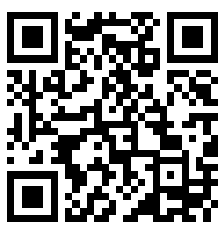

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THE CONSTITUTIONAL ISSUE IN MINIMUM-WAGE LEGISLATION

IN the MINNESOTA LAW REVIEW for June,[1] Mr. Rome G. Brown argues against the economic wisdom and the constitutional validity of minimum-wage legislation. He recognizes rightly that the question is still an open one so far as the interpretation of the federal constitution is concerned, since the Supreme Court establishes no precedent by affirming by a four to four vote the judgment of the state court in the Oregon Minimum Wage cases. His surmise as to the division of opinion among the members of the bench seems to be well founded. "It seems evident," he says, "that in the final decision Justices McKenna, Holmes, Day and Clarke favored affirmance [of the Oregon decision sustaining the statute] with Chief Justice White, and Justices Van Devanter, Pitney, and McReynolds for reversal." Mr. Brown's allocation of the judges coincides approximately with the division in earlier cases when the questions in issue involved legislative interference with freedom of contract for personal service.[2] Such division indicates the extent to which the solution of consti-

[1] 1 MINNESOTA LAW REVIEW 471-86.

[2] During the last term of the Supreme Court, Justices White, Van Devanter, and McReynolds dissented in cases sustaining the Washington Compulsory Insurance Act, Mountain Timber Co. v. Washington, (1917) 243 U. S. 219, 37 S. C. R. 260, and the Oregon ten-hour law,

tutional issues is affected by the general mental outlook of the judges.

This is of course natural in the interpretation of such a clause as the one providing that no person shall be deprived of liberty or property without due process of law. The clause itself sheds no light on the crucial question of what is and what is not due process. It indicates that statutes depriving any one of liberty must pass some test to be constitutional, but the test is left entirely without definition. Nor has the Supreme Court given us any definition which defines. It has said that interference with liberty or property must be reasonable and not arbitrary. But there is as ample room for disagreement as to what is reasonable and what is arbitrary as there is as to what is due process of law. Such vague phrases lend themselves naturally to the conscious or unconscious preconceptions of the persons who use them.

This appears to have happened in a measure to Mr. Brown. His concluding paragraph seems more appropriate to the hustings than to a legal article.

"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,

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Bunting v. Oregon, (1917) 243 U. S. 426, 37 S. C. R. 435. They were with the majority in declaring unconstitutional a statute forbidding employment agencies from accepting fees from employees. Adams v. Tanner, (1917) 37 S. C. R. 662. Justice Holmes and Clarke took the opposite position in all three cases and also voted to sustain the Adamson Law, Wilson v. New, (1917) 243 U. S. 332, 37 S. C. R. 298. Mr. Justice McKenna differed from Justices Holmes and Clarke only in the decision involving the Washington Compulsory Insurance Act. Justices Pitney and Day agreed with Justices Holmes and Clarke with respect to compulsory insurance and the ten-hour day and differed from them in respect to the Adamson Law and the employment agency case. Though Chief Justice White voted to sustain the Adamson Law his opinion indicated clearly his opposition to statutory wage-fixing in general. This is also true of the opinion of Mr. Justice Pitney in that case. Hence it seems almost certain that Justices White, Van Devanter, Pitney and McReynolds would regard minimum-wage legislation as unconstitutional. In addition to the fact that this would necessitate placing Justices Day and McKenna among the four who upheld the Oregon minimum-wage statute, there is little if anything in their opinions on the Adamson Law to induce the contrary inference. See 65 University of Pennsylvania Law Review 607.

such legislation still seems to the writer to be a long step toward nullifying our constitutional guaranties."

It may be doubted whether fortunes will be greatly leveled as a result of the administration of a statute which compels employers to pay normal employees at least $8.64 a week. It may be doubted whether such a statute is more paternalistic than one providing for compulsory education or compulsory military service. The statute does not go far towards compulsory division of property when all it does is to say to an employer: "If you choose to seek profit from the labor of a woman, you must pay that woman what it costs to keep her in condition to furnish that labor. If it is not to your advantage to pay for labor what it costs to produce it, you need not employ the labor." Such a statute prevents an employer from taking advantage of the support furnished his employee by others than himself. It prevents a division of property which has been taking place in his favor by reason of his superior bargaining power. It puts the burden of meeting the cost of producing the labor on the one who voluntarily seeks to enjoy the fruits of the labor. These observations too are perhaps more appropriate to the hustings than to a legal article. They plead the excuse of the homeopathic pharmacopeia and they claim the merit of approaching more nearly to the concrete than do the phrases "socialistic tendencies" and "principles of our government."

I

Mr. Brown presents some economic objections to minimum-wage legislation, recognizing however that "they are not directly pertinent in a discussion of its constitutionality." The first of these objections is in reality an economic objection to our federal system of government. The complaint is that employers in states having minimum-wage statutes will be at a disadvantage in competing with rivals in other states who are still free to drive as hard bargains with their employees as they can. This cannot be denied. It is equally true of state legislation relating to hours of labor, requiring safe and sanitary factories and prohibiting the employment of children. If the objection were to be given weight in determining questions of constitutionality, it would postpone much of our labor legis-

lation until all the states were ready to take the same step. The remedy for the admitted evil is plain. Congress has already adopted it with respect to the employment of child labor. In the exercise of its power over interstate commerce it has closed the channels of such commerce to the manufacturers who employ children below the designated age. This gives to those who do not employ children the whole of the market fed by interstate transportation. Similar action may be appropriate with respect to employers who pay wages less than the cost of subsistence.

The other economic objections referred to are that the minimum wage will tend to become the maximum wage and that the statutory raising of wages will reduce the number of jobs. Underlying the argument in support of these two objections is the assumption that the value of the contribution of each laborer is susceptible of precise determination. Thus Mr. Brown says:

"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 worth-work."

This is to say that employers are now paying the more efficient employees more than they earn. If they have to pay less efficient employees more than they earn, they will reduce the wages of the more efficient. It assumes that each individual laborer has a "work-worth," that employers now pay less efficient employees their work-worth and pay more efficient employees more than their work-worth. Two results are to follow the application of minimum-wage legislation. Employers are to dismiss their less efficient employees. Employers are to retain their less efficient employees at higher wages and reduce correspondingly the wages of their more efficient employees

To be saved from inconsistency Mr. Brown must be taken to mean that some employers will choose one alternative and the rest choose the other. But it is hard to accept these dire results to the laborers which Mr. Brown predicts and at the same time to acquiesce in his complaints that the statutory minimum wage raises the cost of production and savors of the division of property between those who have and those who

have not. The only instance of actual experience which he adduces is of one brush concern in Massachusetts which discharged one hundred of its unskilled employees, apportioned the unskilled labor among the skilled employees and reduced its total wage bill $40,000 a year.[3] Yet "this sort of legislation is a new expression of the paternalistic and socialistic tendencies of the day." And again: "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."

It is nowhere made clear why employers are so philanthropic as to pay any employee more than his "work-worth." The only answer would seem to be that employers are unable to compute the "work-worth" of their individual employees. But Mr. Brown does not adopt this explanation. He assumes the contrary, not only in his discussion of economic objections to the legislation, but in his argument against its constitutionality.

II

The objections to the constitutionality of minimum-wage legislation are stated under four heads. The first is that it "fixes a wage based solely upon the individual needs of the employee—not as a worker, but as an individual." Consideration of this objection will be given later. The fourth objection is that "the statute has, therefore, the effect to deprive both the employer and the employee of their property and of the liberty of contract." This may be conceded. But it does not get us far, since the question is whether the deprivation is with or without due process. All of the statutes which have been sustained as valid exercises of the police power have taken liberty or property. The constitution does not forbid the taking of liberty and property. It forbids only such takings as are without due process of law.

[3] 1 MINNESOTA LAW REVIEW at pp. 474-75. Many instances of a contrary tenor might have been found by Mr. Brown in the brief submitted to the Supreme Court in support of the Oregon minimum-wage statute. This brief has been reprinted by the National Consumers' League under the title Oregon Minimum Wage Cases. The material referred to was gathered by Miss Josephine Goldmark and appears on pages 77-763 passim.

The second objection is that the statute "puts the burden on the employer to supply those individual needs to the extent that the money required therefor is in excess of what the employee earns, or can earn, or is worth." One obvious answer to this is that it is false. The employer remains entirely free to say to any employee: "You are not worth to me the statutory minimum wage. Therefore I will not hire you. I will not be so foolish as to hire you if your labor does not yield me what the statute says I must pay you." Moreover, in the Oregon statute which has been sustained, there was a provision for granting special licenses to those "physically defective or crippled by age or otherwise" permitting them to be employed at a wage less than that found by the commission to be the cost of living. It is plain that minimum-wage legislation does not compel employers to make any contract that in their judgment is not remunerative. It may, it is true, disable them from making as remunerative contracts as they might do if left free to bargain to their best advantage. The legislation is opposed to the theory that there is a constitutionally guaranteed right to make the most advantageous bargains which one's economic position permits. So is all usury legislation. So is legislation directed against restraint of trade. So is the recent legislation of Congress relating to the control and distribution of the food supply.

But the fundamental fallacy in Mr. Brown's second objection is its assumption that each employee has an ascertainable "work-worth." This is not true of the simple case of a domestic servant. The difficulty is increased when two labor in co-operation. Mr. Brown's article states that the argument before the Supreme Court against the Oregon minimum-wage statute was made by "Rome G. Brown, of Minneapolis, and C. W. Fulton, of Portland, Oregon." Their appeal failed. How shall we tell the "work-worth" which each contributed to the result? Still more complicated is the situation in a large industrial establishment, where land, buildings, machinery, power, management and labor are all necessary to the creation of the saleable product. Subtract any single factor and there is no product to sell. Who will tell the "work-worth" of each? If profits are unsatisfactory, is it because the location is bad, because the buildings are ill

adapted to their purpose, because the machinery is inferior to that of rivals, because the manager is extravagant or otherwise incompetent, or because the wage-scale is too high? Is it because the various factors have not been combined in the best proportions? Or is it because, in spite of the fact that all the processes of manufacturing have been wisely conducted, the sales force has been stupid, the transportation system has been faulty, credits have been unwisely extended or the whims of consumers have veered? Where one man fails, a rival may pay twice the wage per capita and succeed. Even granting that the proportion which labor contributes to the product could be ascertained, this needs translation into terms of money, and in such translation the price received for the product must be reckoned with. As increase of wages follows increase of prices, so increase of prices will follow increase of wages, if the wages paid in rival plants similarly increase and if the product satisfies a genuine need. If it does not, it is of public importance that the labor be turned to the creation of products which do satisfy a real need. This may be hard on individual manufacturers if they cannot run their business unless others contribute to the support of their employees. But an industry or a particular plant which is not economically self-sustaining can hardly be heard to claim a constitutional right to secure a labor force which it cannot ration, clothe and shelter.

