept payment for honor when such payment for honor is offered at the maturity of the instrument, or subsequent thereto, and the conditions under which he is authorized to do so.[201] As regards the form in which payment for honor must be made, and the procedure to be followed, the law of the place where such payment for honor is made naturally controls.[202]

11. Renvoi.

All of the aforementioned rules must be understood as referring to the municipal law of the locus contractus, locus solutionis, etc., and not to the law of the state or country in its totality inclusive of its rules of the Conflict of Laws. The circumstance that the law of the place of contracting or of the place of performance may have another rule of private international law governing capacity, the formal validity or the obligation of the different contracts is therefore of no consequence.

The courts do not always bear this fact in mind. The follow-

200. Diena, III, pp. 128-29; Jitta, II, p. 124; Ottolenghi, p. 207.
201. Diena, III, pp. 157-58; Ottolenghi, p. 330.
202. Diena, III, p. 159.

ing quotation from the opinion of Judge Sanborn in *Guernsey v. Imperial Bank of Canada*[203] may serve as an illustration:

"This is an action by the owner of a promissory note payable in Canada made and indorsed in Illinois to recover the amount due upon the note from the indorser. Presentment, demand and protest were made, and notice of dishonor was given in compliance with the law of Canada, but the indorser claims, and it is conceded, but neither admitted nor decided, that the notice would have been insufficient to charge the indorser if the note had been payable in Illinois. The court below held that the notice was good and rendered a judgment against the indorser. The latter's counsel insist that this ruling is error on the ground that the sufficiency of the notice is governed by the law of the place of indorsement, and not by the law of the place of payment. To this contention there is a short and conclusive answer. The place of the indorsement was the state of Illinois. The law of that state was, when the indorsement was made, and it still is, that when commercial paper is indorsed in one jurisdiction and is payable in another the law of the place where it is payable governs the time and mode of presentment for payment, the manner of protest, and the time and manner of giving notice of dishonor, and the law of the place of indorsement is inapplicable to them. Wooley v. Lyon, 117 Ill. 248, 250, 6 N. E. 885, 886, 57 Am. Rep. 867. *If, therefore, as counsel contend, the law of the place where the indorsement was made, the law of Illinois, governs the sufficiency of the notice of dishonor in this case, that notice was good, for it was sufficient under the law of Canada where the note was payable, and the law of Illinois was that in a case of this character the law of the place where the note was payable governed the time and manner of giving the notice of dishonor.*"

The portion of the quotation which has been printed in italics accepts, in fact, the so-called renvoi doctrine, which, if generally adopted in the Conflict of Laws, would lead to great confusion. Counsel argued that the law of the place of indorsement, which was Illinois, should control the sufficiency of notice. The court's answer is that even if, for the sake of argument, counsel's contention be granted, the notice would be sufficient because it satisfied the law of the place of payment, that is, the law which would govern the question according to the rule of the Conflict of Laws adopted in Illinois. The viciousness of the reasoning consists in the fact that the law of the place of indorsement, for the application of which counsel contended, was understood by the court as including the Conflict of Laws of the state of Illinois instead of merely its law of bills and notes. The

203. (1911) 188 Fed. 300, at p. 301.

fundamental question raised is whether the rules of the Conflict of Laws should be understood as referring the judge to the municipal law of the foreign state or country, exclusive of its rules of the Conflict of Laws, or to the law of such state or country in its totality. In another place[204] it has been shown that all Conflict of Laws rules should be understood in the former sense. A court adopting the view that the rules of the Conflict of Laws referred to the law of the foreign state or country in its totality gives up, in fact, its own convictions on the subject of the Conflict of Laws and yields to the superior wisdom of the courts of another state. Unless the rules of the Conflict of Laws administered by the courts of the forum are understood as referring to the municipal law of the foreign state, that is, in the present instance, to its law of bills and notes, instead of to the law of that state in its totality, inclusive of its rules governing the Conflict of Laws, the courts of each state might be compelled to administer as many systems of the Conflict of Laws as are in existence in the whole world. The only sound and practical view is that all rules of the Conflict of Laws be understood as referring to the municipal law of a foreign state, exclusive of its rules of the Conflict of Laws.

12. Conclusion.

The following is a brief summary of the conclusions reached in the foregoing study.

(a) The capacity to contract by bill or note is determined by the lex loci contractus.

(b) The formal or essential validity of a bill or note is determined by the lex loci contractus. Where a bill or note, issued out of the United States, or any supervening contract placed thereon out of the United States, conforms as regards requisites in form to the law of the United States, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United States.

(c) The interpretation and obligation of the drawing, indorsement, making, acceptance, or acceptance supra protest of a bill or note is determined by the law of the place where such contract is made.

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204. See 10 Columbia Law Review, pp. 190-207, 327-44. For the literature on the subject, see also Beale, a Treatise on the Conflict of Laws, pp. 74-77.

Provided:

(1) That where an instrument is a negotiable bill or note under the law of its place of issue, it shall be deemed negotiable with respect to all parties.

(2) That a title to a negotiable bill or note acquired in conformity with the law of the place of transfer shall be recognized with respect to all parties.

(d) Where a bill or note is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.

(e) The sufficiency of the presentment for acceptance or payment and of the protest is determined by the law of the place where the bill or note is dishonored.

(f) The sufficiency of the notice of dishonor is determined by the law of the place from which such notice must be given.

(g) All of the above rules are to be understood as referring to the municipal law of the foreign state, exclusive of its rules of the Conflict of Laws.

ERNEST G. LORENZEN.

UNIVERSITY OF MINNESOTA.

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JOINDER OF PARTIES DEFENDANT IN TORT ACTIONS.—At the common law where a tort was committed by two or more persons, the liability arising therefrom was regarded as joint and several in its nature, and the injured party might bring an action against all the wrongdoers, against any number of them, or against any part of the whole, providing always the tort was of such a nature that it could have been committed by two or more persons in combination. If, in contemplation of law, the single tort could not have been committed by two or more together, and could only be a different tort by each, a separate action had to be brought against each wrongdoer.[1] The common law doctrines

1. Pomeroy, Code Remedies, fourth ed., Sec. 208.

concerning the liability of tort feasors, and as to the joinder or separation of them in actions brought to recover damages for the wrong, are entirely unchanged by the new system of procedure, since the code makes no provision for the joinder of parties defendant in tort actions.[2]

In general, those who have united in the commission of a tort to the person or to property are liable to the injured party without any restriction or limit upon his choice of defendants. It is generally held, however, that in order that this rule may apply and a union of wrongdoers in one action be possible, there must be some community in the wrongdoing among the parties who are to be united as defendants; the injury must in some sense be their joint work.[3] The rule itself is simple enough to state; the difficulty arises in its application.

It may be said at the outset that probably no satisfactory rule has been laid down as to what circumstances will constitute a sufficient "community in the wrongdoing" to make a joinder of the wrongdoers proper. Several tests have been suggested by the courts. The view which seems to prevail in a plurality of the jurisdictions is that a joinder will be permitted only when there is a "ligament of common purpose" between the defendants.[4] This doctrine has been concisely stated as follows: "Persons who act severally and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same time. A joint tort is essential to the maintenance of joint action. For separate and distinct wrongs in no wise connected by the ligament of a common purpose, actual or implied by law, the wrongdoers are liable only in separate actions, and not jointly in the same action."[5]

Other courts take the view that a joinder will not be allowed where the liability of the various defendants is based on different theories, as where one is liable at common law while the other is liable only under some statute, or where the master is joined with

2. Id. Sec. 208.

3. Id. Sec. 209.

4. Wm. Tackaberry Co. v. Sioux City Service Co., (1911) 154 Iowa 358, 132 N. W. 945. Weaver, J., dissented from the decision of the court, saying, "In so holding, it seems to me we are sacrificing substantial right to empty forms." Mooney v. Edison Electric Illuminating Co., (1904) 185 Mass. 547, 70 N. E. 933; Smith v. Day, (1901) 39 Ore. 537, 64 Pac. 812; Weist v. Electric Traction Co., (1901) 200 Pa. 148, 49 Atl. 891, 58 L. R. A. 666.

5. 15 Encyc. Pl. & Pr. p. 562, subd. b.

the servant for the negligence of the servant.[6] Still other courts have allowed the joinder where the concurring acts of the defendants have brought about the injury to the plaintiff, regardless of the question whether or not the basis of recovery from each defendant is on the same theory.[7] This latter view has been adopted in Minnesota,[8] but since our court has gone farther than any other in the direction of allowing a joinder of parties defendant in tort actions it may not be unprofitable to consider what are the reasons for refusing the joinder where the acts are merely concurrent, or the liability of the defendants rests upon different theories, and to determine, if possible, which view will best subserve the ends of justice without doing violence to settled principles of law.

One proposition is certain: if only one primary right of the plaintiff has been invaded, he is entitled to only one satisfaction, even though there be several verdicts or judgments. If the tort is actually joint, he may proceed against the various defendants either jointly or severally to secure this satisfaction. It is argued for those who favor the requirement of a concert of action, that if a joinder is allowed where there is no ligament of common purpose between the defendants, these defendants would lose their right to contribution against each other in the cases in which such right exists. But it is clear that, where the defendants have not acted in concert, they are not in pari delicto, and their rights may be adjusted according to the relations in fact existing between them,[9] and hence the argument that their right to contribution will be lost is unsound. From a practical viewpoint

6. Parsons v. Winchell, (1850) 5 Cush. (Mass.) 592, 52 Am. Dec. 745; Campbell v. Portland Sugar Co., (1873) 62 Me. 552, 16 Am. Rep. 503; French v. Central Construction Co., (1906) 76 Ohio St. 509, 81 N. E. 751, 12 L. R. A. (N.S.) 669; See also notes in 28 L. R. A. 441, 12 L. R. A. (N.S.) 675, and 25 L. R. A. (N.S.) 356. Betcher v. McChesney, (Penn. 1917) 100 Atl. 124.

7. Kansas City v. File, (1889) 60 Kan. 157, 55 Pac. 877; Pugh v. Chesapeake, etc., Ry. Co., (1897) 101 Ky. 77, 39 S. W. 695, 72 Am. St. Rep. 392.

8. Mayberry v. Northern Pacific R. Co., (1907) 100 Minn. 79, 110 N. W. 356, 12 L. R. A. (N.S.) 675; Fortmeyer v. National Biscuit Co., (1911) 116 Minn. 158, 133 N. W. 461.

9. Ankeny v. Moffett, (1887) 37 Minn. 109, 33 N. W. 320. The general rule is that no right of contribution exists between wrongdoers, but the rule is confined to cases where the person seeking redress knew, or must be presumed to have known, that the act was unlawful. But where the parties are not in pari delicto, and one is compelled to pay the damages, he may sue the other for contribution. See article in 8 Am. L. Reg. (N.S.) 449, and an article in 6 Albany L. J. 23, on "Contribution Between Wrongdoers."

it is objected that one defendant should not be made to suffer for the prejudices existing against another. But if the parties have the fair trial to which they are entitled, there could be no such prejudices.

Where the liability of each of the various defendants is on a different theory, as in the case of the joinder of a master and servant, or, as in the recent Minnesota case of *Doyle v. St. Paul Union Depot Company*,[10] where the liability of one defendant was dependent upon the Federal Employer's Liability Act, and that of the other dependent upon the common law, it is argued against joinder that the defenses of the various defendants may become embarrassed. It is no doubt true that the defenses may in such case be different, and such was the situation in the *Doyle Case*, since there the defense of contributory negligence would operate only to cut down the damages as to the one defendant, while as to the other it would be a complete defense. In answer to the objection to joinder on this ground the court said, "such considerations as those mentioned suggest that the presentation of a case to the jury may in particular cases be more difficult than is usual, but do not affect the propriety of the joinder or the right of recovery."[11] Although it may justly be argued that in some cases the amount of recovery against the various defendants may very well be different on account of the difference in the effect of the several defenses, yet this should not be an important objection to the joinder, since the matter may be taken care of by a proper charge to the jury, and can do no harm more than to complicate the issues.[12]

The requirement of concert of action, it is submitted, is objectionable in that it makes defendant's purpose a material fact, whereas in an action for negligence the defendant's purpose is clearly immaterial. Those courts applying the test of a "ligament of common purpose between the wrongdoers" seem to reach an undesirable result from the standpoint of practical justice, since they bring about a multiplicity of suits, and may result in

10. (Minn. 1916) 159 N. W. 1081. This case collects the Minnesota authorities on the subject.

11. Id. 1082.

12. Hillman v. Newington, (1880) 57 Cal. 62. This case seems to be directly contra to the Minnesota holding. Rauma v. Lamont, (1901) 82 Minn. 477, 85 N. W. 236, is in accord with the Doyle case. Exemplary damages were found against an officer making a false arrest, and compensatory damages only against the defendant who assisted him.

a practical impossibility of proof by the plaintiff. The common law practice and the modern statutes are designed for the furtherance of justice, and taking this into consideration, with the obvious reasons of practical convenience, economy, and the orderly administration of justice, it would seem that the liberal view adopted by the Minnesota courts, allowing the joinder as defendants of all parties contributing to cause the injury, regardless of the existence or non-existence of any ligament of common purpose or of any common ground of liability on which all the defendants are sought to be held, is much the preferable view.

IMPUTED NEGLIGENCE.—The doctrine of imputed negligence is one which has caused much discussion and the decisions reveal a considerable conflict and diversity of opinion as to when the negligence of one person will be imputed to another and as to the true basis for such imputation. For purposes of convenience, the cases in which this question arises most frequently may be divided into three groups: first, where the occupant of a vehicle is injured through the negligence of the defendant and the contributory negligence of the driver; second, where a child is injured through the negligence of the defendant and the contributory negligence of its parent or guardian; and, third, where a husband or wife is injured and the other spouse has been guilty of negligence which contributed to the injury. In all of these cases, the question is at once presented as to whether the negligence of the driver, parent, or husband, as the case may be, will defeat recovery by the injured party.

With respect to the first of these classes, the early English case of *Thorogood v. Bryan*[1] laid down the doctrine of imputing the negligence of the driver of the vehicle to the passenger. The basis of that decision seems to have been that the occupant, having trusted the driver by selecting the conveyance in which he was carried, had so far identified himself with the driver that if any injury resulted from such driver's negligence, he must be considered a party to it.[2] The doctrine of that case after being repeatedly questioned by later English cases was finally over-

1. (1849) 8 C. B. 115, 18 L. J. C. P. 336.

2. Coltman, J. "It appears to me, that having trusted the party by selecting the particular conveyance, the plaintiff has so far identified himself with the owner and her servants, that if any injury results from their negligence, he must be considered a party to it."

ruled by the case of *The Bernina.*[3] In speaking of *Thorogood v. Bryan,* Lord Herschell said:

"With the utmost respect for those eminent judges, I must say that I am unable to comprehend this doctrine of identification. . . . In what sense is the passenger by a public stage coach, because he avails himself of the accommodation afforded by it, identified with it?"

The Supreme Court of the United States[4] has likewise disapproved the rule of *Thorogood v. Bryan.* The great weight of authority in this country is to the effect that the negligence of the driver will not be imputed to a passenger who exercises and can exercise no control over the driver.[5] This is true in the case of a public carrier,[6] a hired conveyance,[7] or a private conveyance if the passenger exercise no authority or control over the driver[8] as in the case of master and servant. The passenger himself must, however, use reasonable care for his own safety, and if he acquiesces or participates in the negligent acts of the driver, no recovery can be had.[9] In this connection, it must be remembered that the courts have distinguished between the ordinary case of driver and occupant and the case where two persons are engaged in a joint enterprise. In the latter case the weight of authority is that the contributory negligence of one will bar a recovery by

3. (1888) L. R. 13 App. Cas. 1, 57 L. J. Adm. 65, 58 L. T. 423, 36 W. R. 870.

4. Little v. Hackett, (1885) 116 U. S. 366, 6 S. C. R. 391, 29 L. Ed. 652. The court per Field, J., said: "The truth is, the decision in Thorogood v. Bryan rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal co-operation or encouragement, is a gratuitous assumption. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world."

5. Shearman and Redfield on Negligence, sixth ed., I, Sec. 66; Central of Georgia. Ry. Co. v. Jones, (Ala. 1916) 70 So. 729; Schultz v. Old Colony Street Ry. Co., (1907) 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N.S.) 597; Carnegie v. Great Northern Ry. Co., (1914) 128 Minn. 14, 150 N. W. 164; Toledo Rys. & Light Co. v. Mayers, (1916) 93 Ohio St. 304, 112 N. E. 1014.

6. Holzab v. New Orleans, etc., R. Co., (1886) 38 La. Ann. 185, 58 Am. Rep. 177.

7. Little v. Hackett, supra.

8. Carnegie v. Great Northern Ry. Co., supra; Toledo Rys. & Light Co. v. Mayers, supra. Contra, Lauson v. Fond du Lac, (1909) 141 Wis. 57, 123 N. W. 629, 135 Am. St. Rep. 30.

9. Wachsmith v. Baltimore, etc., R. Co., (1912) 233 Pa. St. 465, 82 Atl. 755, Ann. Cas. 1913B 679.

either,[10] if it is a matter within the scope of the joint undertaking. The supreme court of Minnesota[11] has said:

"The rule as to imputed negligence, as settled by this court . . . is that negligence in the conduct of another will not be imputed to a party if he neither authorized such conduct, nor participated therein, nor had the right or power to control it. If, however, two or more persons unite in the joint prosecution of a common purpose under such circumstances that each has authority, expressed or implied, to act for all in respect to the control of the means or agencies employed to execute such common purpose, the negligence of one in the management thereof will be imputed to all the others."

In the second group of cases, the doctrine of the English courts was laid down in the case of *Waite v. Northeastern Ry. Co.*[12] The plaintiff, a child of five, was in the care of his grandmother who purchased two tickets on the defendant's railway. In crossing the tracks, the plaintiff and his grandmother were injured by one of the defendant's trains. The jury found that both the servants of the defendant and the grandmother of the plaintiff were negligent. The court applied the identification theory of *Thorogood v. Bryan* and held that the plaintiff was so far identified with his guardian that her negligence barred a recovery by him for the injuries sustained. The case of *Hartfield v. Roper*[13] is the leading case in this country for the doctrine of imputing the negligence of the parent to the child. This doctrine was explained in this way by Mr. Justice Cowen:

"An infant is not sui juris. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is his keeper and agent for that purpose; and in respect to third persons his act must be deemed that of the infant, his neglect the infant's neglect."

It is difficult to see how an agency exists as the infant is in many cases too young to appoint an agent, or to make any choice of the person to take charge of him. This case has received the support of some of our leading courts[14] but has been so severely

10. Paducah Traction Co. v. Walker's Adm'r., (1916) 169 Ky. 721, 185 S. W. 119; Beaucage v. Mercer, (1910) 206 Mass. 492, 92 N. E. 774, 138 Am. St. Rep. 401; Washington, etc., Ry. Co. v. Zell's Adm'r., (1915) 118 Va. 755, 88 S. E. 309.

11. Koplitz v. City of St. Paul, (1902) 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74.

12. (1859) El. Bl. & El. 728, 28 L. J. Q. B. 258, 5 Jur. N. S. 936, 7 W. R. 311.

13. (1839) 21 Wend. (N. Y.) 615, 34 Am. Dec. 273.

14. Meeks v. Southern Pacific R. Co., (1878) 52 Calif. 602.

criticized as being unsound in principle and unjust in result that today the weight of authority in the United States is against this doctrine.[15] In the case of *Whirley v. Whiteman*,[16] Mr. Justice McKinney, in speaking of *Hartfield v. Roper*, said:

"This decision is no less opposed to the current of authority on the point than to every principle of reason and justice. It is literally to visit the transgression of the parent upon the child."

As to the third group of cases, a minority of our courts hold that the contributory negligence of the husband will be imputed to the wife so as to defeat a recovery by her. Whether this imputation arises out of the marital relationship alone or whether, as in a case where a wife is injured while riding in a carriage driven by her husband, the basis for imputing his negligence to her is the relationship of driver and passenger, is not always clear, some courts putting it on the former ground[17] and some on the latter.[18] Under the Married Women's Acts, which are in force in most of our states today, the basis for imputing negligence from the relationship of husband and wife alone is certainly done away with.

A survey of these cases shows that the tendency today is away from the doctrine of imputed negligence as far as possible, and toward permitting the plaintiff who is himself guilty of no negligence, to recover regardless of any negligence of his parent, guardian, husband or wife, as the case may be.

It must, however, be borne in mind that quite a different rule applies where suit is brought, not by the child, or by one in his behalf, but by his parents. In such a case the negligence of the parent may utterly defeat a recovery. The reason for this is obvious and there is no conflict among the decisions.[19] One whose

15. Matson v. Minn., etc., R. Co., (1905) 95 Minn. 477, 104 N. W. 443, 111 Am. St. Rep. 483, 70 L. R. A. 503, repudiating the earlier Minnesota rule. Denver City Tramway Co. v. Brown, (1914) 57 Colo. 484, 143 Pac. 364. Atlantic, etc., R. Co. v. Gravitt, (1894) 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553. Chicago City R. Co. v. Wilcox, (1891) 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76.

16. (1858) 1 Head (Tenn.) 610.

17. McFadden v. Santa Ana, etc., R. Co., (1891) 87 Calif. 464, 25 Pac. 681, 11 L. R. A. 252.

18. Yahn v. Ottumwa, (1883) 60 Iowa 429. Fogg v. N. Y., etc., R. Co., (1916) 223 Mass. 444, 111 N. E. 960; Carlisle v. Sheldon, (1866) 38 Vt. 440. For the majority rule see Denton v. Missouri, etc., Ry. Co., (1916) 97 Kan. 498, 155 Pac. 812.

19. Pratt Coal & Iron Co. v. Brawley, (1887) 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751; Bellefontaine, etc., R. Co. v. Snyder, (1874) 24 Ohio St. 670; Westbrook v. Mobile, etc., R. Co., (1888) 66 Miss. 560, 6 So. 321, 14 Am. St. Rep. 587, semble.

negligence has brought about an injury cannot be allowed to profit by the results of his own misconduct. The recent Minnesota decision in the case of *Kokesh v. Price*[20] shows that the same is of course true where the husband sues for loss of his wife's services, his negligence having contributed to her injury. The court in this case held that in an action by a husband in his individual capacity to recover damages for injury to his wife, negligence on his part which directly contributed to her injury is a bar to his recovery. The decision on this point is clearly right and is in accord with the universal rule.

LABOR LITIGATION—BOYCOTTING AND PICKETING.—The decided cases involving questions arising in labor litigation reflect the great variety of forms and shapes assumed by the contest between employer and employed. While the decisions seem to rest largely on the peculiar facts of the case in hand, there are, however, a few fundamental situations into which the cases may be classified. The following discussion is based on the assumption that no violation of contractual rights is involved. First, there is the case where but two parties are concerned—the ordinary strike. Secondly, the class of cases where a third party is involved in the struggle. It is cases of the latter class that have caused the most difficulty in the courts.

A situation frequently arising is the so-called secondary boycott where the striking employees attempt to force those dealing with the employer to break off trade relations with him. The chief question in such a case is as to the means and methods used by the strikers. Mere persuasion involving no intimidation should not render the employees liable.[1] The third party has the legal right to refuse to deal with the employer. Inducing him by persuasion to exercise that right, although to a slight extent an interference with the employer's right to a free market, could not be enjoined without too great an interference with personal liberty and the right of free speech. It is on these grounds that many courts have declared picketing in itself to be lawful. Moreover, the employees have the right to present their side of the case to the public.[2] While this may have the intended result of inducing

20. (Minn. 1916) 161 N. W. 715.

1. See article by Jeremiah Smith, "Crucial Issues in Labor Litigation," 20 Harv. L. Rev. 253 at 266.

2. Beck v. Railway Teamsters' Protective Union, (1898) 118 Mich. 497, 77 N. W. 13, 74 Am. St. Rep. 421, 42 L. R. A. 407; Butterick Publishing

third parties to cease dealing with the employer, it would seem unwise to attempt to restrict it.[3] Such action is not even a prima facie wrong and needs no justification. On the other hand, when actual violence is threatened the courts are agreed that this should be enjoined on the ordinary principles governing the prevention of torts.[4]

A problem of much more difficulty is presented where the pressure goes beyond persuasion without amounting to threats of violence. Primarily, every man has the right to a free market, freedom on the part of both buyer and seller of goods and labor.[5] Any interference with this right is prima facie a wrong,[6] for although a man has a right to buy or refrain from buying, to work or refrain from working for anyone that he pleases, he has not the absolute right to make the exercise of his right to buy or to labor conditional and to use it as a lever to coerce the conduct of a third party. In the majority of cases in which this situation arises, such action can be justified on the ground of competition. Thus the action of one of two rival dealers in inducing a customer to cease to deal with the other is justifiable as legitimate competition.[7] Likewise, union employees by threats of striking may induce their employer to discharge non-union employees to make room for other union men. These two groups are competing and neither the employer nor the non-union men have any cause of action against the union men.[8] The situation is greatly changed,

Co. v. Typographical Union, (1906) 50 N. Y. Misc. Rep. 1, 100 N. Y. Supp. 292.

3. State v. Stockford, (1904) 77 Conn. 227, 58 Atl. 769, 107 Am. St. Rep. 28; Beaton v. Tarrant, (1902) 102 Ill. App. 124.

4. Goldberg, Bowen & Co. v. Stablemen's Union, (1906) 149 Cal. 429, 86 Pac. 806, 8 L. R. A. (N.S.) 460, 117 Am. St. Rep. 145, 9 Ann. Cas. 1219; My Maryland Lodge v. Adt, (1905) 100 Md. 238, 59 Atl. 721, 68 L. R. A. 752; Matthews v. Shankland, (1898) 25 N. Y. Misc. Rep. 604, 56 N. Y. Supp. 123.

5. Jersey City Printing Co. v. Cassidy, (1902) 63 N. J. Eq. 759, 53 Atl. 230; Atkins v. Fletcher Co., (1904) 65 N. J. Eq. 658, 55 Atl. 1074.

6. Quinn v. Leathem, [1901] App. Cas. 495.

7. Mogul S. S. Co. v. McGregor, (1892) App. Cas. 25; Master Builders' Association v. Domascio, (1901) 16 Colo. App. 25, 63 Pac. 782; Bowen v. Matheson, (1867) 14 Allen (Mass.) 499; Lewis v. Huie-Hodge Lumber Co., (1908) 121 La. 658, 46 So. 685.

8. Allen v. Flood, [1898] App. Cas. 1, 141; National Protective Association v. Cumming, (1902) 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648. See also dissenting opinion of Holmes, C. J., in Plant v. Woods, (1900) 176 Mass. 492, 502, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330. Contra, Berry v. Donovan, (1908) 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N.S.) 899, 108 Am. St. Rep. 499; Erdman v. Mitchell, (1903) 207 Pa. St. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783.

however, where the third party is an outsider. Whether the strikers threaten to divert trade from the third party or to call out his men with whom he has no dispute, the effect is the same. A neutral who was not involved in the controversy is then dragged in and through fear of injury to himself is forced to break off trade relations with the employer. Here there is no competition between the third party and the strikers to justify this interference with the employer's trade relations. The only remaining ground of justification is self protection. The question is whether the unions will be allowed to use this means of strengthening their organization. The weight of authority is to the effect that such a secondary boycott cannot be justified and is not permissible.[9] This view seems sound in principle. The Minnesota supreme court, however, refused to enjoin such action by a union in its recent decision in the case of *Grant Construction Co. v. St. Paul Building Trades Council.*[10] The defendant was an unincorporated association composed of delegates from local unions. Plaintiff, a contractor, ran an "open shop" and the defendants agreed not to work for plaintiff until this dispute was settled and further refused to work for any subcontractor working for plaintiff as long as plaintiff employed non-union men. The trial court refused a temporary injunction and this order was affirmed. The court said, "The interference with the trade relations of one with whom you have no trade relations is presumptively unlawful, but conditions may be such as to furnish justification for such conduct." The required justification was found in the fact that the defendants were in pursuit of a lawful object, namely, the protection of their own interests. The same question was before the Minnesota court in an earlier case,[11] in which the boycott was defined as:

"a combination of several persons to cause a loss to a third

9. Temperton v. Russell, [1893] 1 Q. B. 715; Loewe v. California State Federation of Labor, (1905) 139 Fed. 71; Purrington v. Hinchcliff, (1905) 219 Ill. 159, 76 N. E. 47, 2 L. R. A. (N.S.) 824, 109 Am. St. Rep. 322; Pickett v. Walsh, (1906) 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N.S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638; New England Cement Gun Co. v. McGivern, (1914) 218 Mass. 198, 105 N. E. 885, L. R. A. 1916C 986; Clarkson v. Laiblan, (1913) 178 Mo. App. 708, 161 S. W. 660; Purvis v. United Brotherhood of Carpenters, (1906) 214 Pa. St. 348, 63 Atl. 585, 112 Am. St. Rep. 757; Contra, Meier v. Speer, (1910) 96 Ark. 618, 132 S. W. 988; Lindsay & Co. v. Montana Federation of Labor, (1908) 37 Mont. 264, 96 Pac. 127.

10. (Minn. 1917) 161 N. W. 520.

11. Gray v. Building Trades Council, (1903) 91 Minn. 171, 97 N. W. 663, 97 N. W. 1118, 103 Am. St. Rep. 477, 63 L. R. A. 753, 1 Ann. Cas. 172.

person by causing others against their will to withdraw from him their beneficial business intercourse through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts, which tend to violence, and thereby cause him through fear of resulting injury to submit to dictation in the management of his affairs."

This would seem broad enough to cover threats of strikes against subcontractors, but the court, while enjoining any interference with the customers of the plaintiff, by threats of any kind or nature, said that the union might "refuse to allow their members to work in places where non-union labor is employed."[12] On principle it is difficult to differentiate between prospective customers and prospective subcontractors. Both are induced by intimidation to refuse to enter into business relations with the plaintiff and such action by the unions should be forbidden as undue interference with plaintiff's right to a free market. *Grant v. St. Paul Building Trades Council* follows that part of the earlier case refusing to enjoin the union from ordering out the union men of the subcontractors.

In *Steffes v. Motion Picture Machine Operators' Union*,[13] another phase of the same question arose. Plaintiff, the owner of a theater, refused to employ a union operator and the defend-

12. The injunction as granted by the trial court in Gray v. Building Trades Council was as follows:—

"Said injunction shall specifically enjoin said defendants and each of them, their members, agents, and employees, from in any manner interfering with the business of the plaintiffs by means of threats or intimidation, of any kind or nature, directed against the customers or prospective customers of said plaintiffs.

"Said injunction shall specifically enjoin the said defendants, council and brotherhood, their members, agents, and employees, and each and every of them, from interfering with the customers or prospective customers of plaintiffs by threats of any kind or nature, *and particularly from notifying such customers or prospective customers that plaintiffs are unfair.*

"Said injunction shall specifically enjoin said defendants, council and brotherhood, their members, agents, representatives and employees, and each and every of them, from going upon the premises where plaintiffs are engaged or employed, for the purpose of interfering with the business of plaintiffs, and pursuant to said purpose, from ordering or directing or notifying men belonging to the various allied unions to desist from work upon said premises by reason of the fact that plaintiffs are employed thereon."

The supreme court modified this injunction by omitting the part in italics and affirmed the order as modified.

13. (Minn. 1917) 161 N. W. 524.

ant union hired a man to carry back and forth in front of the theatre a sign on which was printed, "This Theater is Unfair to Organized Labor." An order refusing a temporary injunction was affirmed by the supreme court. The court said that if such notification to the public portended a threat or intimidation it would be unlawful and would be enjoined, but that mere notification in itself was not unlawful. Such action involves an interference with the plaintiff's right to a free market by attempting to induce third parties to cease to deal with plaintiff, but as the means used are mere persuasion and notification, this would seem to be the exercise of a clear legal right. Some few courts have enjoined picketing on the theory that it necessarily leads to violence and threats.[14] It has been said that, "there is and can be no such thing as peaceful picketing any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching."[15] The weight of authority, however, properly holds that picketing is not unlawful per se.[16] It is but the exercise of the right of free speech and until it amounts to a threat or intimidation it should not be subject to the prohibition of the courts.

MUNICIPAL REGULATION OF BILL BOARDS.—When we consider the question of municipal regulation of bill boards, we are at once confronted by two questions: what is police power; and to what limits may it be extended by a municipality? Police power has been defined as the power vested in the legislature by the constitution to make, ordain and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as the legislature shall judge to be for the good and welfare of the commonwealth and of the people of the same.[1] However, it has been affirmed that it is much easier to realize the existence and source of this power than to mark its boundaries, or prescribe its limits.[2] In brief the police power of a municipal corporation ex-

14. Vegelahn v. Gunter, (1896) 167 Mass. 92, 44 N. E. 1077, 57 Am. St. Rep. 443, 35 L. R. A. 722; Beck v. Railway Teamsters' Protective Union, supra.

15. Atchison, etc., Ry. Co. v. Gee, (1905) 139 Fed. 582.

16. Karges Furniture Co. v. Amalgamated Woodworkers' Local Union, (1905) 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N.S.) 788; Butterick Publishing Co. v. Typographical Union, supra; Everett Waddey Co. v. Richmond Typographical Union, (1906) 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N.S.) 792. See also Beaton v. Tarrant, supra.

1. Commonwealth v. Alger, (1851) 7 Cush. (Mass.) 53, 85.

2. Stone v. Mississippi, (1879) 101 U. S. 814, 818, 25 L. Ed. 1079.

tends to all matters affecting the health, morals, convenience, comfort, and safety of its citizens. It is certain that recent judicial decisions incline to give a more extensive scope to police power than did the earlier cases. The general welfare doctrine is rapidly expanding. The Supreme Court of the United States in an early case stated:

"that all rights of the individual were held subject to the police power of the state, and if public safety and morals require a discontinuance of any manufacture or traffic the legislature may provide for its discontinuance, notwithstanding individuals or corporations may thereby suffer inconvenience."[3]

It is under the rule of this case that the bill board cases arise. To promote the public safety, convenience, comfort, morals, and welfare of the inhabitants of a municipality the police power to regulate the use of streets and public ways confers ample authority to enforce by reasonable regulations, general and uniform in their nature, ordinances respecting the erection and maintenance of bill boards and other structures placed near the street lines. Such regulations are salutary and necessary, are not in restraint of trade, nor an unlawful restriction upon the legal or beneficial use of the property.[4] These regulations are sustained under the general welfare clause, and based on the maxims which are fundamental to the existence of police power, "the welfare of the people is first law,"[5] and "so use your property as not to injure the rights of another."[6]

While aesthetic or artistic considerations may be matters of governmental concern, they alone, in view of the weight of judicial authority, are not sufficient to support restrictions as to use of private property, nor will they alone justify the taking of such property without due process of law.[7] Therefore the mere fact that bill boards are unsightly, or offensive to the eye when compared with their surroundings, is not sufficient reason for their

3. Boston Beer Co. v. Massachusetts, (1877) 97 U. S. 25, 32, 24 L. Ed. 989.

4. Chicago v. Gunning System, (1905) 214 Ill. 628, 73 N. E. 1035, 70 L. R. A. 23, 2 Ann. Cas. 892; Rochester v. West, (1900) 164 N. Y. 510, 58 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659; Cream City Bill Posting Co. v. Milwaukee, (1914) 158 Wis. 86, 147 N. W. 25.

5. 13 Coke 139.