This is what is meant by the statement that the employer who objects to the constitutionality of minimum-wage legislation is claiming a constitutional right to be a parasite. Mr. Brown seeks to escape this conclusion by insisting that "the need to any person of a 'living' is an individual need." "It exists," he says, "before employment, and during employment, and after employment." So it does. But during employment the need to the employee of a living is likewise a need to the employer. And the statute deals with the employer only during the employment. Two persons may have a need of the same thing. A living for the employee is a need of the employee, but such living is none the less a need of the employer. One of the requirements of having employees is that those employees be supported in health. Someone must furnish that support if the business is to continue. Support

of employees is the sine qua non of having them. Yet such support Mr. Brown regards as outside the "normal" cost of running the industry.

"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' 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."

Here again is the assumption that what the low-paid employees now receive is the limit of their "work-worth." And what they now receive is taken as the "normal" cost of the existence of the business. Yet if the employees were secured under a régime of slavery and not of free contract, the normal cost of the existence of the business would include the full and not merely the partial support of the labor force.

Mr. Brown nowhere makes clear why he regards the wages now received by low-paid employees as the exact measure of their contribution to the product created jointly by labor and several other factors. This failure piques our curiosity the more when we find him taking the position that the wages of the higher-paid employees are in excess of their contribution, as he does when he says that "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." If wages measure contribution in one case, why not in the other? If the "normal cost" of the business includes paying the more efficient employees more than their work is worth, why does it not include the same excess in respect to the less efficient? These mysteries are for those who insist that there is some method of determining what a woman's work is worth when other factors in the business are as variable as is the scale of wages. Minimum-wage legislation

proceeds on no such theory. It prescribes a wage based, as Mr. Brown recognizes, on the needs of the worker, on what it costs to keep her a worker. It says that that need is a need of a business and that the owners of the business shall not by superior bargaining power impose on others the costs which are essential to keep the business going. This is not only the theory of the legislation but it is its result. And from the standpoint of this theory and this result the question of constitutionality must be determined.

Mr. Brown's third objection to the legislation is that "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." Here, in spite of the repetition of his "work-worth" assumption, he stands on somewhat firmer ground. That employers whose wage rate for low-paid workers is increased will strive to reduce the number of workers is quite possible. They will be spurred to conduct their business at its highest possible efficiency. In some instances they may succeed in creating the same output with a smaller force. Where the number of employees remains the same, the employer will doubtless be able to attract laborers of greater efficiency by the higher wage. With a wider field of choice he will scan the qualifications of his laborers more closely. And some of the less efficient will lose their places. Though it is not possible to determine what portions of the annual excess of income over expenditures are attributable respectively to capital, to profits and to labor, though it is not possible to ascertain the share of the joint product created by each individual laborer, it is certain that some laborers are more efficient than others. If an employer pays a wage sufficient to keep the individual employee alive, he can exercise more discrimination in selecting his employees than if he pays starvation wages.

Let it be granted, then, that through the operation of the statutory minimum-wage some employees who are now partially supported by their wages in industrial establishments will lose their places. Must the legislation fail because of this? No similar argument prevails to defeat statutes raising the standards of admission to the bar or to the practice of

medicine, requiring licenses of locomotive engineers or of chauffeurs. The public purpose of these statutes differs from that of the minimum-wage law. But if there be a public purpose in both cases, the fact that resulting injury to the less efficient is not permitted to defeat the effectuation of that purpose in one line of cases is warrant for dismissing it as a controlling consideration in the other line of cases. This is not to say that it is entitled to no weight whatever. But against it must be balanced the advantages. It is certainly going far to insist that there is a constitutional right to the perpetuation of a labor system which has jobs which take an employee's entire energies and give in return less than enough to maintain those energies.

The resulting loss to individual employees from the operation of a minimum-wage law may be compared with that to would-be borrowers from the operation of usury statutes. Here the public purposes are the same, the prevention of contracts which are deemed coercive and unfair. Some borrowers will fail to get loans as some employees will fail to get jobs. But it is believed that it is the better public policy not to have loans made on a basis that is likely to prove ruinous to the borrower. So is it believed that it is the better public policy not to have industry conducted on a basis that is likely to prove ruinous to employees. Those who do not get the loans and those who do not get the jobs may suffer for a time more than if they could borrow at usurious interest or work for less than it costs to live. But against these regrettable results are to be weighed the advantages which come to those whose loans and jobs are on a basis that the legislature deems essential to a more general social welfare. Standard rates of interest for loans, standard forms of insurance policies, a standard minimum of wages in certain employments —these are all indications of a public interest in the terms of individual bargains which outweighs the interest of individuals to make their bargains on the best or worst terms which they can get under unrestricted legal freedom of contract. They indicate the recognition that abstract legal freedom for each individual is deemed less precious than the adoption of general standards dictated by considerations of a wide social policy.

The objectors to minimum-wage legislation are riding two horses which run in opposite directions. They are concerned that the legislation benefits employees at the expense of employers. They are fearful for the ruin it will bring to employees. They love to choose and see their path so that they find only the losses and never the countervailing gains. Solicitous for the stray individuals who may be harmed by the adoption of social standards, they are unmindful of the social gains from the institution of such standards. They are like those who would view a conscription law wholly from the standpoint of the individual who does not wish to be conscripted. However legitimate it may be for them to urge their point of view before the legislature, it requires more justification to warrant their endeavor to incorporate it into the constitution of the United States.

III

Though neither the doctrine of individualism nor of laissez faire is contained in the language of the constitution, they permeate many judicial opinions interpreting the constitution. From some of such opinions Mr. Brown quotes. The opinions were in cases involving statutes excluding aliens from employment [4] or forbidding employers to discharge employees because of their membership in a labor union [5] or to require of employees as a condition of receiving or remaining in employment an agreement not to become or remain a member of a labor union.[6] These cases are not precedents on the question whether a minimum wage may be imposed by statute. Indeed Mr. Brown does not cite them for this purpose. He is concerned rather with the social philosophy of the judges who wrote the opinions. And that social philosophy is congenial to his objections to minimum-wage legislation. But it indicates nothing more than the personal equation of the particular judge who wrote the particular opinion. Quotations from opinions of other judges indicating personal equations of a

[4] Truax v. Raich, (1915) 239 U. S. 33, 60 L. Ed. 131, 36 S. C. R. 7, L. R. A. 1916D 545.

[5] Adair v. United States, (1908) 208 U. S. 161, 52 L. Ed. 436, 28 S. C. R. 277, 13 Ann. Cas. 764.

[6] Coppage v. Kansas, (1914) 236 U. S. 1, 35 S. C. R. 240, L. R. A. 1915C 960.

contrary tenor may be cited to match those adduced by Mr. Brown. The situation is familiar to all students of constitutional law.[7] It is not to be denied that these personal equations are influential factors in the decision of constitutional questions. They may explain the diversities of judicial opinion which are revealed in so many of the important cases. But they are not the law of the constitution. They do not even indicate the theory of the Supreme Court as to the social philosophy which should govern the interpretation of the constitution. For with respect to this social philosophy there is division of opinion among the members of the Supreme Court. If we are to deal with problems of constitutionality as problems of law rather than of judicial psychology we must disregard judicial utterances of general social views and fix our attention on judicial sanction or disapproval of particular social expedients.

Mr. Brown cites no cases decided by the Supreme Court which are authority against the validity of minimum-wage legislation. He tells us that "on principle and 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." But his only support for this conclusion is the opinions in the cases referred to in the foregoing paragraph and the dissenting opinion in a case holding that it is not a denial of due process to regulate the rates of insurance companies.[8] These are not precedents on the question in issue. They are at best data from which to infer how individual members of the Supreme Court will incline to view minimum-wage legislation. But of this we have better evidence than the social philosophizing in opinions several years old. We have the fact that one member of the present bench had gratuitously devoted much of his time during the last few years of his career at the bar to advocating the constitutionality of this legislation.

[7] See Freund, Standards of American Legislation 185-214, 220. Compare also, Pound, Liberty of Contract, 18 Yale Law Journal 514; Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harvard Law Review, 366, 460; id. The Supreme Court and the Fourteenth Amendment, 7 Michigan Law Review 743; and Kales, Due Process, the Inarticulate Major Premise and the Adamson Act, 26 Yale Law Journal 519.

[8] German Alliance Ins. Co. v. Lewis, (1913) 233 U. S. 389, 58 L. Ed. 1011, 34 S. C. R. 612, L. R. A. 1915C 1189.

and the further fact that the other members of the bench are divided evenly on the question. We know that so long as the personnel of the Supreme Court remains unchanged, the only decisions that will be rendered against such legislation must be in state tribunals. So that reliance on the individual philosophy of particular Supreme Court judges past or present is not the sound or safe method of dealing with our problem.

IV

Mr. Brown makes no inquiry to discover the extent to which legislatures have already been permitted to deal with the wage relation. Such inquiry would show that in 1901, the Supreme Court sustained a state statute requiring employers who issue scrip or store orders in payment of wages to redeem the same in money when so requested.[9] Such a statute has to do with the rate of wages. The situation which it was passed to remedy is well known. Employees to tide over the necessities of the moment were glad to accept scrip or store orders even though it subjected them to exorbitant prices at the company store. They freely made such binding contracts, if by "freely" we mean that they chose one of two theoretically possible alternatives. The statute says that the contract to accept the store order in lieu of cash shall not be binding. It may be rescinded at the option of the employee. One effect of such a statute is to relieve the employee from the monopoly of the company store and so to increase his real wages. His scrip or store order is convertible into cash on the regular pay day. Rival stores may arrange to take the scrip as security for goods sold by them and count on subsequent redemption in cash. Company stores will have to meet this competition and so increase the purchasing power of the scrip and thereby the real wages of employees. The bearing of this decision on the social philosophy breathed by the opinions which Mr. Brown quotes is apparent when the decision is compared with the denunciatory utterance of the supreme court of Pennsylvania on similar legislation:

"More than this, it is an insulting attempt to put the laborer under a legislative tutelage which is not only degrading

[9] Knoxville Iron Co. v. Harbison, (1901) 183 U. S. 13, 46 L. Ed. 55, 22 S. C. R. 1.

to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privilege and consequently vicious and void." [10]

The Supreme Court of the United States with more dignity and more common sense takes the opposite position. The decision is not pertinent from the standpoint of an employee who objects to a minimum-wage statute, but it directly controverts the contention of the employer that he has a constitutionally protected right to use his superior economic position to drive as hard a bargain as he can. It sanctions a statute whose design and effect was to raise the real wages of employees in spite of bargains which made every advance payment of wages conditioned on paying the prices demanded at the company store—bargains which in orthodox legal theory were freely entered into though the freedom was one to delight the metaphysician more than the laborer.