6. In re Morgan, (1899) 26 Colo. 415, 423, 58 Pac. 1071, 77 Am. St. Rep. 269.

7. Haller Sign Works v. Physical Culture Training School, (1911) 249 Ill. 436, 94 N. E. 920. State v. Lamb, (N. J. 1916) 98 Atl. 459.

regulation under the police power of the municipality.[8] The supreme court of Missouri, in sustaining a bill board ordinance of the city of St. Louis, after reviewing the authorities, reaches the conclusion that such regulations are reasonable, constitutional, and necessary enactments because (1) being temporary structures, bill boards are liable to be blown down and injure pedestrians, (2) they gather refuse and paper which may tend to spread conflagration, (3) they are used for dumping places for dirt, filth, and refuse, and nuisances are committed behind them, and (4) they serve as hiding places for criminals.[9] The recent case of *Thomas Cusack Co. v. City of Chicago*[10] is the latest utterance of the doctrine just stated, holding that the erection of any bill board over twelve square feet in area in any block in which one-half of the buildings on both sides are used exclusively for residential purposes, without first obtaining the written consent of the owners of the majority frontage on both sides of the street in each block, may be prohibited in the exercise of the police power, and that such prohibition works no denial to a corporation engaged in outdoor advertising of either due process of law, or equal protection of law as guaranteed by the fourteenth amendment of the federal constitution. The court further decided that a municipal ordinance passed under authority delegated by the state legislature to regulate and control bill boards was a valid exercise of police power unless clearly unreasonable or arbitrary. The court pointed out further that while it has always refrained from defining police power with any degree of precision it is disposed to favor the validity of laws which relate to matters com-

8. Varney and Green v. Williams, (1909) 155 Cal. 318, 100 Pac. 867, 21 L. R. A. (N.S.) 741, 132 Am. St. Rep. 88; Chicago v. Gunning System, supra; Passaic v. Paterson Bill Posting, etc., Co., (1905) 72 N. J. L. 285, 62 Atl. 267, 111 Am. St. Rep. 676. "Aesthetic considerations are a matter of luxury and indulgence rather than one of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

9. St. Louis Gunning Advertisement Co. v. St. Louis, (1911) 235 Mo. 99, 137 S. W. 929.

10. (U.S. 1917) 37 S. C. R. 190. The ordinance in question is as follows: "707. Frontage consents required.—It shall be unlawful for any person, firm or corporation to erect or construct any bill board or sign board in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners or duly authorized agents of said owners, owning a majority of the frontage of the property on both sides of the street in the block in which such bill board or sign board is to be erected, constructed or located. Such written consent shall be filed with the commissioner of buildings before a permit shall be issued for the erection, construction or location of such bill board, or sign board."

pletely within the territory of the state enacting them; that the local legislative authority is primarily the judge of public welfare, and that when their action is approved by the highest court of the state whose people are directly concerned, it will only interfere when it is plain and palpable that the legislation has no substantial relation to public health, safety, morals or general welfare. It would seem that the United States Supreme Court is leading the way toward giving the most extensive scope possible to police power, providing the legislation in question can be said to relate in any way to the health, safety, morals or general welfare of the community.

Admitting that municipalities under the police power have the authority to regulate the erection and maintenance of bill boards, it is submitted that it is questionable whether ordinances like the one under discussion do not involve a delegation of legislative power to individuals. It is an elementary proposition of constitutional law that the power to legislate conferred on one governmental body cannot be delegated.[11] On this principle it has been held that ordinances seeking to restrict the building of a public garage in the residence portions of a city without the consent of the majority of the property owners are invalid, as unreasonable, not uniform, and an unwarranted delegation of the legislative power to make building regulations under the police power granted by the city charter, which must be exercised if at all by the legislative branch and cannot be delegated to individuals.[12] The same results have been reached in regard to similar ordinances endeavoring to restrict livery stables in residence districts,[13] the erection of gas tanks within certain limits,[14] the building of frame buildings in districts without the consent of the owners of fire-

11. Ex Parte Wall, (1874) 48 Cal. 279, 17 Am. Dec. 425; Rice v. Foster, (1847) 4 Har. (Del.) 479.

12. Dangel v. Williams, (Del. 1916) 99 Atl. 84. In regard to ordinances of this kind the court said, "By the overwhelming weight of authority, with scarcely any decisions to the contrary, such legislation is invalid. It is a fundamental right of government to restrict for the public good the use of private property by the individual owning it, and this is included in the term police power, the exercise of which is seen in regulations of construction of buildings for the safety of the public, and the prohibition against certain kinds of business to preserve the public health. But all regulation must be reasonable, general and uniform, and the power must be exercised by the legislative body directly and not be delegated to any individual."

13. St. Louis v. Russell, (1893) 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721.

14. State v. Withnell, (1907) 78 Neb. 33, 110 N. W. 680, 8 L. R. A. (N.S.) 978, 126 Am. St. Rep. 586.

proof structures in the vicinity,[15] and the establishment of a building line by a majority of the property owners in a block in a residential district.[16] These cases all advance the reason that if the ordinances were upheld the owner's use of his land would be restricted by the caprice or hostility of his neighbors, and while one individual might be allowed to build a certain kind of structure on his lot within the block, another individual who had just the same legal right to build might be denied such privilege, because of the caprice of some of his neighbors. It would seem that the same would be true in regard to bill boards. On the other hand "such reference to a neighborhood of the propriety of having carried on within it trades or occupations which are properly the subject of police regulation, is not uncommon in laws which have been sustained against every possible claim of unconstitutionality," such as local option laws.[17] Some cases are found that extend this doctrine even to the cases of garages,[18] and livery barns.[19] The United States Supreme Court applied the reasoning of these cases in deciding the case in question, holding that there was not a delegation of legislative power. The court pointed out that the first part of the ordinance provided for an absolute prohibition of bill boards and then gave the property owners the opportunity to waive such prohibition; that the plaintiff in error could not possibly be injured by such result, but obviously might be benefited, for without it the prohibition would be absolute.

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15. Tilford v. Belknap, (1907) 126 Ky. 244, 103 S. W. 289, 11 L. R. A. (N.S.) 708.

16. Eubank v. Richmond, (1912) 226 U. S. 137, 33 S. C. R. 76, 57 L. Ed. 156, 42 L. R. A. (N.S.) 1123, Ann. Cas. 1914B 192.

17. Thomas Cusack Co. v. Chicago, supra; citing Swift v. People, (1896) 162 Ill. 534, 44 N. E. 528, 33 L. R. A. 470, and other cases.

18. People ex. rel. Busching v. Ericsson, (1914) 263 Ill. 368, 105 N. E. 315, L. R. A. 1915D 607, Ann. Cases 1915C 183. But see People v. City of Chicago, (1913) 261 Ill. 16, 103 N. E. 609.

19. Chicago v. Stratton, (1896) 162 Ill. 492, 44 N. E. 853, 35 L. R. A. 84, 53 Am. St. Rep. 325. In referring to the ordinance in question, Magruder, J., said, "There is a general prohibition against the location of livery stables in blocks where two-thirds of the buildings are devoted to exclusive residence purposes, and then an exception to the prohibition is created in favor of the blocks of the class designated, where the majority of the lot owners consent in writing to the location of livery stables there. We are unable to see how this exception amounts to a delegation by the common council to direct the location of such stables to the lot owner."

RECENT CASES

ARMY AND NAVY—ENLISTMENT—EFFECT OF.—A minor enlisted in the National Guard of the District of Columbia, having falsely represented his age to be over eighteen. His company was mustered into the federal service before he reached that age. His father relying on Sec. 27, Act of Congress, June 1916, which provides that no person under the age of eighteen shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardian, sought to secure his release on habeas corpus. *Held*, that this section applies to the National Guard when called into the service of the United States, and not solely to enlistment in the regular army. *Hoskins v. Dickerson*, (C. C. A. fifth circuit 1917,) 239 Fed. 275.

An enlistment contract of an infant, unlike most of his other contracts, is not voidable at his option. At common law, such a contract was not voidable by the infant, his parents, or guardians. *U. S. v. Blakeney*, (1847) 3 Grat. (Va.) 405. In the absence of some statutory provision such a contract will be regarded as absolutely binding. *In re Morrissey*, (1890) 137 U. S. 157, 11 S. C. R. 57, 34 L. Ed. 644. The first statute on this subject was passed in 1812, and since that time with the exception of the periods covered by the Mexican and Civil Wars, there has been some provision in force. Public policy requires that the obligation to render military service shall not be released. *U. S. v. Blakeney*, supra, semble. The statutes have, therefore, been strictly construed. It has been held that these statutes were passed for the benefit of parents and guardians, and that the minor himself can not secure his own release on habeas corpus. *Solomon v. Davenport*, (1898) 87 Fed. 318, 30 C. C. A. 664. Release can not be secured under the United States statute when the minor has enlisted in a volunteer army raised through the states. *Lanahan v. Birge*, (1862) 30 Conn. 438; *U. S. v. Lipscomb*, (1847) 4 Grat. (Va.) 41. At least one case has held that a mother can not secure the release of her son even if his father is dead. *Commonwealth v. Murray*, (1812) 4 Binn. 487, 5 Am. Dec. 412. But the general rule at the present time is contra to that case. *In re McNulty*, (1873) 2 Lowell (U. S. D. C.) 270, Fed. Cases No. 8917. The instant case is contra to *Ex parte Winfield*, (1916) 236 Fed. 552, and *Ex parte Avery*, (1916) 235 Fed. 248. The instant case also holds that where a minor over sixteen and under eighteen enlisted in the National Guard without the consent of his parents, he became a soldier, subject to military jurisdiction and liable to be tried by court-martial for the military offense of so enlisting; and for this reason the court had no jurisdiction to issue habeas corpus.

BILLS AND NOTES—DELIVERY—HOLDER IN DUE COURSE.—A stock brokerage firm drew its check to the order of plaintiff trust company and gave it to one of its clerks with instructions to certify same at defendant bank

and use it for purchase of revenue stamps from plaintiff. The clerk handed the check to defendant's clerks for certification. After the same had been certified, it was taken by or erroneously handed to a third party who forged the name of the drawer to a requisition for stamps and used the check for the purchase. *Held,* that plaintiff could not recover the amount of the check from the bank. *Empire Trust Co. v. Manhattan Co.,* (1916) 162 N. Y. Supp. 629.

The court assumed that plaintiff, the payee, acted in good faith, but held that it was not a holder in due course within the meaning of Section 35 N. Y. Cons. Laws 1909, Vol. 3, p. 2487, (Minn. G. S. 1913, Sec. 5828). This section protects a holder in due course by conclusively presuming a valid delivery by all prior parties. Section 33 of the same act (Minn. G. S. 1913, Sec. 5826) protects the holder in due course, to whom an instrument is negotiated after completion, although blanks in the instrument are filled in violation of instructions. Very few cases have been found deciding whether a payee can be a holder in due course. As to whether he can be such a holder within the meaning of section 33, there is a conflict of authority. Some cases have held that he may. *Boston Steel & Iron Co. v. Steuer,* (1903) 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426; *Liberty Trust Co. v. Tilton,* (1914) 217 Mass. 462, 105 N. E. 605, L. R. A. 1915B 144; Contra: *Herdman v. Wheeler,* (1902) 1 K. B. 361; *Vander Ploeg v. Van Zuuk,* (1907) 135 Ia. 350, 112 N. W. 807, 13 L. R. A. (N.S.) 490, 124 Am. St. Rep. 275. The court distinguishes the instant case from *Boston Steel Co. v. Steuer,* supra, mainly because in the latter case there was a delivery, although instructions as to filling blanks were violated, while in the principal case there was no delivery. It is submitted that if a payee is a holder in due course within the meaning of Section 33, he must also come within Section 35, on the analogy of the Massachusetts cases. In England practically the same result has been reached by a different method. It was first held that the payee could recover although blanks had been filled in violation of instructions. *Lloyd's Bank, Ltd., v. Cooke,* (1907) 1 K. B. 794, 8 Ann. Cas. 182. The decision was put upon the ground of common law estoppel, and not on the ground that the payee was a holder in due course. The doctrine of the case was limited later by holding that no estoppel would arise where there was no valid delivery. *Smith v. Prosser,* (1907) 2 K. B. 735, 11 Ann. Cas. 191. The English cases seem to have arrived at the result of the principal case more consistently. Common law estoppel is more clearly available, however, under the saving clause of the Bills of Exchange Act than under the Negotiable Instruments Law. The English Bills of Exchange Act, Section 97, expressly mentions the rules of the common law; the Negotiable Instruments Law, Section 7, (N. Y. Cons. Laws 1909, Vol. 3, p. 2483; Minn. G. S. 1913, Section 6008) mentions only the law merchant. And see 13 L. R. A. (N.S.) 490, note.

COMMERCE—REGULATION—TELEGRAPH COMPANIES—STATE STATUTES.—Through error of the telegraph company the initials of the addressee of a telegram were changed, causing delay in the delivery of the telegram. The message was to a person in the same state, but in order to reach him it had to pass through two other states. The printed contract contained

a provision limiting liability of the company. The plaintiff sued for the penalty fixed by state law and for damages for the delay. *Held,* the limitation of liability in respect to an interstate message, which has not been disapproved by the Interstate Commerce Commission, is binding on the parties and the statute does not apply. *Western Union Telegraph Co. v. Bolling,* (Va. 1917) 91 S. E. 154.

Plaintiff sued for damages alleged to have been caused by negligence of the defendant company resulting in the incorrect transmission of an interstate telegram. Defendant had limited its liability to fifty dollars by contract, and contended that such limitation, based on rates and classifications, was in accord with the regulations of the Interstate Commerce Commission. *Held,* such provision in the contract is invalid and unenforceable under the state statute prohibiting the limitation of liability for negligence. *Western Union Telegraph Co. v. Piper,* (Tex. Civ. App. 1917) 191 S. W. 817.

The above recent cases indicate the sharp conflict of decision on the effect of the Carmack Amendment on telegraph companies engaged in interstate commerce. State statutes which prohibited the limiting of liability for negligence occurring within the state formerly were held enforceable by the United States Supreme Court, even though the message was interstate commerce. *Western Union Telegraph Co. v. Commercial Milling Co.,* (1910) 218 U. S. 406, 31 S. C. R. 59, 54 L. Ed. 1088. This was on the ground that state statutes which would not "unfavorably affect or embarrass" the telegraph company in the course of its employment should be held valid "until Congress speaks upon the subject." *Western Union Telegraph Co. v. James,* (1896) 162 U. S. 650, 16 S. C. R. 934, 40 L. Ed. 1105. Congress, however, in 1910, by the Carmack Amendment to the Interstate Commerce Act, impressed upon telegraph and telephone companies engaged in interstate commerce the character of common carriers, provided for supervision of their rates and practices, and placed them under the control of the Interstate Commerce Commission. Act of June 18, 1910, 4 U. S. Compiled Statutes, 1913, Sec. 8563 (3). The Virginia case takes the stand that the act of Congress has superseded state legislation upon this subject. While the point was not squarely before the court, Mr. Justice Holmes stated with reference to a South Carolina act allowing recovery for mental anguish, "But the act also is objectionable in its aspect of an attempt to regulate commerce among the states." *Western Union Telegraph Co. v. Brown,* (1913) 234 U. S. 542, 34 S. C. R. 955, 58 L. Ed. 1457. In conformity with this dictum the Virginia case holds that when telegraph companies attempt to limit their liability, "until disapproved by the Interstate Commerce Commission, these conditions furnish the exclusive rule for determining their liability subject to federal statutes and general law, any state statutes to the contrary notwithstanding." The Texas court, on the other hand, took the position that the proposition is not yet settled and held that state regulations are still applicable to telegraph companies insofar as they do not conflict with federal law. The Carmack Amendment merely declares that telegraph companies are interstate carriers, and provides that their charges shall be just and reasonable and that messages may be classified as directed and different rates charged. It was argued that had Congress

intended to assume control over the contract, such an intention would have been declared, or regulations to that effect would have been provided, as was done in the case of carriers of property. In the absence of such regulations "the mere fact that Congress has enacted some legislation on this subject does not of itself signify an intention to monopolize the field and exclude the states entirely." *Western Union Telegraph Co. v. Piper,* supra, at p. 824. The court suggested that to hold otherwise "is to impute to Congress an oversight or an inability to select unambiguous words to express its purpose." *Id.* With the exception of Texas, however, the decisions of the state and lower federal courts appear to be uniform that the act of Congress has superseded state legislation on this subject. *Gardner v. Western Union Telegraph Co.,* (C. C. A. 8th Cir. 1916) 231 Fed. 405; *Western Union Telegraph Co. v. Hawkins,* (Ala. 1917) 73 So. 973; *Western Union Telegraph Co. v. Holder,* (1915) 117 Ark. 210, 174 S. W. 552; *Western Union Telegraph Co. v. Bank of Spencer,* (Okla. 1916) 156 Pac. 1175. This is upon the same general principle as the doctrine that, by the Carmack Amendment, Congress has manifested an intention to take entire control of interstate commerce by common carrier, and hence liability arising therefrom cannot be affected by state regulation. See 1 MINNESOTA LAW REVIEW 276. See also, *Durre v. Western Union Telegraph Co.,* (Wis. 1917) 161 N. W. 754.

CONSTITUTIONAL LAW—MASTER AND SERVANT—DUE PROCESS OF LAW—WORKMEN'S COMPENSATION ACTS.—The United States Supreme Court has upheld the constitutionality of the workmen's compensation laws of New York, Iowa, and Washington. *New York Central R. Co. v. White,* (1917) 37 S. C. R. 247 (New York); *Hawkins v. Bleakly,* (1917) 37 S. C. R. 255 (Iowa); *Mountain Timber Co. v. Washington,* (1917) 37 S. C. R. 260 (Washington). In the first two the decision was unanimous, in the last, five justices concurred in sustaining the law, four dissenting.

The New York law requires compensation to be made by the employer to the employee for injuries arising out of and in the course of the employment, without regard to fault as a cause except where the injury is occasioned by the wilful intention of the employee or results from his intoxication while on duty. If the employer fail to secure the payment of the prescribed compensation, he is liable to an action for damages, in which case the defenses of contributory negligence, negligence of fellow servant, and assumption of risk are barred. Agreements by employees to waive the right to compensation are invalidated. The employer is required to secure compensation to his employees either through the state fund, or some approved insurance company, or by furnishing proof to the industrial commission of his financial ability, depositing securities, etc. The law was attacked on the grounds that it takes the employer's property without due process of law because it subjects him to liability for compensation without regard to neglect or default, and in spite of the fact that the injury may be solely attributable to the fault of the employee; because the employee's rights are interfered with by preventing him from having compensation commensurate with his damages; and because both parties are deprived of the freedom of contract. The court holds that the rule of the common law founding liability upon fault or neglect is not a

fundamental right in which a party has a vested interest; that in fact under previous statutes in some instances employers are made liable regardless of negligence. *St. Louis, etc., Ry. v. Taylor,* (1908) 210 U. S. 281, 295, 28 S. C. R. 616, 52 L. Ed. 1011; *Texas & Pacific R. Co. v. Rigsby,* (1916) 241 U. S. 33, 39, 43, 36 S. C. R. 482, 60 L. Ed. 874. Instances of statutes imposing liability without fault are found in *St. Louis, etc., Ry. Co. v. Mathews,* (1897) 165 U. S. 1, 17 S. C. R. 243, 41 L. Ed. 611; *Chicago, etc., Ry. Co. v. Zernecke,* (1902) 183 U. S. 582, 586, 22 S. C. R. 229, 46 L. Ed. 339. Likewise, the employer has no vested interest in the defenses of assumption of risk, fellow-servant, and contributory negligence. Even if the state could not sweep away the whole body of rules regulating the liability of employer to employee without affording a just substitute, such a substitute is given in this instance in the limitation of the amount of recovery, in the fact that it goes directly to the beneficiary, and perhaps in the corresponding adjustment of the wage schedule. The court regards the industry as a joint adventure of employer and employee, in which personal injury to the employee often is inevitable, and the court considers that a system by which such losses are to be borne by the employer according to a definite scale is not arbitrary or unreasonable. Regarding the freedom of contract, the court reaffirms its recent declarations upholding the right to make contracts of employment as partaking of the nature of personal liberty and private property, and that the right to work for a living is of the very essence of personal freedom under the fourteenth amendment: *Coppage v. Kansas,* (1915) 236 U. S. 1, 14, 35 S. C. R. 240, L. R. A. 1915C 960; *Truax v. Raich,* (1915) 239 U. S. 33, 41, 36 S. C. R. 7, 60 L. Ed. 131, L. R. A. 1916D 545; but holds that the exercise of the police power permits the reasonable limitation of the freedom of contract of employment, because the subject matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and that the public has a direct interest in this as affecting the common welfare.

The Iowa law, like that of New York, is an elective workmen's compensation law, raising the same constitutional questions, which are disposed of in the same way. It provides that in case of an action against an employer who has rejected the act, it shall be presumed that the injury was the direct result of his negligence, and that he must assume the burden of proof to rebut the presumption of negligence. The court holds that the employer has no more vested interest in the rule respecting the burden of proof than in the so-called common-law defenses, and hence that a provision of this kind is no denial of due process of law. The act is also sustained against objections that the tribunal for the adjustment of compensation claims is wholly administrative and that the employer is denied access to the courts, because it provides for final judicial review upon all fundamental and jurisdictional questions. The state is shown to have the right to dispense with jury trial so far as the fourteenth amendment is concerned; and the act is sustained against the objection that it denies the employer the equal protection of the laws.

By far the most radical of the compensation statutes is that of Washington. It is a workmen's pension act rather than a compensation

act. It "establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. It is obligatory upon both employer and employee in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death." 37 S. C. R. 261.

It withdraws the whole subject from private controversy, and by a combination of the police and taxing power the state undertakes the burden of making compensation to injured workmen and their families "regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation except as otherwise provided in this act." It enumerates certain employments as being extra-hazardous, establishes a number of classes of such employments, and creates by the taxation of each class a fund applicable to such class, the rate of contribution by each class to its fund being fixed by the state. Each fund is required to bear the burden of the accidents occurring in that class in proportion to its respective hazards. The right of the injured workman or his dependents to compensation is transferred exclusively to this fund; and payment is made in every case unless injury or death results to a workman from his deliberate intention to produce it.

So far as the interests of the employees are concerned the case raises no questions not disposed of in the New York case; as to the employers, the principal difference consists in the enforced contributions to the state fund. Inasmuch as employers in whose establishments on account of careful management few or no accidents happen are compelled to contribute to a fund for the payment of pensions to workmen injured in the carelessly managed plants, it was contended that the enforced contribution could not be defended either as a license tax or as a tax for the purpose of regulation; but the court holds that considered as either or both, it is not so unfair or unreasonable as to constitute an abuse of power. It finds an analogy in the statute of Oklahoma which levied upon every state bank an assessment of a percentage of the bank's average deposits, for the purpose of creating a guaranty fund to make good the losses of depositors in insolvent banks, which was upheld in *Noble State Bank v. Haskell,* (1911) 219 U. S. 104, 31 S. C. R. 186, 55 L. Ed. 112, 32 L. R. A. (N.S.) 1062. It is considered to be well within the police power for the state to assume in the first instance the burden of thus pensioning its injured workmen as well as its injured soldiers, and by taxing the industries in which they are employed to compel such industries ultimately to bear the losses inevitably occurring. Considered as a tax, the subject is public in its nature, and the burden is not excessive nor inequitably distributed.

ELECTIONS—CORRUPT PRACTICE—STATUTE.—Defendant, a candidate for the office of town supervisor, furnished means of conveyance to voters on election day to and from the place of election. He also furnished several drinks of liquor to different voters, and, at the same time, solicited their votes. *Held,* defendant violated the corrupt practices act, and there-

by forfeited his right to hold office. *Miller v. Maier,* (Minn. 1917) 161 N. W. 513.

The Minnesota corrupt practices act provides that no candidate in seeking an election to a public office may directly or indirectly give or provide any meat or drink or other entertainment or provision, clothing, liquor, cigars, or tobacco to any person for the purpose of, or with intent to influence such person to give or refrain from giving his vote at such election to or for any candidate. Minn. G. S. 1913, Section 576. And no person may convey or furnish any vehicle for conveying, or bear any portion of any expense for conveying any voter to or from the polls. Id., Section 579. The constitutionality of such statutes cannot be doubted. *Saari v. Gleason,* (1914) 126 Minn. 378, 148 N. W. 293. "All such reasonable regulations of the constitutional right which seem to the legislature important to the preservation of order in elections, to guard against fraud, undue influence and oppression, and to preserve the purity of the ballot-box, are not only within the constitutional power of the legislature, but are commendable, and at least some of them are absolutely essential." Cooley, Constitutional Limitations, 6th ed., p. 757. In the instant case, Quinn, J., speaking for the court, said: "It may be said that any candidate for a public office who during his campaign by word of mouth solicits the vote of an elector who has the right to vote for him at such election and at the same time dispenses intoxicating liquor to such elector, brings himself clearly within the terms and meaning of the statute; nor can a holding that such acts on the part of the candidate amount to mere hospitality or that they are trivial and unimportant be sustained. To so hold would destroy entirely the effect and value of the statute." The trial court was reversed. Such a decision will have a salutary effect in showing that a corrupt practices act may have some teeth in it.

EMINENT DOMAIN—COMPENSATION—CONSTITUTIONAL PROVISIONS.—Plaintiff owned a tract of land on which was a dwelling house occupied by him. Subsequent to his occupation, defendant set up stockyards on its right of way, seventy-nine feet distant from plaintiff's dwelling house. The stockyards were properly located and carefully operated. *Held,* the plaintiff can recover for the injury to his property caused by the noise and foul odors from the stockyards. *Stuhl v. Great Northern Ry. Co.,* (Minn. 1917) 161 N. W. 501.

The court held that there could be recovery under Art. I, Sec. 13, of the constitution of Minnesota, which reads: "Private property shall not be taken, destroyed, or damaged for public use, without just compensation therefor first paid and secured." Many states have similar constitutional provisions. Where the constitution provides compensation for a "taking" only, courts have been quite strict in confining recovery to where either there has been an unjustified entry upon the land or a deprivation of substantially all beneficial use. *Northern Transportation Co. v. Chicago,* (1878) 99 U. S. 635, 25 L. Ed. 336; *Rochette v. Chicago, etc., Ry. Co.,* (1884) 32 Minn. 201, 20 N. W. 140; *Cleveland, etc., R. Co. v. Speer,* (1867) 56 Pa. St. 325, 94 Am. Dec. 84. A leading case, however, took the more liberal view which prevails where the constitutional provision includes "damaging." *Eaton v. Boston, etc., R. Co.,* (1872) 51 N. H. 504, 12 Am. Rep. 147. When part of a tract is taken, full compensation for all dam-

ages, direct and consequential to the remainder of the tract must be made. *Kremer v. Chicago, etc., Ry. Co.*, (1892) 51 Minn. 15, 52 N. W. 977, 38 Am. St. Rep. 468. Damages resulting from the ordinary and careful operation of a railroad by reason of noise, smoke, or jarring of the ground cannot be recovered. *Atchison, etc., Ry. Co. v. Armstrong*, (1905) 71 Kan. 366, 80 Pac. 978, 114 Am. St. Rep. 474, 1 L. R. A. (N.S.) 113; *Carroll v. Wisconsin Central R. Co.*, (1889) 40 Minn. 168, 41 N. W. 661. But a distinction is made between the ordinary operation of a road and the operation of special facilities, such as railroad shops, engine houses, and switchyards. *Baltimore, etc., Ry. Co. v. Fifth Baptist Church*, (1883) 108 U. S. 317, 2 S. C. R. 719, 27 L. Ed. 739; *Cogswell v. N. Y., etc., R. Co.*, (1886) 103 N. Y. 10, 8 N. E. 537. 57 Am. Rep. 701; *Matthias v. Mpls., etc., Ry. Co.*, (1914) 125 Minn. 224, 146 N. W. 353. The last case cited emphasizes the point that recovery is not defeated although the particular facility is properly located and carefully operated. The basis of the distinction made was that the location and operation of a special facility only indirectly concerns the public and that the railroad company has the same latitude of choice as other industrial corporations as to location of such facility. But the court limited the doctrine of that case by saying that public convenience would in most instances require that shipping stock yards be near or at the station. The court in the principal case went a step further and disregarded the element of public convenience and laid down as a test of liability "whether the structure is a nuisance for which action will lie at common law." The reason given is that "one citizen should not be expected for the public good to bear, uncompensated and alone, a material and special injury not common to the public at large."

ESCROW—DELIVERY—DEPOSIT FOR DELIVERY ON PAYMENT.—Grantor pursuant to no prior or contemporaneous contract of sale of the land, deposited a deed with a third person to be delivered to the grantee upon payment to the depositary of the price for the land fixed by the grantor. Grantor died before grantee made payment. *Held*, the delivery was not an escrow, but was a mere offer which grantor had the legal right to withdraw, her death revoking the offer and the authority of third person to receive payment. *Holland v. McCarthy*, (Cal. 1916) 160 Pac. 1069.

"A conveyance may be delivered to a person as an escrow, i. e., a scroll or writing, to be held by him until the performance of a condition by the grantee. Upon the performance of such condition, even though it be after the death of the grantor, or after he has become mentally disabled, the instrument takes effect as of the original delivery." 2 Tiffany, Real Property, 931; Sheppard's Touchstone, 58. This definition and the usual definitions given by courts and text-writers leave the question undecided as to whether the escrow must be pursuant to a contract between grantor and grantee. The first text to lay down any definite rule upon the question was Devlin, Deeds, published in 1887. That text almost in the words of the court in *Fitch v. Bunch*, (1866) 30 Cal. 208, states that "not only are sufficient parties, a proper subject-matter, and a consideration required, but also an actual contract by the parties." 1 Devlin, Deeds, Sec. 313. *Fitch v. Bunch*, supra, is the only case cited by Devlin in support of this point. Early cases cited in support of the proposition, as in *Stanton*

v. Miller, (1874) 58 N. Y. 192, 202, do not necessarily uphold this contention. *Graham v. Graham,* (1791) 1 Ves. Jr. 272; *Millett v. Parker,* (1859) 2 Met. (Ky.) 608; *Cook v. Brown,* (1857) 34 N. H. 460, 476; *Shirley v. Ayres,* (1846) 14 Ohio 307, 310. Moreover, *Graham v. Graham,* supra, upon close inspection, is seen to decide directly contra, viz. that a bond is delivered in escrow, though the grantee declined to enter into a prior contract. However, *Fitch v. Bunch,* supra, so far as discoverable, is the first case which discusses and directly decides this point upon argument. All cases subsequent to that case seem to have decided in accord whenever the point has been raised, and the instant case cites that case as authority. *Anderson v. Messenger,* (1907) 158 Fed. 250, 85 C. C. A. 468; *Davis v. Brigham,* (1910) 55 Ore. 41, 107 Pac. 961, Ann. Cas. 1912B, 1340; *King v. Upper,* (1910) 57 Wash. 130, 106 Pac. 612, 31 L. R. A. (N. S.) 606, and see note, 16 Cyc. 562 A-1. On principle, it seems clear that when A has given B a deed to deliver to C upon the payment of a price by C, and C has not been connected with the transaction, A has merely made B his agent to make a sale to C at the given price and that the deed is of no more force in the hands of the agent B than in the hands of his principal. Of course, B's agency is revoked by the death of A, and C who is an outsider has gained no interest and can neither sue nor be sued. This case is to be distinguished from the delivery of a deed by grantor to a third person, intending to part with all control over it, and vesting him with authority to deliver it to the grantee upon the death of the grantor, in which case the delivery vests the fee in the grantee and reserves a life estate in the grantor. See *Hagen v. Hagen,* (Minn. 1917) 161 N. W. 380. Were it not for the fact that courts and writers have defined escrow in such general terms and that the contract element seems to have been ignored by the courts until the case of *Fitch v. Bunch,* there would be little justification for confusing agency and escrow.

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—DEPOSIT OF FUNDS.—The heirs at law of the estate represented by defendant, as administrator, brought an action to recover money lost through the failure of the bank where the defendant, as such administrator, had deposited the funds of the estate. The deposit was made in a bank of good standing, in the name of "T. M. Furlow, Administrator." *Held,* reversing the trial court, that the administrator under such circumstances was prima facie individually liable for the loss. *Gatewood v. Furlow,* (Ga. 1916) 90 S. E. 973.

The court in the principal case held that to avoid individual liability for loss, the administrator must deposit the funds in the name of the administrator of the particular estate to which the funds belonged, as "John Jones, adm'r of the estate of John Doe, deceased," or with words of similar import. When an executor deposits funds of the estate of his testator in a bank, and takes therefor a certificate of deposit in his own name individually, the deposit is at his risk, and a loss happening from the failure of the bank will be borne by him, though he acted in good faith. *Chancellor v. Chancellor,* (1912) 177 Ala. 44, 58 So. 423, 45 L. R. A. (N.S.) 1; *In re Arguello's Estate,* (1893) 97 Cal. 196, 31 Pac. 937; *In re Curtis' Estate,* (1910) 162 Mich. 47, 127 N. W. 36. Nor will the fact that he informed the bank at the time of the deposit that the funds be-

longed to an estate of which he was administrator alter his liability. *Harward v. Robinson,* (1884) 14 Ill. App. 560; *In re Estate of Horner,* (1896) 66 Mo. App. 531; *Williams v. Williams,* (1882) 55 Wis. 300, 12 N. W. 465, 13 N. W. 274, 42 Am. Rep. 708. This rule is based on sound policy, as to hold differently would open the door to great temptation for fraud in the handling of trust funds. See cases cited above. The court in the principal case applied the same rule, but on principles of agency, where it is well settled that if a contract is made by John Jones, agent, administrator, etc., it will bind John Jones individually, because the appended words are merely descriptio personae. *Pershing v. Swenson,* (1894) 58 Minn. 310, 59 N. W. 1084. But if the trustee ear-marks the deposit by naming the particular estate, then, as the instant case intimates, the administrator will be relieved from individual liability. *Officer v. Officer,* (1903) 120 Ia. 389, 94 N. W. 947, 98 Am. St. Rep. 365; *In re Fishbeck's Estate,* (1906) 146 Mich. 348, 109 N. W. 666, 117 Am. St. Rep. 646; *Jacobus v. Jacobus,* (1883) 37 N. J. Eq. 17. No cases have been found deciding whether if a deposit is made as in the instant case, the administrator will be relieved from personal liability. It is submitted, however, that this ear-marks the fund and reduces the possibility of embezzlement, which is the basis of the strict rule of liability, and that the principal case might, therefore, have reached a different conclusion. The addition of "trustee" to the name of the grantee in a deed is sufficient to charge a subsequent purchaser with notice of the existence of some trust, and put him upon inquiry. *Mercantile National Bank v. Parsons,* (1893) 54 Minn. 56. 55 N. W. 825. In the instant case, the bank would have been charged with notice so as to prevent its acquiring a lien upon the deposit for a debt of the depositor individually.

HOMESTEAD—ACQUISITION—VALIDITY.—Plaintiffs owned five adjoining lots. A house used by plaintiffs as a home stood on three of them; on the other two lots was another house, formerly occupied by plaintiffs as a residence, but now rented out. Plaintiffs, claiming these two lots as part of their homestead, sought to enjoin an execution sale against them. *Held,* said property was not part of the homestead and injunction refused. *Bouse et al. v. Stone,* (Okla. 1916) 162 Pac. 479.

Section 1, Article 12 of the constitution of Oklahoma provides "the homestead within any city, town, or village, owned and occupied as a residence only, shall consist of not exceeding one acre of land, to be selected by the owner." The court in the instant case construes this to mean that together with the limitation in size, a homestead must be impressed with the homestead character, and the occupancy as a residence is the essential part. Homestead law is mostly statutory, but some courts are more liberal than others in their limitation of homesteads under the statutes. The principal case follows an earlier Oklahoma decision. *Watson v. Manning,* (1916) 156 Pac. 184. There are cases which support the decision of the instant case. *Maloney v. Hefer,* (1888) 75 Cal. 422, 17 Pac. 539, 7 Am. St. Rep. 180; *Kelley v. Williams,* (1899) 110 Ia. 153, 81 N. W. 230; *Schoffen v. Landauer,* (1884) 60 Wis. 334, 19 N. W. 95. In Minnesota the statute limits the size of the homestead and provides that it shall be "the dwelling place" of the claimant. G. S. 1913, Sec. 6957, 6958. But Minnesota is quite liberal in its interpretation of the statute and holds

that the land being within the area defined it may be claimed as a homestead even though part of it is used for purposes other than the dwelling place of the owner. See 1 MINNESOTA LAW REVIEW 90, 91.

HOMICIDE—EVIDENCE—DECLARATION OF DECEASED.—Defendant was indicted and tried for murder. The evidence was entirely circumstantial. The state introduced in evidence over objection an oral declaration made by deceased to a witness for the state in the afternoon of the day of the murder to the effect that she could not go home with the witness that night because defendant was coming to see her. This declaration was an important link in the chain of circumstances. *Held,* the evidence was admissible for the purpose of showing that deceased intended to meet defendant that evening. *State v. Farnam,* (Ore. 1916) 161 Pac. 417 (one judge dissenting).

Whenever the intention is of itself a distinct and material fact in a chain of circumstances, the general rule is that it may be proved by contemporaneous oral or written declarations of the party. *Mutual Life Ins. Co. v. Hillmon,* (1892) 145 U. S. 285, 12 S. C. R. 909, 36 L. Ed. 706; *State v. Hayward,* (1895) 62 Minn. 474, 65 N. W. 63. The objection to the admission of this class of evidence is that it is hearsay; that the declarations are not made under the sanction of an oath; that there is no opportunity to cross-examine the person making the statements. Most courts, however, admit this class of evidence, but they are not agreed as to the theory for its admission. Some admit it as a part of the res gestae. *Banks v. State,* (1901) 157 Ind. 190, 60 N. E. 1087; *Hunter v. State,* (1878) 40 N. J. L. 495. This theory seems erroneous, since matters are admissible as part of the res gestae only when the declarations are contemporaneous with the acts which they explain, i. e., they must be spontaneous utterances which are the natural result of the act which they characterize. 1 Greenleaf, Evidence, fifteenth ed. Sec. 108; Jones, Evidence, second ed., 429. Others admit the declarations as verbal acts. *Commonwealth v. Trefethen,* (1892) 157 Mass. 180, 31 N. E. 961. This is on the theory that these declarations are acts from which the state of mind or intention may be inferred in the same manner as from the appearance or general behaviour of a person. Still others admit such declarations as original evidence under an exception to the hearsay rule. *State v. Hayward,* supra; *State v. Mortensen,* (1903) 26 Utah 312, 73 Pac. 562. In all such cases, the length of time between the declaration of intention and the act enters into consideration as to its admissibility. The intervening time may be so great as to be too remote. *Hale v. Life Indemnity & Investment Co.,* (1896) 65 Minn. 548, 68 N. W. 182 (two years). The other limitations upon the admission of this class of evidence are that the statement must be of a present existing state of mind, and must have been made in a natural manner and not under circumstances of suspicion. 3 Wigmore, Evidence, Sec. 1725. The decision of the principal case is supportable both on authority and on principle. The statement was made at a time when there was no reason to falsify or to manufacture evidence. It was a natural expression of the declarant's mind, and as declarant was dead at

the time the evidence was offered, the element of necessity entered into consideration. In such case, it is only proper that the hearsay rule shall give way.

LANDLORD AND TENANT—LEASE FOR "SALOON"—EFFECT OF PROHIBITION LAW.—Defendant executed a lease to the plaintiff, who covenanted that he would use the premises for saloon purposes only. By a later agreement defendant was permitted to put in a cigar stand and a restaurant. The rent for the last three months of the term was paid in advance. Over a year before the expiration of the lease a "prohibition" law went into effect. *Held*, the law dissolved the lease and discharged the parties from their obligations. *The Stratford, Inc., v. Seattle Brewing & Malting Co.*, (Wash. 1916) 162 Pac. 31.

When performance of a contract legal in its inception is made illegal by subsequent statutory enactment, the contract is wholly terminated as soon as the statute goes into effect. *Baily v. De Crespigny*, (1869) L. R. 4 Q. B. 180, 38 L. J. Q. B. 98, 19 L. T. 681, 17 W. R. 494; *Presbyterian Church v. New York*, (1826) 5 Cow. (N. Y.) 538. See 10 L. R. A. (N.S.) 415, note. There are dicta in Minnesota to the same effect. *Stees v. Leonard*, (1874) 20 Minn. 494 (448); *Paine v. Sherwood*, (1875) 21 Minn. 225. If buildings are leased for saloon purposes, and the nature of the use is merely permissive, the parties are not discharged. *San Antonio Brewing Association v. Brents*, (1905) 39 Tex. Civ. App. 443, 88 S. W. 368; *Hayton v. Seattle Brewing & Malting Co.*, (1911) 66 Wash. 248, 119 Pac. 739, 37 L. R. A. (N.S.) 432. Where the lease is restrictive and a subsequent law prohibits the use of the premises for the purposes to which the lessee is restricted, it has been held that the lease is rendered void and the parties are excused. *Greil Bros. Co. v. Mabson*, (1912) 179 Ala. 444, 60 So. 876, 43 L. R. A. (N.S.) 664; *Adler v. Miles*, (1910) 69 N. Y. Misc. Rep. 601, 126 N. Y. Supp. 135. The courts have refused to apportion and abate the rent when part of the object of the lease was defeated by the enactment of a prohibition law. *Lawrence v. White*, (1909) 131 Ga. 840, 63 S. E. 631, 19 L. R. A. (N.S.) 966. If the lease was made after the passing of a county option law, and performance was then made illegal by a vote of the people of the county, the lessee is not discharged from his obligation to pay rent, for this was a contingency which an ordinarily prudent man would have anticipated. *Houston Ice & Brewing Co. v. Keenan*, (1905) 99 Tex. 79, 88 S. W. 197. Although the principal object of the lease is the sale of liquor, and the lease restricts the use to this and other specified purposes subordinate to it, the passage of a law making the sale of liquor illegal does not release the parties. *In re Bradley*, (1915) 225 Fed. 307; *O'Byrne v. Henley et al.*, (1909) 161 Ala. 620, 50 So. 83, 23 L. R. A. (N.S.) 496; *Hecht v. Acme Coal Co.*, (1910) 19 Wyo. 18, 113 Pac. 788, 34 L. R. A. (N.S.) 773, Ann. Cas. 1913E 258. The present case comes within the last named class and is contrary to the weight of authority. It is submitted, however, that the result reached is correct on principle, for the lessee does not get substantially what he bargained for, the right to conduct a saloon during the term of lease. The other purposes for which the lessee was permitted by

the lease to use the premises were from a financial viewpoint secondary, and it is difficult to see any but a technical reason why these cases should be treated differently than those in which the whole object of the contract is defeated by operation of law, as in *Baily v. De Crespigny,* supra.

MORTGAGES—FORECLOSURE—BAD FAITH—REDEMPTION.—Plaintiff mortgaged to defendant property of the reasonable value of $3,900 to secure a loan. Defendant foreclosed by advertisement and purchased the property for $300, which was the amount of the loan, interest and costs. After the statutory period for redemption had expired, plaintiff brought action to redeem. *Held,* that defendant's purchase was not in good faith and plaintiff may redeem. *Sletten v. Bank,* (N. D. 1917).

In the absence of statutory authorization, a mortgagee may not purchase at the foreclosure sale. *Cunningham v. Macon, etc., R. Co.,* (1895) 156 U. S. 400, 15 S. C. R. 361, 39 L. Ed. 471; *Wilson v. Bell,* (1871) 17 Minn. 61 (40). See 92 Am. St. Rep. 573, 576. Where such purchase is so authorized, it must be made in good faith. *Laylor v. McCarthy,* (1874) 24 Minn. 417. North Dakota, Compiled Laws, 1913, Sec. 8083, provides: "The mortgagee, his assigns or their legal representatives, may fairly and in good faith purchase the premises so advertised, or any part thereof, at such sale." The identical provision is found in Minn. G. S. 1913, Sec. 8132. Under these statutes a mortgagee, who acts in good faith stands in the same position as any other purchaser at the sale. *Tinkcom v. Lewis,* (1874) 21 Minn. 132; *Lawton v. St. Paul, etc., Co.,* (1894) 56 Minn. 353, 57 N. W. 1061. From the opinion in the principal case as printed in the Grand Forks Herald, Feb. 25, 1917, the court seems to hold that the mere inadequacy of the price bid by the mortgagee constitutes bad faith. It appears to be well settled that in the ordinary case mere inadequacy of price is no ground for setting aside a foreclosure sale. Jones, Mortgages, seventh ed., Section 1670, note 38; 92 Am. St. Rep. 582, 103 id. 51. This rule probably does not apply to private sales where authorized by the terms of the mortgage and not prohibited by statute. *Newman v. Meek,* 1 Freem. Ch. (Miss.) 441. And if the inadequacy is so gross as to shock the conscience, the court may avoid the sale or refuse to confirm it. *Ballentyne v. Smith,* (1907) 205 U. S. 285, 51 L. Ed. 803, 27 S. C. R. 527. But where the mortgagee bids the full amount of his claim, and the sale and all other proceedings are otherwise in compliance with the statutory requirements, it would seem that every consideration of policy, of intention of the parties and of statutory interpretation would require the validation of the sale. And so the Supreme Court of North Dakota expressly held in a well-considered opinion in a prior case, wherein a four thousand dollar property was purchased by the mortgagee at a foreclosure for the sum of $113.32. *Bailey v. Hendrickson,* (1913) 25 N. D. 500, 143 N. W. 134. Mr. Justice Robinson in the principal case, instead of explaining, distinguishing or overruling the Bailey Case, contents himself with classic allusions to killing "the goose that laid the golden egg" and exacting "the pound of flesh," and prefers "to base the decision of this court on a broader and better equity." If this "broader and better equity" requires a mortgagee to pay substantially the market

value of property on foreclosure, the goose that lays the golden egg of farm loans in North Dakota will probably meet an early and untimely death.

MORTGAGES—FORECLOSURE—TIME TO REDEEM.—Defendant for default in payment of the mortgage debt duly foreclosed by advertisement a mortgage made to defendant by plaintiff. Plaintiff attempted to redeem but on account of accidents due to a snow storm failed to tender the redemption money to the proper sheriff until the day after the statutory period for redemption expired. *Held*, that plaintiff is entitled to redeem. *Wade v. Major*, (N. D. 1917) Grand Forks (N. D.) Herald, Feb. 25, 1917.

A distinction must be made between the equity of redemption, which is the interest of the mortgagor in the mortgaged premises before foreclosure, and the right to redeem after foreclosure. *Lewis v. McBride*, (1912) 176 Ala. 134, 57 So. 705. The former, courts of equity guard very jealously, so that any attempt to clog or restrict it is futile. Jones, Mortgages, seventh ed., Sec. 1039-1046; Wyman, 21 Harv. L. Rev. 459. The latter had no existence at common law or in the system of equity administered previous to the organization of the American government, but is purely statutory. *Parker v. Dacres*, (1889) 130 U. S. 43, 47, 9 S. C. R. 433, 32 L. Ed. 848; *Hughes v. Winkleman*, (1912) 243 Mo. 81, 147 S. W. 994. Consequently, it is a privilege which must be exercised pursuant to the terms of the statute in order to be effective. *Littler v. The People*, (1867) 43 Ill. 188; *Haley v. Young*, (1883) 134 Mass. 364. Thus, the mortgagor's mistake in paying his money to the master in chancery instead of to the sheriff will not extend the statutory period for redemption. *Littler v. The People*, supra. Neither will the fact that the Register of Deeds misinformed the mortgagor as to the date when the statutory period began to run. *Carll v. Kerr*, (1914) 111 Me. 365, 89 Atl. 150. Nor will the dangerous illness of the mortgagor. *Cameron v. Adams*, (1875) 31 Mich. 426. It is true that courts of equity have large powers in relieving from penalties and forfeitures for accident and mistake, but in this class of cases it is confined to foreclosure sales made under decree of court. "Where a valid legislative act has determined the conditions on which rights shall vest or be forfeited, and there has been no fraud in conducting the legal measures, no court can interpose conditions or qualifications in violation of the statute." *Cameron v. Adams*, supra, l. c. 428. Cf. *Billington v. Forbes*, (1843) 10 Paige Ch. 487; *Thompson v. Mount*, (1846) 1 Barb. Ch. 607. Vague generalizations as to the duty of equity "to mitigate the asperities of the law" and inapt references to "The Merchant of Venice" cannot conceal the fact that the fireside equities in the principal case have been used as a basis for judicial legislation.

MORTGAGES—PRIORITY—MECHANIC'S LIEN.—Plaintiff rendered certain services to A, upon land of which A was in possession under a contract. A afterwards received a deed and gave back a purchase money mortgage which was duly recorded and afterwards foreclosed. Defendant claims under one who redeemed from the foreclosure. In a suit to foreclose

plaintiff's mechanic's lien, *Held,* the mortgage was prior to plaintiff's lien. *Weinstein v. Montowese Brick Co.,* (Conn. 1916) 99 Atl. 488.

The court reasoned that any equity which the purchaser might have had in the premises was subject to the agreement to give purchase money mortgage, and, therefore, any lien upon the purchaser's interest would be subject to the mortgage. The law of mechanics' liens is entirely statutory and therefore varies in different jurisdictions. For a mechanics' lien to attach there must be a consent of the owner of the realty. *Husted v. Mathes,* (1879) 77 N. Y. 388. The consent of the owner may be implied. *Hill v. Gill,* (1889) 40 Minn. 441, 42 N. W. 294. A purchase money mortgage has been held to take precedence over a mechanics' lien, though the work was done prior to the execution of the mortgage and the lien was filed before the mortgage was recorded. *Miller v. Stoddard,* (1892) 50 Minn. 272, 52 N. W. 895. One who has a contract for the purchase of land may subject his equitable interest to a mechanics' lien. *Inter-State Building & Loan Ass'n v. Ayers,* (1897) 71 Ill. App. 529, affirmed in 177 Ill. 9, 52 N. E. 342; *Carey-Lombard Lbr. Co. v. Bierbauer,* (1899) 76 Minn. 434, 79 N. W. 541. But not the interest of his vendor without the latter's consent. *Beck v. Catholic University,* (1902) 172 N. Y. 387, 65 N. E. 204, 60 L. R. A. 315. So, after a decree of foreclosure of a mortgage and a sale of the mortgaged premises, the mortgagor has no such ownership in the premises as will support a lien for labor done or materials furnished on the premises. *Davis v. Conn. Mutual Life Ins. Co.,* (1887) 84 Ill. 508. The principal case seems correctly decided. The purchase money mortgage agreement fastened an equity upon the land to which the mechanics' lien was subject.

MUNICIPAL CORPORATIONS—POLICE POWER—VALIDITY OF MUNICIPAL ORDINANCE—BILL BOARDS.—The city of Chicago passed an ordinance prohibiting the erection or construction of any bill board or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the written consent of the owners of the majority of the frontage on both sides of the street in such block. Action to restrain the enforcement of such ordinance. *Held,* the ordinance is not unconstitutional. *Thomas Cusack Co. v. City of Chicago,* (1917) 37 S. C. R. 190.

For discussion of the principles involved, see NOTES p. 441.

MUNICIPAL CORPORATION—USE OF STREET—ACTION FOR INJURIES—DEFENSES—WANT OF LICENSE.—The plaintiff, while operating his motorcycle upon the highway, was run into by the defendant who was driving an automobile. Plaintiff brought action for injuries to his person and to the machine. At the trial the defendant offered to prove that the plaintiff at the time of the injury was driving without a license. The trial court refused to admit the evidence. On appeal the trial court was sustained on the ground that the plaintiff's violation of the statute requiring a license for motorcycles was no defence to an action founded on defendant's negligence. *Marquis v. Messier,* (R. I. 1917) 99 Atl. 527.

For a discussion of the principle set forth in this case, see 1 MINNESOTA LAW REVIEW 76. And for an interesting application of the Massachusetts doctrine, see *Fairbanks v. Kemp,* (Mass. 1917) 115 N. E. 240.

NEGLIGENCE—DANGEROUS INSTRUMENTALITY—ATTRACTIVE NUISANCE.—Defendant company owned and maintained a water supply pool in connection with its sub-station. The premises were left in charge of an attendant, who unknown to defendant company, kept bathing suits for rent. Plaintiff's intestate, a boy twelve years of age, rented a suit, went into the pool to swim and was drowned. Plaintiff, as administrator, sought to hold the company on the ground that the pool was an attractive nuisance and a dangerous instrumentality. *Held*, defendant was not liable. *Gurley v. Southern Power Co.*, (N. C. 1916) 90 S. E. 943.

Plaintiff's intestate was a trespasser, and it is a well settled rule of torts that a trespasser takes the premises as he finds them, and that a landowner owes no duty to him further than to refrain from wilful acts of injury. 2 Cooley, Torts, third ed. 1268. The doctrine of "attractive nuisance" which plaintiff advanced in the instant case was first announced in the case of *Sioux City, etc., R. Co. v. Stout*, (1873) 17 Wall. 657, 21 L. Ed. 745, called the "turntable case," where defendant railway was held liable for injuries sustained by a child while playing on defendant's turntable. Since this decision, some courts have refused to adopt the doctrine at all. *Wheeling, etc., R. Co. v. Harvey*, (1907) 77 Ohio St. 235, 83 N. E. 66, 11 Ann. Cas. 981. Many courts have not only adopted it but have turned it into the "attractive nuisance" doctrine and extended liability to other circumstances and instrumentalities than turntables. *Union Pacific Ry. Co. v. McDonald*, (1894) 152 U. S. 262, 14 S. C. R. 619, 38 L. Ed. 434, (a pit of burning slack and ashes); *Coeur D'Alene Lbr. Co. v. Thompson*, (1914) 215 Fed. 8, L. R. A. 1915A 731 (storage cistern); *Pekin v. McMahon*, (1895) 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206 (pond fenced off on defendant's premises). The cases generally limit the application of this doctrine to cases where injuries occur to trespassing children while playing on a turntable, or to injuries occasioned by alluring, attractive, and dangerous unguarded machinery where there is usually a concealed danger. *Hanna v. Iowa Central R. Co.*, (1906) 129 Ill. App. 134; *Akron Waterworks Co. v. Swartz*, (1906) 8 Ohio C. C. (N.S.) 509; *Riggle v. Lens*, (1914) 71 Ore. 125, 142 Pac. 346, L. R. A. 1915A 150. So it has been held that a landowner, whether an individual or a municipality, is not answerable for injuries to children by reason of dangers on the premises, such as open and unguarded ponds, excavations, or crust resembling ground, formed over a deep pond of water. *Stendal v. Boyd*, (1898) 73 Minn. 53, 75 N. W. 735, 72 Am. St. Rep. 597, 42 L. R. A. 288; *Dehanitz v. St. Paul*, (1898) 73 Minn. 385, 76 N. W. 48. This has been held to apply especially where the pool or cistern does not adjoin a public highway. *Hargreaves v. Deacon*, (1872) 25 Mich. 1; *Klix v. Nieman*, (1887) 68 Wis. 271, 32 N. W. 223. Different reasons have been advanced in favor of the "attractive nuisance" doctrine: that the instrumentalities are an implied invitation to children to come on the premises; that the child is only technically a trespasser; that any other doctrine is cruel and inhuman, putting property before humanity; that the maxim "sic utere tuo ut alienum non laedas" applies; that for every wrong there must be a remedy. *Pekin v. McMahon*, supra; *Lbr. Co. v. Thompson*, supra; *Bjork v. Tacoma*, (1913) 76 Wash. 225, 135 Pac. 1005, 48 L. R. A. (N.S.) 331. None of these reasons are compelling. The landowner clearly did

not intend to invite inquisitive and roaming children, while the other reasons assume that there is a legal duty resting upon the landowner to trespassers and so assume the point in issue. The maxim relied upon refers to acts the effect of which extends beyond the limits of the property, and to neighbors who do not interfere with it or upon it. *Ratte v. Dawson,* (1892) 50 Minn. 450, 52 N. W. 965. It is submitted that the doctrine of the principal case is sound and safe. Once it is established that the landowner owes a greater duty to a trespassing infant than to an adult, when is the owner to know that his land is "child-proof"? If there are some exceptions to be made in favor of infants, it would seem to be the province of the legislature, rather than the courts.

PLEADING—GENERAL DENIAL—BILLS AND NOTES—PROOF OF PAYMENT.—The complaint in a suit on a promissory note alleged that no part of the same had been paid. Defendant put in a general denial. *Held,* the issue of payment was not made by the pleadings. *First State Bank of Grand Rapids v. Cohasset Wooden Ware Co.,* (Minn. 1917) 161 N. W. 398.

By the weight of authority, in a suit for money due on a contract obligation an allegation of non-payment is a necessary part of the complaint. *Melone v. Ruffino,* (1900) 129 Cal. 514, 62 Pac. 93; *Wheeler & Wilson Mfg. Co. v. Worall,* (1881) 80 Ind. 297. And yet, inconsistently, it is generally held that payment is an affirmative defense and is not put in issue by a general denial. *Pierce v. Hower,* (1895) 142 Ind. 626, 42 N. E. 223; *McKyring v. Bull,* (1857) 16 N. Y. 297, 69 Am. Dec. 696; *Fewster v. Goddard,* (1874) 25 Ohio St. 276. The Minnesota court holds in accord with the weight of authority that payment is an affirmative defense and must be pleaded specially. *Farnham v. Murch,* (1887) 36 Minn. 328, 31 N. W. 453. The question whether or not the plaintiff must plead non-payment in his complaint has not been specifically passed upon, but the court has said obiter that the plaintiff need not allege non-payment. *First National Bank v. Strait,* (1898) 71 Minn. 69, 75, 73 N. W. 645; *Montgomery v. Leuwer,* (1905) 94 Minn. 133, 102 N. W. 367. In the instant case the plaintiff did plead non-payment, and the question was whether payment was in issue under a general denial. The same court, contrary to the weight of authority, repeatedly has held that a general denial will put in issue contributory negligence, if the plaintiff alleges due care. (See next succeeding Recent Case.) So in the case of libel, it has held that if plaintiff pleads his own good reputation, the defendant may under a general denial, introduce evidence of bad reputation. *Dennis v. Johnson,* (1891) 47 Minn. 56, 49 N. W. 383. On the analogy of these cases, the court might well have allowed the defense in the instant case, but the court affirmed the doctrine of *Bank v. Strait,* supra, to the effect that even though plaintiff pleads non-payment, defendant cannot prove payment under a general denial.

PLEADING—ANSWER—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.—In an action to recover for damage to the automobile of the plaintiff alleged to have been caused by defendant's negligence, defendant answered by a general denial and an allegation "that the damage to said automobile was caused by the negligence of the said plaintiff . . . and not otherwise."

Held, that under this answer evidence of contributory negligence was properly received. *Elliott Jobbing Co. v. Chicago, etc., Ry. Co.* (Minn. 1917) 161 N. W. 390.

The general rule is that plaintiff need not negative contributory negligence in his complaint, as there is no presumption of negligence on his part. *Thompson v. Great Northern Ry. Co.,* (1897) 70 Minn. 219, 72 N. W. 962; *Grant v. Baker,* (1885) 12 Ore. 329, 7 Pac. 318. It is generally held to follow that the issue of contributory negligence is not raised by a general denial. *Hill v. Minneapolis Street Ry. Co.,* (1910) 112 Minn. 503, 128 N. W. 831; *Donovan v. Hannibal, etc., R. Co.,* (1886) 89 Mo. 147, 1 S. W. 232. It would seem that since the plaintiff need not negative contributory negligence in his complaint, the pleading of it in the complaint would be mere surplusage, and that such an immaterial allegation could not be put in issue by a general denial. *Hudson v. Wabash, etc., Ry. Co.,* (1890) 101 Mo. 13, 14 S. W. 15; contra, *Hoblit v. Mpls. Street Ry. Co.,* (1910) 111 Minn. 77, 126 N. W. 407. The courts are divided on the question of what effect should be given to an allegation that the injury was caused by the sole negligence of the plaintiff. The weight of authority holds that contributory negligence is a plea in confession and avoidance, and must, therefore, necessarily imply negligence on the part of the defendant to which the negligence of the plaintiff can contribute. *Watkinds v. Southern Pacific R. Co.,* (1889) 38 Fed. 711; *Montgomery Gas Light Co. v. Montgomery, etc., Ry. Co.* (1888) 86 Ala. 372, 5 So. 735; *Cincinnati Traction Co. v. Forrest,* (1905) 73 Ohio St. 1, 75 N. E. 818. This may well be considered a strict definition of contributory negligence. Some of the courts which have held contra to the principal case have advanced a better ground for their holding. The averment that the injury was caused solely through the negligence of the plaintiff is considered logically as simply another and unnecessary way of denying defendant's negligence; in other words, that the allegation is mere surplusage and adds nothing to defendant's answer. *Watkinds v. Southern Pacific R. Co.,* supra; *Ramp v. Metropolitan Street Ry. Co.,* (1908) 133 Mo. App. 700, 114 S. W. 59; *Birsch v. Citizens Electric Co.,* (1908) 36 Mont. 574, 93 Pac. 940. The court in the instant case admitted the logic of this argument, but decided that rules of pleading "are more a means than an end" and that the rule adopted was in conformity with long established usage in the state and resulted in no prejudice to the litigant.

SPECIFIC PERFORMANCE—RIGHT TO—UNDISCLOSED PRINCIPAL—STATUTE OF FRAUDS.—The owner of real estate gave verbal authority to an agent to sell. The agent, without disclosing the name of his principal, entered into a contract in writing in her own name as vendor to sell the property to defendant who knew that the agent was not the real owner. Defendant refused to carry out the contract, and plaintiff, as unnamed principal, sought specific performance. *Held,* plaintiff is entitled to performance. *Unruh v. Roemer,* (Minn. 1916) 160 N. W. 251.

This decision is in accord with the general rule as to rights of undisclosed or unnamed principals against third parties, viz. where a duly authorized agent contracts for his principal, but in his own name, the principal, whether undisclosed or unnamed, can maintain an action in his

own name upon all simple contracts. 2 Mechem, Agency, second ed. Sec. 2059. This applies to contracts for the sale of land. *Forgey v. Gilbirds,* (1914) 262 Mo. 44, 170 S. W. 1135. Several exceptions to this general rule are recognized. An undisclosed principal can not maintain an action on a contract of guaranty or indemnity entered into by the agent in his own name, *Second National Bank v. Diefendorf,* (1878) 90 Ill. 396. This is on the theory that there is an element of mutual trust in such contracts. *Mitchell v. Railton,* (1891) 45 Mo. App. 273. This exception was carried pretty far in one case where it was held that a contract by an agent in his own name to sell land with warranty against incumbrances involved personal considerations to such an extent that the undisclosed principal could not enforce it. *Birmingham Matinee Club v. McCarty,* (1907) 152 Ala. 571, 44 So. 642, 13 L. R. A. (N. S.) 156. Where, however, a contract made with an agent, in consideration of his personal character, ability or skill has been fully performed on his part, or if performance by the principal has been accepted, there is no reason why the undisclosed principal should not be entitled to enforce performance of the contract by the third party, subject to equities existing against the agent. *Sullivan v. Schailor,* (1898) 70 Conn. 733, 40 Atl. 1054; *Warder v. White,* (1883) 14 Ill. App. 50. Another exception has been made in states which have not abolished seals. There it is held that the principal can not maintain an action on an instrument under seal made by the agent in his own name. *Newberry Land Co. v. Newberry,* (1897) 95 Va. 119, 27 S. E. 899. In negotiable instruments, the tendency is to allow a principal to maintain an action on such an instrument made in the name of the agent. *Pacific Guano Co. v. Holleman,* (C. C. 1882) 12 Fed. 61. The principal case, waiving the question of the statute of frauds, seems sound both on principle and authority. Since a contract made by an agent in his own name for an undisclosed principal would be binding on the principal on disclosure, it seems fair to give him the reciprocal benefit of suing thereon so long as the equitable rights of the third party are preserved. Since this was a case of unnamed principal, it is apparent that the vendee could not have relied on any personal element of the agent.

As to the defense founded on the provision of the statute of frauds declaring the contract void unless in writing and signed "by the party by whom the sale is to be made, or by his agent thereunto authorized in writing," the court relies upon *Davidson v. Hurty,* (1911) 116 Minn. 280, 133 N. W. 862, 39 L. R. A. (N.S.) 324. The points chiefly discussed in that case were the right of an undisclosed principal to enforce specific performance of a contract of sale of land, and whether parol evidence is admissible to prove the agent's authority. The court directed the discussion almost exclusively to showing that the admission of such evidence did not contradict the writing, and to the capacity of a husband to act as his wife's agent in the sale of her land. That the Minnesota statute (G. S. 1913, Section 7003) expressly requires the agent's authority to be in writing was little considered, if at all, in the opinion, and was not raised in the brief of counsel. No authorities were cited to this point by the court. In the instant case, also, the attention of the court seems to have been focussed upon the question whether the parol evidence alters,

varies, or contradicts the contract, rather than upon the invalidity of the contract for any purpose. "Void," in this statute, has been held to mean that the contract is void, and not merely unenforceable. *Pierce v. Clarke,* (1898) 71 Minn. 114, 73 N. W. 522. In that, as in the instant case, the contract was signed by the vendee and by the agent of the vendor not authorized in writing, differing from the instant case only in the feature of undisclosed principal, which can hardly afford ground for distinguishing it. New York, from which Minnesota borrowed the words of the statute declaring the contract void unless signed by the party by whom the sale is to be made, likewise holds that the contract not signed by the vendor is void in toto, and cannot be enforced by the vendor. *Miller v. Pelletier,* (1842) 4 Edw. Ch. 102; *Laughran v. Smith,* (1878) 75 N. Y. 205. The same is assumed in Michigan. *Maynard v. Brown,* (1879) 41 Mich. 298, 2 N. W. 30. The conclusion is difficult to avoid, that if the agent's authority is not in writing, the contract, though signed by the vendee, is void for all purposes. In states whose statutes require the writing to be signed by the "party to be charged," it is pretty well established that the vendor who did not sign may enforce the contract against the vendee who did: see note to 28 L. R. A. (N.S.) 680, at p. 694; except in Kentucky and Tennessee, whose courts hold that "party to be charged" means the vendor: *City of Murray v. Crawford,* (1910) 138 Ky. 25, 127 S. W. 494, 28 L. R. A. (N.S.) 680; and in those states the vendor who did not sign cannot enforce the contract against the vendee who did sign. Id.; *Armstrong v. Lyen,* (1912) 148 Ky. 59, 145 S. W. 1120. And see note to 43 L. R. A. (N.S.) 410, at p. 411.

STATUTES—ENACTMENT—INITIATIVE.—Under the initiative provision of the constitution of the state of Montana, the people of that state adopted a statute known as the Farm Loan Act. The State Board of Land Commissioners refused to perform the duties imposed upon them by the act on the ground that it was unconstitutional, insofar as it fastened the primary liability for the integrity of the fund from which the loan was to be made upon the counties, when there was a provision in the constitution to the effect that primary liability should be upon the state. On writ of mandamus it was *Held,* that even though the act had been approved by a majority of the voters of the state, nevertheless this provision of the act was unconstitutional. *State ex rel. Evans v. Stewart,* (Mont. 1916) 161 Pac. 309.

This case raises the question as to what are the limitations upon the power of the people. "By the constitution which they (the people) establish, they not only tie up the hands of their official agencies, but their own hands as well; and neither the officers of the state, nor the whole people as an aggregate body, are at liberty to take action in opposition to this fundamental law." Cooley, Constitutional Limitations, seventh edition, p. 56. The courts have distinguished between fundamental law which represents the settled policy of the state, and ordinary laws which are temporary adjustments and expedients. It has been held that a constitutional amendment can be adopted only in the way provided in the constitution. *State ex rel. McClurg v. Powell,* (1900) 77 Miss. 543, 27 So. 927, 48 L. R. A. 652; *Kadderly v. Portland,* (1904) 44 Ore. 118, 74 Pac.

710, 75 Pac. 222. There is even more reason for requiring statutes adopted by the people to conform to the constitution because it is generally much easier to present a law to the people than a constitutional amendment. The position that the courts have taken seems to be that when the people are exercising the power of the initiative they are acting jointly with the legislative body in performing legislative functions and should be subject to the same limitations. *Allen v. State,* (1913) 14 Ariz. 458, 130 Pac. 1114, 44 L. R. A. (N.S.) 468; *Gottstein v. Lister,* (1915) 88 Wash. 462, 153 Pac. 595. In these cases the problem of the principal case was considered but the acts passed were held to be constitutional. It may, however, be inferred from the language the courts used that, if the acts had been considered as contrary to the provisions of the constitution, they would have been void. These cases also held that an act adopted under the initiative, although it had not been given the publicity required by the constitution, would not be declared void because the judiciary does not have power to look beyond the authentication and enrollment of the statute, again applying the same rule that would be applied if the act were an ordinary act of a legislature. *Field v. Clark,* (1891) 143 U. S. 649, 12 S. C. R. 495, 36 L. Ed. 294. The instant case seems decided upon sound principles of constitutional law.

TELEGRAPHS AND TELEPHONES—COMPETING LINES—BASIS OF POWER TO COMPEL PHYSICAL CONNECTION.—Pursuant to a Michigan statute, which gave the State Railroad Commission power to enforce physical connection between competing telephone companies whenever public convenience and necessity required it, the Commission ordered the Michigan State Telephone Co., and the Citizens' Telephone Co., to make such connection between their toll lines as to afford toll service to the subscribers of each company over the toll lines of the other company in Traverse City. Complainant, as one of the companies affected, brought this action to set aside the order. *Held,* such enforced physical connection is not a taking of property by eminent domain, but a proper regulation in the interests of the public. *Michigan State Telephone Co. v. Michigan Railroad Comm.* (Mich. 1916) 161 N. W. 241.

The court in the instant case disapproves of the holding in *Pacific Telephone & Telegraph Co. v. Eshleman,* (1913) 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, where the court held this to be an exercise of eminent domain. The instant case applies the theory approved in 1 MINNESOTA LAW REVIEW 95, justifying the commission's order as a proper exercise of the police power.

TENANCY IN COMMON—TAX TITLE—PURCHASE BY CO-TENANT.—In an action to quiet title to lands, the plaintiff claimed under a tax deed of the interest of defendant, his co-tenant. It appeared that the tenants in common derived their interests under separate instruments, that the lands were vacant and unoccupied, and that there was no relationship between the owners other than that of the mere tenancy in common. *Held,* one tenant in common may acquire the title of his co-tenant by a tax deed. *Hobe v. Rudd,* (Wis. 1917) 161 N. W. 551.

One tenant in common cannot, by purchasing an outstanding lien, acquire a title which will evict his co-tenant. *Van Horne v. Fonda,* (1821) 5 Johns. Ch. (N. Y.) 388. It was suggested in earlier decisions that one co-tenant should be permitted to acquire a tax title and hold it adversely to his co-tenant. *Sands v. Davis,* (1879) 40 Mich. 14; *Boynton v. Veldman,* (1902) 131 Mich. 555, 91 N. W. 1022; *Frentz v. Klotsch,* (1871) 28 Wis. 312. There has been some uncertainty as to the extent and the grounds of the principle that a purchase of a tax title by one tenant in common inures to the benefit of all. *Rothwell v. Dewees,* (1862) 2 Black (U.S.) 613, 618, 17 L. Ed. 309; *Frentz v. Klotsch,* supra. Some cases dwell principally on the existence of a fiduciary relation. *Flinn v. McKinley,* (1876) 44 Iowa 68; *Lloyd v. Lynch,* (1857) 28 Pa. 419, 424. But the real ground seems to be the obligation to pay the taxes which rested upon him who now seeks to assert the tax title. *Choteau v. Jones,* (1849) 11 Ill. 300, 323; *Elston v. Piggott* (1883) 94 Ind. 14; *Blackwood v. Van Vleit,* (1874) 30 Mich. 118; *Adm'rs. of Downer v. Smith,* (1866) 38 Vt. 464; *Smith v. Lewis,* (1866) 20 Wis. 369, 375, opinion of Dixon, C. J. The duty to pay the taxes was recognized by the Minnesota court, it being said (Mitchell, J. dissenting), "It is as much the duty of one tenant in common to pay the taxes as it is of another. Equity holds that one such tenant must protect his co-tenant as much as he protects himself." *Easton v. Scofield,* (1896) 66 Minn. 425, 427, 69 N. W. 326. Courts have usually refused to make an exception to the rule where titles are derived from different sources, or where there is an inequality of interest or estate. *Rothwell v. Dewees,* supra; *Venable v. Beauchamp,* (1835) 3 Dana (Ky.) 321, 28 Am. Dec. 74; *Hoyt v. Lightbody,* (1906) 98 Minn. 189, 192, 108 N. W. 843. Nor is it clear that an exception should be made when there is a statutory right to redeem an undivided interest. The purpose of the statute is merely to enable one co-tenant to protect himself, and does not necessarily mean that he will be justified in destroying the title of another tenant in common. *Blackwood v. Van Vleit,* supra; *Easton v. Scofield,* supra; *Hoyt v. Lightbody,* supra.

THEATRES AND SHOWS—SCENIC RAILWAY—PERSONAL INJURY—PLEADING AND PROOF—RES IPSA LOQUITUR.—Plaintiff, in an action for personal injuries, pleaded specific acts of negligence and then sought to prove his case by an invocation of the doctrine of res ipsa loquitur. *Held,* he cannot avail himself of that doctrine. *Pointer v. Mountain Railway Construction Co.,* (Mo. 1916) 189 S. W. 805.