Mr. Brown also neglects a decision of the Supreme Court handed down in 1909 sustaining a state statute requiring mine operators to pay miners by "run of mine" weight rather than by weight after screening. [11] This put an end to the system by which miners received no pay for mining small pieces, although such small pieces had a market value to the mine-owners. The result was to raise the wages of the miners, provided the rate of payment remained unchanged. It left the parties free to contract as to the rate, but not as to the application of the rate to the coal mined. It indicated that the wage relation was not immune from legislative interference.

Other cases dealing with the wage relation are ones sustaining a statute forbidding the advance payment of wages to seamen, [12] prohibiting contracts to pay employees less often than semi-monthly, [13] and prohibiting the assignment of wages. [14] These cases all indicate the judicial recognition that the wage relation may be a matter of public concern, that it is

[10] Godcharles v. Wigeman, (1886) 113 Pa. St. 431, 6 Atl. 354.
[11] McLean v. Arkansas, (1908) 211 U. S. 539, 29 S. C. R. 206.
[12] Patterson v. Bark Eudora, (1903) 190 U. S. 169, 47 L. Ed. 1002, 23 S. C. R. 281.
[13] Erie Railroad Co. v. Williams, (1914) 233 U. S. 685, 34 S. C. R. 761.
[14] Mutual Loan Co. v. Martell, (1911) 222 U. S. 225, 32 S. C. R. 74.

a legitimate subject of legislative regulation and that the particular legislative regulation will be sustained if it is warranted by the public interest. They do not, it is true, involve judicial sanction of the particular public interest involved in the prescription of a minimum wage. But they utterly refute the notion that it is constitutionally impious for a legislature to interfere with the freedom of employer and employee to make whatever contract they may choose or be forced by necessity to make.

A word should be said about Mr. Brown's dismissal of cases sustaining minimum-wage statutes which apply only to public employment.[15] From the standpoint of the employers these have no bearing on the imposition of a minimum wage in private employment. But may they not cause the same suffering to the less efficient employee? Does not such raising of wages as resulted from the Adamson Law[16] have possibility of loss of employment for individual employees? Will not the roads curtail expenses as much as possible? If they cannot economize in rate of wages, will they not seek economy in the number on the pay-roll? Similar considerations may be urged with respect to legislation requiring expenditures for safety appliances, or increasing costs of production by abbreviating the hours of labor or eliminating the employment of children. Whenever a statute makes an employer expend money he might retain if left free to do as he chose, it spurs him to greater economy. And such economy may take the form of curtailing the number of his employees. The argument that minimum-wage legislation interferes with sacred rights of employees is of a piece with complaints that might have been directed against most if not all of the labor legislation that has received judicial sanction. Legislative compulsion always interferes with liberty. It usually imposes pecuniary loss on certain individuals. But such results do not make the legislation wanting in the requirements of due process, unless it cannot reasonably be believed that the

[15] Atkin v. Kansas, (1903) 191 U. S. 207, 48 L. Ed. 148, 24 S. C. R. 124. The statute involved in this case fixed the minimum at "the current rate of per diem wages in the locality where the work is performed."

[16] Sustained in Wilson v. New, (1917) 243 U. S. 332, 37 S. C. R. 298.

statute tends to promote a public welfare which outweighs any concomitant individual loss.

V

This, then, is the vital issue raised by the statutory minimum wage. What attention does Mr. Brown give to it? He says that

"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 comfortable living, makes the occupation in question 'affected with a public interest,' and, therefore, subject to the wage regulation in question."

What he means by saying that the occupation is affected with a public interest is not clear. The theory of the legislation is that there is a public interest in having those who give their whole strength to an employer receive enough from that employer to maintain that strength, that there is a public interest in having an industry support itself instead of relying on outside subsidies. Mr. Brown does not say that there is no such public interest. He says in effect that the promotion of such public interest by minimum-wage legislation will cause loss to individual employers and to individual employees. So it may. But individual loss results from the promotion of most if not all public interests. It results from war, from taxation, from discharges in bankruptcy, from exercises of the police power. The question is whether the public interest is sufficient to justify the individual loss. The individuals who suffer loss are part of the public. If they do not share in the public gain which accompanies their individual loss, they share in other public gains which depend for their attainment on the principle that they shall not be defeated by fear of attendant individual loss.

The only specific public interest to which Mr. Brown adverts is the claim that "the statutory minimum wage is a protection of the morals of women workers." "This sensational claim," he says, "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." Yes, if all women now underpaid shall as a result of the minimum-wage statute lose employment entirely.

But if the greater part of the women now receiving wages less than the cost of subsistence are raised to a standard which will support them, the number of those who must rely on outside subsidies will be greatly diminished. In so far then as immorality is fostered by the necessity of adding to wages some other source of income, the number of those who are in this predicament will be greatly diminished by the minimum wage. And those who receive no wage at all will form a special class for whom some special provision must be made.

What is true of the relation of the minimum wage to immorality is true also of the relation of the minimum wage to ill-health due to insufficient nourishment and improper living conditions. The purpose and result of minimum-wage legislation is to ensure that those who give a day's work receive a day's support in return. The purpose is a public purpose, because the evils which result from poverty and weakness and premature death are public evils.[17] They are the public evils that all our health laws seek to avert. They are the public evils that public charity seeks to avert. Men are compelled to pay money in taxes to prevent those evils. They must pay to provide food and lodging and medical care for those who stand in no relation to them except that of fellow citizens. There can be no dispute that the end sought by minimum-wage legislation is a legitimate public end. The only question is the appropriateness of the means.

The objection of the employer is in substance that he is not his brother's keeper. The statute says that he shall be his employee's keeper, that he shall not have his employee kept for him by others. It leaves him free to decide whether any person shall be his employee. He has a freedom which is not accorded to those who are taxed to support others who do not receive from private sources enough to support themselves. But if the employer chooses to take the daily labor

[17] Felix Frankfurter in his brief submitted to the Supreme Court in support of the Oregon minimum-wage statute calls the statute "a reasonable exercise of the state power to minimize danger of unfair or oppressive contracts." The cases cited in notes 9, 11, 12, and 13, supra, are instances of the judicial sanction of the legislative promotion of such purpose. So is anti-trust legislation and "blue-sky" legislation. In minimum-wage legislation, however, this public purpose seems ancillary to the public purpose of preventing the evils referred to in the text above, since such evils are the inevitable concomitants of such oppressive contracts.

of a woman he is compelled to pay that woman enough to make that labor possible. He pays only the cost of that from which he chooses to reap the benefits. He pays what the common law makes men pay in judgments in quasi-contract.[18] The obligation which the law imposes on him in respect to wages is similar to that which it imposes on him in respect to injuries arising in the course of employment. Under our modern workmen's compensation statutes[19] the employer pays for injuries to employees, not because his negligence has caused the injuries, but because the injuries were incident to the employment and the employer chose to make the contract that gave rise to the employment. Injuries are only a possible or likely incident of the employment. The support of the worker is a necessary and certain incident of the employment. It is a condition without which the employment cannot exist. The employer must pay for the fuel for his furnaces, as the farmer pays for fodder and shelter for his kine. But when a statute commands an employer to pay enough for clothing, food and shelter to those whose labor he uses in his factory, it is alleged to be a violation of the principles of our government. Yet by common law and by many approved statutes those who accept benefits are made to bear the attendant burdens.

The only employees who can complain of minimum-wage legislation are those whom the employer rejects. It must be recognized that a serious defect in minimum-wage legislation is the absence of specific provision for caring for the unemployables. But a statute is not invalid because it takes only the first step in dealing with a situation and leaves other steps to be adopted as experience shall advise.[20] "Constitutional law, like other mortal contrivances, must take some

[18] For a discussion of the extent to which what is really the imposition of absolute liability for reasons of public policy is attained through actions ex contractu and ex delicto, see Jeremiah Smith "Tort and Absolute Liability—Suggested Changes in Classification," 30 Harvard Law Review 241, 319, 409.

[19] Sustained by the Supreme Court in New York Central R. C. v. White, (1917) 243 U. S. 188, 37 S. C. R. 247; Hawkins v. Bleakly, (1917) 243 U. S. 210, 37 S. C. R. 255; and Mountain Timber Co. v. Washington, (1917) 243 U. S. 219, 37 S. C. R. 260.

[20] "But the federal constitution does not require that all state laws shall be perfect, nor that the entire field of proper legislation shall be covered by a single enactment," Mr. Justice Pitney, in Rosenthal v. New York, (1912) 226 U. S. 260, 33 S. C. R. 27.

chances," Mr. Justice Holmes has reminded us.[21] Minimum-wage statutes will tend to sort out the unemployables. They will remedy the evils due to the fact that industry is not now maintaining the employees whom it requires and must continue to require. Those whom industry does not require must be subjected to special treatment later.

This is not, however, all that may be said in answer to the objection of the employee who loses her chance to work because her employer will not retain her at the wage prescribed by the statute. She must be regarded not as an isolated individual but as a member of a class. The class of women workers as a whole will derive such benefits from the raising of their wages to the cost of subsistence, that the loss to the unemployables is overbalanced by the gain to those whom industry cannot dispense with. As a compulsory vaccination statute cannot be defeated because some will suffer from its enforcement, so a statute raising wages should not be defeated because some laborers will suffer from its enforcement. The class to which they belong will gain. Therefore there is no loss to the class to be weighed against the general public benefits which the statute will promote.