Res ipsa loquitur, the thing speaks for itself, symbolizes that the occurrence of the injury raises a presumption of culpability on the part of the owner or the manager of an apparatus. *Delaware & H. Co. v. Dix,* (1911) 188 Fed. 901, 905, 110 C. C. A. 535. The maxim is simply a rule of evidence. Negligence is never presumed from the mere fact of injury, but the manner of the occurrence of the injury or the attendant circumstances may sometimes well warrant an inference of negligence. It is sometimes said that it warrants a presumption of negligence. Such a presumption is one of fact, not of law, and it were better to refer to it as an inference which the jury may draw. *Palmer Brick Co. v. Chenall,* (1904) 119 Ga. 837, 842, 47 S. E. 329; *City Water Power Co. v. City of Fergus Falls,*

(1910) 113 Minn. 33, 128 N. W. 817. As to whether the doctrine is available to one who has pleaded specific allegations of negligence, the cases fall into three general classes. The cases of the first class hold the doctrine available only where the party has put in solely a general allegation of negligence, just as does the Missouri court in the instant case. *Jaquette v. Capital Traction Co.*, (1909) 34 App. Cas. (D. C.) 41, 25 L. R. A. (N.S.) 407; *Chicago Union Traction Co. v. Leonard*, (1906) 126 Ill. App. 189; *Norton v. Galveston, etc., R. Co.* (Tex. Civ. App. 1908) 108 S. W. 1044. The cases of the second class hold that the doctrine is available although the party has pleaded specific acts of negligence, and although he has not proved them. *McNeil v. Durham, etc., R. Co.*, (1902) 130 N. C. 256, 41 S. E. 383; *Dearden v. San Pedro, etc., R. Co.*, (1907) 33 Utah 147, 93 Pac. 271; *Walters v. Seattle, etc., R. Co.*, (1908) 48 Wash. 233, 93 Pac. 419, 24 L. R. A. (N.S.) 788. The last group, taking a middle ground, allows a party who has alleged specific acts of negligence to avail himself of the doctrine to establish negligence in the particular respect alleged. *Palmer Brick Co. v. Chenall*, supra; *Terre Haute, etc., R. Co. v. Sheeks*, (1900) 155 Ind. 74, 56 N. E. 434; see 24 L. R. A. (N.S.) 788 note. The holdings of the cases of the second group are hardly compatible with a rule that one who has pleaded specific acts of negligence is limited to them in his proof, while the cases of the first group seem to apply that rule too strictly. It is submitted that the rule adopted by the cases in the last group is the most reasonable and logical. Since the doctrine of res ipsa loquitur is simply one of evidence and not of pleading and merely permits a want of proof by specific facts to be supplied by an inference of fact, the plaintiff should be permitted to utilize the doctrine to prove the allegations to which he is limited by his complaint. Since the doctrine has nothing to do with pleading, there would seem to be no reason to limit its application to proof of a general allegation of negligence.

USURY—USURIOUS RATE OF INTEREST—WHAT CONSTITUTES.—Defendant bank made several loans to plaintiff for terms of six months and less, at 8% interest, the maximum legal rate in Georgia. Interest was deducted in advance and notes were taken for the amount of the loans. In an action by the trustee in bankruptcy for permission to sell the property which secured the loans, plaintiff set up the defence of usury. *Held*, that the transactions were usurious. *McCurry v. Hartwell Bank*, (1916) 236 Fed. 556.

Taking payment at the highest legal rate of interest in advance was generally considered usurious by the early cases. *Barnes v. Worlich*, (1601) Cro. Jac. 25; *Marsh v. Martindale*, (1802) 3 B. & P. 154. The law merchant has been changed, however, until now it is the well settled rule of a great majority of the states that interest may be reserved in advance upon a short time loan without rendering the loan usurious. *Cobe v. Guyer*, (1909) 237 Ill. 516, 86 N. E. 1071; *Bramblett v. Deposit Bank*, (1906) 122 Ky. 324, 92 S. W. 283, 6 L. R. A. (N.S.) 612; *Fowler v. Equitable Trust Co.*, (1891) 141 U. S. 384, 12 S. C. R. 1, 35 L. Ed. 786. Such a result is illogical on principle, but has developed from the usual custom and practice of banks to collect interest in advance on such loans. *Tholen v. Duffy*, (1871) 7 Kan. 253. A similar result is reached in a con-

siderable number of states by statutes providing that interest for one year or less may be received in advance on obligations drawing the maximum legal rate. Minn. G. S. 1913, Sec. 5807; Neb. Comp. St. 1907, Sec. 1, Ch. 44. These statutes are evidently intended to legalize the established banking custom. *Smith v. Parsons,* (1893) 55 Minn. 520, 57 N. W. 311. In the absence of statutes, no limit has been fixed as to what is a short term loan, but the general holding with some dissent is that the taking of interest in advance on loans for more than one year, interest being at maximum rate, constitutes usury. See *Grider v. Driver,* (1885) 46 Ark. 50; *Tallman v. Truesdell,* (1854) 3 Wis. 393. One case has held that the mere fact that such interest is deducted in advance on a five-year loan does not of itself make the loan usurious, unless an intent to evade the law is shown. *Swanson v. Realization & Debenture Co.,* (1897) 70 Minn. 380, 73 N. W. 165; See *Commonwealth v. Dakko,* (1903) 89 Minn. 386, 391, 94 N. W. 1088, semble. The principal case is in line with the small minority which still adheres to the original rule that any reservation of interest in advance, when the loan bears the maximum rate, is usurious. *Purvis v. Frink,* (1909) 57 Fla. 519, 49 So. 1023; *Hiller v. Ellis,* (1898) 72 Miss. 701, 18 So. 95, 41 L. R. A. 707.

BOOK REVIEWS.

THE LAW OF EMINENT DOMAIN, Second Edition.—Philip Nichols, Albany: Matthew Bender & Co., 1917. Two volumes, $15.00.

I was put immediately in sympathy with this work by finding that the author does not approve the holding of the supreme court of Illinois in *South Park Commissioners v. Ward,* 248 Ill. 299, 93 N. E. 910, 21 Ann. Cas. 127, to the effect that the legislature abused its powers in seeking to terminate by eminent domain proceedings the right of an abutting owner to have park lands kept free from buildings which had been dedicated to public use with that restriction. Mr. Nichols has apparently been schooled in the idea, with which I fully concur, that there is no species of private property right which may not be appropriated or terminated for public use; but he makes no adverse comment upon the New Jersey decision, *Albright v. Sussex County Lake & Park Commission,* (1904) 71 N. J. L. 303, 57 Atl. 398, 69 L. R. A. 768, 108 Am. St. Rep. 749, 2 Ann. Cas. 48, holding that while the bed and shores of a non-navigable lake may be taken for park purposes, the right of fishery in the waters together with a portion of the riparian lands, may not be taken for public use.

The present work is the successor to the author's earlier one volume edition enlarged so as to cover not merely the principles which underlie the power of eminent domain but also the restrictions upon its use. It brings that work down to date and in addition, covers the subjects of evidence and procedure. It is much more than a digest and citation of authorities. The author discusses with ability and discrimination, the basis of the power and those limitations upon its use which are found in the character of American government, as well as the limitations of positive constitutional law. He puts decided cases in a large measure to the test of his own experienced judgment and does not hesitate to criticise

when he thinks criticism is due. He has not failed to call attention to the questions that have recently arisen in connection with this subject, such as the boundary line of the police power beyond which compensation must be made if private property rights are interfered with. He cites the recent cases on excess condemnation,—that is, taking with the expectation of selling, aesthetic considerations as public use, the establishment of building lines, the control of height of buildings, additional servitudes, the taking of property by one sovereignty to accomplish results beyond its own territorial limits.

I hoped to find that Mr. Nichols had considered whether the power of eminent domain had been used for the establishment of residence districts and for dividing cities into zones for other purposes. The city of New York is making a notable effort in this direction but in reliance, so far as I know, upon the police power alone. Its charter provisions have not been judicially tested. Mr. Nichols cites the leading case, *People v. Chicago,* (1913) 261 Ill. 16, to the effect that the state cannot, without compensation, forbid the erection of a store building in a residence section. The analogous case, *State v. Houghton,* (1916) 158 N. W. 1017, was decided on like grounds by the Minnesota supreme court too recently to have been cited in this work.

It goes without saying that the book is not perfect. It deserves a better index. There is an occasional typographical error. The citation of authorities is liberal but it omits many important cases. In at least one instance I think his statement inaccurate. He says in Section 410,

"When a corporation undertakes to exercise eminent domain for a particular purpose under authority of a general statute, it is not open to the owner of land sought to be taken to contest the proceedings on the ground that the corporation, by the terms of its charter, had no authority to engage in the business for which the land was desired."

I think that statement much too broad. Taken literally, it would mean that the land owner could not contest the power of a mercantile corporation to take land for railroad purposes.

It is ungracious to point out minor defects. It is an able and well written work, seven years later in time than any other important work on this subject, and it will be extremely useful to courts and lawyers.

C. J. ROCKWOOD.

CASES AND OTHER AUTHORITIES ON LEGAL ETHICS.—George P. Costigan, Jr. American Casebook Series. St. Paul: West Publishing Company. 1917. pp. XIII, 616. $4.00.

A TREATISE ON FEDERAL IMPEACHMENTS.—Alex. Simpson, Jr. The Law Association of Philadelphia. 1916. pp. 230.

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OREGON MINIMUM WAGE CASES

THE constitutionality of the statutory minimum wage in private employment, so far as its repugnance to the federal constitution is concerned, is yet an open question. On April 9th, last, the United States Supreme Court, only by reason of an equally divided court, affirmed the judgments of the Oregon state supreme court, in the so-called "Oregon Minimum Wage Cases,"[1] wherein the Oregon minimum wage statute had been held to be not in contravention of the federal constitution.

HISTORY OF THE OREGON CASES

The final judgments by the Oregon court in these cases were rendered, one in the month of March, and the other in the month of April, 1914. Both cases were applications for permanent injunctions against the enforcement of the Oregon statute, based upon the claim that that statute had the effect to deprive plaintiffs of their property without due process of law and to infringe the right of liberty of contract, contrary to the fourteenth amendment. The *Stettler Case* was brought by a manufacturing employer, and the *Simpson Case* by an employee of Stettler. Judgment in the Oregon cases had been entered on demurrer,[2] and

1. Stettler v. O'Hara, et al., and Simpson v. O'Hara, affirmed by equally divided court, U. S. Supreme Court, April 9th, 1917; 37 S. C. R. 475.

2. Stettler v. O'Hara, (1914) 69 Ore. 519, 139 Pac. 173, Ann. Cas. 1916A 217; Simpson v. O'Hara, (1914) 70 Ore. 261, 141 Pac. 158.

practically the only question before the courts was the federal question involved. The cases were immediately taken to the United States Supreme Court on writ of error and advanced for argument at the October, 1914, term of that court. They were fully argued, with extension of time, on the 17th and 18th days of December, 1914; Louis D. Brandeis, of Boston (now Mr. Justice Brandeis), and Attorney-General A. M. Crawford, appearing for the defendants, and Rome G. Brown, of Minneapolis, and C. W. Fulton, of Portland, Oregon, appearing for plaintiffs. No decision was filed upon this argument, and in July, 1916, the cases were ordered by the court to be reargued at the October, 1916, term. That reargument was had on January 18th and 19th, 1917, again with extension of time; Professor Felix Frankfurter, of the Harvard Law School, appearing for the defendants and the same attorneys as in the previous argument appearing for the plaintiffs.

MINIMUM WAGE LEGISLATION IN THE UNITED STATES

These cases were the first minimum wage cases to be taken to the federal Supreme Court. Their importance, especially if a decisive result had been reached, is shown by the present status of minimum wage legislation in the United States.

Such statutes have been passed in the following states: Massachusetts, 1912;[3] Minnesota, 1913;[4] Nebraska, 1913;[5] Arkansas, 1915;[6] California, 1913;[7] Colorado, 1913;[8] Oregon, 1913;[9] Utah, 1913;[10] Washington, 1913;[11] Wisconsin, 1913.[12] In 1915, also, Idaho provided for a commission to investigate the question, but has not as yet passed any minimum wage statute.

With the exception of the statutes of Massachusetts, Nebraska, Arkansas and Utah, these minimum wage statutes are substantially in the terms of the Oregon statute. All these statutes purport to be based upon the police-power regulation of occupa-

3. Mass. Acts 1912 Chap. 706; Mass. Acts 1913 Chaps. 330 and 673.
4. Minn. G. S. 1913 Chap. 547.
5. Neb. Laws 1913 Chap. 211.
6. Ark. Laws 1915 Act 191.
7. Cal. Statutes 1913 Chap. 324.
8. Colo. Laws 1913 Chap. 110.
9. Ore. Laws 1913 Chap. 62.
10. Utah Laws 1913 Chap. 63.
11. Wash. Laws 1913 Chap. 174.
12. Wis. Rev. Stat. 1913 Section 1729s—1 to 12, Laws 1913 Chap. 712.

tions in the interest of "public welfare, safety, health and morals." In each case, their concrete object is to provide for women workers a wage which shall not be less than that which is considered required to supply each female worker, as an independent supporter of herself, such full "living wage" as will keep her in health and comfort. Such exercise of police-power regulation is based on the claim that the supplying, to an individual who happens to be an employee in any occupation, of the needs of such individual for a comfortable living, makes the occupation in question "affected with a public interest," and, therefore, subject to the wage regulation in question.

The Massachusetts statute authorizes a commission to investigate and determine the wages of female workers in any industry or occupation which are necessary to supply to such workers the cost of living and to maintain them in health. The commission has the same power as to the wages of all learners or apprentices, of either sex, and of all minors below eighteen years of age, of either sex. The wage so found is not directly compulsory upon the employer; that is, there is no fine or imprisonment for failure to pay that wage.

The penalty upon an employer for not paying the prescribed wage is, that the commission publishes the recalcitrant employer in newspapers, and the publication of such official list is made compulsory upon the newspapers. The only remedy allowed the employer is, that he may come into court and assume the burden of proof of showing that the prescribed wage is such as not to leave him a fair profit. If he is successful in so showing, then the court may restrain the commission from the publication provided. The remedy is individual to each employer.

This method of coercion was intended to obviate the constitutional objections raised to directly compulsory statutes. In its practical application, it is more repugnant to the business sense of the community, as well as to established law, than the apparently more drastic statutes of Minnesota and Oregon. This can now be better said of the Massachusetts statute than it could be a year or two ago, before its viciousness had been demonstrated by practice. The state commission and its wage boards become mere instruments for carrying out the demands of the employees. In terms, the statute affords employers a hearing upon the question of the reasonableness of the wage fixed and of their ability to pay. In practice, all such considerations are cast aside, includ-

ing evidence of facts, except in so far as they accord with the preconceived notion as to what the wage should be in order to give to the employees all that they demand, and to take from the employers irrespective of their ability to pay. If an employer fails to pay the wage fixed he is published throughout the state. The statute makes it a crime for any newspaper publisher to refuse thus publicly to blacklist an employer. He may be compelled thus publicly to hold up to censure his own relative, or his best paying advertiser—or even himself. Such a statute holds over every employer the threat of an official, public blacklist and boycott, more severe and more damaging than any private boycott ever established.

Again, in practice, the Massachusetts statute, as also all minimum wage statutes, results in discrimination. Its wage boards and commission fix different wages for different occupations, and even for different classes of employees in the same occupation. As the wage is fixed irrespective of the earning capacity of the employee and is theoretically based upon the individual cost of living, then why has one worker a right to a living wage greater than that of another? The fact is that, although theoretically computed upon the basis of a living wage, it is not computed at all. It is simply fixed for each class, from time to time, as the various boards are influenced by the demands of the employees. Moreover, each wage, when fixed, is only a stepping-stone to a higher wage. Each class of employees is constantly seeking an increase, regardless of any basis of computation, and particularly regardless of the worth of the employee to the employer.

The results of the application of the Massachusetts statute have justified the objections to such legislation based upon economic as well as upon constitutional grounds. The first industry in the United States to have applied to it the statutory minimum wage was the brush-making industry in Massachusetts, in which, from its very nature, an unusually large number of unskilled workers are employed. One brush concern, after the minimum wage for brush makers took effect, discharged over one hundred of its unskilled employees. Then it reorganized its methods of work so that the less skilled labor is done by those who also perform more skilled work. The total wage, however, is $40,000 a year less than that paid before. Many others of the brush concerns in Massachusetts discharged a large number of

their employees who were incapable of earning the wage fixed. An investigation six months afterwards showed that two-thirds of the workers so discharged had not since been able to get employment in any line of work at any price, and that many were engaged in other employments where a minimum wage was not yet fixed, and were receiving less than when discharged from their work as brush makers.[13] The Massachusetts courts have been holding their decision as to this statute's constitutionality, awaiting the United States Supreme Court's decision in the Oregon cases.

The Minnesota statute prohibits any employer from employing any "worker" at less than a "living wage." "Worker" is defined to mean a "woman . . . employed for wages"; that includes, also, minors (of both sexes), a woman or minor learner, and a woman or minor apprentice. "Living wage" is defined as "wages sufficient to maintain the worker in health and supply him with the necessary comforts and conditions of reasonable life."

In Minnesota a commission was formed and proceeded to put the statute in operation, but was enjoined by the courts in a decision holding the statute unconstitutional.[14] This decision was filed November 23, 1914, and is now in the supreme court of Minnesota, on appeal, having been argued and submitted, but held for decision awaiting decision of the United States Supreme Court in the Oregon cases.

The Arkansas statute fixes the minimum wage in the first instance directly, instead of through a commission. It provides:

"Sec. 7. It shall be unlawful for any employer of labor mentioned in Section 1 of this Act [manufacturing, mechanical or mercantile establishment, laundry, or express or transportation company] to pay any female worker in any establishment or occupation less than the wage specified in this section, to-wit, except as hereinafter provided: All female workers who have had six months' practicable [practical] experience in any line of industry or labor shall be paid not less than $1.25 per day. The minimum wage for inexperienced female workers who have not had six months' experience in any line of industry or labor shall be paid not less than $1.00 per day."

13. Mass. Minimum Wage Commission. Bulletin and Annual Report; also, "The Minimum Wage—Massachusetts Experience," published, Boston, 1916, Merchants and Manufacturers of Mass.

14. A. M. Ramer Company v. Evans et al., and Williams v. Evans et al., decided in Ramsey County District Court by Judge Catlin, November 23, 1914.

Section 9 provides that females who are paid upon a piece work basis, bonus system or in any other manner than by the day, shall be paid not less than the rate specified for the female employees who are working on the day rate system. A commission is provided which, after investigation, may raise or lower the statutory rate so fixed, and establish a rate which "is adequate to supply a woman, or minor female worker engaged in any occupation, trade, or industry, the necessary cost of proper living, and to maintain the health and welfare of such woman, or minor female worker." Failure on the part of any employer to pay the rate so fixed is punishable by a fine of not less than twenty-five dollars nor more than one hundred dollars for each day of noncompliance. This Arkansas statute has been declared unconstitutional by the lower courts of that state and on appeal the question is still pending in the Arkansas supreme court.[15]

The Nebraska statute substantially follows that of Massachusetts.

The California statute fixes the minimum wage as "the necessary cost of proper living and to maintain the health and welfare of such women and minors." It is generally on the lines of the Oregon statute.

The Colorado statute applies to "any mercantile, manufacturing, laundry, hotel, restaurant, telephone or telegraph business." The minimum wage is fixed on the basis of what is adequate "to supply the necessary cost of living, maintain them in health and supply the necessary comforts of life." This statute is generally on the lines of the Oregon statute.

The Washington statute prohibits employment of women workers "at wages which are not adequate for their maintenance" and authorizes the establishment of a minimum wage such "as shall be held to be reasonable and not detrimental to health and morals and which shall be sufficient for the decent maintenance of women."

The Wisconsin statute prohibits less than "a living wage," to any female or minor employee; which is defined to mean compensation by time or piece work or otherwise "sufficient to enable the employee receiving it to maintain himself or herself under conditions consistent with his or her welfare."

In Utah, the wage commission feature of other state statutes is entirely eliminated, and the statute briefly and directly makes it

15. Arkansas v. Crowe, submitted 1915.

unlawful to employ females at less than a specified rate for minors, another specified rate for adult learners and apprentices, and another specified rate for experienced adults. There is no distinction between different classes of employments, and a breach of the law by any regular employer is made a misdemeanor.

There are no minimum wage statutes in either Idaho or Ohio. In Idaho, however, the legislature of 1915 provided for a commission to investigate the question of minimum wages. In Ohio, in 1912, there was adopted a constitutional amendment authorizing laws establishing minimum wages.

THREE CLASSES OF STATUTES

From the above summary it will be seen that the statutes of Massachusetts and Nebraska are on a different basis from those of the other states. The statute of these two states has been sometimes termed a "non-compulsory" statute, because it does not, under a direct penalty upon the employer, compel the adoption of the minimum wage fixed by the commission, but compels newspapers to publish the delinquent employer as a recalcitrant. It is obvious that such a statute is indirectly and drastically compulsory, and that, too, by an attempt to legalize a compulsory black-list. This question was not directly involved in the discussion of the Oregon cases, although it is now pending before the Massachusetts courts.

The statutes in the states other than Massachusetts and Nebraska are directly compulsory and penal in their provisions. These others, however, are of two kinds: (1) those in which the statutory wage is fixed by a commission through wage boards, and whose final promulgation of the wage in any employment is binding upon the employer; and (2) those, of which there are two, Arkansas and Utah, in which the terms of the statute fix in precise figures the statutory wage, without providing for the intervention of a commission in the original instance.

UNCONSTITUTIONAL FEATURES

While differing somewhat in detail, the main provisions of the Oregon statute are followed in the statutes of all these other states, except, as already stated, in Massachusetts and Nebraska, and in Arkansas and Utah. The main objections to its constitutionality are: (1) it fixes a wage based solely upon the individual needs of the employee, measured not by anything which has relation to the fact of employment or to the particular occu-

pation in question, but measured solely by the individual needs of the person employed,—not as a worker but as an individual entitled in some way to all the funds necessary to supply her needs in accordance with an arbitrary standard of living; (2) it puts the burden on the employer to supply these individual needs to the extent that the money required therefor is in excess of what the employee earns, or can earn, or is worth; (3) it prohibits the employee from making a binding contract for work at an amount which is measured by efficiency or worth, and renders jobless those whose efficiency does not come up to that properly measured by the minimum wage fixed; (4) the statute has, therefore, the effect to deprive both the employer and the employee of their property and of the liberty of contract.

In the *Stettler* and *Simpson* cases the facts were undisputed that the employee, Simpson, was a regular worker whose efficiency was such that she was unable to earn in the occupation in question, or in any other occupation, more than $6.00 per week, and that she was one of a large number of such employees; and that the statute in question had the effect to compel Stettler, the employer, to pay her not less than $8.64 per week, and also had the effect to prevent her from making any contract for employment at $6.00 per week, or any other sum less than $8.64.

This is a good example of the effect of these minimum wage statutes, although rates at which the minimum wage is fixed vary in different states and vary according to raises which may be made from time to time by the wage commissions.

ARGUMENT FOR UNCONSTITUTIONALITY

The theory on which the Oregon statute was held constitutional by the supreme court of that state and on which theory the main argument for its constitutionality is based, is that it is police-power regulation supportable on the same theory that statutory regulation of maximum hours of employment has been upheld. The fact, which is apparent, that the regulation attempted involves to some extent the deprivation of property and of liberty of contract is admitted; but it is claimed that this statute comes within the well established rule that such deprivation of property or of liberty does not make the statute repugnant to the fourteenth amendment, if such deprivation is one which is only incidental to a proper exercise of the police-power of regulation,—under the rule that the rights of property and of contract

protected by the federal constitution are not absolute and unyielding, but are "subject to limitation and restraint in the interest of the public health, safety, and welfare, and such limitations may be declared in legislation of the state."[16] And numerous instances of regulation of occupations at the expense of the employer are cited as precedents controlling in this instance.

Such argument overlooks the distinctions expressly made by the federal Supreme Court in supporting state legislation regulating occupations or business in different ways.

The declaration by a state legislature that an attempted regulation of a business is enacted in promotion of the public health, safety or welfare, does not render the enactment valid as a police regulation. There is a limit to the valid exercise of the police-power of the state. A public welfare statute must have a direct relation as a means to an end, and the end itself must be appropriate and legitimate.[17]

Regulation of hours in *public employment* does not involve the question of the state's police-power, for such regulation applies only as between the state itself, or political sub-division thereof, and its own employees.[18] So, of course, as to minimum wage statutes which apply only to public employment. As to *private employment* the regulation of hours is supported only because, and to the extent that, longer hours involve dangers to the safety and health of employees, arising out of hazards which are peculiar to the employment in question.[19]

The Factory Acts compel the employer, at his own expense, to protect all employees against hazards of unsafe machinery or of unsanitary conditions of work,—hazards only which are peculiar to the employment in question, and which arise out of the fact and nature of the employment. The Workmen's Compensation Acts protect the employee against casualties arising out of and because of the hazards of and during employment. Such statutes are sustained as a proper exercise of the police power

16. Coppage v. Kansas, (1914) 236 U. S. 1, 28, 35 S. C. R. 240, L. R. A. 1915C 960.

17. Lochner v. New York, (1905) 198 U. S. 45, 56, also dissenting opinion p. 68, 49 L. Ed. 937, 25 S. C. R. 539; Coppage v. Kansas, (1914) 236 U. S. 1, 15-16, 35 S. C. R. 240, L. R. A. 1915C 960.

18. Atkin v. Kansas, (1903) 191 U. S. 207, 218, 48 L. Ed. 148, 24 S. C. R. 124.

19. Holden v. Hardy, (1898) 169 U. S. 366, 395, 42 L. Ed. 780, 18 S. C. R. 383; Muller v. Oregon, (1908) 208 U. S. 412, 421, 52 L. Ed. 551, 28 S. C. R. 324.

because the protection thereby given has "a real, substantial relation" to the employment itself. The state regulation of rates of public service companies, of railroads, and of insurance companies, is supported solely on the basis that these enterprises are quasi-public, or so affected with a public interest, that the regulation made is valid.[20]

But the need to any person of a "living" is an *individual* need. It exists before employment, and during employment, and after employment. Such need is, indeed, diminished, or supplied, during employment to the extent of the wage actually paid. Hazards and dangers that arise from this individual need are less with employment than they are without employment. The need itself is one which is a natural or purely individual need and has no origin in the fact of employment.

The statutory "living wage" is based upon the ethical doctrine that every person born into the world has a "generic right" to receive from the state, or the community in which he lives, the full means of subsistence; and more than a mere subsistence only, —he has such a right to the full means of living in health and comfort, including reasonable expenditures for pleasure and diversion. What an individual does not earn, so far as necessary to supply the living wage, must come from outside sources. The minimum wage statute says that this difference must be supplied by the one who happens to have that individual on his pay-roll; and that such employer cannot make a valid contract for employment for any less than such fixed minimum. He must contribute the balance, even if he has to pay it out of profits. If he cannot pay it out of profits then he must pay it out of capital. If his business is such that it cannot continue under such expenditures, beyond those which his business will allow, or which competition from other states will permit, then his business must cease. His business has become a "parasite" in the industrial world because it cannot finance the normal cost of its existence together with the forced contribution to the individual needs of its employees which are measured by the minimum wage.

An Arizona statute limiting the number of aliens that an employer could employ, and similar statutes, have been held unconstitutional by the federal Supreme Court on the ground

20. Munn v. Illinois, (1876) 94 U. S. 113, 24 L. Ed. 77; German Alliance Ins. Co. v. Lewis, (1913) 233 U. S. 389, 415, 58 L. Ed. 1011, 34 S. C. R. 612, L. R. A. 1915C 1189.

that, "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [fourteenth] amendment to secure."[21]

As to a labor union statute the same court had said:

"The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it . . . The employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."[22]

A Kansas statute attempted to prevent the condition in contracts for labor that an employee should remain a non-union man; but was held unconstitutional and the federal Supreme Court adhered to the rule laid down in the *Adair Case,* saying:

"The principle is fundamental and vital. Included in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense. The right is as essential to the laborer as to the capitalist, to the poor as to the rich; for the vast majority of persons have no other honest way to begin to acquire property, save by working for money."[23]

Further support of the minimum wage statutes is attempted on the ground that they apply only to women employees and are a proper police-power regulation, because women are of "weak bargaining-power," and that, therefore, intervention of the state, in respect of contracts between them and their employers, is justifiable. This argument is also completely answered in the *Coppage Case,* where the same argument was made with reference to employees generally in regard to contracts of employment. The court said:

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21. Truax v. Raich, (1915) 239 U. S. 33, 41, 60 L. Ed. 131, 36 S. C. R. 7, L. R. A. 1916D 545.

22. Adair v. United States, (1908) 208 U. S. 161, 174, 52 L. Ed. 436, 28 S. C. R. 277, 13 Ann. Cas. 764.

23. Coppage v. Kansas, (1914) 236 U. S. 1, 14, 35 S. C. R. 240, L. R. A. 1915C 960.

"No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employee. Indeed a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights. But the Fourteenth Amendment, in declaring that a State shall not 'deprive any person of life, liberty or property without due process of law,' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars the States from any unwarranted interference with either.

"And since a State may not strike them down directly, it is clear that it may not do so indirectly, as by declaring in effect that the public good requires the removal of those inequalities that are but the normal and inevitable result of their exercise, and then invoking the police power in order to remove the inequalities, without other object in view. The police power is broad, and not easily defined, but it cannot be given the wide scope that is here asserted for it, without in effect nullifying the constitutional guaranty."[24]

The dissenting opinion in the *German Alliance Insurance Co. Case* denied the right to regulate insurance rates, on the ground solely that the business was not one properly termed "affected with a public interest,"—that is, it denied the fact which was the basis of the decision of the majority of the court upholding the state regulation of insurance rates. This dissenting opinion, therefore, without conflicting with any legal principle held by the majority, discussed the question of the regulation of prices, rates, wages, etc., in private businesses. On that point of law, therefore, it is a direct authority. Quoting from that opinion:

"If the price of a private and personal contract of indemnity can be regulated—if the price of a chose in action can be fixed,—then the price of everything within the circle of business transactions can be regulated. Considering, therefore, the nature of

24. Coppage v. Kansas, (1914) 236 U. S. 1, 17-20, 35 S. C. R. 240, L. R. A. 1915C 960.

the subject treated and the reasoning on which the court's opinion is based, it is evident that the decision is not a mere entering wedge, but reaches the end from the beginning and announces a principle which points inevitably to the conclusion that the price of every article sold and the price of every service offered can be regulated by statute. . . .

"Acts were passed by Parliament fixing the price of many commodities that were convenient or useful. These laws did not stop at fixing the price of property, but, like the present act, they fixed the price of private contracts, and, by statute prescribed the rate of wages, and made it unlawful for the employee to receive or for the employer to give more than the wage fixed by law. It is needless to say that these laws were felt to be an infringement upon the rights of men; that they were bitterly resisted by buyer and seller, by employer and employee, and were a source of perpetual irritation often leading to violence. But the fact that the English Parliament had the arbitrary power to pass such statutes made them valid in law, though they were in violation of the inherent rights of individuals. . . .

"For great and pervasive as is the power to regulate, it cannot override the constitutional principle that private property cannot be taken for private purposes. That limitation on the power of government over the individual and his property cannot be avoided by calling an unlawful taking a reasonable regulation. Indeed, the protection of property is an incident of the more fundamental and important right of liberty guaranteed by the Constitution and which entitled the citizen freely to engage in any honest calling and to make contracts as buyer or seller, as employer or employee in order to support himself and family."[25]

On principle and also on authority, the minimum wage statute seems clearly to extend the power of regulation beyond the limits held to be prohibited by the federal constitution.

ECONOMIC OBJECTIONS

There are many economic objections to the minimum wage statute. These are not directly pertinent in a discussion of its constitutionality; but they should not be overlooked. Competition today is not confined to intra-state trade. Prices are determined by the markets of the entire country, indeed, of the world. In the case of most manufacturing enterprises the largest percentage of their trade is outside of the limits of the home state. Any local, artificial raising of the cost of production interferes with natural competition. Industries of states not interfering with wages have an advantage over those of states exercising such paternalistic interference.

25. German Alliance Ins. Co. v. Lewis, (1913) 233 U. S. 389, 420-424, 58 L. Ed. 1011, 34 S. C. R. 612, L. R. A. 1915C 1189.

Again, the minimum wage statute defies the economic law of supply and demand and increases the army of jobless seekers of work. The employer will not keep employees on his payroll whose efficiency is below the standard of the minimum wage. The employee is forbidden to make a contract for what his labor is worth. He must achieve a certain standard of efficiency, —and this, too, at his own expense,—before he can get a job. He is deprived of the assistance which he might otherwise obtain by getting a job for what he is worth, and having his wage increased as his efficiency increases. If the employer, by reason of the extra production-cost imposed, has to go out of business, then all classes of his employees are rendered jobless.

As an economic proposition the minimum wage is impracticable and it tends to fix a maximum wage,—which is presumably impossible by legislation. The tendency of the effect of the minimum wage is to lower higher wages and to establish maximum wages as well. The possible wage-cost of any particular industry is limited. If a sum which is more than the work-worth of the less efficient employees is fixed as a minimum wage for them, then the unavoidable result is holding the more efficient class more precisely to the limit of their actual work-worth; and thereby the rewards for experience and efficiency, by participation in profits beyond the actual wage, are diminished. Mr. Samuel Gompers, president of the American Federation of Labor, has expressed his view that the statutory minimum wage is a step toward slavery. President Wilson, and others, recognize the fact that the ultimate tendency of the minimum wage is to lower higher wages rather than raise lower wages.

The claim was formerly asserted that the statutory minimum wage is a protection of the morals of women workers. This sensational claim has been practically abandoned. Of course, if insufficient wages during employment produce immorality, then lack of employment would tend to produce it all the more. As said by Judge Catlin of the District Court of Ramsey County, Minnesota, in the *Ramer* decision, already cited, such a statute "is quite as likely in actual results to increase both distress and immorality, if morals are dependent on wages."

SOME SURMISES SUGGESTED

An interesting phase of the consideration of this question by the United States Supreme Court is the question of the probable effect upon the final result caused by the changing personnel of

the court during the consideration of these cases. Whatever may be the basis of such surmise, and without any available proof to support it, it seems probable that after these cases were first submitted the court after consultation reached a decision reversing the Oregon state courts and holding that the Oregon statute was unconstitutional; that that decision was being written by Justice Lamar at the time of his sickness and death; and that such decision had been reached with five justices for reversal and four dissenting. Further, it would seem that the death of Justice Lamar left the court evenly divided, and that it was therefore decided to await the appointment of Justice Lamar's successor, whose opinion in the matter was expected to be decisive upon reargument. It happened, however, that after a long delay Justice Brandeis was appointed, but was disqualified to sit in these cases, having been of counsel in their former presentation. Then came the resignation of Justice Hughes, and this apparently left the seven remaining members of the court, who were qualified to sit in these cases, four to three in favor of the unconstitutionality of this statute. Then reargument was ordered and the appointment of Justice Clarke followed. No members of the court having changed their mind upon reargument, this left the court four to four. The final decision does not state which four favored and which opposed the constitutionality of the statute, but the writer's surmise is, that on the first submission the statute was deemed unconstitutional by Chief Justice White and by Justices Van Devanter, Lamar, Pitney and McReynolds, and was deemed constitutional by Justices McKenna, Holmes, Day and Hughes It seems evident that in the final decision Justices McKenna, Holmes, Day and Clarke favored affirmance, with Chief Justice White, and Justices Van Devanter, Pitney and McReynolds for reversal.

EFFECT OF DECISION BY DIVIDED COURT

The judgment of affirmance rendered in these cases is by some assumed to constitute an authority and precedent holding that the statutory minimum wage is not repugnant to the prohibitions of the federal constitution. Such is not the case. The question of constitutionality is still an open one, so far as the federal courts are concerned, and also so far as all state courts are concerned, except, of course, in Oregon where it has been upheld by the state supreme court. The rule in the United States is that, a decision by a divided appellate court operates to affirm the decision

reviewed, and determines the rights of the parties in the particular case, but does not establish a rule of law which has the force of precedent either in the same court or in inferior courts.[26] In such case no opinion is handed down and the decision is simply one of "affirmance by a divided court," without settling the principles of law which were at issue before the court.[27]

It may be expected, therefore, that the Minnesota state supreme court will disagree with the Oregon supreme court and uphold the decision of Judge Catlin in the *Ramer Case;* and also that the decision of the lower courts of Arkansas against the constitutionality of the minimum wage statute of that state will be upheld.

This sort of legislation is a new expression of the paternalistic and socialistic tendencies of the day. It savors of the division of property between those who have and those who have not, and the leveling of fortunes by division under governmental supervision. It is consistent with the orthodox socialist creed, but it is not consistent with the principles of our government which are based upon the protection of individual rights. After long study and discussion of the subject, such legislation still seems to the writer to be a long step toward nullifying our constitutional guaranties.

ROME G. BROWN.

MINNEAPOLIS.

26. Hertz v. Woodman, (1910) 218 U. S. 205, 213-214, 54 L. Ed. 1001, 30 S. C. R. 621.

27. Etting v. Bank of United States, (1826) 11 Wheat. (U. S.) 59, 78, 6 L. Ed. 59; Durant v. Essex Co., (1868) 7 Wall. (U. S.) 107, 113, 19 L. Ed. 154; Kinney v. Conant, (1909) 92 C. C. A. 410, 166 Fed. 720, 721; Westhus v. Union Trust Co., (1909) 94 C. C. A. 95, 168 Fed. 617, 618.

THE MINNESOTA RESIDENCE DISTRICT ACT OF 1915.

THE Minnesota Residence District Act of 1915 is an attempt to achieve one step of progress in the general program which the country has had before it for a number of years for the improvement of city life. There has been a continuous struggle in the residence districts of the larger cities to keep them free from commercial and industrial activities as well as from structures which are positively offensive to the sight and hostile to the public safety. Among the more conspicuous of the contests that have been carried on, are those for the suppression of bill-boards, the beautification of grounds adjoining the public ways, and the establishment of residence districts from which business occupations should be excluded.

Prior even to any of these in the state of Minnesota were city ordinances and state laws excluding the liquor business from large portions of the cities of Minneapolis and St. Paul. An ordinance was first resorted to in Minneapolis which confined the retail liquor business to an area in the business sections embracing not more than four or five per cent of the total area of the city. It was sustained by the supreme court, *In re Wilson*.[1] This ordinance was sustained as an act of the police power and in accordance with the universal practice in liquor legislation, made no provision for the payment of damages to any who might be injured.

The war against bill-boards and other forms of out-of-door advertising has been country-wide and has relied upon the police power alone as its weapon. It has succeeded to the extent that restrictions and prohibitions embodied in legislation were designed for the physical and moral safety of the community. It has failed to the extent that its purposes were aesthetic only. Among the very late cases are the decisions in Wisconsin and Rhode Island and in the federal Supreme Court. They cite all or nearly all that precede.[2]

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1. (1884) 32 Minn. 145, 19 N. W. 723.
2. Cream City Bill Posting Co. v. Milwaukee, (1914) 158 Wis. 86, 147 N. W. 25; Horton v. Old Colony Bill Posting Co., (1914) 36 R. I. 507, 90 Atl. 822; Thomas Cusack Co. v. Chicago, (1917) 37 S. C. R. 190.

The discussions in the bill-board cases have frequently pointed out the distinctions between police power and the power of eminent domain, and have often declared that aesthetic considerations alone are sufficient for the latter but not sufficient for the former.

There are but few cases in which aesthetic considerations alone have been the basis of attempts to interfere with private property rights, but there are two cases in which it is distinctly held that such purposes are sufficient to sustain the exercise of eminent domain. One is the famous case of *Attorney General v. Williams,*[3] in which condemnation proceedings were sustained for the purpose of limiting the height of buildings about the historic Copley Square in Boston. One object was the preservation of architectural symmetry which was purely aesthetic, but in that case there was the additional consideration of keeping an open space for the admission of light and air to the public library and other public and semi-public buildings. The statute provided for compensation but the court declared that the statute might perhaps have been sustained without such provision because it involved considerations other than aesthetic. In the case of *In re New York,*[4] the purpose was to control the planting and beautification of a strip of land along a street without taking the right of travel. It was a condemnation case and the appellate division laid down squarely the doctrine that aesthetic considerations were sufficient to justify the statute. The court of appeals affirmed the judgment upon the opinion of the lower court.

Another method of accomplishing city beautification which a few years ago had many stout advocates was called excess condemnation. It consisted in taking more land than was needed for an improvement and re-selling the excess with restrictions. This is said to be common practice in European countries whose legislatures are not bothered by written constitutions. A somewhat careful search of judicial decisions has failed to discover any case in the United States sustaining this procedure. In two cases decided within the same week by courts of the highest authority, excess condemnation was condemned.[5]

3. (1899) 174 Mass. 476, 55 N. E. 77.
4. (1901) 167 N. Y. 624, 60 N. E. 1116.
5. Salsbury Land & Imp. Co. v. Commonwealth, (1913) 215 Mass. 371, 102 N. E. 619, 46 L. R. A. (N.S.) 1196; Pennsylvania Mut. Life Ins. Co. v. Philadelphia, (1913) 242 Pa. St. 47, 88 Atl. 904, 49 L. R. A. (N.S.) 1062.

The Pennsylvania decision is based in part upon the ground that the purposes of excess condemnation so far as they are public, can be otherwise accomplished.

The Minnesota Residence District Act of 1913, Chapter 98, undertakes to empower cities of the first class without making compensation, to

"designate residence districts in such cities wherein only buildings for residences may be erected and maintained including duplex houses, and double houses and prohibiting the erection and maintenance of hotels, stores, factories, warehouses, dry cleaning plants, public garages or stables, tenements and apartment houses."

There is probably no judicial precedent for this act and it seems to be inconsistent with the rules adopted by the highest courts of other states in bill-board cases. The doctrine on which it was based was squarely repudiated by the supreme court of Illinois.[6]

An ordinance of the city of Chicago was held to be void which forbade the construction of a retail store on any street in which all the buildings are used exclusively for residence purposes without the written consent of a majority of property owners on both sides of the street in the block. This case was decided after the Minnesota act of 1913 was passed and before it reached a test in the courts. In July, 1916, however, in *State v. Houghton*[7] the Minnesota act was held to be void with respect to a retail store building. The opinion was by a divided court two of the five judges dissenting. The majority and minority opinions respectively state with full force the arguments and considerations for the opposing views. The question is whether a retail business, for instance a grocery business, carried on in a district otherwise occupied chiefly or wholly by residences is so offensive to the neighborhood that it ought to be excluded by law and without provision for assessment in payment of damages. The minority in this case say yes and the majority say no.

A mercantile building usually stands on the street line and is comparatively plain in architecture. The grounds are not ornamented with trees and shrubbery. It brings a more or less con-

6. People v. City of Chicago, (1913) 261 Ill. 16, 103 N. E. 609.
7. (1916) 158 N. W. 1017. And in State ex rel. Roerig v. Minneapolis (Minn., May 11, 1917), the same rule was applied to a four-family flat building.

stant stream of customers and is likely to make a loading platform of the sidewalk. There are few if any who would, other things being equal, select for a residence a location adjoining a store building and there are many who are willing to pay higher prices for lots and higher rentals for houses in neighborhoods that are free from such buildings. One view is that the residence property should be protected by arbitrary law from the lessening of value caused by the store buildings; the other view is that there is nothing immoral or unsanitary about the mercantile building as such and that property owners who find it advantageous to use their lots for such purposes, should not be prevented without compensation in the interest of adjacent residences.

Anticipating that the act of 1913 might not meet with judicial approval, the legislature of 1915 passed Chapter 128 of the laws of that year applying the rule of eminent domain to the establishment of residence districts. The purpose of the act is stated in the first section, to-wit:

"Any city of the first class may, through its council, upon petition of fifty (50) per cent of the owners of the real estate in the district sought to be affected, designate and establish by proceedings hereunder restricted residence districts within its limits wherein no building or other structure shall thereafter be erected, altered or repaired for any of the following purposes, to-wit: hotels, restaurants, eating houses, mercantile business, stores, factories, warehouses, printing establishments, tailor shops, coal yards, ice houses, blacksmith shops, repair shops, paint shops, bakeries, dyeing, cleaning and laundering establishments, billboards and other advertising devices, public garages, public stables, apartment houses, tenement houses, flat buildings, any other building or structure for purposes similar to the foregoing. Public garages and public stables shall include those, and only those operated for gain.

"Nothing herein contained shall be construed to exclude double residences or duplex houses so-called, schools, churches, or signs advertising for rent or sale the property only on which they are placed.

"No building or structure erected after the creation of such district shall be used for any purpose for which its erection shall be prohibited hereunder.

"The term 'council' in this act shall mean the chief governing body of the city by whatever name called."

The remainder of the act confers eminent domain powers and defines procedure. This bill was prepared in great haste and

with a minimum of consultation with others. It is crude and needs amendments in many particulars. The city of St. Paul has conducted a number of important proceedings under the act but none of them has yet resulted in any judicial determination of its validity.

A clear statement of the principles upon which this act of 1915 is based although written apparently without any thought of restricted residence districts, is found in Nichols on Eminent Domain:[8]

"Questions differing but slightly from those already discussed arise in deciding whether a use is public which satisfies no material needs but gratifies the artistic sense of the public or supplies means for public pleasure and recreation. It was felt in former times that land could be taken only to be used by the public for necessary and useful purposes and not for public pleasure and aesthetic gratification. Inroads on this doctrine have been made on all sides, partly by general acquiescence and partly by judicial decisions, until all that is left of it is the possibility that in a close case lack of material advantage to the public may be held to be decisive against the public nature of a taking.

"From the earliest recorded times public money has been spent to make public buildings attractive, and under American constitutions it has long been considered proper for the nation, state or city to erect memorial halls, monuments, and statues and to plan public buildings upon a more expensive scale than if designed for utility alone. The public mind has thus been educated to feel that aesthetic and artistic gratification are purposes public enough to justify the expenditure of public money, and to authorize the exercise of eminent domain in behalf of similar purposes was but a short step beyond."

The cases cited by Mr. Nichols include *Attorney General v. Williams*,[9] and *In re New York*.[10] A general discussion of the same doctrines is found also in *Bunyan v. Coms. of Palisades Interstate Park*.[11]

It is open to question whether there is not unwisdom in some cases in the exercise of the police power to its fullest extent, no matter how desirable the object. Aesthetic ideals are in proper cases well worth paying for. The sense of oppression which often is caused from enforcing ideals by arbitrary power may go far to offset the good that is accomplished. There is no question but that in some instances the exclusion of business from a

8. Nichols, Eminent Domain, second ed., Sec. 55.
9. (1899) 174 Mass. 476, 55 N. E. 77.
10. (1901) 167 N. Y. 624, 60 N. E. 1116.
11. (1915) 167 N. Y. App. Div. 457, 153 N. Y. Supp. 622.

neighborhood causes hardship to individuals. A controlling motive on the part of those who advocate restrictions is often the preservation of their own property values and frankly so. In such cases, if there is no adjustment of damages and benefits someone loses. It may be a very much sounder policy to require those who are benefited to compensate those who lose.

CHELSEA J. ROCKWOOD. *

MINNEAPOLIS.

*Judge, District Court of Hennepin County.

THE FEDERAL UNIFORM BILLS OF LADING ACT

THE Pomerene Act passed August 29, 1916, prescribes the rights and duties of shippers and carriers arising from bills of lading issued for the transportation of goods in interstate commerce. By this enactment, Congress exercises its power of regulation over these instrumentalities of commerce and this statute becomes the law in all the states so far as interstate commerce is concerned.

Bills of lading are divided into two classes: (1) Straight Bills, wherein goods are consigned to a specified person,[1] and (2) Order Bills, wherein the goods are consigned to the order of any person.[2] The rights and duties of carriers and shippers vary with the kind of bill issued and the two classes must be considered separately. But there are some general provisions applying to both.

The principal purpose of the statute was to make order bills of lading negotiable. And the rights and duties arising from the issuance, transfer and possession of order bills are set out in detail.

The Report of the Senate Committee on Interstate Commerce, in 1914, declared the statute was designed to remedy defects in commercial law, which were said to be mainly as follows: (1) Shipper's load and count; (2) Duplicate bills of lading; (3) Altered bills of lading; (4) Spent bills of lading; (5) Forgeries; (6) Fraudulent bills of lading. These remedies may be considered first.

1. *Shipper's Load and Count.* A bill of lading at common law was strictly nothing more than a receipt for the goods accepted for transportation and a memorandum of the agreement between shipper and carrier. It was prima facie evidence of the truth of the statements contained, but none of its recitals were conclusive. But in so far as the quantity and quality of the goods were concerned, the carrier was estopped from denying the description in the bill of lading as against an innocent purchaser for value.[3]

1. Sec. 2.
2. Sec. 3.
3. Cyc., VI, p. 416 and cases cited.

Hence there arose the custom on the part of the carrier of limiting its liability in this respect by inserting in the bill "Shipper's load and count," and similar phrases. When the bill contained this stipulation, the burden shifted to the shipper when the delivery was not in accord with the quantity and quality specified.[4]

Shippers complained that the limiting clause was sometimes inserted by carriers even when the loading had been done by the carriers' agents, and that the loading by carriers' agents at shippers' warehouses, yards, etc., had been refused. Inasmuch as with the growth of commerce, the bill of lading, while not negotiable, had acquired a degree of negotiability, and was transferred and treated as the representative of the goods it covered, the fluidity and welfare of commerce were obstructed by the inconclusive character of the description of the goods in bills of lading. And this was one of the evils the present statute was designed to remedy. Consequently by Sections 20 and 21 it is provided:

"Section 20. When goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, 'Shipper's weight, load, and count,' or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

"Section 21. When package freight or bulk freight is loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon the packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting

4. Porter, Bills of Lading, Sec. 60, Hutchinson, Carriers, third ed., Sec. 165. See also In the matter of the Suspension of Western Classification, (1912) 25 I. C. C. R., 442, 491.

in the bill of lading the words 'Shipper's weight, load, and count,' or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the non-receipt or by the misdescription of the goods described in the bill of lading: Provided, however, Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words 'Shipper's weight,' or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein."

These sections of the statute do more than fix liabilities arising from the bill of lading. A right is created in the shipper to have his shipments described by the carrier, and the carrier must assume liability for the description so made.

2. *Duplicate Bills of Lading.* At common law the validity of a duplicate bill of lading depended upon the terms of the contract. In the absence of a stipulation concerning it, the duplicate had all the validity of the original.[5] Delivery by a carrier on a duplicate bill of lading in good faith was a legal delivery and no further liability existed.[6] By Section 5, a carrier is made liable to a purchaser for value of a duplicate order bill unless the word "duplicate" is placed plainly upon the face of the bill. A bill marked "duplicate" imposes only the liability of an accurate copy.[7] This provision does not apply to shipments outside of the United States, nor to Alaska.

3. *Altered Bills of Lading.* An alteration of a written instrument which materially changes its purport and effect by the common law vitiates the instrument even in the possession of an innocent purchaser for value.[8] It is doubtful whether or not this rule should ever have applied to bills of lading; for its reason arose when the alteration occurred in an instrument which was itself a requisite to the right it evidenced. An alteration ma-

5. Missouri Pacific Ry. Co. v. Heidenheimer, (1891) 82 Tex. 195, 17 S. W. 608; Michie, Carriers, I, pp. 400-1 and cases cited; Porter, Bills of Lading, Sec. 495.

6. Glyn, Mills, Currie & Co. v. East and West India Dock Co., (1882) L. R. 7 App. Cas. 591; Midland National Bank v. Missouri Pacific Ry. Co., (1896) 132 Mo. 492, 33 S. W. 521, 53 Am. St. Rep. 505.

7. Sec. 15.

8. Cyc., II, pp. 177-79 and cases cited.

terial in character may well vitiate the instrument itself, and when the writing is essential to the right it witnesses the right would follow the fate of the instrument. But a bill of lading was, in one sense, only a receipt for goods at common law, or a memorandum of an agreement enforceable without the production of the memorandum, and the application of this principle to bills of lading seems to have been of questionable logic.

Under the present statute, however, all doubt is removed, and the alteration is declared void and of no effect, and the original writing enforced. Section 13 provides:

"Section 13. Any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor."

4. *Spent Bills of Lading.* Delivery of goods was often made by carriers without surrender of bills of lading, or without any entry thereon, and a prolific source of fraud was the transfer and sale of bills of lading to innocent purchasers after the goods had been received. Custom had to some extent removed this evil and carriers as a rule enforced surrender of order bills of lading before delivery.

The liability of the carrier under these "spent" bills depended upon the terms of the bill of lading, and differed in different jurisdictions.[9] Sections 11 and 12 impose the absolute duty upon carriers of enforcing surrender of bills of lading by providing:

"Section 11. Except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

"Section 12. Except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered with a description which may be in

9. Michie, Carriers, I, pp. 377, 519 and cases cited.

general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto."

5. *Forgeries.* Section 41 of the Act defines forgeries of bills of lading, declares them misdemeanors, and prescribes a penalty.

6. *Fraudulent Bills of Lading.* In *Friedlander v. Texas and Pacific Railroad Company,*[10] the Supreme Court held:

"A bill of lading fraudulently issued by the station agent of a railroad company without receiving the goods named in it for transportation, but in other respects according to the customary course of business, imposes no liability upon the company to an innocent holder who receives it without knowledge or notice of the fraud and for a valuable consideration."

This doctrine was followed by many states, although some held the carrier liable.[11]

Section 22 of the Act provides:

"Section 22. If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several states and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

Delivery. Under straight bills of lading delivery by the carrier must be made to consignee, if in possession of the bill, if transportation charges are paid, and receipt of goods is acknowledged, "in the absence of some lawful excuse." If the carrier refuse to deliver under the above conditions the burden of establishing the lawful excuse is upon the carrier.[12] The duty to deliver to consignee is, however, lifted from the carrier if it (1) "had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such

10. (1889) 130 U. S. 416, 32 L. Ed. 991, 9 S. C. R. 570.
11. Michie, Carriers, I, pp. 308, 310, 311 and cases cited.
12. Sec. 8.

delivery" or if it (2) "had information at the time of delivery that it was to a person not lawfully entitled to the possession of the goods";[13] and the carrier is made liable to the lawful owner if it delivers after notice or after having such information.

At common law the lawful owner of the goods was entitled to possession, but if the carrier delivered to the consignee in good faith, notice of a claim by a third person, whether ultimately proven to be the lawful owner or not, would not subject the carrier to liability. Under the present statute, delivery to a consignee would be at the carrier's peril, if it had received notice of a claim from a person who might be the lawful owner. This statute, therefore, puts the burden upon the carrier of determining who was the lawful owner and making this decision with liability for mistake. But by Sections 17 and 18 it is provided:

"Section 17. If more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as defense to an action brought against him for non-delivery of the goods or as an original suit, whichever is appropriate.

"Section 18. If some one other than the consignee or the person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead."

The carrier, therefore, may escape liability for refusal to deliver by requiring claimants to interplead, or it may make delivery to the lawful owner, subject to liability if its determination, as to who is the lawful owner, is erroneous.

The effect of these provisions may be summed up as follows:

1. Delivery must be made to consignee if in possession of the bill, in the absence of notice or information as to another lawful claimant, upon payment of freight charges and acknowledgement of receipt of goods.

2. When notice is given or information is had of another claimant, the carrier must deliver to the lawful owner, and unless it require an interpleader, it determines the lawful owner at its peril.

These provisions concerning delivery apply equally to holders of order bills with the added condition that the holder must sur-

13. Sec. 10.

render the order bill properly endorsed to be entitled to possession. The surrender of the order bill is an absolute requirement to relieve the carrier from liability.

These duties as to delivery affect the hitherto existing rights of reconsignment and diversion, and in the case of order bills the right of stoppage in transitu. The right of stoppage in transitu is preserved in consignors, as it existed at common law, in straight bills.[14] It is entirely destroyed in order bills. This is, of course, a necessary corollary to making order bills negotiable instruments. And any right of diversion or reconsignment which may have existed at common law in either consignor or consignee under order bills is destroyed. Because the holder of the order bill is entitled to possession and any diversion or reconsignment without surrender of the order bill would be at the carrier's peril.

At common law the rights of diversion and reconsignment depended on the ownership of the goods.[15] The bill of lading was not conclusive evidence of ownership, but in the absence of other evidence, certain presumptions arose. Under a straight bill of lading, the consignor was presumed the owner during transit and might divert and reconsign.

Under the new statute this presumption does not arise. The consignor must be a claimant, or the carrier prove the consignor the lawful owner, to excuse its failure to deliver to a consignee. The rights of diversion and reconsignment are still under the new statute dependent upon ownership, but the presumptions formerly arising from straight bills of lading no longer arise.

The following cases illustrate the rules in different jurisdictions as to the presumptions arising upon the rights of diversion and reconsignment. Under a straight bill of lading, naming a consignee, the consignor may divert and reconsign.[16] When the bill of lading has been forwarded by consignor to consignee, the consignor cannot alter destination.[17] When the consignor is the agent of the consignee, and this is known to carrier, consignor

14. Sec. 22.

15. Hutchinson, Carriers, third ed., Sec. 611, 660, 735; Michie, Carriers, I, p. 482; Southern Express Co. v. Dickson, (1876) 94 U. S. 549, 24 L. Ed. 285.

16. Strahorn v. Union Stock Yard & Transit Co., (1867) 43 Ill. 424, 92 Am. Dec. 142; Sutherland v. Second National Bank, (1880) 78 Ky. 250, 6 Am. & Eng. R. R. Cas. 368; Fort Worth etc., R. Co. v. Caruthers, (Tex. Civ. App. 1913) 157 S. W. 238.

17. Michie, Carriers, I, p. 482, citing Hartwell v. Louisville etc., Ry. Co., 15 Ky. L. Rep. 778.

cannot divert or reconsign.[18] A consignee under a straight bill of lading cannot divert or reconsign, if it be known to carrier he was agent of consignor.[19] A consignee under a straight bill of lading cannot divert or reconsign without producing the bill of lading.[20] A bill of lading consigned to shipper, "notify" vendee, endorsed by shipper to a bank for collection, still leaves the shipper the presumptive owner, and entitled to route, divert, and reconsign. Diversion by consignee without having bill of lading is unlawful.[21]

In all cases the rights of diversion and reconsignment rest in the true owner, but their exercise becomes subject to the provisions of the statute.

The carrier cannot assert a right or title to the goods in itself to excuse its failure to deliver, unless the right or title is derived from a transfer made by the consignor or consignee after shipment, or from the carrier's lien.[22] While the carrier could not become a claimant as a matter of defense, it might become a claimant in an independent action.

The carrier cannot assert a right or title to the goods in a third person to excuse its failure to deliver, except as provided in Sections 9, 17 and 18, unless enforced by legal process.[23] The exception would seem to nullify the first clause of the section; but its intent is evidently that a carrier cannot assert claims of third persons to excuse failure to deliver, unless asserted in good faith for the benefit of third persons. It is supposable that third persons who are the true lawful owners and so known to a carrier, might desire delivery to a consignee, and, in such an event, this information in the carrier could not be used as a cloak to cover its refusal or failure to deliver.[24]

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18. Thompson v. Fargo, (1872) 49 N. Y. 188, 10 Am. Rep. 342, cited and approved in Southern Express Co. v. Dickson, (1876) 94 U. S. 551, 24 L. Ed. 285.

19. Southern Express Co. v. Dickson, supra.

20. Ryan v. Great Northern Ry Co., (1903) 90 Minn. 12, 95 N. W. 758.

21. Perkett v. Manistee, etc., R. Co., (1913) 175 Mich. 253, 141 N. W. 607.

"By using bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to deliver it to no one who had not the order of the shipper." The Thames, (1871) 14 Wall. 98, 107, 20 L. Ed. 804.

Ship bills of lading are the same in the eyes of the law as carrier bills of lading. Robinson v. Memphis etc., R. Co., (1881) 9 Fed. 129.

22. Sec. 16

23. Sec. 19.

24. Sec. 22.

A straight bill cannot be negotiated free from existing equities.[25] The transferee of a straight bill acquires as against the transferor title to the goods, subject to any agreement with transferor. The transferee acquires the obligations the carrier owed the transferor immediately prior to notice to the carrier of the transfer. Prior to notification to carrier of the transfer of a straight bill, the transferee's rights may be defeated by garnishment, attachment, or execution by a creditor of the transferor, or by a notification to the carrier of another sale or transfer by the transferor. Notification to the carrier must be to a proper officer or agent, and within a reasonable time.[26] This section is an elaboration of the non-negotiable character of a straight bill.

To consummate a sale of a straight bill, the carrier must be notified. Such notification is the end of a process of taking title out of the seller and fixing it in the buyer. When the process is completed, the seller's acts, his debts, and creditors can no longer affect the property purchased; but until notification to the carrier, the transferee of a straight bill is holding it at his peril, subject to the various rights creditors of the transferor may have against the transferor, and subject also to the transferor's acts.

This is a radical change in the common law rights of parties which had previously existed. At common law, while the bill of lading was not negotiable, title to the goods it represented might pass by ordinary contract of sale and no notification to the carrier was necessary.

It is possible that the language of this section goes further than the intent of Congress. Failure to deliver on the part of a carrier might well be excused by garnishment, execution or subsequent sale, when the carrier had not been notified of the first sale and transfer of the bill. But the statute here declares the title of the transferee of the goods may be defeated. The relative rights of parties to the transfer have been changed. Notification to the carrier has been made an essential element in the sale of the goods.

It may be noted, however, that at common law, to complete a sale of personalty in the possession of a bailee, notice to the bailee was necessary to defeat the right of a creditor to attach the goods. There had to be notice to change the possession in the bailee for the seller, to a constructive possession for the pur-

25. Sec. 29.
26. Sec. 32.

chaser.[27] But this rule did not apply to bills of lading. Though non-negotiable they acquired by custom a quasi-negotiability, so that transfer of the instrument was equivalent to a transfer of the goods.[28]

Order Bills. The various sections in the statute with reference to the negotiability of order bills are self-explanatory and need no comment; but the liabilities of an indorser are different from an indorser of an ordinary negotiable instrument. There is no element of suretyship in the indorsement of a bill of lading. The indorsement is mainly for the purpose of transfer and to permit the exchange and marketing of the instrument. Section 31 provides:

"Section 31. A person to whom an order bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him."

And an indorser of an order bill by implication makes certain warranties by Section 34, which reads as follows:

"Section 34. A person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

(a) That the bill is genuine;

(b) That he has a legal right to transfer it;

(c) That he has knowledge of no fact which would impair the validity or worth of the bill;

(d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby."

But the element of suretyship is eliminated from the indorsement by Section 35.

"Section 35. The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations."

HENRY HULL.*

WASHINGTON, D. C.

*Law Division Interstate Commerce Commission.

27. Buhl Iron Works v. Teuton, (1888) 67 Mich. 623, 35 N. W. 804.
28. Cyc., VI, pp. 426-27 and cases cited.

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ACCORD EXECUTORY.—In 1701, the English Court of Common Pleas said that no action could be maintained upon an accord executory. "And the books are so numerous that an accord ought to be executed that it is now impossible to overthrow all the books. But if it had been a new point, it might be worthy of consideration."[1] More than ninety years later, the same court applied this dictum, and intimated that even had the point been undetermined by authority, it would have reached the same result on principle. "Interest reipublicae ut sit finis litium: accord executed is satisfaction: accord executory is only substituting one cause of action in the room of another, which might go on to any

1. Allen v. Harris, (1701) 1 Ld. Raym. 122.

extent."[2] And some forty years afterward the Court of Exchequer unhesitatingly reached the same result.[3] These cases have never been overruled, and are by some text-writers regarded as representing the present English law,[4] though perhaps their authority is indirectly weakened by later cases.[5] Some American courts have adopted this rule and regard an accord executory as giving no right of action but as revocable at pleasure until executed.[6] The explanation of this doctrine is purely historical. Long prior to the time when simple contracts were given validity by the courts,[7] legal obligations might be extinguished by accord and satisfaction.[8] The accord was then of value only as showing the intention of the parties in giving and receiving the satisfaction, and naturally "the books" demonstrated the worthlessness of such an agreement unperformed. As early as 1681, the Court of King's Bench suggested that since this rule was established when "remedy was not given for mutual promises, which now is given," the rule should be changed.[9] And although this suggestion met with no favor in England,[10] many American courts have adopted it, and give validity to accords executory as to other bilateral contracts.[11] And where it is shown to be the

2. Lynn v. Bruce, (1794) 2 H. Bl. 317.

3. Reeves v. Hearne, (1836) 1 M. & W. 323, 5 L. J. Ex. 156, 2 Gale 4.

4. Leake, Contracts, sixth ed., 643.

5. See Crowther v. Farrar, (1850) 15 Q. B. 677, 20 L. J. C. B. 298, 15 Jur. 535. Nash v. Armstrong, (1861) 10 C. B. N. S. 259, 30 L. J. C. P. 286, 7 Jur. N. S. 1060, 9 W. R. 782.

6. Elliott v. Dazey, (1826) 19 Ky. (3 T. B. Mon.) 268; Brennan v. Ostrander, (1884) 50 N. Y. Super. Ct. 426; Kinney v. Brotherhood of American Yeomen, (1905) 15 N. D. 21, 28, 106 N. W. 44 (semble); 1 C. J. 534.

7. Prior to 1504 no action lay for breach of a simple contract. Ames, History of Assumpsit, 2 Har. L. Rev. 1, 2.

8. Ames, Specialty Contracts and Equitable Defences, 9 Harv. L. Rev. 49. "The action is brought for 20 pounds and the concord is that he shall pay only 10 pounds which appears to be no satisfaction for 20 pounds. For payment of 10 pounds cannot be payment of 20 pounds. But if it were a horse which horse is paid according to the concord, that is a good satisfaction; for it does not appear whether the horse is worth more or less than the sum in demand." (1455) Y. B. 33 H. VI. f. 48, A. pl. 32, as quoted by Ames in 12 Harv. L. Rev. 521, and by Williston in 17 Harv. L. Rev. 468.

9. Case v. Barber, (1682) T. Raym. 450.

10. See Notes 1, 2, 3, 4, supra.

11. White v. Gray, (1878) 68 Me. 579, 580 (semble); Chicora, etc., Co. v. Dunan, (1900) 91 Md. 144, 46 Atl. 347, 50 L. R. A. 401 (does not designate the agreement an accord); Hunt v. Brown, (1888) 146 Mass. 253, 15 N. E. 587; Schweider v. Lang, (1882) 29 Minn. 254, 13 N. W. 33, 43 Am. Rep. 202; Palmer v. Bosley, (Tenn. Ch. 1900) 62 S. W. 195 (does not designate the agreement an accord); Babcock v. Haw-

intention of the parties that the new agreement shall of itself extinguish the old obligation, the new agreement is both an accord and a satisfaction, and is, of course, enforceable in all modern courts.[12]

In this last class of cases, the effect of the new agreement upon the original obligation is obvious; but where an accord is recognized as a valid bilateral contract and the intention of the parties is that satisfaction thereof, and not the mere accord, shall extinguish the original obligation, a rather puzzling problem is presented. By the accord the claimant expressly promises to accept the substituted performance at the time fixed for the execution of the accord, and, if effect is to be given to the obvious intention of the parties, he also agrees to forbear action on his claim until that time. If he brings action on that claim before that time, the accord cannot be pleaded as a complete defense at law, for by the very terms of the agreement the original claim is to subsist until the accord is satisfied.[13] For the same reason, the accord would furnish no basis for a permanent injunction and would not constitute a complete equitable defense. Professor Williston therefore suggests that defendant's only remedy should be a temporary injunction.[14] This may be true where law and equity are administered as separate systems; but it is respectfully submitted that where the distinction between actions at law and suits in equity has been abolished, facts which would warrant the granting of a temporary injunction should, when pleaded in an answer, constitute a defense equivalent to that of prematurity of action, whether as a plea in bar or as a plea in abatement, just as facts warranting a permanent injunction constitute a perfect plea in bar. Analogy may be found in those decisions where agreements to extend the time of payment of bills and notes are held valid defenses.[15]

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kins, (1851) 23 Vt. 561 (semble); Very v. Levy, (1851) 13 How. (U. S.) 345, 14 L. Ed. 173.

12. Cases to this effect are collected in 12 L. R. A. (N.S.) 1134; 1 C. J. 567, notes 40, 41; 17 Harv. L. Rev. 465, note 2. Good v. Cheesman, (1831) 2 B. & Ad. 328 is considered the leading English case.

13. The cases on this point are too numerous for citation. See 1 C. J. 530, note 84; 1 Am. & Eng. Encyc. of Law, second ed., 422.

14. 17 Harv. L. Rev. 464.

15. Pitts, etc., Co. v. Commercial National Bank, (1887) 121 Ill. 582, 13 N. E. 156; Bacon v. Schepflin, (1900) 185 Ill. 122, 56 N. E. 1123; Lyman v. Rasmussen, (1880) 27 Minn. 384, 7 N. W. 687; Hall v. Parsons, (1908) 105 Minn. 96, 101, 117 N. W. 240 (semble); Fisher v. Stevens, (1897) 143 Mo. 181, 44 S. W. 769; Condon National Bank v. Rogers, (1911) 60 Ore. 189, 118 Pac. 846, Ann. Cas. 1914A, 101; Price

In like manner it is almost universally held that tender of performance of the accord to the claimant at the time stipulated therefor, and his refusal to accept it do not constitute a defense to an action on the original claim.[16] Strictly speaking, it is clear, as Professor Williston points out, that the tender does not pass title to the claimant and should not of itself extinguish the original claim.[17] A recent case clearly illustrates this point. In an action for personal injuries the defendant's supplemental answer pleaded an agreement between plaintiff and defendant to compromise the claim and dismiss the action for two hundred dollars, a tender of that sum and a refusal to accept it. A demurrer thereto was sustained.[18] Obviously the tender of the sum did not pass the title thereof to plaintiff; and it was the money that was to be exchanged for the release of the claim. Where law and equity are separately administered, defendant's only remedy would seem to be by bill in equity for specific performance of the accord, as Professor Williston suggests,[19] and as a few cases on the point seem to indicate.[20] It is perfectly apparent that in those jurisdictions recognizing the validity of an accord executory, defendant would have an action against plaintiff for plaintiff's refusal to accept the tender; and his damages in that action would equal the difference between what he was compelled to pay and the sum of two hundred dollars. The result of rejecting the plea is circuity of action. If defendant had kept his tender good or had paid the satisfaction of the accord into court, there would seem to be no reason why an answer setting up these facts should be held insufficient under modern code procedure. If the facts set forth would warrant a decree of specific performance under the old system, there is no reason why those same facts could not be set up in an answer under a system which requires a pleader to set up in his answer only the facts constituting his defense and ground for any affirmative relief to which he may be entitled. These facts, if not constituting an equitable defense, would con-

v. Mitchell, (1901) 23 Wash. 742, 745, 63 Pac. 514 (semble). There are some cases contra. 8 C. J. 441. Cf. Walker v. Nevill, (1865) 34 L. J. Ex. 73; Newington v. Levy, (1870) L. R. 5 C. P. 607; Slater v. Jones, (1873) L. R. 8 Ex. 186.

16. The cases are collected in 1 C. J. 533, notes 2, 3, 4; 17 Harv. L. Rev. 462, note 2.

17. 17 Harv. L. Rev. 463.

18. Reilly v. Barrett, (N. Y. 1917) 115 N. E. 453.

19. 17 Harv. L. Rev. 464.

20. Chicora, etc., Co. v. Dunan, supra, note 11; Very v. Levy, supra, note 11.

stitute an equitable counterclaim, which should be deemed allowable under the ordinary code provision.[21] And the judgment could easily be formulated so as to pass title of the money to plaintiff and extinguish the original claim.

If at the date set for performance of the accord, no performance or tender thereof is made, then the claimant should have his option of pursuing the defendant either on the original claim or on the accord.[22] The original claim is still unsatisfied; and the defendant cannot set up as a defense an accord as to which he is in default. Likewise, the accord is binding; defendant is in default and has no defense therefor in the fact that the original claim still exists. But clearly the claimant must make his election. He is not entitled to the benefit of both obligations.