The immateriality of loss to individual employees from the operation of minimum-wage legislation would seem to be sufficiently established by the instances already given in which the courts have sustained legislation establishing standards of fitness, of rates of interest and of pay. Such loss is regrettable, but it does not make the statute unconstitutional. It is however to be hoped that the states which adopt minimum-wage legislation will soon add provisions for dealing with the needs of the unemployed and the unemployable. Such needs are of course provided for in a measure by our systems of public charity and by institutions for the care and training of defectives. To the extent to which public funds are released by the effect of minimum-wage statutes on those who remain in employment, the care of the unemployed will involve no increase of the tax burden. And to the extent to which the statutes operate to sift the defectives from the mass of workers, substantial aid will be given to the movement for

[21] Blinn v. Nelson, (1911) 222 U. S. 1, at p. 7, 32 S. C. R. 1.

mental hygiene which has already won recognition as an essential governmental function.

The economic wisdom or folly of minimum-wage legislation can of course be better demonstrated by experience than by theoretical argument. The judicial determination of such questions should not be based on fantastic or at best highly speculative predictions of dire results. And when the results are known, their appraisal will be in large part dependent upon views of social policy. Under the development of our constitutional system such questions of policy are passed upon by the courts. The considerations which influence the judicial decision of such questions are not always susceptible of easy determination.[22] It is apparent, however, that the courts are rapidly abandoning the general notions of individualism and of laissez faire which underlie the arguments of the opponents of minimum-wage legislation. Experience is demonstrating the superior wisdom of legislative prescription of social standards over the anarchic chaos of unfettered individual action.

Legislation compelling employers to pay a wage equal to the cost of subsistence differs in detail from other legislation

[22] See the discussion of this problem in the article by Mr. Kales cited in note 7. Mr. Kales suggests the following test for what is a proper exercise of the police power. "The legislative power is the legitimate means of correcting mistakes of persistent stupidity and shortsighted selfishness on the part of the managers. It is the legitimate means of compelling all to do that which the wiser are ready to do, but the more stupid and the more selfish are unwilling to attempt, and, therefore, not infrequently prevent action by any. The legislative power is the legitimate means of cutting down the rewards of successful management so that they are not out of all proportion to what the successful manager is willing to take." After enumerating some of the statutes which the Supreme Court has sustained, Mr. Kales adds: "All these acts in a degree interfere with the managers' freedom to manage according to their judgment and opportunity. All in a degree tend to substitute the legislative fiat for the will of the managers. They tend to some extent to undermine the managers' chances and motives for successful management. At the same time they tend to counteract the persistent stupidity and short-sightedness of the managers themselves. They tend to compel all alike to do what the more enlightened are willing to concede for the best interests of the business. They tend to compel that co-operation or common action by all the members of a group, which is desirable in the interests of the business itself as well as the general welfare, but which cannot be obtained without the compulsion of law, because some at least would never subscribe to the plan voluntarily."

In applying this test to minimum-wage legislation it seems moderate to say that any sensible manager of a business would choose to pay his employees enough to make them capable of efficient and continuous labor without dependence on other sources of support than their wages.

already sustained as constitutional. But the public ends to be gained by the statutory minimum wage are akin to, if not identical with, the public ends secured by legislation which has already successfully run the gauntlet of judicial consideration. The private detriment which minimum-wage statutes may cause is less serious and more easily justified than are the burdens imposed by statutes which have long been part of our system of legal regulation. A judicial declaration that minimum-wage legislation is a deprivation of property without due process of law would be inconsistent with the necessary implication of the group of decisions on similar statutes and with the social philosophy which those decisions exemplify.

THOMAS REED POWELL.

COLUMBIA UNIVERSITY.

ENGLISH AND GERMAN PRIZE COURTS AND PRIZE LAW

By reason of the failure of the nations to set up an international prize court,[1] the belligerent governments have found it necessary to continue the practice of employing municipal courts for the hearing and determination of prize cases. The organization and procedure of these courts differ materially in the several countries.[2]

According to the ancient practice in England, jurisdiction in all matters of prize was conferred upon the High Court of Admiralty by virtue of a special commission issued by the Crown under the great seal, at the outbreak of war.[3] The issuance of a special commission, however, did not affect in the slightest the legal character of the court as one of the regular tribunals of the country. By the Naval Prize Act of 1864,[4] the Court of Admiralty was constituted a permanent court of prize, independent of any commission issued under the great seal. A slight change was effected in the reorganization of the judicial system under the Supreme Court of Judicature Acts of 1873 and 1891.[5] The High Court of Justice was now substituted for the Court of Admiralty as a permanent prize court. In other words, the old Court of Admiralty was constituted a division of the High Court of Justice, with-

[1] The Hague Convention of 1907 made provision for the erection of an international prize court, but owing to the differences among the nations in regard to the constitution of the court and the law to be applied therein, the court has never been called into existence.

The Declaration of London, 1909, was an unsuccessful attempt to formulate a uniform body of rules for the international prize court. Stowell and Munro, International Cases, War and Neutrality, II, p. 488.

[2] For a general outline of the procedure of these courts, see Phillimore, International Law, III, pp. 658-74.

[3] A brief historical statement of the evolution of the English Prize Court may be found in the introductory remarks of the Attorney General, Sir John Simon, at the opening of the Prize Court in 1914. The Chile, (1914) 31 T. L. R. 3 (4), 1 Trehern, British and Colonial Prize Cases, 1.

[4] L. R. Statutes 27 & 28 Vict. Chap. 25.

[5] Anson, Law and Custom of the English Constitution, II, p. 424.

out in any way affecting its jurisdiction. From the High Court an appeal lay to the Judicial Committee of the Privy Council.[6]

This organization and procedure is of the greatest significance to neutrals, inasmuch as their chief protection against the arbitrary action of the political and naval officers of the belligerents depends upon the existence and maintenance of the judicial standing, traditions, and independence of the courts. If the prize courts are under the control of the executive department, the decisions of the courts are apt to reflect the policy of the government, rather than the principles of justice. In England, fortunately, the independence of the judiciary extends to international as well as civil and constitutional questions. It can scarcely be expected that a national court, no matter how high-minded its members may be, will be entirely indifferent in time of war to the interests of its own nation; but so far as possible English law has endeavored to guarantee to the neutral a fair and impartial consideration of his rights of person and property. In a word, the neutral is put upon the same footing with the citizen of the country and is entitled to appeal to the highest court of the empire for the vindication of his rights.

As a prize court is a national court, the question naturally arises: what law does it apply, municipal or international?[7] The decisions of the English courts upon this point are clear and emphatic. The commission of the ancient Court of Admiralty expressly provided that the court should "proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships and goods that are or shall be taken and to hear and determine according to the course of admiralty and the law of nations.[8] The report of the Royal Commission upon the Silesian claims in 1753[9] emphatically announced that:

[6] For the history and jurisdiction of the Judicial Committee of the Privy Council, see Anson, Law and Custom of the English Constitution, II. p. 442. The Judicial Committee is the final court of appeal for admiralty, ecclesiastical and colonial cases, and for such other matters as the Crown may choose to refer to it for hearing and consideration. The House of Lords is, with a few exceptions, the court of final jurisdiction in all other cases.

[7] For a detailed discussion of this question, see Picciotto, The Relation of International Law to the Law of England and the United States.

[8] The Chile, (1914) 31 T. L. R. 3, 1 Trehern 1.

[9] De Martens, Causes Célèbres, II, 97.

"All captures at sea as prize in time of war must be judged of in a court of admiralty according to the law of nations and particular treaties, where there are any. There never existed a case where a court, judging according to the laws of England only, took cognizance of prize. . . . It never was imagined that the property of a foreign subject taken as prize in the high seas could be affected by the laws peculiar to England."

In the case of *The Maria,* [10]Sir William Scott declared:

"The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality."

And in the subsequent case of *The Recovery,*[11] he reasserted the same fundamental principle:

"In the first place it is to be recollected this is a court of the law of nations, though sitting here under the authority of the king of Great Britain. It belongs to other nations as well as to our own, and what foreigners have a right to demand from it is the administration of the law of nations simply and exclusively from our own municipal jurisprudence."

Likewise, during the course of the Boer war, in the case of *West Rand Central Gold Mining Company v. The King,*[12] Lord Alverstone concurred in the general proposition that international law was a part of the law of England and as such would be recognized in all English courts:

"It is quite true that whatever has received the common assent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general can properly be called international law and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant."

The same principle has been enunciated by the prize courts during the present war. In *The Marie Glaeser,*[13] Sir Samuel Evans took occasion to pass upon this question incidentally in the course of a discussion of the legal character of the Declaration of Paris:

"This court accordingly ought to, and will, regard the Declaration of Paris not only in the light of rules binding in the conduct of war, but as a recognized and acknowledged part of

[10] (1799) 1 C. Rob. 340, 1 Roscoe, Prize Cases 152.
[11] (1807) 6 C. Rob. 341.
[12] [1905] 2 K. B. 391, 93 L. T. R. 207, 21 T. L. R. 562.
[13] [1914] P. 218 (233), 31 T. L. R. 8 (10), 1 Trehern 38 (55).

the law of nations, which alone is the law this court has to administer."

And in the case of *The Zamora,*[14] on appeal to the Judicial Committee of the Privy Council, Lord Parker laid down:

"The law which the prize court is to administer is not the national, or, as it is sometimes called, the municipal law, but the law of nations; in other words, international law. It is worth while dwelling for a moment on this distinction. Of course the prize court is a municipal court and its decrees and orders owe their validity to municipal law. The law which it enforces may, therefore, in a sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law is well defined. A court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign state which calls it into being. It need inquire only what that law is; but a court which administers international law must ascertain and give effect to a law which is not laid down by any particular state, but originates in practice and usage long observed by civilized nations in their relations towards each other, or in express international agreement."

But a further question arises. Suppose that the principles of international law should come into conflict with an Order in Council or an act of Parliament; which then would prevail? In other words, admitting that the courts will enforce the rules of international law as a general proposition, will they do so when those rules run counter to municipal ordinances or legislation? This question has been a thorn in the flesh for the English prize courts. As a general rule, they have endeavored to avoid the difficulty by denying an actual or possible conflict between the two, or by adopting a rule of construction which would reconcile the municipal act or ordinance with the principle of international law. In the case of *The Fox and others,*[15] Sir William Scott observed:

"These two propositions, that the court is bound to administer the law of nations and that it is bound to enforce the King's orders, are not at all inconsistent with each other, because these orders and instructions are presumed to conform themselves under the given circumstances to the principles of its unwritten law."

In this particular instance the court endeavored to get around the conflict by holding that the Orders in Council, con-

[14] [1916] 2 A. C. 77, 114 L. T. R. 626, 2 Trehern 1 (12).
[15] (1811) Edw. 311, 2 Roscoe, Prize Cases 61.

sidered as a retaliatory measure were in strict conformity with international law. This question was again raised in more acute form by the English Orders in Council at the outbreak of the present European war. It was impossible this time to evade the issue. In the case of *The Zamora,*[16] the Privy Council settled the matter by clearly recognizing the sovereign power of Parliament to set aside any rule of international law:[17]

"It cannot, of course, be disputed that a Prize Court, like any other court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by acts of the Imperial Legislature. It is none the less true that if the Imperial Legislature passed an act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would, in the field covered by such provisions, be deprived of its proper function as a Prize Court. Even if the provisions of the act were merely declaratory of the international law, the authority of the court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the act itself."

But Orders in Council stand upon a different legal basis, in the judgment of the Privy Council. From the fact that the prize courts are under a legal obligation to recognize the superior authority of acts of Parliament, it does not follow that they are bound by the administrative actions of the King in Council:

"The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by courts of law in this country is out of harmony with the principles of our constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the

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[16] See note 13, supra.

[17] In the original hearing before the Prize Court, Sir Samuel Evans recognized the binding force of Orders in Council, but at the same time added, "I am not called upon to declare what this Court would or ought to do in an extreme case, if an Order in Council directed something to be done which was clearly repugnant to and subversive of an acknowledged principle of the law of nations." [1916] P. 27 (47), 31 T. L. R. 513 (519), 1 Trehern 309 (331), 9 Am. J. Int. Law 1014.

statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in courts of common law or equity."

The same principle was clearly applicable in courts of prize. "The Attorney General," Lord Parker declared, "was unable to cite any case in which an Order in Council had as to matters of law been held to be binding on a court of prize." Under the terms of the Naval Prize Act of 1864, a limited power of making rules as to the practice or procedure of prize courts had been conferred upon the King in Council, but this grant "did not extend to prescribing or altering the law to be administered by the court, but merely to give such executive directions as might from time to time have been necessary." The conclusion, therefore, in *The Zamora case* [18] was that a British Order in Council authorizing the requisition of certain contraband articles, pending a decision of the prize court, was not binding upon the court. According to the express terms of its commission, the court was required to administer the rules of international law, and that requirement could not be waived by the court at the instance of the executive in the absence of express legislative authorization.

The decision in this case is significant, both from a constitutional and international standpoint, though its constitutional value is undoubtedly the greater. The Judicial Committee has reasserted the well-known constitutional principle of the rule of the ordinary law. [19] It has placed a salutary restriction upon the tendency of the executive to extend the ordinance making power in time of war. The rights of neutrals and citizens alike have been protected against arbitrary action on the part of the Crown. At the same time the court has unmistakably accepted the complementary principle of parliamentary sovereignty.[20] An act of Parliament is the supreme law in England. The neutral may appeal to the courts against any invasion of his rights by the Crown, but he has no legal protection against the arbitrary legislation of Parliament. In the latter eventuality he must look to his

[18] See note 13, supra.
[19] Dicey, Law of the Constitution, Chap. IV.
[20] Ibid. Chap. I.

own government to support his just claims by diplomatic representations, or, if necessary, by force. Parliament, it is true, as a deliberative body, is much less likely to encroach upon neutral rights than is an executive department, but this is small satisfaction to the neutral in case of an actual invasion of his rights.[21] He is not interested in the constitutional aspect of the question; the distinction between acts of Parliament and ordinances is of no concern to him. What he demands is the vindication of his rights as established by international law; but at present this right may be legally denied by act of Parliament and that denial will be upheld by the courts.

By the Prize Act of 1884[22] the constitution of the German prize courts is left to the determination of the Imperial Government. The organization thus provided is essentially different from that of the English courts. Preliminary proceedings are conducted before a prize board. There are two prize courts, located at the chief naval centers, Hamburg and Kiel. Each of the courts consists of five judges, of whom the president and one member are chosen from the legal profession. Of the remaining members one is a naval officer, and the other two are laymen representing the shipping and mercantile interests respectively. The Imperial Government is represented by a special commissioner. Cases are carried, on appeal, to the Supreme Court of Prize at Berlin. This court is made up of seven judges, three of whom are lawyers, one a naval officer, one a representative of the Ministry for Foreign Affairs, and the other two are lay judges.[23]

In this elaborate organization may be seen a typical example of a German administrative court. According to continental usage, courts are divided into two branches,—ordinary and administrative courts,—each with its own organization, jurisdiction, and principles of law. Private controversies are heard in the ordinary courts, but questions of a public nature, or those in any way affecting the bureaucracy, are reserved for the determination of the administrative courts.[24] The

[21] Scott. British Orders in Council and International Law. 10 Am. J. Int. Law 560.
[22] Huberich and King, German Prize Code, Introduction, p. xiv.
[23] Ibid. p. xvi.
[24] Dicey. Law of the Constitution, 315.

prize courts, as might be expected, belong to the system of administrative courts. One of the characteristic features of these courts is the important role which is played by the non-professional members. To the Anglo-Saxon jurist there is a strange incompatibility of functions in the presence of naval and political officers upon the bench. In theory, at least, the courts are free from governmental control, and in actual practice it must be admitted that they have manifested a marked degree of independence;[25] but war conditions are exceptional. National patriotic feeling runs high. The members of the prize court are put to the severest test of judicial impartiality. In such circumstances it would be surprising indeed if the bureaucratic traditions of the members did not reassert themselves. Some of the recent decisions[26] of the German prize courts tend to confirm this suspicion of strong national feeling. The Prussian official, rather than the international jurist has been in evidence.[27]

The procedure in the German prize courts is simple and exceptionally favorable to enemy interests. The owner of a ship or cargo and any other persons interested in the same have the right to appear as claimants, either in person or by attorney.[28]

"Alien enemies have the same right to appear or be represented as other persons. If no claim is interposed, the court proceeds to a determination of the case on the basis of the

[25] Ashley, Local and Central Government, 309.

[26] See notes, 39, 40, 41.

[27] A recent article by Dr. Joseph Kohler on The New Law of Nations brings out the bitterness of national feeling of one of the greatest international jurists. He denies the very possibility of a re-establishment of legal relations with the chief enemies of Germany. "An International Law based on international treaties can no longer be. International association can only lead to forms of law if the people are actuated by legal endeavors. Treaties with liars and falsifiers cannot form sources of law; only those peoples can co-operate in the development of law who have a living conscience." International law in his opinion can only be developed by German scholars through a rational conception of "an historical Law of Nature." "Of course International Law is not a conceptual science in the sense of a speculation wholly divorced from actualities which we wish to enthrone, but a science which draws its guiding principles from the observation of life and its rational culture-aims, forms them into conceptions, and out of the conceptions constructs the particulars of law. This is German science, for German science alone has been able to work in systematic fashion." Zeitschrift für Völkerrecht, September, 1915. Translated in 14 Mich. L. Rev. 631 (635).

[28] Huberich and King, German Prize Code, Introduction, p. xvi.

claims submitted by the Imperial commissioner. . . . Proceedings in all the courts are public."

The most striking feature of this procedure is the liberality of the treatment extended to alien enemies. According to German law, the mere outbreak of war does not entail a cessation of all legal or commercial relations. Neither does an alien enemy lose his standing in a German court. It has even been held that a member of the armed forces of the enemy can proceed with the prosecution of his claims as in time of peace. Some express action on the part of the executive or legislative departments is required to deprive the alien of his privileged status.

The liberality of this procedure stands out in marked contrast to the narrow tenet of the English courts. By common law an alien enemy was practically an outlaw.[29] Even though domiciled in England, he could not sue unless protected by some act of public authority that discharged him from the character of an enemy and put him within the King's peace pro hac vice.[30] So severe, indeed, was the rule, that in the case of ransom contracts the alien enemy was not permitted to sue in his own name, but payment was enforced by an action brought by the imprisoned hostage, or his relatives, in his own home court for the recovery of his freedom.[31] In the case of *The Troija*,[32] during the Crimean war, Dr. Lushington laid down the same hard and fast principle of the common law:

"I entertain no doubt as to the correct practice in such cases: it is that when an alien enemy claims, he must show a persona standi in judicio, the law being that an alien enemy is not entitled in any way to sue in this or any other court."

But the severity of the common law has been gradually relaxed in the interests of international commerce and good faith. As early as the seventeenth century it was held that a license to an alien enemy to reside in England conferred

[29] In Sylvester's Case, (1701) 7 Mod. 150, the court held: "If an alien enemy come into England without the Queen's protection, he shall be seized and imprisoned by the law of England and he shall have no advantage of the law of England nor for any wrong done to him here."

[30] The Hoop, (1799) 1 C. Rob. 196. 1 Roscoe, Prize Cases 104.

[31] Ibid. The Charming Nancy, (1761) Marsden's Adm. Cases 398.

[32] (1854) 1 Spinks E. & A. 342.

upon such alien the rights and status of an alien friend.[33] This concession has been extended during the present war to cover all aliens who have duly registered under the Aliens' Registration Act.[34] but the common law courts have refused to remove the disability in the case of alien enemies resident abroad.[35] The prize court, on the other hand, has been much more broad-minded in its treatment of the claims of alien enemies. In the case of *The Moewe*,[36] soon after the outbreak of war, Sir Samuel Evans frankly admitted the necessity of relaxing the ancient procedure of the court regarding aliens in order to bring English practice more nearly into line with the more liberal principles laid down by the prize courts of the United States, Japan, and Russia during the course of the Spanish-American and Russo-Japanese wars:

"I will now consider whether the owners of an enemy vessel have a right, or should be given the right, to appear to put forward a claim under the conventions, assuming, as was done during the argument, that they are operative. Dealing with the Hague Conventions as a whole, the court is faced with the problem of deciding whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise. Mr. Holland argued that this is a matter not of international law, but of the practice of this court. That view is correct. I think that this court has the inherent power of regulating and prescribing its own practice, unless fettered by enactment. Lord Stowell from time to time made rules of practice, and his power to do so was not questioned. Moreover, by Order XLV of the Prize Court Rules, 1914, it is laid down that in all cases not provided for by those rules the practice of the late High Court of Admiralty of England in prize proceedings should be followed, or such other practice as the president may direct. The rules do not provide for the case now arising. I therefore assume that as president of this court I can give directions as to the practice in such cases as that with which the court is now dealing.