INSTALLMENT CONTRACTS—RENUNCIATION—REMEDIES OF INJURED PARTY.—What justifies the repudiation of a continuing or installment contract and the remedies for non-performance are questions concerning which the English and American courts have exhibited a great diversity of opinion. The solution depends on the terms of the contract and the nature and circumstances of the default. The breaches of such installment contracts have been considered in four separate classes.[1]

In case the seller has failed to deliver the quantity of goods called for by the contract as an installment, the principle was established by the English case of *Hoare v. Rennie*[2] that this breach if material excuses the buyer from further performance. The only question, said Pollock, C. B., is "whether, if the sellers at the outset send a less quantity than they are bound to send, so as to begin with a breach, they can compel the purchaser to accept and pay." This decision is followed by the great weight of American authority.[3] The leading American case is *Norrington v. Wright*,[4] in which the United States Supreme Court lays down

21. See Hall v. Parsons, supra, note 15.
22. Babcock v. Hawkins, supra, note 11.
1. Williston, Sales, p. 810.
2. (1859) 5 H. & N. 19, 29 L. J. Ex. (N.S.) 73.
3. Cleveland Rolling Mills v. Rhodes, (1887) 121 U. S. 255, 78 S. C. R. 282, 30 L. Ed. 920; Robson v. Bohn, (1880) 27 Minn. 333; Pope v. Porter, (1886) 102 N. Y. 366, 7 N. E. 304. Contra, Myer v. Wheeler, (1884) 65 Ia. 390, 21 N. W. 692; and perhaps Herzog v. Pundy, (1897) 119 Cal. 99, 51 Pac. 27.
4. (1885) 115 U. S. 188, 6 S. C. R. 12, 29 L. Ed. 366.

the test of materiality of the breach. *Hoare v. Rennie* has been seriously discredited in England and, while not expressly overruled, is no longer law in that country.[5] And in the United States if the buyer accepts installments which are overdue or defective in quantity he waives the right to cancel the contract unless he gives notice of a refusal to proceed.[6]

Where there is a failure or refusal by the buyer to accept delivery of an installment the English rule, as laid down in *Simpson v. Crippen*,[7] is that this does not justify abandonment by the seller unless there is ground for believing it will be persisted in. This decision introduces the English idea that an intent to abandon the contract must be shown before the other party will be excused, and it has been followed in a few jurisdictions in this country.[8] But the great weight of American authority is to the effect that failure to accept one installment excuses the seller from delivery of the remainder.[9]

A failure or refusal of the buyer to pay for an installment is also held by the English courts not to excuse the seller unless the acts or conduct "evince an intention no longer to be bound by the contract." This test is stated by Lord Coleridge in *Freeth v. Burr*,[10] though it was probably incorrectly applied to the facts of that case. In the famous case of *Mersey Steel Co. v. Naylor*[11] a majority of the House of Lords approved the test of *Freeth v. Burr*, though Lord Blackburn based his decision on the fact that the breach did not go to the root of the contract. The great majority of the American courts have adopted the test of materiality

5. Later English cases attempt to distinguish this on the ground that it is a breach occurring in the first installment and hence need not be so material as after part performance. See Simpson v. Crippen, (1872) L. R. 8 Q. B. 14; Brandt v. Lawrence, (1876) L. R. 1 Q. B. D. 344. But Hoare v. Rennie was approved and Simpson v. Crippen was criticized in Honck v. Muller, (1881) L. R. 7 Q. B. D. 92, 50 L. J. Q. B. 529.

6. McDonald v. Kansas City Bolt & Nut Co., (1906) 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N.S.) 1110; Morgan v. McKee, (1874) 77 Pa. St. 228.

7. (1872) L. R. 8 Q. B. 14.

8. Worthington & Co. v. Gwin, (1898) 119 Ala. 44, 24 So. 739, 43 L. R. A. 382; Blackburn v. Reilly, (1885) 47 N. J. L. 290, 1 Atl. 27.

9. Smith v. Keith Coal Co., (1887) 36 Mo. App. 567; King Philip Mills v. Slater, (1878) 12 R. I. 82, 34 Am. Rep. 603; Loudenback Fertilizer Co. v. Tennessee Phosphate Co., (1903) 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402.

10. (1874) L. R. 9 C. P. 208.

11. (1884) L. R. 9 App. Cas. 434.

of the breach,[12] holding as in *Rugg v. Moore*,[13] that, where there is not substantial performance, good intentions will not suffice. For instance, in *Robson v. Bohn*,[14] where the suit was on a contract providing for the payment of lumber in three installments, the Minnesota supreme court held that failure to pay for the second installment justified the seller in repudiating. While a considerable number of the American courts use expressions to the effect that mere breach of a contract does not justify repudiation unless there is an intent manifested no longer to be bound by the contract, or unless performance is prevented by the wrongdoer, yet it is difficult to find cases which actually hold that a breach preventing substantial performance requires also an intent to refuse performance in the future in order to excuse.[15] Attempts have been made to harmonize the English and American rules by the statement that non-payment will excuse only when made under such circumstances as to evidence an intention to renounce or abandon the contract.[16] But it is not true that a material breach will necessarily show an intent to abandon the contract, and the courts of Iowa, New Jersey and Michigan, recognizing these divergent views, have definitely adopted the English doctrine.[17]

With respect to the effect of a delivery of goods defective in quality, the English and American decisions are in substantial accord, requiring a persistence in furnishing goods of defective quality to permit abandonment of the contract.[18] Immediate notice of discovery of the default and of an intention not to perform is held an indispensable condition of the release of the purchaser from liability on the contract.[19] There seems to be a ten-

12. Savannah Ice Co. v. Am. Refrigerator Co., (1900) 110 Ga. 142, 35 S. E. 280; Hess v. Dawson, (1894) 14 Ill. 138, 36 N. E. 557; Eastern Forge Co. v. Corbin, (1902) 102 Mass. 590, 66 N. E. 419.

13. (1885) 110 Pa. St. 236, 1 Atl. 320.

14. (1880) 27 Minn. 333. To the same effect Palmer v. Breen, (1885) 34 Minn. 39, 24 N. W. 322; Peet v City of East Grand Forks, (1907) 101 Minn. 518, 112 N. W. 1003.

15. Monarch Cycle Co. v. Royal Wheel Co., (1900) 105 Fed. 324, 44 C. C. A. 523; Harris Lumber Co. v. Wheeler Lumber Co., (1908) 88 Ark. 491, 115 S. W. 168, 29 Ann. Cas. 1021.

16. 32 L. R. A. (N.S.) 1, note; 65 Cent. L. Journ. 271, 329.

17. Hansen v. Consumers Heating Co., (1887) 73 Ia. 77, 34 N. W. 495; West v. Bechtel, (1900) 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791.

18. Johnassohn v. Young, (1863) 4 B. & S. 296, 32 L. J. Q. B. (N.S.) 385, 11 W. R. 962; Vallens v. Tillman, (1894) 103 Cal. 187, 37 Pac. 213.

19. Cahen v. Platt, (1877) 69 N. Y. 348; McDonald v. Kansas City Bolt & Nut Co., supra; Baltimore Brick Co. v. Coyle, (1901) 18 Pa. Super. Ct. 186.

dency in some modern cases to put breaches as to quality in the same class as other breaches[20] and to use as the test a default going to the root of the contract. But the weight of authority still is that there must be persistence in sending goods of defective quality to excuse the innocent party.[21]

In all of these cases the proper test would seem to be the materiality of the breach. When one party does not get substantially what he bargained for he ought to be excused from going on, unless by acceptance of such defective performance he has waived his right to object. If the injured party is not getting substantial performance, he should be excused regardless of whether or not the other party has an intention of refusing to perform the remainder of the contract. If the breach in one installment amounts to a material breach of the whole contract, its effect ought not to depend on the intent of the wrongdoer as to the rest of the contract.[22] The American courts fortunately have applied the well established rules of bilateral contracts to installment agreements. If the contract were to be performed at one time, the innocent party could not be compelled to accept what did not amount to substantial performance and he should not be compelled to proceed merely because the performance happens to be divided into installments. It should be remembered, however, that not every breach of a contract will excuse the other party from his entire obligation, though it may justify delay until the defect or omission is corrected.[23] The right to take the former course depends on the materiality of the breach.

The distinction between the American and English rules is shown in the sales acts of the two countries. Under the Uniform Sales Act[24] in this country it is to be determined from the terms of the contract and the circumstances of the default whether the

20. Fullam v. Wright, etc., Co., (1907) 196 Mass. 474, 82 N. E. 711; Morrison, McIntosh & Co. v. Leiser, (1897) 73 Mo. App. 95; 38 L. R. A. (N.S.) 539.

21. Blackburn v. Reilly, supra; Scott v. Kittaining Coal Co., (1879) 89 Pa. St. 231, 33 Am. Rep. 753; Williston's Wald's Pollock on Contracts, third Am. ed., p. 331, note 11.

22. Williston, Sales, p. 809.

23. Pope v. Porter, supra.

24. Sales Act, Sec. 45, par. 2. "It depends in each case on the terms of the contract and the circumstances of the case, whether the breach of the contract is so material as to justify the injured party in refusing to proceed further and in suing for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken."

breach is so material as to allow the injured party to refuse to proceed. By the English act[25] it depends on the contract and circumstances whether the breach amounts to a repudiation of the whole contract. It has been suggested that the latter puts the real test on the results rather than on the intention prompting the acts constituting the breach.[26]

If the breach is sufficient to excuse plaintiff from further performance he has a choice of remedies as is set forth clearly in the recent case of *United Press Ass'n. v. National Newspaper Ass'n.*[27] As a general rule it may be said that in the United States he has a right to rescind but this right to rescind is subject to qualifications, and the English rule is still more conservative. Whether or not rescission will be allowed depends largely on the status of the contract at the time of breach. If it is executory on both sides clearly the party not in default may abandon the contract in case of repudiation or material breach.[28] But in case the injured party has partially performed and has enjoyed no benefit from the one in default a different situation may be presented. If he has paid money and the other party has failed to perform, restitution is allowed in both England and United States.[29] If land has been conveyed, equity will compel reconveyance in this country,[30] but in England the right of vendor's lien is the only remedy allowed aside from an action on the contract.[31] If personalty has been parted with, the transferrer is confined to his action for breach of contract in both England and United States and is not allowed to rescind and sue in replevin or trover.[32] If the contract is for services and these have been fully performed, plaintiff is usually required to sue on the contract for the agreed sum.[33] If, however, he has performed only in part, he may sue on quantum meruit for the value of what he

25. English Sale of Goods Act, Sec. 31. "It is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of the contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated."

26. Williston's Wald's Pollock on Contracts, third Am. ed., p. 333.

27. (C. C. A. 8th Circuit, 1916) 237 Fed. 547.

28. Mason v. Thompson Co., (1905) 94 Minn. 472, 103 N. W. 507.

29. Giles v. Edwards, (1797) 7 T. R. 181; Todd v. Bettingen, (1910) 109 Minn. 493, 124 N. W. 443.

30. Pinger v. Pinger, (1889) 40 Minn. 417, 42 N. W. 289.

31. Williston's Wald's Pollock on Contracts, third Am. ed., p. 335.

32. Martindale v. Smith, (1841) 1 Q. B. 389; Thompson v. Conover, (1865) 32 N. J. L. 466; Benjamin, Sales, p. 867.

33. Barnett v. Swearingen, (1898) 77 Mo. App. 64, 71.

has given.[34] But if the party in default has rendered some benefit to the other party the results in the above cases may be different. The great majority of the courts hold that the party who has committed the material breach can not recover on quantum meruit for the part performance. But there is some conflict as to whether the innocent party may still rescind, for this contemplates putting both parties in statu quo. In England rescission is not permitted, for it is said the defaulting party can not be put in statu quo, for he has parted with the enjoyment, at least temporarily, of what he has given.[35] In the United States the law is more liberal and allows rescission if the party not in default restores what he has received.[36] If this is impossible because the benefit has been consumed, the great majority of American jurisdictions do not allow rescission.[37] A minority, however, hold that the party not in default may pay the reasonable value of what he has received and rescind.[38] If the innocent party wishes to protect himself by rescission, in any of these situations where it is allowed, he must elect to do so within a proper time.[39]

In case plaintiff does not wish to rescind, but desires to seek his remedy on the contract, he may treat the notice as inoperative and await the time of execution of the contract, or he has the alternative to treat the repudiation as "putting an end to the contract at once and may sue for breach of it." This is the rule as stated by Cockburn, C. J., in *Frost v. Knight*,[40] and is generally followed in England. The first alternative is not permitted generally in the United States, due to the application of the rule that plaintiff must mitigate damages if possible without loss to himself.[41] And, in spite of the apparently contrary language of Lord Cockburn, the English courts have not allowed plaintiff to en-

34. Mayor v. Pyne, (1825) 3 Bing. 285; United States v. Behan, (1884) 110 U. S. 338, 345, 4 S. C. R. 81, 28 L. Ed. 168.

35. Hunt v. Silk, (1804) 5 East 449.

36. Naugle v. Yerkes, (1900) 187 Ill. 358, 58 N. E. 310; Potter v. Taggert, (1882) 54 Wis. 395, 11 N. W. 678.

37. Handforth v. Jackson, (1889) 150 Mass. 149, 22 N. E. 634; Los Angeles Traction Co. v. Wilshire, (1902) 135 Cal. 654, 67 Pac. 1086.

38. Todd v. Leach, (1896) 100 Ga. 227, 28 S. E. 43; Todd v. McLaughlin, (1900) 125 Mich. 268, 84 N. W. 146.

39. Hennessy v. Bacon, (1890) 137 U. S. 78, 11 S. C. R. 17, 34 L. Ed. 605; Mills v. Osawatomie, (1898) 59 Kan. 463, 53 Pac. 470.

40. (1872) L. R. 7 Ex. 111.

41. Gibbons v. Bente, (1892) 51 Minn. 499, 53 N. W. 756; Clark v. Marsiglia, (1845) 1 Denio (N. Y.) 317; Tufts v. Weinfeld, (1894) 88 Wis. 647, 60 N. W. 992.

hance damages unnecessarily. If plaintiff takes advantage of the second alternative stated in *Frost v. Knight*, it can hardly be said that he may treat the contract as at an end, for in such case no action for breach of it would lie. The action must be on a contract which still exists, but plaintiff has an excuse for his non-performance. Whether or not the contract is still alive becomes a vital matter when defendant seeks a cross action. Moreover, if plaintiff wishes to consider the contract at an end, he must have indicated his election to rescind by positive action.[42]

JURISDICTION OF EQUITY TO REVIEW EXPULSION OF MEMBER FROM AN ASSOCIATION.—There are three situations which may arise when an expelled member of a club or association appeals to equity to review the expulsion: first, where the club is purely social, owning no property; second, where the club owns some tangible property; and, third, where there is no property but where membership in the club or association is necessary to the pursuit of a trade.

Cases of the first type are rare and the courts are agreed that there is no remedy for expulsion.[1] The only injury is the humiliation suffered, and the danger that would arise from attempts of equity to review every action of a social organization by which a member felt himself aggrieved, would outweigh the possible benefits from such supervision. The plaintiff does not generally desire reinstatement so much as a vindication of his character. In *Baird v. Wells*[2] the court first found that the expulsion was wrongful and then held that equity could give no relief, thus giving the plaintiff what he really sought.

But where a property right, however small, is found, the courts have uniformly taken jurisdiction.[3] Although the property right may be comparatively unimportant, it is the foundation of the interference of the courts.[4] The decisions of such an organi-

42. Williston, 14 Harv. L. Rev. 329.

1. Roscoe Pound, Equitable Relief Against Defamation and Injuries to Personality. 29 Harv. L. Rev. 640, 677.

2. (1890) L. R. 44 Ch. D. 661.

3. United Brothers v. Williams, (1906) 126 Ga. 19, 54 S. E. 907, 115 Am. St. Rep. 64; Huston v. Reutlinger, (1891) 91 Ky. 333, 15 S. W. 867, 12 Ky. Law Rep. 925, 34 Am. St. Rep. 225; Albers v. Merchant's Exchange, (1890) 39 Mo. App. 583, 598; Gray v. Christian Society, (1884) 137 Mass. 328, 50 Am. Rep. 310; Society of Shakers v. Watson, (1895) 68 Fed. 730, 15 C. C. A. 632.

4. Van Houten v. Pine, (1882) 36 N. J. Eq. 133 and note. In In re

zation are of a quasi-judicial character and the court will not examine into the merits of the expulsion.[5] It will never interfere further than to see that the proceedings were in accordance with the rules of the society, that there was no fraud or bad faith and that there was nothing in the proceeding in violation of the law of the land.[6] The majority of the courts have also held that the member must exhaust his remedies within the society before he can appeal to equity.[7] In actions at law a distinction is made between proceedings which are void and those which are merely invalid for some irregularity, the majority of the courts holding that where the decision is absolutely void, no appeal within the organization need be taken.[8] But a review of the decided cases reveals the fact that this is not the rule in equity, the reason evidently being that the court hesitates to use the extraordinary power of injunction until the aggrieved member has demonstrated his inability to obtain a fair hearing within the organization itself.[9] This assumes, of course, that the rules of the society contain adequate provision for appeal. The recent decision of the

St. James' Club, (1852) 2 De G. M. & G. 383, 387, 16 Jur. 1075, it was said, "What, then, were the interests and liabilities of a member? He had an interest in the general assets as long as he remained a member, and, if the club was broken up while he was a member, he might file a bill to have its assets administered in this court, and he would be entitled to share in the furniture and effects of the club."

5. Woolsey v. Independent Order of Oddfellows, (1883) 61 Ia. 492, 16 N. W. 576; The Osceola Tribe v. Schmidt, (1881) 57 Md. 98; Black and White Smiths' Society v. Van Dyke, (1836) 2 Whart. (Pa.) 309, 30 Am. Dec. 263; Murray v. Supreme Hive, (1904) 112 Tenn. 664, 80 S. W. 827. Contra, Otto v. Journeymen Tailors', etc., Union, (1888) 75 Cal. 308, 17 Pac. 217, 7 Am. St. Rep. 156; Karcher v. Supreme Lodge, (1884) 137 Mass. 368.

6. Connelly v. Masonic Mutual Benefit Association, (1890) 58 Conn. 552, 20 Atl. 671, 9 L. R. A. 428, 18 Am. St. Rep. 296.

7. Supreme Lodge, Knights of Pythias v. Wilson, (1895) 66 Fed. 785, 14 C. C. A. 264, 30 U. S. App. 234; Levy v. Magnolia Lodge I. O. O. F., (1896) 110 Cal. 297, 42 Pac. 887; Grand Lodge, Knights of Pythias v. People, ex rel. Waldeck Lodge, (1895) 60 Ill. App. 550, 49 L. R. A. 379; Hickey v. Baine, (1907) 195 Mass. 446, 81 N. E. 201; Harris v. Typographical Union, (1906) 144 Mich. 422, 108 N. W. 362; Potter v. Sheffer, (1903) 40 Misc. Rep. 46, 81 N. Y. Supp. 164.

8. Hall v. Supreme Lodge Knights of Honor, (1885) 24 Fed. 450; Kidder v. Supreme Commandery, U. O. G. C., (1906) 192 Mass. 335, 78 N. E. 469; Malmsted v. Minneapolis Aerie No. 34, (1910) 111 Minn. 119, 126 N. W. 496, 137 Am. St. Rep. 542; Supreme Lodge v. Eskholme, (1896) 59 N. J. L. 255, 35 Atl. 1055, 59 Am. St. Rep. 609; Langnecker v. Grand Lodge, A. O. U. W. (1901) 111 Wis. 279, 87 N. W. 293, 55 L. R. A. 185, 87 Am. St. Rep. 860.

9. In O'Brien v. Musical Mutual, etc., Union, (1903) 64 N. J. Eq. 525, 54 Atl. 150, the court says by way of dicta that were a property right involved the plaintiff would not have to exhaust his remedies. The case cited in support of the statement was, however, an action at law.

supreme court of Georgia in *Holmes v. Brown*[10] illustrates the principles set forth above. The plaintiff had been suspended from a mutual benefit society until payment of a fine imposed upon him at a meeting at which he was not present and without any written charge being brought against him. The proceedings were contrary to the provisions of the constitution of the society in both of these particulars. The supreme court upheld the lower court in granting an interlocutory injunction. It was there decided that a member of a voluntary association who had been wrongfully suspended and who had exhausted his remedies within the organization might appeal to equity for protection of his property rights incident to membership. The right to share in the benefit fund was the property right involved and it was this right that the court protected.

When the property right is eliminated, however, the situation is radically changed. Since there is then no tangible property to protect, courts of equity have been very reluctant to take jurisdiction. As a rule, the expelled member who can show no injury to a property right can get no relief.[11] When the club or society is merely social in character, this view seems justifiable. But when the ability of the members to earn a livelihood is dependent upon their membership, a serious question arises as to whether equity should not extend its jurisdiction to meet such a situation. It is true that such a case would very seldom arise since practically all trade unions own tangible property, usually benefit funds, which will enable courts of equity to interfere. But the infrequency of the situation alone cannot justify refusal to grant relief. It would seem that a property right upon which to base the jurisdiction might be found in the right of every man to work at his trade. When the serious economic injury that can be inflicted upon a member by a union is considered, it seems desirable that the courts should find some way of exercising supervision. This point was raised in *Fales v. Musicians' Protective Union*,[12] recently decided by the supreme court of Rhode Island.

10. (Ga. 1917) 91 S. E. 408.

11. Roscoe Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 677. Forbes v. Eden, (1867) L. R. 1 H. L. Sc. 568; Rigby v. Connol, (1880) L. R. 14 Ch. Div. 482; Baird v. Wells, supra; State ex rel. Waring v. Georgia Medical Society, (1869) 38 Ga. 608, 95 Am. Dec. 408; Grand Lodge, Knights of Pythias v. People, ex rel. Waldeck Lodge, supra; Froelick v. Musicians' Mutual Benefit Association, (1902) 93 Mo. App. 383. Contra, People v. Musical Mutual Protective Union, (1889) 118 N. Y. 101, 23 N. E. 129.

12. (R. I. 1917) 99 Atl. 823.

The defendant union in disciplining the plaintiff, a member of the union, for alleged breach of its rules, failed to give proper notice of its meetings, held the meetings on Sunday and failed to adjourn when the plaintiff was engaged in court. He was expelled and subsequently filed a bill for an injunction. The injunction was granted, the court holding that the proceedings were void and that this excused the plaintiff from exhausting his remedies within the society before applying to the courts. It does not appear that any tangible property was involved and the court did not consider the ownership of property by the union as essential to its jurisdiction. The main point considered was the necessity of the member exhausting his remedies within the organization before appealing to the courts, and this was decided on the authority of two cases which were actions at law for death benefits.[18] While, as pointed out above, this is the majority rule in actions at law, it is not upheld by the decisions in equity cases. The reason for the distinction seems sound. In actions at law, which are generally for death benefits, the member at the time of his expulsion had the legal right to disregard the void proceeding, while equity, before it will grant an injunction compelling the organization to readmit him to membership, should require him to use every means available within the society to secure justice.

RECENT CASES.

BILLS AND NOTES—NEGOTIABILITY—WORDS RESTRICTED—REFERENCE TO CONTRACT.—Action was brought on a note containing the words, "value received, with interest as per contract of Nov. 12, 1915." *Held*, the note is negotiable. *Waterbury-Wallace Co., Inc. v. Ivey*, (1917) 163 N. Y. Supp. 719.

A promissory note to be negotiable must contain an absolute and unconditional promise to pay, not dependent for its performance upon any contingency. *Third National Bank v. Armstrong*, (1879) 25 Minn. 530. But a written contemporaneous agreement showing the consideration and condition upon which the note was given may be put in evidence in a suit upon the note, as part of the same contract. *Woodward v. Mathews*, (1860) 15 Ind. 339; *Seieroe v. First National Bank*, (1897) 50 Neb. 612, 70 N. W. 220. The court in the instant case confined itself to an examination of the note and did not bring in the contract referred to. The court held that the words did not express any contingency as to payment or refer to any fund out of which the note was to be paid, but that they were

13. Malmsted v. Minneapolis Aerie No. 34, supra; Langnecker v. Grand Lodge, A. O. U. W., supra.

merely a reference to the transaction out of which the note grew. If the words can measure up to such interpretation the decision is correct. See *Taylor v. Curry*, (1871) 109 Mass. 36, 12 Am. Rep. 661 (note contained "on policy No. 33386); *National Bank v. Wentworth*, (1914) 218 Mass. 30, 105 N. E. 626 ("as per terms of the contract"); *Schmittler v. Simon*, (1886) 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737. In all three cases the notes were held negotiable. If we consider the rate of interest referred to as the legal rate, then the instant case comes within the above decisions. If we must look to the contract to find the rate, it would seem that the note would be indefinite and non-negotiable, unless the contract be considered as part of the whole transaction.

CARRIERS—INTERSTATE SHIPMENTS—ACTION FOR INJURY—NOTICE.—Plaintiff shipped cattle under an interstate shipping contract which required written notice as to loss or damage within one day after arrival as a condition precedent to recovery. Plaintiff failed to give the required notice, but introduced evidence tending to show that the carrier had waived the stipulation. *Held*, the stipulation cannot be waived by the carrier. *Chicago, etc., Ry. Co. v. Parsons*, (Okla. 1917) 162 Pac. 955.

Decisions by state courts of the question involved in the above case have not been uniform. A majority seem to have worked out the liabilities of the parties on principles of contract without regard to statutory provisions against discriminations, holding that the stipulation may be waived by the carrier. *St. Louis, etc., Ry. Co. v. Shepherd*, (1914) 113 Ark. 248, 168 S. W. 137; *Ray v. Missouri, etc., Ry Co.*, (1915) 96 Kan. 8, 149 Pac. 397, L. R. A. 1916D 1046; *Robinson v. Great Northern Ry. Co.*, (1913) 123 Minn. 495, 144 N. W. 220. Some state courts, while recognizing that the principles of contract as between the parties must yield to the policy of these statutes when the two conflict, hold that a waiver is not such a preference or discrimination as to violate the statute, and further hold that control of carriers' liability under interstate shipping contracts is not a federal matter under the Carmack Amendment, which would require them to follow the federal rule regarding waivers. *Clingan v. Cleveland, etc., Ry. Co.*, (1913) 184 Ill. App. 202; *Newborn v. Louisville, etc., Ry. Co.*, (1915) 170 N. C. 285, 87 S. E. 37; contra, *Wall v. Northern Pacific Ry. Co.*, (Mont. 1916), 161 Pac. 518; *Olivit Bros. v. Pennsylvania R. Co.*, (N. J. 1916), 96 Atl. 582. The federal courts have consistently held that a waiver by a carrier of a stipulation in a shipping contract was such a preference and discrimination as to be prohibited by the interstate commerce act and its amendments. U. S. Comp. St. 1913, Sec. 8592, and particularly by the Elkins Amendment of 1903, *Georgia, etc., Ry. Co. v. Blish Milling Co.*, (1916) 241 U. S. 190, 36 S. C. R. 541. It was declared to be the intention of Congress in the Carmack Amendment of 1906 to make the liability of carriers under interstate shipping contracts a federal matter. *Adams Express Co. v. Croninger*, (1913) 226 U. S. 491, 33 S. C. R. 148. See 1 MINNESOTA LAW REVIEW 276, 447. As showing that an inter-state tariff rate is a matter strictly of law, and no longer of contract, see *W. C. Goodnow Coal Co. v. Northern Pac. Ry. Co.*, (Minn. May 11, 1917.

CONTEMPT—MUNICIPAL CORPORATIONS—POWER TO PUNISH.—The petitioner, the president of a gas company at St. Louis, was summoned under a provision of the home rule charter of that city to give testimony in an investigation undertaken by a committee of the city council to determine the cost of the production of gas. He refused to testify and was arrested for contempt. *Held*, on habeas corpus proceedings that the council or its committee acted within its power. *Ex parte Holman*, (Mo. 1917) 191 S. W. 1109.

The power to punish for contempt has been jealously guarded under Anglo-American law because it is an invasion of the rights of the individual. Chapter 29 of Magna Charta and provisions in many of the state constitutions are relied upon as limiting this power. Attempts on the part of the legislative branch of the government to exercise this power have given rise to much litigation. Congress has the right to punish for contempt. *Anderson v. Dunn*, (1821) 6 Wheat. (U. S.) 204. But not if the subject-matter of the investigation is judicial in character. *Kilbourn v. Thompson*, (1880) 103 U. S. 168, 26 L. Ed. 389. And this right does not warrant the House of Representatives in punishing for contempt a district attorney for writing and publishing a letter reflecting upon a subcommittee of said house investigating a resolution for his impeachment, *United States ex rel. Marshall v. Gordon*, (1917 U. S. Sup. Ct. not yet reported) reversing same case, (1916) 235 Fed. 422. State legislatures may also exercise this power. *State v. Matthews*, (1859) 37 N. H. 450. Courts are not agreed as to whether it may be delegated to a board or commission created by the legislature. See *In re Sanford*, (1911) 236 Mo. 665, 139 S. W. 376; *Langenbury v. Decker*, (1891) 131 Ind. 471, 31 N. E. 190, 16 L. R. A. 108. There is also a conflict on the question whether the legislature may delegate this power to municipalities. Massachusetts has held that an act conferring upon a municipal corporation the power to punish witnesses for contempt is void, because it would be a very serious invasion of the rights and liberties of the citizen. *Whitcomb's Case* (1876) 120 Mass. 118, 21 Am. Rep. 502. Missouri reached the opposite conclusion. *In re Dunn*, (1880) 9 Mo. App. 255. The Minnesota court held that such power could not be inferred or implied, and that a city could not assume it by a home rule charter, but left open the question whether the legislature may confer it upon a municipal corporation by an express provision. *State ex rel. Peers v. Fitzgerald*, (1915) 131 Minn. 116, 154 N. W. 750.

CONTRACTS—RENUNCIATION—REMEDY OF INJURED PARTY.—Plaintiff contracted to furnish defendant, a newspaper publisher, with news service for a period of years to be paid for weekly in advance. Before the expiration of the term defendant notified plaintiff that it would no longer perform, but that it desired to continue a part of the service contracted for. *Held*, that even though plaintiff continued performance for five weeks longer, while the parties were negotiating, it might treat the contract as ended because of defendant's refusal to perform, and that it might recover for installments due and for future profits. *United Press Ass'n v. National Newspaper Ass'n.*, (C. C. A. 1916) 237 Fed. 547. For a discussion of the principles involved, see NOTES, p. 507.

CONVERSION—EQUITABLE CONVERSION—LEASE WITH OPTION TO BUY.—Testator executed a will, leaving to his wife, not the mother of his children, all his personalty and a life estate in his realty, and leaving his children all his real estate, subject to the interest of the wife. Two years later he leased the realty and gave the lessee an option to purchase. After the death of the testator, the lessee exercised his option and received a deed from the beneficiaries of the estate. The widow died. The children of testator claimed the proceeds of the sale of the realty under the option contract as against the next of kin of the widow. *Held*, the exercise of the option by the lessee worked no equitable conversion of the real estate into personalty, and the children get the benefits of the sale. *Ingraham v. Chandler*, (Iowa, 1917) 161 N. W. 434.

From an early date it has been held that where parties enter into a contract for the conveyance of land and the vendor dies before the execution of the contract, the vendee must pay the purchase money to the personal representative of the vendor and receive the deed from the heir. *Bubb's Case*, (1678) Freeman Ch. Cas. 38. The reason commonly given is the so-called doctrine of "equitable conversion," that on the making of the contract the intention of the parties converts the purchase money into a part of the personal estate of the vendor and makes the land a part of the realty of the vendee. *Lysaght v. Edwards*, (1876) L. R. 2 Ch. Div. 499; *Re Estate of Bernhard*, (1907) 134 Ia. 603, 112 N. W. 86, 12 L. R. A. (N.S.) 1029. It is submitted that the same result may be attained without resort to this legal fiction. If A agrees to sell land to B, and B agrees to pay money for the land, A becomes at once a quasi trustee of the land for B. He is not a true trustee, for he holds the legal title not for the sole benefit of B, but also to secure the payment of the purchase price for his own benefit. The relationship is very similar to that of mortgagor and mortgagee. When A dies, the contract for the conveyance and the payment of the purchase money, being personalty, goes to A's personal representative. The legal title to the land will descend to his heir. The heir's interest in the land, he being a mere volunteer, will be much the same as that of A. He will hold it as security for payment of the purchase price by B. The question then arises, to whom is payment due? Since the contract calling for the payment of the purchase money has gone to the personal representative of A, it seems obvious that the heir holds the legal title as security for the payment of the purchase money to the personal representative.

Where there is an option for the sale of real estate greater difficulty is met, particularly if the court looks to the doctrine of "equitable conversion" as a basis for its decision. It cannot be said that the property is "converted" at the time when the option is given, for it is not certain then that the option will ever be exercised. The nature of the property in the meantime would remain uncertain. If the option were exercised during the life of the vendor, it would seem proper to hold that the property was converted at that time, for on the exercise of the option the vendee obtained a valid contract for the conveyance of land. But if the option is not exercised until after the death of the vendor, it would seem that the "conversion," if any, must have taken place at that time. If so, the purchase money would go to the heir, as in the instant case. *Smith v. Locwen-*

stein, (1893) 50 Oh. St. 346, 34 N. E. 159. To avoid this result other courts have held that the conversion relates back to the date of the option, and have thus found an excuse for giving the purchase money to the personal representative. *Lawes v. Bennett,* (1785) 1 Cox Ch. 167; *Newport Water Works v. Sisson,* (1893) 18 R. I. 411, 28 Atl. 336. Such reasoning stacks two legal fictions one upon the other. If the purchase money should go to the heir or devisee but for this second fiction, to use it as a means of divesting him of his rights is going farther than the courts will usually go with legal fictions. In the instant case, operating on the "equitable conversion" theory, it was stated in substance by the court that it was not the purpose of the testator to disinherit his children, and that the court will not defeat his intention by the use of an equitable presumption. But the second fiction is no more necessary than the first. As in the case of a contract for the conveyance of land, the option contract will go to the personal representative or legatee under the will. It is true that this option contract is different from a straight contract in that there is no duty on the part of the one holding the option to pay until he has made his election, and the vendor, and now his personal representative, has no action. But the money, when paid, is the proceeds of the option contract belonging to the personal representative. The more strict legal reasoning would direct that it be paid him.

COVENANTS—VENDOR AND PURCHASER—"LIEN"—"INCUMBRANCE"—SPECIAL ASSESSMENT.—Pursuant to a contract for the exchange of farms, deeds containing covenants against incumbrances were delivered in escrow. While the deeds were in escrow, and before final delivery was made, the lien of a special assessment for drainage attached to the land conveyed by defendant. The plaintiff now sues to recover for the breach of the covenant against incumbrances caused by the special assessment. *Held,* the special assessment was not a lien or incumbrance within the meaning of the covenant, in view of the fact that the benefit accrued wholly to the land in the hands of the purchaser. *Cornelius v. Kromminga,* (Iowa 1917) 161 N. W. 625.

An incumbrance may be defined as any right or interest outstanding to the diminution of the value of the land but consistent with the passing of title. *Fraser v. Bentel,* (1911) 161 Cal. 390, 119 Pac. 509; *Prescott v. Trueman,* (1808) 4 Mass. 627, 3 Am. Dec. 246; *Simons v. Diamond Match Co.,* (1909) 159 Mich. 241, 123 N. W. 1132; *Fritz v. Pusey,* (1884) 31 Minn. 368, 18 N. W. 94. Incumbrances may be divided into two groups: those affecting the title, such as outstanding mortgages and leases, and those affecting the physical condition, such as highways and easements generally. The same classification also has been applied to the usual covenants in a deed. *Memmert v. McKeen,* (1886) 112 Pa. St. 315, 4 Atl. 542. It is now well settled that the statute of limitations does not commence to run against any covenantee until there has been a breach such as will give rise to an action for substantial damages, although in cases within the first group there is a technical breach at the time the deed is executed. Any other rule would defeat the very purpose of the covenant, and might deprive the covenantee of his remedy before he knew of his cause of action. *Brooks v. Mohl,* (1908) 104 Minn. 404, 116 N. W. 931, 17 L. R. A.