"The practice should conform to sound ideas of what is fair and just. A merchant who is a citizen of an enemy country would not unnaturally expect that when the state

[33] Wells v. Williams, (1698) 1 Ld. Raymond 282, 1 Salk. 46.
[34] Princess of Thurn and Taxis v. Moffit, (1914) 112 L. T. R. 114.
[35] Porter v. Freudenberg, [1915] 1 K. B. 857, 112 L. T. R. 313, 31 T. L. R. 162.
[36] [1915] P. 1, 31 T. L. R. 46, 9 Am. J. Int. Law 547.

to which he belongs, and other states with which it may unhappily be at war, have bound themselves by formal and solemn conventions dealing with a state of war like those formulated at the Hague in 1907, he should have the benefit of the provisions of such international compacts. He might equally naturally expect that he would be heard in cases where his property or interests were affected as to the effect and results of such compacts upon his individual position. It is to be remembered also that in the international commerce of our day the ramifications of the shipping business are manifold; and others concerned, like underwriters or insurers, would feel a greater sense of fairness and security if, through an owner (though he be an enemy), the case for a seized or captured vessel were permitted to be independently placed before the court.

"From the considerations to which I have adverted, I deem it fitting, pursuant to powers which I think the court possesses, to direct that the practice of the court shall be that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant, and to argue his claim before this court. The grounds of his claim would be stated in the affidavit before appearance which is required to be filed by Order III, Rule 5, of the Prize Court Rules, 1914."

But even this concession falls far short of the liberality of the German law in this respect. The arbitrary procedure of the old common law, it must be admitted, is an anachronism in this day and generation. An alien enemy is no longer considered an outlaw. Both custom and convention have guaranteed to him certain immunities for his property captured on the high seas. A like immunity should be extended to him in the courts of the belligerent country.

"It is doubtful," says Mr. Norman Bentwick,[37] "whether the old common law rule excluding alien enemies from sueing in the King's courts during the war might not be completely abrogated in our day without any injury to the public weal. The change would require legislation, but it is submitted that legislation with this aim would bring our law into more complete accord with the progressive ideas of international law. There may be circumstances under which the denial of the right of action involves loss of property, and the spirit of the modern law of war is that proprietary rights of enemies in the belligerent country are to be preserved during the war. What the interests of the belligerent state demand is

[37] Bentwick, Treatment of Alien Enemies, 9 Am. J. Int. Law 642.

that no wealth should be sent to any person in the enemy territory, and it would therefore be necessary to require any sum awarded by judgment to an alien enemy to be paid into court. But it would be possible to secure this condition while leaving the courts open in war as in peace to do justice between all persons who have rights to assert or defend."

The liberality of German procedure in respect to alien enemies is, however, more than offset by the attitude of the German prize courts towards the principles of international law. According to recent decisions, the primary function of the prize court is to enforce the laws and ordinances of the empire in respect to the conduct of naval operations. The prize courts look to their own government for legal guidance and not to the principles of international law.[38] In short, the courts are not only administrative courts, but they also apply administrative law. In the case of *The Batavia V.*,[39] the prize court at Hamburg lays down:

"A part of the claimants have in the oral proceedings given expression to the view that prize courts have to apply international, not national, law and especially not the contents of the German Prize Ordinance of September 13, 1909, since this does not have the character of a rule of law.

"This is not the case.

"The prize courts are national courts. They are established by their state to determine whether the legal standards to which the naval organs should adhere according to their instructions are observed or not, and to declare their conclusions thereon. From their purpose it follows that they have to judge according to the law established by their state, whether or not it agrees with the principles of international law. Whether this is the case is not the affair of prize courts to judge, but of the belligerent states, which alone are answerable therefor, to other states. The principle sustained by statements of the older literature, that prize courts have to apply international law even if it does not agree with their national law is then thrown out on fundamental principles. . . . They (prize courts) would also be unable practically to carry such principles into operation, for the content of so-called principles of international law is in many cases uncertain and not determined. So far as this is not the case, they might have lost their applicability as a consequence of the relations of the belliger-

[38] Wright, Destruction of Neutral Property on Enemy Vessels, 11 Am. J. Int. Law 362.

[39] Preisengericht Hamburg, June 1, 1915, Dutch Orange Book, Oct. 1, 1915, p. 106.

ents or through the alteration of their actual provisions. It cannot be expected, for instance, of a belligerent party, whose opponent has broken an international agreement although it was concluded expressly for the event of war, to hold to it and to prescribe a further observance of it to his prize courts. And it needs no proof that certain principles previously valid as customary international law may become obsolete through the development of new forms of naval procedure, such as the submarine."

The law which the courts must apply is, then, municipal law as set forth in the Imperial Prize Ordinance of September 13, 1909.

"It is not true," the court continues, "that this is exclusively an instruction for the naval commanders. The introduction ('I approved the following prize ordinance and decree...') and especially a part of its contents which can relate not to the acts of commanders, but only to those of prize courts, as that concerning the guarantee of compensation, (Articles 8, 121, paragraph 3) and that concerning condemnation, (Articles 17, 41, 42) prove the contrary."

The same principle is affirmed by the Supreme Prize Court at Berlin in the case of *The Elida*:[40]

"The prize regulations contain the principles laid down by the Kaiser as commander-in-chief within his imperial jurisdiction for the practice of prize law pertaining to naval warfare and are, therefore, primarily law not only for the navy but also for the inland authorities, particularly prize courts in so far as they have to pass upon the legality of the action of commanders at sea falling within the prize law.

"International law only lays down rights and duties as between different states. The prize courts, when judging of the legality of prize actions, can take general international principles only into account when the prize regulations contain no instructions and, therefore, tacitly refer to the principles of international law. Therefore, the question whether an instruction of the prize regulations agrees with general international law is not for the prize court to decide. If a contradiction in this connection is asserted, the point in controversy is to be settled in another manner."

The same doctrine has been maintained in subsequent cases,[41] with some slight modifications. According to these decisions, the German prize courts accept the supremacy of an

[40] Oberpreisengericht Berlin, May 18, 1915, 9 Zeitschrift für Völkerrecht 109, 10 Am. J. Int. Law 916.

[41] The Glitra, (1915) 10 Am. J. Int. Law 921; The Maria, (1915) ibid. 927; The Indian Prince, (1916) ibid. 930.

imperial ordinance without question. The principles of international law only come in for secondary consideration, in case the imperial government fails to lay down a rule covering the particular matter. In short, a rescript of the Kaiser or the Bundesrath is more authoritative than all the rules of international law. The prize courts do not consider themselves, as in England, an independent and co-ordinating branch of the government. They are but humble agents for the execution of the national law. They are not the guardians of neutral rights, but the champions of German interest. Under such conditions, neutral rights exist only by sufferance. In a word, international law has likewise been reduced to a mere "scrap of paper" and in this case not by the armies of Germany, but by the courts.[42] Should such a doctrine prevail, the German prize courts may become a more dangerous foe of world-wide liberty than the lawless submarine or the faithful legions of Von Hindenburg. The courts, in truth, would lend their legal sanction to those acts which an imperial chancellor could only defend on the ground of national necessity.

Against this condition of international lawlessness the world must present a united protest. The national prize courts have failed to afford adequate protection to neutral interests or the just claims of the hostile belligerents. Some means must be found of restricting both the national sovereignty of Parliament and the despotic authority of the Kaiser in international relations. Here is a question of world organization; it affects all nations alike. The tenets of national sovereignty must be qualified in the interests of world peace and justice. The principles of international law must be more clearly and firmly established, and henceforth these principles must have an international sanction and interpretation. The erection of an international court of prize was a feeble recognition of the need for an impartial world tribunal. Unfortunately, the court has only existed on paper. The nations should see to it that a real and effective international tribunal is called into existence to which neutrals and belligerents can appeal with equal confidence of a fair and dispassionate hearing. When that day comes we may look forward to the gradual development of a

[42] Reeves, The New Law of Nations, (Foreword) 14 Mich. L. Rev. 631.

uniform body of international prize law in place of the conflicting decisions and discriminatory practice of the existing national courts. [43]

C. D. ALLIN,

UNIVERSITY OF MINNESOTA.

[43] Scott, British Orders in Council and International Law, 10 Am. J. Int. Law 568.

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THE LAW SCHOOL. The registration in the Law School is 130, as compared with 217 for the corresponding period last year, showing a loss of forty per cent. A rather larger decrease in numbers had been expected in view of the fact that seventy-two of the students in attendance last year are known to have entered the military or some other branch of government service.

Professors Morgan and Lorenzen resigned at the end of the last session to go to the Yale Law Faculty, though Professor Morgan, in a major's uniform, is now in command of a desk in the office of the Judge Advocate General at Washington. Professor Thurston is now a major in the Judge Ad-

vocate General's office at Washington, having been granted leave of absence from the University. Professor Everett Fraser, Dean of the Law Faculty of the George Washington University, has been called to take charge of Professor Lorenzen's courses. Professor Morgan's work in Practice and the course in Contracts have been entrusted to Mr. Wilbur H. Cherry, while Professor Thurston's course in Equity has been given to Mr. Abbott L. Fletcher. Professor Thurston's other subjects are being carried by other members of the faculty, with especial assistance from Judge Dibell of the Supreme Court of Minnesota, and Mr. W. M. Jerome of the Minneapolis bar. Professor C. D. Allin, transferred to the Law Faculty from the Department of Political Science, will teach classes in Carriers, Domestic Relations, Administrative Law and International Law. He will continue to give the Public Law courses offered by the Department of Political Science. Mr. Leigh C. Boss has been appointed Instructor in Practice, in charge of the Legal Aid Bureau, in place of Mr. Z. L. Begin, resigned to enlist in the army.

STUDENT EDITORIAL BOARD OF 1916-17. Of last year's student editorial board only Dwight Williams and John M. Regan are registered this session. Mr. Regan, enlisted in the Aviation Corps, is awaiting his call to service. Charles M. Dale is in the Coast Artillery Officers' Training Camp at Fort Monroe. R. C. Alley, H. J. Acton, Wendell T. Burns, M. L. Countryman Jr., Neil C. Head, and L. A. Wilson are now second lieutenants in the Officers' Reserve Corps. Kenneth V. Riley and Claire I. Weikert, first lieutenants, unassigned, are "somewhere in France." Joseph D. Sullivan is in the Quartermaster's Department with the rank of second lieutenant. Leslie H. Morse and Willard A. Doerr have just been commissioned as first lieutenants. H. C. Costello is at Camp Dodge. A. L. Gausewitz is employed in the law office of John F. Bernhagen, Minneapolis. H. W. Davis is in the Federal Land Bank of St. Paul.

ASSIGNABILITY OF FUTURE BOOK ACCOUNTS.—One of the best known maxims of the common law is, "A man cannot grant or charge that which he hath not." The principle being that a man cannot transfer property that he does not possess and to

which he has no title. However, the doctrine was laid down very early in the case of *Grantham v. Hawley*,[1] that future crops of specified land, the future wool to be clipped from specified sheep, to which the seller has title, could be transferred at law, because the seller has potential possession. The result of this doctrine, obviously based on a fiction, is not only that the legal title to the future property passes to the buyer as soon as the goods come into existence, but that this title is regarded as relating back to the time of the agreement.[2] This doctrine seems to have been rarely applied to sales in England, and is apparently discarded by the English Sales of Goods Act of 1893,[3] which provides in Section 5 (3), that "where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods." The English Sales of Goods Act does not purport to cover mortgages, so that the doctrine of potential possession can still be applied to mortgages in England, except in so far as it has been limited by the Bills of Sales Act.[4]

The courts in this country generally profess to follow *Grantham v. Hawley*, but they have a tendency to regard the transfer of future property as creating an equitable right and not a legal right.[5] Minnesota[6] holds that a contract of sale of a future crop does not pass any title, because something remains to be done by the seller to put the goods in a deliverable condition, but in regard to mortgages, that it does pass an equitable title[7] good against creditors and purchasers with only constructive notice. The question as to sales is now settled by the adoption of the Uniform Sales Act.[8] In the United States the doctrine is not carried to the full extent of allowing the owner of land and parent animals to mortgage

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[1] (1616) Hobart 132. Williston, Cases on Sales. p. 1.
[2] Williston, Transfers of After-Acquired Personal Property. 19 Harv. L. Rev. 558.
[3] L. R. Statutes. 56 and 57 Vict., Chap. 71.
[4] L. R. Statutes. 41 and 42 Vict. Chap. 31; 45 and 46 Vict. Chap. 152.
[5] Williston, Transfers of After-Acquired Personal Property. 19 Harv. L. Rev. 559.
[6] Welter v. Hill, (1896) 65 Minn. 273, 68 N. W. 26.
[7] Hogan v. Atlantic Elevator Co., (1896) 66 Minn. 344, 69 N. W. 1.
[8] Minn. Laws, 1917, Chap. 465.

the crops or young for any great time in advance,[9] and is sometimes so limited by statute.[10]

Apart from the doctrine of potential possession, the case of *Holroyd v. Marshall*[11] laid down the rule that a mortgage of tangible chattels subsequently to be acquired gives the mortgagee an equitable lien on the property as soon as it is acquired, good against all except purchasers for value without notice. The English Bills of Sales Act limited the doctrine to certain classes of future property, such as debentures, trades fixtures and shares of stock. The doctrine of *Holroyd v. Marshall* may be regarded as the majority American doctrine.[12] Massachusetts and a minority[13] hold that a mortgage of after-acquired property is ineffectual as against creditors unless there is some further act of appropriation by the parties after the goods come into existence. Wisconsin[14] goes further and holds that a mortgage of future goods gives no lien equitable or otherwise by force of the mortgage.

The doctrine of *Holroyd v. Marshall* has also been extended to choses in action[15] and it would logically seem more applicable to them, since an assignment of a future chose in action is nothing more than a power of attorney to collect future debts,[16] and on the ground of public policy it is difficult to see any distinction, for if it is not against public policy to assign future chattels, there seems to be no reason why a different rule should be applied to choses in action. Wherever it is reasonably practicable, it is desirable that the same rules

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[9] Williston, Transfers of After-Acquired Property. 19 Harv. L. Rev. 559.

[10] Minn. G. S. 1913, Sec. 6980.

[11] (1861) 10 H. of L. Cases 191.

[12] Pennock v. Coe, (1859) 23 How. U. S. 117, 16 L. Ed. 436; Gregg v. Sanford, (1860) 24 Ill. 17, 76 Am. Dec. 719; Leland v. Collver, (1876) 34 Mich. 418; Ludlum v. Rothschild, (1889) 41 Minn. 218, 43 N. W. 137; 19 L. R. A. (N. S.) 911; McCaffery v. Woodin, (1875) 65 N. Y. 459, 22 Am. Rep. 644. See Jones, Chattel Mortgages, 4th ed, Sec. 173, p. 203.

[13] Moody v. Wright, (1847) 13 Metc. (Mass.) 17, 46 Am. Dec. 706. See Williston, Transfers of After-Acquired Personal Property, 19 Harv. L. Rev. 575.

[14] Case v. Fish, (1883) 58 Wis. 56, 15 N. W. 808.

[15] Tailby v. Official Receiver, (1888) L. R. 13 App. Cases 523; Burdon, etc., Ref'g Co. v. Ferris, etc., Mfg. Co., (1897) 167 U. S. 127, 42 L. Ed. 105, 17 S. C. R. 754; Williamson v. N. J., etc., R. Co., (1875) 26 N. J. Eq. 398. See Williston, Transfer of After-Acquired Personal Property. 19 Harv. L. Rev. 562.

[16] Williston, Transfer of After-Acquired Personal Property. 19 Harv. L. Rev. 563.

of law should be applied to similar classes of facts, and exceptions that have their foundation more upon appearances than upon substance should not be multiplied. Though it is true in the majority of cases that the courts that follow *Holroyd v. Marshall* in regard to future chattels also apply the same rules to choses in action, yet a few,[17] including Minnesota[18] hold that in the case of future choses in action, the mortgagee or assignee must take possession to make his title good, and Minnesota further requires that such possession must be taken with the consent of the mortgagor or assignor or by the intervention of the court.

The question of the assignability of future choses in action has arisen not infrequently by attempts to mortgage future book accounts. In England the most important case on this phase of the subject is the case of *Tailby v. Official Receiver*,[19] decided by the House of Lords in 1888. This case laid down the rule that a mortgage of future book accounts, though not limited to the accounts of a particular business, passed an equitable interest to all book debts thereafter created. While the Bills of Sales Acts of 1878 limits the mortgaging of future chattels, yet it expressly excludes choses in action[20] from its operation. So, a mortgage of future book accounts is still valid in England.

In the United States the question has been raised several times. One of the earliest cases came up in Alabama in 1851,[21] and the principle was laid down, that while an assignment of future book accounts might give the assignee an equitable title as against the assignor, yet it would be of no force against a creditor without notice. The same court followed the same rule in 1860,[22] even though the accounts were specified. Finally, in 1868,[23] the court laid down the rule and followed it in

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[17] Miss., etc., Ry. Co. v. The United States Express Co., (1876) 81 Ill. 534; N. Y., etc., Co. v. Saratoga, etc., Co., (1899) 159 N. Y. 137, 53 N. E. 758, 45 L. R. A. 132.

[18] De Graff v. Thompson, (1878) 24 Minn. 452. Such possession being the assumption of control by the mortgagee of the subject matter, in this case, the railroad, or of the choses in action already reduced into possession by the mortgagor, in this case, the income.

[19] (1888) L. R. 13 App. Cases 523.

[20] L. R. Stat. 41 & 42 Vict. Chap. 31, Sec. 4.

[21] Stewart v. Kirkland, (1851) 19 Ala. 162.

[22] Purcell's Adm'r v. Mather, (1860) 35 Ala. 570, 76 Am. Dec. 307.

[23] Skipper v. Stokes, (1868) 42 Ala, 255, 94 Am. Dec. 646.

1915[24] that book accounts to be acquired in the future are not subject to assignment. In 1907,[25] the circuit court of appeals for the sixth circuit applying the law of Michigan, held that a parol assignment of future book accounts created a valid lien good against a trustee in bankruptcy. Massachusetts[26] in a recent case held directly contra. It is interesting to note in the above cases that while Michigan[27] and Alabama[28] both follow *Holroyd v. Marshall* in regard to future chattels, they reach entirely different results in regard to future book accounts. The question frequently has been raised in the Northwest by attempts to mortgage future accounts of threshing machines. Iowa[29] implied that while such a mortgage might be valid, yet the one in question was void for lack of definiteness. The North Dakota[30] court has said that such a mortgage may be valid, but the one in question was void as to a creditor without notice who relied upon the debtor's supposed ownership of machine and earnings. South Dakota[31] holds that if the mortgage is sufficiently definite, it is valid as against creditors. In 1900,[32] the Minnesota court questioned but did not determine the validity of such mortgage. In 1908,[33] the court held that such a mortgage was void, at least, against creditors without notice.

While it would be bad public policy to allow a man to bargain away all that he has or ever will have, yet there seems to be no good reason to question the propriety of the equitable relief given by the courts in regard to assignments of future property, the expectancy of which is based upon an existing contract or potential possession with proper limitations. However, in regard to future chattels and future choses in action

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[24] Clanton Bank v. Robinson, (1915) 195 Ala. 194, 70 So. 270.
[25] Union Trust Co. v. Bulkeley, (1907) 150 Fed. 510.
[26] Taylor v. Barton-Child Co., (Mass. 1917) 117 N. E. 43.
[27] Leland v. Collver, (1876) 34 Mich. 418.
[28] Cox v. Birmingham Drygoods Co., (1899) 125 Ala. 320, 28 So. 456, 82 Am. St. Rep. 238.
[29] Sandwich Mfg. Co. v. Robinson, (1891) 83 Iowa 567, 49 N. W. 1031, 14 L. R. A. 126.
[30] Sykes v. Hannawalt, (1895) 5 N. D. 335, 65 N. W. 682.
[31] Flanders v. French, (1906) 20 S. D. 316, 106 N. W. 54. See also Mpls. Threshing Machine Co. v. Skau, (1898) 10 S. D. 636, 75 N. W. 199.
[32] Baylor v. Butterfass, (1900) 82 Minn. 21, 84 N. W. 640, 20 L. R. A. (N. S.) 506.
[33] Dyer v. Schneider, (1908) 106 Minn. 271, 118 N. W. 1011, 20 L. R. A. (N. S.) 506.

that are outside of the two above named classes, the expectancy seems to be too vague, uncertain and indefinite to be the subject of transfer. Further, the whole spirit of our law seems to be that a man should not be allowed to create encumbrances more or less secret upon property of which he is to come into possession in the future as ostensible owner in absolute right. Such expectancies also seem to be a doubtful basis of credit; for instance, while there might be some need of allowing a merchant to mortgage his stock in trade, yet it hardly would be necessary to allow him also to mortgage the book accounts which the sale of those goods will bring into existence. Assignments of choses in action have the added difficulty that apparently they are not covered by the registry statutes. But, if it were not for the more serious objections above mentioned, this latter difficulty might be remedied by suitable legislation.