(N.S.) 1195; *In re Hanlin*, (1907) 133 Wis. 140, 113 N. W. 411, 17 L. R. A. (N.S.) 1187. As to those incumbrances within the first group, the courts are agreed that the covenantee may recover though he had knowledge of the incumbrance at the time the deed was executed. *Yancey v. Tatlock*, (1895) 93 Iowa 386, 61 N. W. 997; *Memmert v. McKeen*, supra. But as to cases falling within the second group the decisions are not harmonious. Here also it is generally held that knowledge is immaterial. *Sandum v. Johnson*, (1913) 122 Minn. 368, 142 N. W. 878; *Huyck v. Andrews*, (1889) 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789. *Demars v. Koehler*, (1897) 60 N. J. Law 314, 38 Atl. 808 is contra, but overruled by *Demars v. Koehler*, (1898) 62 N. J. Law 203, 41 Atl. 720, 72 Am. St. Rep. 642. Some cases hold that the parties must be deemed to have contracted with reference to open, visible, and notorious physical incumbrances, and to have fixed the price accordingly. *Powers v. Heffernan*, (1908) 233 Ill. 597, 84 N. E. 661, 16 L. R. A. (N.S.) 523; *Stuhr v. Butterfield*, (1911) 151 Ia. 737, 120 N. W. 897, 36 L. R. A. (N.S.) 321; *Memmert v. McKeen*, supra. The test of an incumbrance under the definition above given is whether or not it is beneficial to the premises. Any right or interest which diminishes the value of the premises is an incumbrance. Accordingly, it has been held that an outstanding lease is an incumbrance. *Simons v. Diamond Match Co.*, supra; *Fritz v. Pusey*, supra. But it is also recognized that a beneficial lease is not necessarily an incumbrance. *Kellum v. The Berkshire Life Ins. Co.*, (1884) 101 Ind. 455. It is well settled that a mortgage is an incumbrance. *Sandwich Mfg. Co. v. Zellmer*, (1892) 48 Minn. 408, 51 N. W. 379. *Rooney v. Koenig*, (1900) 80 Minn. 483, 83 N. W. 399; *In re Hanlin*, supra. Also an ordinary tax lien. *Rambo v. Armstrong*, (1909) 45 Col. 124, 100 Pac. 586; *Bemis v. Caldwell*, (1887) 143 Mass. 299, 9 N. E. 623; *Knight v. Clinkscales*, (Okla. 1915) 152 Pac. 133. A right of way for an irrigation ditch has been held an incumbrance. *Ericson v. Whitescarver*, (1914) 57 Col. 409, 142 Pac. 413, but the court limited the decision strictly to the facts, suggesting that if the ditch were beneficial it would not be an incumbrance, as was held to be the fact in *Stuhr v. Butterfield*, supra, and a public highway has also been held to be beneficial to the land and not an incumbrance. *Harrison v. Des Moines, etc., R. Co.*, (1894) 91 Ia. 114, 58 N. W. 1081; *Sandum v. Johnson*, supra. This Minnesota decision is not in conflict with *Smith v. Mellen*, (1911) 116 Minn. 198, 133 N. W. 566, where a proposed street over a city lot was held an incumbrance because the street in this case was clearly not beneficial. A right of way of a railroad has been held an incumbrance. *Bruns v. Schreiber*, (1890) 43 Minn. 468, 45 N. W. 861. Also a restriction on the use of firearms, but the court held that there was no proof of damage. *Fraser v. Bentel*, supra. Likewise a release of a railroad company from liability by the grantor of land adjacent to the right of way has been held an incumbrance. *Tuskegee Land and Security Co. v. Birmingham Realty Co.*, (1909) 161 Ala. 542, 49 So. 378, 23 L. R. A. (N.S.) 992, but the court said that the plaintiff would be limited to nominal damages if the railroad were proved beneficial to the land. A special assessment is not the same as a tax. *Farrell Lumber Co. v. Deshon*, (1898) 65 Ark. 498, 47 S. W. 461; *Knight v. Clinkscales*, supra. Special assessments for local improvements have been held incumbrances. Id.; *Smith v. Abington Savings Bank*,

(1898) 171 Mass. 178, 50 N. E. 545. In *Pierse v. Bronnenberg*, (1907) 40 Ind. App. 662, 81 N. E. 739, it was held that a special assessment for drainage attaching before the deed was delivered was an incumbrance. This is contra to the holding in the principal case, unless the case can be distinguished on the ground that the assessment was beneficial in one case and not in the other. Clearly the assessment as such would not be beneficial, but the decision of the principal case could be supported on the theory that the benefit derived from the ditch by the covenantee will outweigh the burden of the assessment. It has been held to be a question for the jury as to whether the benefit derived from a party wall would outweigh its burden. *Mackey v. Harmon*, (1885) 34 Minn. 168, 24 N. W. 702. Although it might appear that the result of the principal case could have been reached on the theory that the passing of title related back to the first delivery in escrow, such is not the fact. In the case of a delivery in escrow, the title is considered as passing at the second delivery or when the condition on which the delivery is to be made happens, unless justice demands otherwise. See *Taft v. Taft*, (1886) 59 Mich. 185, 60 Am. Rep. 291; *Jackson v. Rowland*, (1831) 6 Wend. (N.Y.) 666; *Lindley v. Groff*, (1887) 37 Minn. 338, 34 N. W. 26; *Tharaldson v. Everts*, (1902) 87 Minn. 168, 91 N. W. 467.

DEATH—SEVEN YEARS' ABSENCE—PRESUMPTION OF DEATH.—Plaintiff sued as beneficiary of a benefit certificate. She paid the monthly insurance dues for six years and two months after the date of disappearance of insured. On failure to continue payments, the insured was suspended. After the expiration of seven years from the date of the disappearance, plaintiff brought suit. There was no evidence as to the time of the death of insured. *Held*, plaintiff cannot recover without overcoming the presumption that the insured continued to live to the expiration of the entire seven years. *Clement v. Knights of Maccabees of the World*, (Miss. 1917) 74 So. 287.

The rule at the common law and in many jurisdictions by statute is that a presumption of death arises from continued and unexplained absence of a person from his place of residence without any knowledge of him for seven years. *Davie v. Briggs*, (1878) 97 U. S. 628, 24 L. Ed. 1086; *Whiting v. Nicholl*, (1867) 46 Ill. 230, 92 Am. Dec. 248; *Spahr v. Mutual Life Ins. Co.*, (1906) 98 Minn. 471, 108 N. W. 4. To raise the presumption it is necessary to show an unsuccessful effort to find the absent person by search and diligent inquiry at his last known place of residence and among his relations, and that he has not been heard from by those who would be most likely to hear from him if he were alive. *Modern Woodmen v. Gerdom*, (1905) 72 Kan. 391, 82 Pac. 1100, 7 Ann. Cas. 570; *Hopfensack v. New York*, (1903) 173 N. Y. 321, 66 N. E. 11. But it has been held that no proof of diligent search and inquiry is necessary. *Miller v. Sovereign Camp Woodmen of the World*, (1909) 140 Wis. 505, 122 N. W. 1126, 28 L. R. A. (N.S.) 178. But the presumption may be rebutted. *Spahr v. Mutual Life Ins. Co.*, supra; *Hoyt v. Newbold*, (1883) 45 N. J. Law 219, 46 Am. Rep. 757. It has been held that the fact that the absent person is a fugitive from justice is proper evidence to rebut the presumption of death. *Mutual Benefit Life Ins. Co. v. Martin*, (1900) 108 Ky. 11, 55 S. W. 694. The

authorities are in conflict as to whether there is a further presumption of the *time* of death, in addition to the presumption of the *fact* of death. The weight of authority, perhaps, is that no such presumption arises. *In re Phene*, (1870) L. R. 5 Ch. 139, (overruling previous cases); *Davie v. Briggs*, supra; *Spahr v. Mutual Life Ins. Co.*, supra. But there is much authority in accord with the instant case that the presumption is that the absentee died at the expiration of the seven year period. *Whiting v. Nicholl*, supra; *Executors of Clark v. Canfield*, (1862) 15 N. J. Eq. 119; *Burr v. Sim*, (1838) 4 Whart. (Pa.) 150, 33 Am. Dec. 50; and see note 26 L. R. A. (N.S.) 294. Where the presumption does not arise the usual rule is that the time of death within the seven year period, if material, must be proved, like any other material fact, by the party alleging it. *Spahr v. Mutual Life Ins. Co.*, supra. Where the presumption of the time of death does arise it may be rebutted. *Burr v. Sim*, supra. While the rule is that death is not to be presumed from the mere fact of absence until the expiration of the seven years during which the absentee has not been heard of, yet death may be presumed in less than seven years where the facts in addition to that of absence justify the presumption. *Davie v. Briggs*, supra; *Waite v. Coaracy*, (1890) 45 Minn. 159, 47 N. W. 537; *Coe v. National Council*, (1914) 96 Neb. 130, 147 N. W. 112, Ann. Cas. 1916B 65 and note. Such additional facts may be exposure to some specific peril. *White v. Man*, (1846) 26 Me. 361. Illness at the time of disappearance. *John Hancock Mutual Life Ins. Co. v. Moore*, (1876) 34 Mich. 40. And evidence of character, affections, attachments, prosperity, steady habits, and pleasant domestic relations, showing a want of motive to abandon one's family, may be sufficient to raise the presumption of death regardless of the duration of the absence. *Tisdale v. Connecticut Mutual Life Ins. Co.*, (1868) 26 Iowa 170, 96 Am. Dec. 136; *Spahr v. Mutual Life Ins. Co.*, supra.

DEEDS—WILLS—CHARACTER OF INSTRUMENT—DELIVERY—ESCROW.—A warranty deed contained the following clause: "This deed to be held in escrow by August Bjorklund until the death of said Knute O. Hagen when it becomes operative." The deed by the grantor's direction was given to Bjorklund with instructions to deliver it upon death of grantor. Grantor died and delivery was made. *Held*, the instrument was not an escrow and was not a testamentary instrument, but a conveyance of a present interest by a deed over which the grantor reserved no dominion or control. *Hagen v. Hagen*, (Minn. 1917) 161 N. W. 380.

Though the deed by its terms stated that it was to be held in escrow, the court recognized that it was not an escrow, for delivery was not dependent upon performance of a condition pursuant to a contract between the parties. See 1 MINNESOTA LAW REVIEW 453. By the great weight of authority, if the grantor delivers a deed to a third person absolutely as his deed, without reservation and without intention of reserving any control over the instrument, though it is not to be delivered to the grantee until the death of the grantor, the deed passes a present interest to be enjoyed in the future. *Grilley v. Atkins*, (1905) 78 Conn. 380, 62 Atl. 337, 112 Am. St. Rep. 152, 4 L. R. A. (N.S.) 816; *Munroe v. Bowles*, (1900) 187 Ill. 346, 58 N. E. 331, 54 L. R. A. 865; *Dickson v. Miller*, (1914) 124 Minn. 346, 145

N. W. 112. The negative of the rule, viz., that if delivery to the third person is not made absolutely and without reservation the delivery is of no effect, is equally well established. *Moore v. Trott*, (1909) 156 Cal. 353, 104 Pac. 578, 134 Am. St. Rep. 131; *Renehan v. McAvoy*, (1911) 116 Md. 356, 81 Atl. 586, 38 L. R. A. (N.S.) 941; *Wortz v. Wortz*, (1915) 128 Minn. 251, 150 N. W. 809. A few cases hold that though the grantor has reserved a right to recall the deed, the delivery will nevertheless be effectual if such right is not exercised by the grantor during his life. *Ruggles v. Lawson*, (1816) 13 Johns. (N. Y.) 285, 7 Am. Dec. 375; *Morse v. Slason*, (1841) 13 Vt. 296. Early cases to this effect have not been followed in other jurisdictions, and the holding has been characterized as indefensible on principle. *Arnegaard v. Arnegaard*, (1898) 7 N. D. 475, 495, 75 N. W. 797, 804, 41 L. R. A. 258, 265. Construing the instrument in the instant case as a deed all the requisites necessary to make a valid delivery are present. The holding seems correct. The instant case held that the words, "when it becomes operative," did not render the instrument testamentary in character. But the court found that "the subsequent statement therein as to when it should become operative must be held to refer to the time it operates upon and determines the use and occupation reserved to the grantor," and that therefore the instrument was valid as a deed conveying a present interest in the land. As to the effect of the insertion in a deed of words to the effect that the deed is to be inoperative until the death of the grantor, there is a conflict of authority. Many cases construe such an instrument as testamentary in character. *McGarrigle v. Roman Catholic Orphan Asylum*, (1904) 145 Cal. 694, 79 Pac. 447, 104 Am. St. Rep. 84, 1 L. R. A. (N.S.) 315; *Murphey v. Gabbert*, (1902) 166 Mo. 596, 66 S. W. 536, 89 Am. St. Rep. 733; *Sattingfield v. King*, (1907) 49 Ore. 102, 89 Pac. 142, 8 L. R. A. (N.S.) 1066; and see *In re Bybee's Estate*, (Iowa 1917) 160 N. W. 900 semble. Other cases, in accord with the instant case, treat the words as a clumsy way of deferring the enjoyment of the property until the death of the grantor. *Wilson v. Carrico*, (1895) 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213; *Merck v. Merck*, (1909) 83 S. C. 329, 65 S. E. 347, 137 Am. St. Rep. 815. The courts agree on the general principle that whether an instrument in the form of a deed but to take effect on the death of the grantor is to be construed as a deed or will depends primarily upon whether the grantor intended to pass a present irrevocable interest in the property. *Wall v. Wall*, (1855) 30 Miss. 91, 64 Am. Dec. 147; *Lauck v. Logan*, (1898) 45 W. Va. 251, 31 S. E. 986. It is also a general rule that the intent of the maker is to be ascertained from the instrument taken as a whole in the light of the circumstances surrounding the maker at the time of its execution. *Burlington University v. Barret*, (1867) 22 Iowa 16; *Aldridge v. Aldridge*, (1907) 202 Mo. 565, 101 S. W. 42; see also 7 Ann. Cas. 790, and note. And if it is necessary to hold the instrument a deed in order to uphold it, the general rule applied is that the court will, if possible, so construe the instrument as to give it that effect. *Wilson v. Carrico*, supra; *Hunt v. Hunt*, (1904) 119 Ky. 39, 82 S. W. 998, 68 L. R. A. 180. But the rules of construction for determining the grantor's intent to pass a present interest are "rather shadowy," and so variously applied that "it is almost impossible to lay down a rule with which some well considered case will not be found to be

in conflict." 2 Devlin, Deeds, third ed., Sec. 855a. The instant case is in line with the better authority.

DIVORCE—CUSTODY OF CHILDREN—SUPPORT.—Plaintiff brought an action against her husband for a divorce on the ground of cruel and inhuman treatment, but failed to establish facts entitling her either to a divorce or a decree of separation. *Held,* although plaintiff is not entitled to a divorce or decree of separation, she is entitled to the custody of the children, and defendant must pay her for their support. *Jacobs v. Jacobs,* (Minn. 1917) 161 N. W. 525.

"Although a decree for separation from bed and board be not made, the court may make such decree for the support of the wife and her children, or any of them, by the husband, or out of his property or earnings, as the nature of the case renders suitable and proper." Minn. G. S. 1913, Section 7140. Several states with practically identical acts have held that, in a divorce proceeding, the question of the custody of a minor child is ancillary to the main relief sought and dependent upon the divorce proceedings. When the divorce is denied, the question of custody drops with it, and the court has no power to pass upon it. *Davis v. Davis,* (1878) 75 N. Y. 221. And an attempt to make such provision for the children is ineffective. *Keppel v. Keppel,* (1893) 92 Ga. 506, 17 S. E. 976; *Garrett v. Garrett,* (1901) 114 Ia. 439, 87 N. W. 282. These courts reason that a court of equity has no inherent jurisdiction to adjudicate upon the custody of minor children, and the statute which confers jurisdiction over divorce proceedings upon the court, authorizes it to make provision for the custody and support of the children only where a divorce is granted, or a divorce proceeding is pending. The majority of the courts take a contrary view, their decisions harmonizing with that of the principal case. In *Horton v. Horton,* (1905) 75 Ark. 22, 86 S. W. 824, where a divorce was denied and custody of the children awarded to each parent alternately, it was said, " . . . it cannot be questioned that the chancellor of that court is invested with full power to award custody of minor children for their best interests on habeas corpus proceedings. It seems idle to turn parties out of court, and invite them into the chancellor's chambers for the same relief sought in court." Accord, *Luck v. Luck,* (1892) 92 Cal. 653, 28 Pac. 787; *Hoskins v. Hoskins,* (1905) 28 Ky. L. Rep. 435, 89 S. W. 478; *Knoll v. Knoll,* (1905) 114 La. 703, 38 So. 523; *Power v. Power,* (1903) 65 N. J. Eq. 93, 55 Atl. 111. It has been decided that a court of equity, independently of a decree of divorce, may decree maintenance to a wife who is living apart from her husband for a cause legally justifying her, on the ground of inadequacy of the legal remedy. *Baier v. Baier,* (1903) 91 Minn. 165, 97 N. W. 671; *Stephen v. Stephen,* (1907) 102 Minn. 301, 113 N. W. 913; *Lang v. Lang,* (1912) 70 W. Va. 205, 73 S. E. 716. A decree giving the care and custody of minor children to the wife, without making provision for their support, in no way affects the father's natural obligations to support them. *Holt v. Holt,* (1883) 42 Ark. 495; *Lewis v. Lewis,* (Cal. 1917) 163 Pac. 42; *Spencer v. Spencer,* (1906) 97 Minn. 56, 105 N. W. 483, 114 Am. St. Rep. 695, 2 L. R. A. (N.S.) 851; *Keller v. City of St. Louis,* (1899) 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391; *Buckminster v. Buckminster,* (1865) 38

Vt. 248, 88 Am. Dec. 652. Nor is the husband relieved from further payments by a payment in gross to the wife and accepted by her in discharge of his obligation. *Lewis v. Lewis,* supra; *Konitzer v. Konitzer,* (1904) 112 Ill. App. 326. A few cases hold that if a decree of divorce awards the custody of minor children to the wife, the husband is not under an obligation to pay for support voluntarily furnished them by the wife or other persons. *Ramsey v. Ramsey,* (1889) 121 Ind. 215, 23 N. E. 69, 6 L. R. A. 682; *Johnson v. Onsted,* (1889) 74 Mich. 437, 42 N. W. 62. The husband is not relieved from future payments by the fact that he offers to take the children and keep them when they were delivered to the mother by the court's decree, or remained with her voluntarily. *Ostheimer v. Ostheimer,* (1904) 125 Ia. 523, 101 N. W. 275; *McCloskey v. McCloskey,* (1902) 93 Mo. App. 393. One argument against granting the relief given in the instant case is that it may tend to breed discontent in the family and lead discontented wives to abandon their husbands on the pretext of abuse, relying on the court to compel their husbands to support them and their children. But it is evident that where children are concerned, their interests should be paramount. Moreover, there is a distinction between cases where the wife deserts the husband against his wishes without legal justification for a divorce or separation, and cases where the two by mutual consent live apart. The instant case comes within the latter class, and its decision seems well justified.

INFANTS—LIABILITY—TORTS.—The owner of an automobile loaned it to an infant for one evening. Through unskillful driving by the infant, but without any gross or wanton negligence, the car was injured. *Held,* an action in tort will not lie against the infant. *Brunhoelzl v. Brandes,* (N. J. 1917) 100 Atl. 163.

It is a general and well recognized principle of law that an infant is liable for his torts. *Vosburg v. Putney,* (1891) 80 Wis. 523, 50 N. W. 403, 14 L. R. A. 226. It is equally well settled that, as a general rule, infants are not liable on their contracts, except for necessaries. *McCarty v. Carter,* (1868) 49 Ill. 53, 95 Am. Dec. 572; *Trainer v. Trumbull,* (1886) 141 Mass. 527, 6 N. E. 761. The reason for denying liability in the instant case was, that an enforcement of the tort liability would amount to an enforcement of the contract of bailment, viz., to exercise reasonable care in driving the borrowed car. The infant "cannot be sued for a wrong, when the cause of action is in substance ex contractu, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract." Pollock, Principles of Contract, third Amer. ed., 82. Likewise where a contract of a married woman is void, it cannot be enforced indirectly, although there is some conflict as to whether she can estop herself. Id. p. 87, note 34; *Dobbin v. Cordiner,* (1889) 41 Minn. 165, 42 N. W. 870. Since contracts frequently afford opportunity for the commission of torts, it is often difficult to determine whether an infant should be held liable on the ground of his responsibility for his own torts, or not liable because not bound by his contracts. Where the tort is committed in the course of a bailment, the courts draw a distinction between wilful torts and those of mere negligence. If the infant wholly departs from the purpose of the bailment, and by some positive act wilfully destroys

or injures the bailed article, it is a general rule that the act amounts to a conversion of the property and renders the infant liable, as though he had taken the article in the first instance without permission. *Walley v. Holt*, (1876) 35 L. T. 631; *Eaton v. Hill*, (1870) 50 N. H. 235, 9 Am. Rep. 189, semble. If an infant hires a horse to go to one place and goes to another, or goes beyond the limit agreed upon, and an injury occurs to the horse or carriage, he is liable. *Ray v. Tubbs*, (1878) 50 Vt. 688, 28 Am. Rep. 519; *Homer v. Thwing*, (1826) 3 Pick. (Mass.) 492; *Churchill v. White*, (1899) 58 Neb. 22, 78 N. W. 369, 76 Am. St. Rep. 64; contra, *Schenk v Strong*, (1818) 4 N. J. Law 97. Or, if he returns from the place agreed upon by a much longer and circuitous route, he is also held liable. *Towne v. Wiley*, (1851) 23 Vt. 355, 56 Am. Dec. 85. The reason for these decisions is that if the infant does a positive and wilful act it amounts to an election to disaffirm the contract of bailment, thus entitling the owner to immediate possession of the bailed article, and subjecting the infant to liability in trespass. But in torts of mere negligence, which also amount to a breach of the contract of bailment, the weight of authority accords with the principal case. *Young v. Muhling*, (1900) 48 App. Div. 617, 63 N. Y. Supp. 181; *Lowery v. Cate*, (1901) 108 Tenn. 54, 64 S. W. 1068, 91 Am. St. Rep. 744, 57 L. R. A. 673.

JUDGMENT—COLLATERAL ATTACK—UNAUTHORIZED APPEARANCE.—In an action of debt upon a domestic judgment, the defendant set up that there was no service of process, no appearance, and no knowledge of the judgment. It appeared from the record that no service was made on the defendant, but that a licensed attorney appeared for him. The trial court directed a verdict against the defendant. *Held*, affirming the finding of the trial court, that the absence of authority of the attorney to appear for the defendant could not be shown by parol, nor the judgment collaterally attacked. *Rose v. Parker*, (Me. 1917) 99 Atl. 817.

The general doctrine of the cases is that the authority of an attorney appearing in any action is presumed to be valid until the contrary is proved. *Conrad v. Swanke*, (1900) 80 Minn. 438, 83 N. W. 383; *Hamilton v. Wright*, (1868) 37 N. Y. 502. According to the English rule, where the party has been duly served with process, and an attorney without authority appears for him, the judgment rendered on such appearance is final and will not be disturbed by the court provided the attorney is solvent, so as to be able to reimburse the party in damages. If, however, the attorney is insolvent the injured party will be given relief on equitable grounds. *Bayley v. Buckland*, (1847) 1 Ex. 1, 11 Jur. 564. This rule has been adopted by some American courts. *Smith v. Bowditch*, (1828) 7 Pick. (Mass.) 137; *Denton v. Noyes*, (1810) 6 Johns. (N. Y.) 298, 5 Am. Dec. 237; *University of North Carolina v. Lassiter*, (1880) 83 N. C. 38. Where there is no service of process, the authorities are not in accord as to the effect of a judgment entered on an appearance by an unauthorized attorney. The rule laid down by the English courts is that such a judgment is irregular, may be set aside, and the costs recovered from the attorney. *Bayley v. Buckland*, supra. Some American cases apparently have followed this line of reasoning, holding that the judgment is irregular, and making no distinction between cases where process had been served, and where

there was no service. *Denton v. Noyes*, supra. The great weight of the American authorities, however, is to the effect that a judgment rendered without service of process, and upon an unauthorized appearance of attorney is void. *Shelton v. Tiffin*, (1848) 6 How. (U. S.) 162, 12 L. Ed. 387; *Bryn Mawr Nat. Bank v. James*, (1893) 152 Pa. St. 364, 25 Atl. 823. When the method of attacking a judgment entered on an unauthorized appearance of attorney is considered, the courts distinguish between foreign and domestic judgments, holding that foreign judgments are only prima facie evidence of the matters recited, and therefore may be attacked collaterally. And see *Citizens State Bank of Clayton v. Mellquist*, (Minn. 1917) 161 N. W. 210; *Ferguson v. Crawford*, (1877) 70 N. Y. 253, 26 Am. Rep. 589. With regard to domestic judgments there is authority in support of the doctrine of the principal case, that where an appearance is shown on the record, it is conclusive, and the judgment rendered is not subject to collateral attack. *Cigler v. Keinath*, (1912) 167 Ill. App. 65; *Brown v. Nichols*, (1870) 42 N. Y. 26, 9 Abb. Prac. (N.S.) 1. While under our procedure an action may be maintained to set aside a void judgment, *Vaule v. Miller*, (1897) 69 Minn. 440, 72 N. W. 452, judgments of the type of the one in the instant case are usually attacked by motion in the action in which the judgment is rendered. *Stai v. Selden*, (1902) 87 Minn. 271, 92 N. W. 6; *Vilas v. Plattsburgh, etc., R. Co.*, (1890) 123 N. Y. 440, 25 N. E. 941, 9 L. R. A. 844, 20 Am. St. Rep. 171.

The Supreme Court of the United States declares that "the fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard" *Baker v. Baker, Eccles & Co.*, (1917) 242 U. S. 394, 37 S. C. R. 152. "To hold one bound by the judgment who has not had such opportunity is contrary to the first principles of justice." Id. "Whatever may be the rule with regard to decrees concerning status or its incidents, an ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the state as it is outside of it." *McDonald v. Mabee*, (U. S. 1917) 37 S. C. R. 343. In the two cases last cited jurisdiction was sought to be obtained by publication, but the principle is the same. It is submitted, that a judgment entered without service, or appearance, or knowledge of the pendency of the proceedings, and founded solely upon an appearance by an attorney who is wholly unauthorized, is totally void.

JUDGMENT — CONCLUSIVENESS — JUDGMENT FOR ASSIGNEE — SPLITTING CAUSE OF ACTION.—Plaintiff was employed by the defendant in January for a term of one year. He was discharged in February, and made an assignment of his claim against the defendant, stipulating that the assignment covered all damages up to March 6th and that all damages accruing thereafter were reserved. The assignee sued the defendant and recovered all damages up to March 6th. In June plaintiff began this action for breach of contract, to recover the damages for the remainder of the term. Defendant contended that the judgment in favor of plaintiff's assignee was a bar. *Held*, plaintiff may recover. *Carvill v. Mirror Films, Incorporated*, (1917) 163 N. Y. Supp. 268.

Some courts have allowed an employee, whose wages by the terms of the contract are payable in installments, to bring an action for each install-

ment of wages as it falls due, subsequent to his wrongful discharge, recovery on one installment not being held a bar to recovery on subsequently accruing installments. Formerly recovery was allowed on the theory of constructive service. *Gandell v. Pontigny*, (1816) 4 Camp. 375; *Isaacs v. Davies*, (1881) 68 Ga. 169; *Williams v. Luckett*, (1899) 77 Miss. 394, 26 So. 967. This theory has been abandoned in England and in a great majority of the courts of this country. The remedy of the discharged employee is not an action for wages, but for damages for the breach. *Archard v. Horner*, (1828) 3 C. & P. 349; *Goodman v. Pocock*, (1850) 15 Q. B. 576; *Olmstead v. Bach*, (1893) 78 Md. 132, 27 Atl. 501, 22 L. R. A. 74, 44 Am. St. Rep. 273; *McMullan v. Dickinson Co.*, (1895) 60 Minn. 156, 62 N. W. 120, 27 L. R. A. 409, 51 Am. St. Rep. 511; *Howard v. Daly*, (1875) 61 N. Y. 362, 19 Am. Rep. 285. In the latter jurisdictions there has been some conflict as to whether or not one action for damages will bar any subsequent actions. Minnesota, in the case of *McMullan v. Dickinson Co.*, supra, has held that plaintiff may treat the breach as partial, and sue for damages at the end of each wage paying period. The weight of authority, however, seems to be against this view, holding that a discharge constitutes a total breach of the contract and that plaintiff must recover all the damages in one action. *Doherty v. Schipper & Block*. (1911) 250 Ill. 128, 95 N. E. 74, 34 L. R. A. (N.S.) 557; *Richardson v. Eagle Machine Works*, (1881) 78 Ind. 422, 41 Am. Rep. 584; *Olmstead v. Bach*, supra; *McCargo v. Jergens*, (1912) 206 N. Y. 363, 99 N. E. 838. The court in the instant case concedes that had the plaintiff brought suit upon his undivided cause of action, the mere fact that he did not ask for all the damages that he might have recovered would not have prevented a judgment in his favor from being a bar to any further action; and it seems clear that he cannot do by assignment what the court would not permit him to do directly, thereby subjecting the defendant to two separate suits, unless the defendant consents. *King Bros. & Co. v. Central of Georgia Ry. Co.*, (1910) 135 Ga. 225, 69 S. E. 113, Ann. Cas. 1912A 672. It must be borne in mind that the rule against splitting a cause of action is one primarily for the protection of the defendant and may be waived by him. *Fourth National Bank of St. Louis v. Noonan*, (1885) 88 Mo. 372. It previously had been held in New York that a partial assignee of a chose in action might sue at law by joining his assignor as co-plaintiff, and that a non-joinder was demurrable. *Dickinson v. Tyson*, (1908) 125 App. Div. 725, 110 N. Y. Supp. 269. Defendant by failing to demur to the non-joinder in the instant case, as the court points out, assented impliedly to a severance of the cause of action against him.

JUDGMENT—EQUITABLE RELIEF—RESTRAINING ENFORCEMENT—EFFECT OF CODE.—Defendant had brought an action against the now plaintiff to set aside a tax title on the ground that the taxes were paid. The defendant could not produce its tax receipts and the present plaintiff was decreed owner. Plaintiff then sued defendant for trespass. Defendant set up by way of counterclaim that the tax receipts had been found and that the enforcement of the decree in the former action would be unconscionable. *Held*, plaintiff may be restrained from enforcing the decree. *Washburn Land Co. v. White River Lumber Co.*, (Wis. 1917) 161 N. W. 547.

Code provisions which authorize courts of law to open, vacate, or set aside their own judgments do not deprive courts of equity of the power to give relief against judgments, but simply furnish an additional remedy. *Ex-Mission Land, etc., Co. v. Flash,* (1893) 97 Cal. 610, 32 Pac. 600; *MacCall v. Looney,* (1903) 4 Neb. Unof. 715, 96 N. W. 238. Equity, however, usually will not take jurisdiction to set aside an inequitable judgment where the statute provides for adequate defenses in an action on the judgment at law, or where there was an opportunity at law to vacate the judgment or reopen the case. *Travelers' Protective Ass'n of America v. Gilbert,* (1901) 111 Fed. 269, 55 L. R. A. 538; *Jocum v. Taylor,* (Ia. 1917) 161 N. W. 637; *Wieland v. Shillock,* (1876) 23 Minn. 227; see *Geisberg v. O'Laughlin,* (1903) 88 Minn. 431, 93 N. W. 310. In the instant case defendant's remedy at law was barred by lapse of time. But on facts equally strong the Missouri court refused equitable relief. *Hamilton v. McLean,* (1902) 169 Mo. 51, 68 S. W. 930. See also *Farmers' Fire Insurance Co. v. Johnston,* (1897) 113 Mich. 426, 71 N. W. 1074.

MASTER AND SERVANT—INJURIES TO SERVANT—ASSAULT OF ANOTHER SERVANT—LIABILITY OF MASTER.—Action was brought under the Federal Employers' Liability law to recover damages for death of plaintiff's husband, a section foreman in defendant's employ, who was stabbed by a Mexican employed under him. Deceased had discharged the Mexican but was ordered to reinstate him, in spite of his objection that the man was dangerous and had already killed one or two men, the assistant division superintendent assuring him that there was no danger and that he would be protected. The Mexican later stabbed and killed the foreman while both were in the employ of the defendant company. *Held,* no cause of action was stated, as the assault was not committed in the scope or course of the Mexican's employment nor in the furtherance of defendant's business. *Roebuck v. Atchison, etc., Ry. Co.,* (Kan. 1917) 162 Pac. 1153.

It was well settled both in England and in this country before the Employers' Liability Act that a master is bound to use ordinary care in selecting his servants and is liable to any of their fellow servants for negligence in that respect. *Gilman v. Eastern R. Corporation,* (1865) 10 Allen (Mass.) 233, 87 Am. Dec. 635. And this ordinary rule of master and servant still applies except that the federal act has abolished the fellow-servant doctrine and modified the rules of contributory negligence and assumption of risk. The action in cases similar to that above is for the negligence of the carrier in retaining in its employ a dangerous fellow-servant with actual notice of his dangerous character. But in nearly every case this duty of care has been applied only where the question of incompetency related to duties to be performed by the employee and where drunkenness, lack of skill or negligence rendered the performance of those duties uncertain. To hold the master liable the act must have been within the scope of the servant's employment. *Kemp v. Chicago, etc., Ry. Co.,* (1914) 91 Kan. 477, 138 Pac. 621. It is clear that "If a servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time being suspended." *Morier v. St. Paul, etc., Ry. Co.,* (1894) 31 Minn. 351, 353, 17 N. W. 952, 47 Am. Rep. 793; Thompson, Commentaries

on the Law of Negligence, White's Supplement, Section 526. However, upon a state of facts similar to that in the instant case, an action was held to lie against the carrier in a Texas decision. *Missouri, etc., Ry. Co. of Texas v. Day,* (1911) 104 Texas 237, 136 S. W. 435, 34 L. R. A. (N.S.) 111. The rule is stated that the master is liable for an assault by a dangerous, drunken, or desperate employee, if his reputation was such that the master reasonably might have foreseen such consequences. Upon the same principle, a master who negligently retained a servant known to be careless in obeying rules prohibiting him from interfering with appliances not connected with his work, was held liable for the injury to the fellow servant resulting from a disobedience of such rules, though the servant causing the injury may have been competent as to the duty required of him. *Maitland v. Gilbert Paper Co.,* (1897) 97 Wis. 476, 72 N. W. 1124. Upon principle it would seem reasonable that the master, who must furnish safe appliances, a reasonably safe place to work, and reasonably safe fellow servants, would be liable for injury resulting from negligent employment of vicious and dangerous servants, though technically the injuries caused by them may not have been done within the scope of the employment. If it be true that the duty to furnish a reasonably safe place to work is not performed when merely incompetent servants are employed, it is difficult to see how that duty is fulfilled by the employment of servants reputed to be dangerous.

MASTER AND SERVANT—INJURIES TO SERVANT—WORKMAN'S COMPENSATION ACT—APPLICABILITY—WHERE INJURY SUSTAINED IN ANOTHER STATE. —The Rhode Island act is held to govern the right of employee to receive compensation from the employer, when the employment began in the state, but was continued in Connecticut, where the injury was sustained. *Grinnell v. Wilkinson,* (R. I. 1916) 98 Atl. 103.

So held, not because of any specific provision of the statute making it applicable to injuries sustained out of the state, but because the act was intended to furnish a comprehensive scheme for the compensation of injured employees. The Minnesota court applied the ordinary principle of conflict of laws in an action for damages, that the governing law is that of the place where the injury was sustained. *Johnson v. Nelson,* (1915) 128 Minn. 158, 150 N. W. 620. If the cause of action be considered as arising in tort, that result cannot be avoided. But the compensation acts do not merely furnish new remedies for torts. One chief purpose is to establish between employee and employer, in place of the common law or statutory remedy for personal injury, based upon tort, a status which carries with it a right to compensation for any injury or for death of the employee received in the course of and arising out of his employment, regardless of negligence or fault, except through his serious and wilful misconduct. It perhaps may be open to question whether a state law can establish a status between employer and employee which will go with the latter into a different jurisdiction and exclude the operation of a similar act in that state; but when it is optional with the parties to accept the act or not, it would seem that the statute must be regarded as forming part of the contract, and as going with it into any foreign jurisdiction in which the work may be done. *Mulhall v. Fallon,* (1900) 176 Mass. 266,

57 N. E. 386, 79 Am. St. Rep. 309; *Gooding v. Ott,* (W. Va. 1916) 87 S. E. 862, L. R. A. 1916D 637. In such cases an election might be held to divest the claimant of the right to resort to the law of another jurisdiction for relief on the ground of estoppel. *Shaughnessy v. Northland S. S. Co.,* (Wash. 1917) 162 Pac. 546. Although two recent cases held that the particular acts in question had no extra-territorial effect, the court in each case recognized that a distinction might be made between acts that are compulsory and acts which may be accepted at the option of the parties, holding only that the correlative rights and obligations are not founded upon contract where the statute is compulsory. *North Alaska Salmon Co. v. Pillsbury,* (Cal. 1916) 162 Pac. 93; *Shaughnessy v. Northland S. S. Co.,* supra.

Rulings similar to the instant case are: *Kennerson v. Thames Towboat Co.,* (1915) 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A 436; *Rounsaville v. Central R. Co.,* (1915) 87 N. J. L. 371, 94 Atl. 392; *Post v. Burger and Gohlke,* (1916) 216 N. Y. 544, 111 N. E. 351; *Gooding v. Ott,* supra. On the other hand, the Massachusetts court held that its statute confines the operation of the act to injuries sustained in the state, since there is no evidence of intention to give it extra-territorial force, and that it is not applicable to injuries sustained out of the state. *Gould's Case,* (1913) 215 Mass. 480, 102 N. E. 693, Ann. Cases 1914D 372. This case suggests many practical difficulties in the application of the rule of exterritoriality. See also L. R. A. 1916A 443, note.

MASTER AND SERVANT—WORKMEN'S COMPENSATION LAW—"WAGES"—EARNINGS—"TIPS."—Plaintiff, a taxicab driver, was injured while in the employ of the defendant company and sought compensation under the Workmen's Compensation Law. The Commission in determining the average weekly wages of the plaintiff included the tips which he was receiving while he was employed. *Held,* such a basis for compensation was proper. *Sloat v. Rochester Taxicab Co.,* (1917) 163 N. Y. Supp. 904.

The Workmen's Compensation Law of New York, Sec. 14, provides: "except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation or death benefits...." The American compensation acts in general are patterned after the English act, but differ in terms. Under the English Compensation Act, Section 17-2a, providing, "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman has been remunerated," it has been held that where the giving and receiving of tips is notorious, the money thus received is to be included in the "average weekly earnings." *Penn v. Spiers & Pond, Ltd.,* [1908] 1 K. B. 766, 24 T. L. R. 354, approved and followed in *Knott v. Tingle, Jacobs & Co.,* (1911) 4 Butterworth's Wk. Comp. Cas. 55. Board and lodging furnished to an employee are part of his earnings. *Rosenqvist v. Bowring,* [1908] 2 K. B. 108, 24 T. L. R. 504; *Baur v. Court of Common Pleas,* (1915) 88 N. J. L. 128, 95 Atl. 627. Where plaintiff was injured while in the employ of a railroad, the court took into consideration in fixing the rate of weekly earnings the amount earned by plaintiff while working as usher in a theater at night under a contract of employment, though the

work was not ejusdem generis. *Lloyd v. Midland Ry. Co.*, [1914] 2 K. B. 53, 30 T. L. R. 247. A retainer in the Royal Naval Reserve was considered part of the weekly earnings of a stoker on a merchant vessel. *The Raphael v. Brandy*, (1911) 27 T. L. R. 497. "Weekly wages" under a Massachusetts statute means all wages which the employee received in the course of his permanent employment, not restricted to the wages received from one employer. *Gillen v. Ocean Accident & Guarantee Corp.* (1913) 215 Mass. 96, 102 N. E. 346. But if an employee is required to pay an assistant, if he employs one, out of his salary and he actually does hire the assistant, the amount paid to the latter must be deducted in determining the employee's salary under the Compensation Act. *State v. District Court of Sibley County*, (1915) 128 Minn. 486, 151 N. W. 182. The average amount of tips is to be included in the computation of the earnings of an employee. *Hatchman v. New England Casualty Co.*, 2 Mass. Wk. Comp. Cas. 419; Honnold, Workmen's Compensation, 575. It is submitted that whether the compensation is based on earnings or wages, the average amount of tips should be included in the computation. It is a matter of common knowledge that not only are the tips considered in the fixing of wages, but that in many employments the tips form the only compensation.

PERPETUITIES—TRUSTS—VIOLATION OF RULE—ADVERSE POSSESSION BY TRUSTEE.—The owner of land prior to her death made a gift of it to trustees, their heirs and assigns, in trust to pay the net income, rents and profits to a colonization society for charitable purposes. The trust was to continue indefinitely and the trustees were given power to sell the land and invest the proceeds of the sale. The trustees entered upon the trust and carried out its terms for twenty years, when the residuary legatees of the testator sought to recover the property on the ground that the trust violated the rule against perpetuities and was void. *Held*, since the trustees had held the property adversely to the petitioners for over twenty years, the petitioners were barred from recovery. *American Colonization Society v. Soulsby*, (Md. 1917) 99 Atl. 944.

The questions involved in the principal case present interesting points of law which are often lost sight of in the consideration of the troublesome rules peculiar to the doctrine of perpetuities. At common law the same rule is applied to future estates in realty and personalty. *Ferguson v. Ferguson*, (1876) 39 U. C. Q. B. 232. Under this doctrine, where a future estate in realty is created, a provision giving a power of sale to the trustee does not extricate the case from the operation of the rule against perpetuities. *Estate of Hinckley*, (1881) 58 Cal. 457; *Missionary Society v. Humphries*, (1900) 91 Md. 131, 46 Atl. 320, 80 Am. St. Rep. 432. Though private trusts were subject to the doctrine of perpetuities at common law, it seems that the same rules did not obtain in respect of charitable trusts. Perry, Trusts, Sections 384, 687, 736. However, the decisions in the state of Maryland have held that the rule against perpetuities applies to charitable trusts as well as private trusts. *Dashiell v. Attorney General*, (1822) 5 Har. & J. 392, 9 Am. Dec. 572; *Yingling v. Miller*, (1893) 77 Md. 104, 26 Atl. 491; *Missionary Society v. Humphries*, supra. Where a trust comes within the operation of the rule against perpetuities the active fiduciary duties of the trustee must terminate within the period of

the rule or the trust be declared void. *In re Walkerly,* (1895) 108 Cal. 627, 41 Pac. 772, 49 Am. St. Rep. 97; *Ortman v. Dugan,* (Md. 1917) 100 Atl. 82; see also, *In re Kohler,* (1916) 96 Misc. Rep. 433, 160 N. Y. Supp. 669. The effect of a devise or bequest violating the rule is that the title descends to the testator's heirs or next of kin, though contrary to his intention. *In re Walkerly,* supra. But where the trustee takes possession of the trust property and administers the trust for the period prescribed by the statute of limitations, the trustee acquires title good as against the heir or next of kin of the creator of the trust, even though the trust itself was void. *In re Roman Catholic Society,* (1871) 4 Lans. (N. Y.) 14; *Deepwater Ry. Co. v. Honaker,* (1909) 66 W. Va. 136, 66 S. E. 104; *Phillips v. Insley,* (1910) 113 Md. 341, 77 Atl. 850. But the trustee, by assuming the trust, is estopped to deny the right of the beneficiary or cestui qui trust. *Guilfoil v. Arthur,* (1895) 158 Ill. 600, 41 N. E. 1009; *Sterling v. Sterling,* (1899) 77 Minn. 12, 79 N. W. 525.

SALES—CONDITIONAL SALES—RETAKING OF PROPERTY—RECOVERY OF BALANCE OF PURCHASE PRICE.—Defendant purchased from plaintiff a threshing machine and gave three promissory notes in payment. The parties agreed in writing that title should remain in the vendor, and that upon default of the vendee the vendor could retake the property, sell it, and apply the proceeds upon the notes. Defendant expressly agreed to pay any balance due on the notes after the machine was so sold. A chattel mortgage and a mortgage on sixty acres of land were given as additional security. Defendant defaulted. Plaintiff retook the machine, sold it, applied the proceeds to the amount due on the notes, and then sued to foreclose the real estate mortgage to get the balance due. *Held,* for the plaintiff. *International Harvester Co. v. Bauer,* (Ore. 1917) 162 Pac. 856.

There is much variety in the form and character of conditional sales contracts, and the decisions are in conflict. If vendee defaults, the vendor may elect his remedy. He may retake the goods, or he may treat the transaction as a completed absolute sale and proceed to the collection of the purchase price. *Alden v. Dyer & Bro.,* (1904) 92 Minn. 134, 99 N. W. 784. If the sale is in the form of a lease, the vendee paying a specified rental with a provision that in event of default the vendor may resume possession, the courts hold that a retaking is a rescission of the contract which operates to relieve the vendee from further obligations. *Manson v. Dayton,* (1907) 153 Fed. 258, 82 C. C. A. 588; *Park & Lacy Co. v. White River Lumber Co.,* (1894) 101 Cal. 37, 35 Pac. 442. If the vendor reserves title in himself, with an express power to retake and sell the chattel upon default, applying the proceeds to the purchase price, but with no stipulation for a continuing liability upon the part of the vendee, the decisions are in conflict. Some are to the effect that the vendor may enforce the collection of the unpaid balance, the theory being that the law does not imply a revocation of the contract by such taking and selling, nor does it imply that there is no consideration remaining to support a recovery of the unpaid balance. *Christie v. Scott,* (1908) 77 Kan. 257, 94 Pac. 214; *Van Den Bosch v. Bouwman,* (1904) 138 Mich. 624, 101 N. W. 832, 110 Am. St. Rep. 336. Minnesota holds the contrary, that when the goods are taken from the vendee and sold there is a total failure of considera-

tion as the vendee gets no title and therefore is excused from performance. *Third National Bank v. Armstrong,* (1879) 25 Minn. 530; *Minneapolis Harvester Works v. Hally,* (1881) 27 Minn. 495, 8 N. W. 597. Other courts reach the same result, but on the ground that the vendor, by electing to retake the property, abandons the right to treat the sale as absolute and collect the purchase price. *Rice v. Hampton,* (S. C. 1916) 91 S. E. 5; and see 6 Am. & Eng. Ency., second edition, p. 480. In the instant case the vendee expressly agreed to pay the balance of the purchase price, after the retaking and sale. Under the Minnesota theory, the sale of the chattel and the application of the proceeds to the purchase price cancels the debt. *Keystone Manufacturing Co. v. Cassellius,* (1898) 74 Minn. 115, 76 N. W. 1028; *Nashville Lumber Co. v. Robinson,* (1909) 91 Ark. 319, 121 S. W. 350, accord. But the instant case held that it is the duty of the courts to enforce the contract as written. Accord, *Warner v. Zeuchel,* (1897) 19 App. Div. 494, 46 N. Y. Supp. 569; *McCormick Harvesting Machine Co. v. Kock,* (1899) 8 Okla. 374, 58 Pac. 626. Obviously, the vendor cannot retake the property merely, and then recover the full contract price. *I. X. L. Stores Co. v. Moon,* (Utah 1917) 162 Pac. 622. If the title to the chattel has passed to the vendee, it being taken and sold upon a chattel mortgage, the vendor may still resort to the real estate mortgage to collect the balance. *Beer v. Aultman-Taylor Co.,* (1884) 32 Minn. 90, 19 N. W. 388. Assuming that title may be forced upon the vendee, the result in the instant case may be harmonized with that of the Minnesota case, for the court assumed that the vendor had elected to treat the transaction as a completed absolute sale. But the basis of the decision is that the contract should be enforced in all its terms.

WAR—VIOLATION OF NEUTRALITY—MAKING NEUTRAL PORT ASYLUM FOR PRIZE—RESTITUTION.—A British merchant vessel was captured by a German raider, and sent without convoy to an American port 3,000 miles distant, not on account of stress of weather, but solely to be laid up in a place of safety. The nearest German port was 1,590 miles distant from the point of capture. *Held,* that the neutrality of the United States was violated by sending the prize into port, and the admiralty courts of the United States have jurisdiction to restore the prize to her owners, notwithstanding the institution of proceedings in a German prize court for the condemnation of the vessel. *Berg, Prize Master in Charge of the Prize Ship Appam, v. British & African Steam Navigation Co.,* (U. S. 1917) 37 S. C. R. 337.

The Supreme Court disposes adversely of the claim that Article 19 of the treaty of 1799 with Prussia authorized the sending of the prize into an American port under the circumstances of this case. In the opinion of the Court Article 19 means that the permission was granted "to vessels of war and their prizes, which are not to be arrested, searched, or put under legal process when they come into the ports of the high contracting parties, to the end that they may be freely carried out by their captors to the places expressed in their commissions, which the commanding officer is obliged to show." The treaty only contemplated a temporary asylum for prizes brought in under convoy, and "cannot be held to imply an intention to make of an American port a harbor of refuge for captured prizes."

Assuming that the capture was initially valid, and that bringing it into an American port under the circumstances was a violation of American neutrality, the serious question remains, has an American prize court jurisdiction to restore it to the owner? The question may be otherwise stated: Does the sending of a prize into a neutral port in violation of its neutrality vitiate the capture? The Court does not question the jurisdiction of the German prize court to adjudicate the prize; but it denies that the pendency of such proceedings could oust the American court of its jurisdiction. As to the right of private owners (as distinguished from their government) to invoke the aid of our court, stress is laid upon the decision of the Supreme Court in *The Santissima Trinidad,* (1822) 7 Wheat. 283, in which it was held that the United States district court had jurisdiction to entertain the claim of the owners for restitution of the cargo of a ship which had been illegally captured; the illegality consisting chiefly in the fact that the captor had its force and armament illegally augmented in an American port. The capture being initially illegal, the court held it to be a tort which did not divest the title of the owner. Under such circumstances it is clear that an American court could not refuse to restore the cargo. In the *Appam Case* the capture was unquestionably legal, and the court, therefore, in effect holds that a valid capture is vitiated by being illegally brought into an American port. This distinction was insisted upon in the argument, but Mr. Justice Day declared that the court was at a loss to see any difference in principle. In view of the facts that the prize was sent into the port avowedly under the protection of the treaty, that the prize master was not notified that such interpretation of the treaty was not conceded, but that on the contrary the Department of State itself reached no decision as to the proper interpretation of the treaty until after the filing of the libel and expressly held that in the interim the vessel was not in port in violation of the neutrality of the United States, it is not easy to see the propriety of invalidating the capture ab initio. See article by C. D. Allin, 1 MINNESOTA LAW REVIEW 1.

BOOK REVIEWS

CASES AND OTHER AUTHORITIES ON LEGAL ETHICS.—George P. Costigan, Jr. American Casebook Series. St. Paul: West Publishing Company. 1917. pp. XIII, 616. $4.00.

In what ways may a lawyer, without violating the canons of the profession, advertise or solicit business? Under what circumstances must he accept or reject a proposed case? What are his rights with reference to his own witnesses and those of his adversary both within and without the court room? How should he conduct himself towards the judge and the jurors in court and out? Are his obligations in a criminal case different from those in a civil case? What conditions justify him in abandoning a cause, and what duties does he owe the client thereafter? What rules govern the fixing and collecting of his fees? These and numerous other questions of similar import constantly present themselves to the practitioner, and especially to the inexperienced practitioner. At present few, if any, law schools are making any adequate effort to

answer them. The average course in legal ethics consists of a series of talks by some kindly gentleman of the bar or bench upon the general relation of virtue to happiness and of honesty to success in the profession.

Whatever excuse may have existed for this condition in the lack of material for a proper course has been invalidated by Mr. Costigan. He has collected from widely scattered sources, of varied force as authorities, and presented in useable form, a wealth of material, much of which is not otherwise accessible, throwing light upon almost every ethical question which confronts the lawyer in his relations with his client, the profession, the court and society. He has drawn not only from judicial decisions, from canons of bar associations and law societies, and from books upon legal ethics, but also from the writings of publicists, moralists and philosophers. Most of the selections have been made with rare judgment, and are of absorbing interest. The cases, as to the effect of an attorney's misconduct during the trial upon the verdict, present the right ideal but hardly represent the weight of authority.

The material has been so arranged and classified as to present the subject clearly and develop it logically. It could probably be satisfactorily handled in a course of sixteen lectures or could easily be expanded so as to require thirty-two lectures. While the book is intended primarily for use in law schools, it ought to be of great profit to the lawyer in active practice.

EDMUND M. MORGAN.

CURRENT LEGISLATION

SOME MINNESOTA LEGISLATION OF 1917

This is not in any sense a review of the work accomplished by the legislature of 1917. It is intended only as pointing out some of the new legislation enacted, especially where such legislation is novel, or where it represents decided changes in policy.

CONSTITUTIONAL AMENDMENTS

Contrary to the usual custom, only one constitutional amendment is to be submitted to the voters at the 1918 election. It seems to be recognized that submitting a large number of such amendments tends to confuse the voter and to reduce the chance of any amendment receiving the majority of the total vote cast necessary to its adoption. Hence only one proposed amendment, that prohibiting the manufacture and sale of intoxicating liquors, will appear on the ballot at the next election and, this being a matter of such universal interest, it is expected that nearly all electors will express themselves for or against its adoption.

"BLUE SKY" LAW

This Act (Ch. 429), was passed after the United States Supreme Court had rendered its decision holding constitutional the "Blue Sky" laws of Ohio (242 U. S. 539), South Dakota (242 U. S. 559), and Michi-

gan (242 U. S. 568). The subject matter being the same as in the acts there passed upon, it is probably safe to assume that its constitutionality will not be questioned.

The act provides for a commission, consisting of the public examiner, the attorney general, and the commissioner of insurance, with a secretary and such other office help as may be necessary, who shall pass upon securities sold or offered for sale within the state, except such securities as are specifically excepted (including government, state and municipal, etc.).

All investment companies and dealers must be licensed and the securities offered for sale must be listed with the commission and fully described; copies of all circulars, prospectuses and advertisements must also be submitted. The sale of securities which have been disapproved by the commission is made a gross misdemeanor, punishable by a fine of not more than $1,000 or by imprisonment not exceeding one year, or both.

The supreme court may, upon petition of any person aggrieved, review by certiorari any final order or determination of the commission.

CHILD WELFARE

In August, 1916, Governor Burnquist appointed a Commission to "revise and codify the laws of the state relating to children." The Commission consisted of twelve prominent men and women interested in Child Welfare. After many meetings, and after thorough consideration, the Commission submitted a report recommending the adoption of 43 separate acts, many of which were amendments to the existing law, and all so coordinated as to make the law a consistent whole.

Practically all of the bills recommended were adopted, and it is said that Minnesota now stands in the forefront in Child Welfare legislation.

The acts are too numerous to review, but the central idea seems to have been the placing of the entire general supervision in the State Board of Control. At the same time, changes are made in the law governing adoption, employment of children, mothers' pensions, rights of illegitimate children, training schools, procedure in Juvenile Courts, etc. The Child Welfare legislation bids fair to be the outstanding accomplishment of the 1917 legislature. For a full discussion of this legislation, see 1 MINNESOTA LAW REVIEW 48.

ELECTIONS

All proposals to repeal or modify the present primary laws, and to revert to the convention system, were defeated, except that the Presidential Primary Law was repealed (Ch. 133).

The bill providing for non-partisan conventions for the nomination of candidates for justices of the supreme court was passed in the Senate but defeated in the House.

The problem of the voter necessarily absent from his voting precinct on election day has been before the legislature for some time. In 1911 (Laws 1911, Ch. 300) an act was passed providing a plan under which an elector absent from his precinct might deposit his ballot wherever he might be within the state. This act was so drawn as to be of doubtful

constitutionality, and hence was repealed in 1913, and a somewhat different act was passed (Laws 1913, Ch. 264).

At the Special Session, October, 1916, an act was passed (Laws Spec. Sess. 1916, Ch. 2) providing a method by which members of the National Guard, while in the service of the United States, might vote. At the 1917 session the final step was taken, and a general "Absent Voters Law" was passed (Ch. 68, amended Ch. 120). This act provides for voting by marking and mailing ballots, which have been previously obtained from the county auditor of the county in which the elector resides, at any place within the United States, except Alaska and the Island Possessions. Such ballots are to be delivered on election day to the judges of election of the proper precinct and by them deposited in the ballot box as are other ballots. To ensure delivery the envelope provided for the purpose must bear a special delivery stamp, and be marked "Postmaster deliver on Election Day." The act aims to make all necessary provisions for absent voting and for safeguarding the casting of such ballots.

HIGHWAYS

Chapter 119 abolishes the Highway Commission and places the supervision of state highway work in one commissioner. At the same time the laws governing highways were codified, some of the old laws being amended and others repealed, and many new provisions added, the purpose being to enact one general consistent law covering the subject.

The development of a system of good roads in Minnesota is in its infancy, and legislation tending to further improve our roads is of importance to every citizen of the state.

INJUNCTIONS IN LABOR DISPUTES

Chapter 493 prohibits the issuance of injunctions in labor disputes, except to prevent irreparable injury to property or to property rights. The act also declares that "the labor of a human being is not a commodity or article of commerce," and that the right to enter into, or to change the relation of employer and employee, and to work, is "a personal and not a property right."

The act follows quite closely the provisions of the Clayton Act of October 15, 1914 (38 U. S. Stats. at Large, Ch. 363, p. 730). See 1 MINNESOTA LAW REVIEW 71 for comment on a decision of the supreme court of Massachusetts dealing with similar legislation.

PUBLIC DEFENDER

Of more than passing interest is the act providing for a Public Defender (Ch. 496). This matter of a Public Defender has received considerable attention during the past few years. A number of cities have by ordinance provided for such officer. This is true of Los Angeles (which seems to have been the first to do so), Portland, Omaha, Pittsburg, Houston, Columbus, and probably others.

At least one state has passed a general law (Va. Laws 1916, Ch. 204) providing for such officer in all cities of over 50,000 inhabitants.

It is urged that better results will follow if the duty of defending persons accused of crime, and who, by reason of poverty, cannot employ

counsel for their own defense, is placed upon one certain official, than are attained under the present system of appointment by the court in each individual case.

The present act applies only to counties having 300,000, or more, inhabitants. The Public Defender is to be appointed by the judges of the district court for a term of four years at a compensation to be fixed by them.

This seems to be in the nature of an experiment and, if it works satisfactorily, future legislatures will no doubt extend the law so as to apply to all of the larger cities of the state.

STATE LANDS

By Chapter 164 provision is made for the clearing and improving of state lands under the general supervision of the state auditor and a State Land Improvement Board consisting of three members. It is thought that clearing and improving a part of such lands will greatly facilitate their sale and settlement.

Chapter 31 authorizes the leasing of state lands for the taking of sand, clay, rock, marl, peat, or black dirt therefrom, and also for storing thereon ore or waste material from mines.

Chapter 110 empowers the governor, attorney general and state auditor to dispose of ore lying under the waters of any public lake or river within the state. (See article by Justice Oscar Hallam, Rights in Soil and Minerals Under Water, 1 MINNESOTA LAW REVIEW 34.)

By Chapter 360 all water power owned by the state is withdrawn from sale, as is also the land adjoining, and other land unfit for agriculture but suitable for reforestation, the purpose being to utilize the water power in the manufacture of paper by the state.

UNIFORM STATE LAWS

Two additional "Uniform State Laws" were passed at this session: Chapter 399, Uniform Law for Bills of Lading (see analysis of this Act, article by Donald E. Bridgman, 1 MINNESOTA LAW REVIEW 285), and Chapter 465, Uniform Law of Sales of Goods, making four now in force in this state, the legislature of 1913 having adopted the Uniform Negotiable Instruments Act (Laws 1913, Ch. 272), and the Uniform Warehouse Receipts Act (Laws 1913, Ch. 161).

These Uniform Acts are being adopted gradually in the various states, pursuant to the recommendation of the Commissioners on Uniform State Laws, and are aiding materially, not only in promoting uniformity in the statute law, but also uniformity in construction. The adoption of these Uniform Acts will eventually do away with much of the confusion arising from conflict of laws between the states.

WAR MEASURES

Chapter 261 provides for a Public Safety Commission of seven members, including the governor and attorney general, ex-officio, to continue throughout the war. This commission is given very extensive power in all matters in any way affecting the public safety. The members were appointed soon after the passage of the act, and have already issued a number of orders as precautionary measures.

Chapter 375 authorizes common carriers to give free transportation to members of the army, navy, and National Guard.

Chapter 435 makes it unlawful for any subject of any nation, with which the United States is at war, to have in his possession any firearms or explosives.

Chapter 463 makes it unlawful to interfere with, or discourage in any way enlistment in the army or navy, or to teach or advocate that the citizens of Minnesota should not aid the United States in carrying on the war.

By Chapter 400 a new Military Code was adopted, so as to conform the organization of the National Guard to the requirements of the federal law. It was thought necessary in this emergency to wholly revise the code in order to have a more adequate and efficient organization of the state forces.

Among other things the new Code abolishes the Governor's Staff; enlarges the powers of the Military Board; and changes the method of appointing officers in the Guard.

Another act, which should probably be classified as a war measure, is Chapter 215, which defines and prohibits "criminal syndicalism." The act, briefly, prohibits the advocacy of crime, sabotage, and violence, for the purpose of accomplishing industrial or political ends, special mention being made of malicious injury to or destruction of property. It also prohibits assemblages for the purpose of advocating and teaching such doctrines, and makes it unlawful to permit buildings to be used for such assemblages.

MISCELLANEOUS

By Chapter 116 the state of Minnesota exchanged with the state of Wisconsin an island which formed part of Houston county, Minnesota, for another island which was part of Buffalo county, Wisconsin.

By Chapter 56 women are made eligible to appointment as deputies to public officials.

Chapter 353 prevents persons guilty of felonious homicide from inheriting property of persons whose lives they take.

By Chapter 248 ten hours is made the standard day's work.

The Drainage Laws of the state are revised and amended by Chapters 441 and 442.

Chapter 466 regulates the construction and operation of moving picture theaters, with reference to dangers from fire. The construction of buildings used for the purpose is regulated, as well as the operation of the machines. Supervision is placed with the state fire marshal.

Chapter 247 prohibits the playing of "The Star Spangled Banner" in any public place as part of a medley, or as an exit march, or for dancing purposes.

ELIAS J. LIEN.*

SAINT PAUL.
*State Librarian.

CHANGES IN PROCEDURE EFFECTED BY THE SESSION LAWS OF 1917

Most of the changes in procedure made by enactments of the recently adjourned legislature have for their object the elimination of delay and decreasing of expense in securing a final determination of issues upon the merits. It is purposed here not to discuss the effects of this legislation in detail, but merely to indicate briefly the subject matter of the several chapters.

JUSTICE'S COURT

Chapter 309 dispenses with the necessity of presenting evidence in default cases where the claim is for payment of money only on contract and the complaint has been duly served.

APPEAL FROM JUSTICE TO DISTRICT COURT

Chapter 283 radically changes the procedure on appeal from the court of a justice of the peace to the district court. It requires the notice of appeal to be filed with the clerk of the district court, the bond on appeal to be approved by said clerk, and a fee of $2 for making the return to be paid to said clerk. Said clerk notifies the justice of the appeal, and after the return is made remits the $2 to the justice. Service of notice of appeal may be made upon respondent's attorney.

MUNICIPAL AND DISTRICT COURTS

Chapter 179 amends the method of selecting jurors for municipal courts, and *Chapter* 485 amends the method of selecting jurors for district courts.

Chapters 5 and 6 provide that only one term of court per year shall be held in Ramsey County, and establish therein the practice that now exists in Hennepin County for placing causes upon the calendar and setting them for trial.

Chapter 24 authorizes a motion for judgment to be made after a disagreement of a jury upon the same terms and with the same effect as a motion for judgment notwithstanding the verdict.

APPEALS TO THE SUPREME COURT

Chapter 66 requires the appellant, in order to render the appeal effective for any purpose, to deposit with the clerk of the lower court at the time of filing his notice of appeal and bond on appeal, the sum of $15, of which $10 is to be transmitted to the clerk of the supreme court and $5 is to be retained for making the return. It also provides that upon the filing in the supreme court of the return, the supreme court may fix the time for serving and filing the printed record and briefs, and may set a date for argument of the case. This latter provision gives legislative sanction to the elimination of the call of the calendar.

SUPREME COURT

Chapter 166 fixes certain fees in the supreme court. The fee in all special proceedings, applications and motions, other than in pending causes wherein the regular filing fee has been paid, is two dollars. For certified or authenticated copies the charge is ten cents per folio and twenty-five cents per certificate, except where copies are furnished for certification by the applicant, in which case the charge per folio is reduced to two cents. These charges do not apply to disbarment proceedings, nor to actions or proceedings taken solely in the public interest where the state is the appellant or moving party.

PROBATE COURT

Chapter 251 permits estates consisting of personalty not exceeding $650 in value to be speedily administered by a special administrator.

Chapter 289 authorizes the probate court to administer and distribute at a single hearing any estate not exceeding $650 in value, all of which is exempt.

Chapter 216 empowers the probate judge by writing duly filed to authorize the clerk of probate to sign certain routine orders and citations.

SERVICE OF PROCESS

Chapter 49 makes more specific the requisites of the certificate of authorization of the resident agent of a foreign corporation doing business within this state, and provides that if said agent cannot be found in the county of his residence, as shown by the return of the sheriff of that county, service may be made upon the secretary of state.

Chapter 170 amends the provisions fixing the fees of constables for service of summons, and inserts therein a proviso that if the summons is not served by an authorized officer, no fees for service or mileage can be taxed. Such a proviso was already contained in the statute authorizing service of summons by a sheriff. Whether this chapter has for its purpose the putting of service of summons in inferior courts on the same basis as that in the district court, or whether it intends by implication to permit fees and mileage to be taxed in the district court when service of summons therein is made by a constable, is not quite clear. The former is most likely intended, for a more clumsy method of accomplishing the latter could hardly be imagined.

LIENS OF ATTORNEYS

Chapter 98 makes provision for enforcing liens of attorneys, and for charging third parties with notice thereof.

EDMUND M. MORGAN.

UNIVERSITY OF MINNESOTA

THE MINNESOTA STATE BAR ASSOCIATION

RESULTS OF THE ACTIVITIES OF THE MINNESOTA STATE BAR ASSOCIATION IN THE LEGISLATIVE SESSION OF 1917.

It is not the intention of the writer to go into an elaborate discussion of the merits and demerits of the bills that were proposed, after careful consideration, by the Minnesota State Bar Association at its Duluth meeting in 1916. So far as the merits or demerits of the legislation that was passed, is concerned, these several laws will stand the test of time. The Association may justly feel a sense of pride in having brought about in a small way matters of vital importance to the profession and to the public.

The Association stood committed by almost an unanimous vote in favor of a bill which made a ground for censure, suspension, or disbarment the solicitation by an attorney-at-law of professional employment by means of a runner, solicitor, book, circular, pamphlet or other soliciting matter or agency, etc. This bill was commonly known as the "Ambulance Chaser." Also a bill to regulate the settlement of claims for damages resulting from personal injury or death by wrongful act. Also a bill aimed at the practice now so general in this state of loading down the courts of Minnesota with actions brought by non-resident plaintiffs against non-resident defendants, on causes of action arising outside of the state of Minnesota, known as the "Venue Bill." (See discussion of this bill, 1 MINNESOTA LAW REVIEW 365.) The three bills above mentioned, all of which are of vital importance to the bench and bar of the state, as well as every tax-payer, seem to need no discussion. (See 1 MINNESOTA LAW REVIEW 103.) Suffice it to say that the bills were introduced in both Houses but never brought to a vote. Some died in committee, and others on the way to the goal. Strange as it may seem, there are still some lawyers who are opposed to the passage of these measures, but stranger still is the fact that there are lawyers in our Legislature who are blind to the injustice which these proposed bills were intended to remedy, or else are callous to their existence.

A bill known as the "Disbarment Procedure Bill" which had been prepared by expert lawyers, was presented to the last Legislature but failed to reach a vote. This bill was one of the most wholesome measures that came before the Legislature. It would not appear that there could be anyone opposed to so sane a measure, yet we are advised that there were those who opposed it; but since it never came to a vote, we are unable to say who were its friends or its enemies. The bill in question simplified the procedure in bringing delinquent members of the bar to justice. The bill had been approved by the

bench and bar generally and had the unqualified approval and support of our supreme court, yet there are those of the Bar who opposed the measure. Since it did not become a law we shall refrain from discussing it, except to say this, that the Bar Association of this state will persist until that measure becomes a law in this state. While the members of the Bar rank high and compare very favorably with any and all professions on earth, yet the Bar is not without its black sheep and they must be weeded out, and the real lawyers of this state will not stop at any sacrifice to bring this about.

The following bills were recommended and presented to the Legislature by the Association and have become laws:

(1) Chapter 24 of the Laws of 1917 (see page 542).

(2) Chapter 38 of the Laws of 1917 has reference to the vacation of plats and amends Section 6863 Chapter 64 of the General Statutes of 1913. The material change in this law is that the petitioner or petitioners shall not only give two weeks' published notice, but, in addition, posted notice of the application for the vacation of the plats, the last publication to be at least ten days before the term at which the application shall be heard. In addition, the petitioner shall also serve personally, or cause to be served personally, notice of such application upon the mayor of the city, the president of the village, or the chairman of the town board, where the land to be vacated is situated, at least ten days before the term at which said application shall be heard. The changes thus enacted are very material to the end that in all matters of vacation of plats there may not only be an orderly hearing, but one that can be properly considered from all points of view, as well as by all parties interested, including the city, village or township itself, which, under the old statute, did not seem to be the case.

(3) Chapter 283 amends the procedure on appeal from justice court. (See page 542.)

(4) A very important bill that in one form or another has made its biennial appearance since 1903, known as the so-called "Diploma Bill," finally has been enacted into law. This law has reference to the admission of attorneys to practice at the Bar in this state and amends Section 4946 General Statutes of Minnesota 1913. For some years there have been several standards for admission to practice law. One was by examination by the State Board of Law Examiners under rules promulgated by the supreme court; another was, admission by production of his diploma by a graduate from the Law School of the State University, which right was later enlarged to include graduates from any college of law incorporated in this state, or established by authority of its laws under certain conditions provided by statute. There were thus five standards for admission to the Bar in Minnesota. That is, the requirements of the State Board of Law Examiners, and the respective standards of the four law schools. These inequalities prompted the Association to take steps to correct the evil, and to have but one standard for admission, that of examination before the State Board. The efforts of the Association engendered strong opposition

in former years, but later the authorities of the Law School of the University of Minnesota, and of the St. Paul College of Law gave their unqualified support. The opposition was then confined to certain of the night law schools in Minneapolis, and to the activities of some of the undergraduates of these schools who claimed that they should be exempt from the provisions of the proposed change. Year after year this opposition, upon some pretext or other (for instance, the argument, with apparent untruth, that it militated against the poor farmer boy, was always more or less effective),—was sufficient to defeat the pending measure. Chapter 282 of the laws of 1917 is the result of a great deal of labor on the part of the Association, and of which it has much reason to be proud. Much credit is due to the untiring efforts of the committee on Legal Education. The Act provides that students who have heretofore matriculated in the Law School of the State University shall be admitted upon graduation, without fee or examination, upon production of the diploma within two years from the date thereof, etc.; also upon the same terms and conditions any student who has heretofore matriculated in any college of law incorporated in this state, or established by authority of its law, shall upon graduation, be admitted to practice. In other words, this law does not affect the students in either the Law School of the University or any of the other colleges of law who had matriculated prior to the enactment of this law. This amendment was brought about largely by the students in these various colleges, claiming that their entering school under the old system carried with it a tacit contractual understanding that should not be abrogated by any new law. The Legislature saw fit to accede to this request, and the Bar Association very readily fell in line with it.

(5) A statute of unusual interest is found in Chapter 263 of the Laws of 1917, the full text of which does not yet appear in the printed pages of the Minnesota Law Supplement. The reason is that it applies only to Hennepin County, and the law is rather a lengthy one. This law has reference to the so-called Small Debtors' or Conciliation Court. The State Bar Association recognized the growing necessity of a court for the three large counties of this state that would take up a class of litigation which really could not be taken care of by either a justice court or the ordinary municipal court, because of the formality in pleading, etc. The Association thereupon appointed a special committee of eminent lawyers, of which Mr. F. W. Reed was chairman and Dean Vance of the State University a member, and they drew the bill which is now the law in question. This Conciliation Court will take care of small claims in the most informal manner and almost without expense to the litigants. After the committee met, they found it rather difficult to draw a bill to cover the three large counties for the reason that in each county there is a different law which regulates the practice of its municipal court, and it was deemed advisable that this Conciliation Court be a part of the municipal court, so that a general bill could not be framed, and for that reason the committee came to the conclusion that it would be better to try out

the law in Hennepin County first. The history of the movement for a small debtors' court, the need for such a court, and an analysis of the proposed law, is fully given in an article by Dean W. R. Vance in 1 MINNESOTA LAW REVIEW 107. The Bar looks for good results from this law, the court having just been organized with Hon. Thomas Salmon as the judge, who is peculiarly fitted for the position, and Hennepin County looks for very material benefits to grow out of its organization.

I feel that I cannot conclude this article without a word of commendation and thanks to the many members of the Bar of this state who so willingly and unselfishly gave me their hearty support in my efforts before the Legislature and its committees. They number so many that I cannot name them in person, but one exception should be made. Mr. Stiles W. Burr of St. Paul, the late President of the Association, has at all times sacrificed his time and exerted his energy in support of these Association measures, and in aiding the legislative committee in its work. Mr. Burr is entitled to the gratitude of the State Bar Association as well as the public for his splendid services in the passage of the bills above enumerated.

A. V. RIEKE.*

MINNEAPOLIS.

*Chairman of the legislative committee, State Bar Association.

SUBJECT INDEX.