CONTRACTS TO FARM ON SHARES.—The general nature of the relationship created by cropping contracts or leases long has been the subject of litigation; and the courts differ widely as to whether an agreement to cultivate land for a share of the crop calls for the application of the rules of master and servant, whether it is to be regarded as a joint "adventure" in the nature of a partnership, or whether it operates as a lease of the premises concerned. The test, of course, is the intention of the parties, and the instrument is to be read as a whole;[1] but the application has not everywhere led to the same result. Consequently in Pennsylvania and Vermont it has been held that the parties were master and servant, that a mere contract of hire was contemplated, and that the servant had no estate in the land or title to the crop.[2] It makes no difference that the word "lease" is used if it is not in accord with the tenor of the agreement.[3] Georgia has a statute to this effect.[4]. Yet

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[1] Strangeway v. Eisenman, (1897) 68 Minn. 395, 71 N. W. 617.

[2] Adams v. McKesson, (1866) 53 Pa. St. 81, 91 Am. Dec. 183; Warner v. Hoisington, (1869) 42 Vt. 94.

[3] Ferris v. Hoaglan, (1899) 121 Ala. 240, 25 So. 834.

[4] Ga. Code 1911 Sec. 3707. "Where one is employed to work for part of the crop, the relation of landlord and tenant does not arise. The title to the crop, subject to the interest of the cropper therein, and the possession of the land remain in the owner."

a mere servant may be a tenant in common of the crop.[5] In Wisconsin, the court said that the agreement partakes somewhat of the nature of a joint adventure entitling the parties to a chance in the profits derivable therefrom.[6] The idea that it is purely a lease, is accepted in Texas; the landlord's share is treated as rent, and, in the absence of a stipulation to the contrary, he has no title to the crop until after division.[7] In other cases it is held whether the relation of landlord and tenant be held to exist or not, the owner of the land is a tenant in common of the growing crop.[8] In a recent North Dakota case, holding that the relation was that of landlord and tenant,[9] it was found necessary to overrule an earlier decision on the same sort of facts which had held the contract to be one of hiring.[10] The reversal was made in order to give the occupier, as tenant in common, a mortgageable interest in the crop. Yet in other states it had been held that a mere cropper could have that interest.[11] Thus, whichever party has the legal possession of the land, he can give the other a title to the future crops. Without going into the question of titles to future acquired property, it is apparent that, in either case, tenancy in common in the crops must rest on something besides the rules of landlord and tenant or those of master and servant; and when the applicability of one or the other of these sets of rules is in question the matter must be settled independently of tenancy in common of the crop.

Although it was early held in Minnesota that the parties were tenants in common of the crops, the supreme court was reluctant to say whether the general nature of the contract was

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[5] Wheeler v. Sanitary District of Chicago, (1915) 270 Ill. 461, 110 N. E. 605.

[6] James v. James, (1912) 151 Wis. 78, 137 N. W. 1094; Lanyon v. Woodward, (1882) 55 Wis. 652, 13 N. W. 863.

Where a laborer, hired by the party managing the farm, sued the owner of the farm for wages, on the ground that he was a partner, and the contract contained the words "leased, demised, and let," the court, finding it a lease, held that where it is not inherently impossible that the share in the crop be received as compensation for the use of the land and not as partnership profits, then the intention of the parties should govern. Wagner v. Buttles, (1913) 151 Wis. 668, 139 N. W. 425.

[7] Trinity, etc., Ry. Co. v. Doke, (Tex. Civ. App. 1913) 152 S. W. 1174.

[8] Moulton v. Robinson, (1853) 27 N. H. 550; Fuhrman v. Interior Warehouse Co., (1911) 64 Wash. 159, 116 Pac. 666.

[9] Minneapolis Iron Store Co. v. Branum, (N. D. 1917) 162 N. W. 543.

[10] Angell v. Egger, (1897) 6 N. D. 391, 71 N. W. 547.

[11] Lauderdale v. Flippo, (Ala. 1917) 75 So. 323.

one of hiring or leasing; the court often referred to the instrument as a "lease or contract" or "agreement," and it was generally understood that no tenancy in the land was created.[12] For a long time *Porter v. Chandler*[13] was the only decision that shed much light on the precise point. That case held that the cropper was only a servant and not a part owner of the wheat.

In *Strong v. Colter*[14] the court had refused to entertain an action grounded in trespass de bonis by the occupant against the agent of the landowner; and in *Schmitt v. Cassilius*[15] an injunction issued restraining the cropper from converting the grain, and a receiver was appointed to divide it according to the agreement of the parties. In both cases it was said that the parties were tenants in common of the crop; but the decision might well have proceeded on the ground that the landowner retained all the property rights. The question of the occupant's right came up fairly in *Strangeway v. Eisenman*,[16] where it was held that, as against the landowner, the farmer, as tenant in common of the crop, has a right to the possession of it in order to finish his work of threshing. The landowner's property right is also protected, and he may sue for the conversion of, or replevy, his portion of the grain.[17] But an agreement reserving title in the landowner until after division of the produce is no more than a chattel mortgage given as security against the other party's default, which must be recorded as such if it is to take priority.[18] It is not going far to find that the purpose of such a reservation of title is for security only; but the question seems to be whether there is some inherent quality in the nature of the agreement which creates this joint ownership of the crops. Independently of the relation of landlord and tenant, it would seem from the way that the farmer's interest is safeguarded that the landowner's

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[12] Dunnell, Minn. Digest Sec. 5484.

[13] (1880) 27 Minn. 301, 7 N. W. 142, 38 Am. Rep. 293.

[14] (1868) 13 Minn. 82 (77).

[15] (1883) 31 Minn. 7, 16 N. W. 453.

[16] (1897) 68 Minn. 395, 71 N. W. 617. See also Graves v. Walter, (1904) 93 Minn. 307, 101 N. W. 297; Northness v. Hillestad, (1902) 87 Minn. 304, 91 N. W. 1112.

[17] Avery v. Stewart, (1898) 75 Minn. 106, 77 N. W. 560, 78 N. W. 244; Johnson v. Stone, (1910) 111 Minn. 228, 126 N. W. 720.

[18] Anderson v. Liston, (1897) 69 Minn. 82, 72 N. W. 52; McNeal v. Rider, (1900) 79 Minn. 153, 81 N. W. 830, 79 Am. St. Rep. 437; Agne v. Skewis-Moen Co., (1906) 98 Minn. 32, 107 N. W. 415.

title to the crops likewise would be protected, and that a reservation of title in the former would not exclude the tenancy in common of the latter; but once the court has been forced to determine which party has legal possession of the land, it is doubtful whether the doctrine of tenancy in common of the crops would be so sacred as to limit a reservation of title in that person.

In the early cases the court appears to doubt whether an estate in the land is granted under the agreement to farm on shares. Collins, J., in *McNeal v. Rider*,[19] dissenting from the decision that the cropper had a mortgagable interest in the crop, was of the opinion that he was a mere servant and not a tenant. But in the majority opinion in the same case, it is pointed out that the words "hires and employs" were used in the contract in *Porter v. Chandler,* supra, and that case is thus explained. The question as to the nature of the contract was before the court in *State ex rel. Gillilian v. Municipal Court.*[20] There the contract was styled a "lease," prohibited "subletting," contemplated transfer of "possession," and provided that the owner could "enter" on certain conditions; it also reserved title in the crops to the landowner until after division thereof. The question arose under Minn. G. S. 1913, Sec. 7667, which provides a stay of proceedings, pending an appeal on bond, except in an action on a lease against a tenant holding over after the expiration of his term. The occupant, wishing to delay restitution, claimed that his contract made him a servant; but the court held that the contract was a lease and that the defendant was a tenant.

Three classes may be suggested for grouping the contracts involved in these cases: (1) a leasing, legal possession of the land and title to the crops being in the tenant, the landlord's share of the crop being rent, and consequently, until division, the landlord's interest, if any, being purely a chattel mortgage; (2) a hiring, possession of the land and title to the crops being in the landowner, the cropper, until division, having no more rights than the vendee of unascertained goods under an executory contract of sale; (3) a joint adventure, in which there is neither lease nor hiring, but which results in a tenancy in

[19] (1900) 79 Minn. 153, 79 N. W. 153, 81 N. W. 830, 79 Am. St. Rep. 437.
[20] (1913) 123 Minn. 377, 143 N. W. 978.

common of the crop. Classes one and two are clear cut and distinct; and the solution of a case falling within either is not difficult by reason of the definite sets of rules applicable. But the third class suggested is not so definite. The result is stated; that is, that there is a tenancy in common of the crop; but the courts have not shown by means of what principles they have reached that result. If the result springs from a joint legal possession of the land, the court has not said what right the farmer has in the land. Where the instrument covers the whole of the land and does not attempt to convey a fractional part only of the title, it is a strenuous rule of construction that would create a tenancy in common of the land. *Lanyon v. Woodward*,[21] the leading Wisconsin case on "joint adventure," does not mention the relation of the parties in regard to the land. If it be said that one party acquires title by means of a sale of future goods by the other who has legal possession of the land, then the third class of cases is lost in the first and second, for it assumes either a leasing or hiring. But this can not explain the Minnesota cases, for a sale of future crops is not executed simply by force of the contract, in that jurisdiction.[22] And even if the doctrine of sales of future goods be taken as the explanation of tenancy in common of the crop, the enactment of the sales act would destroy this effect of the contract hereafter.

However, the earlier cases in which the landlord's rights in the crop were protected may be harmonized with the holding in *Gillilian v. Municipal Court*, supra, on the ground that, in each one of those cases, the landlord had a chattel mortgage in the form of a reservation of title.[23] But in the same cases, the court said that the landlord was a tenant in common of the crop regardless of the reservation of the whole title, and that the reservation was merely additional security for advances made

[21] (1882) 55 Wis. 652, 13 N. W. 863.

[22] Walter v. Hill, (1896) 65 Minn. 273, 68 N. W. 26.

[23] Anderson v. Liston, (1897) 69 Minn. 82, 72 N. W. 52; Prouty v. Barlow, (1898) 74 Minn. 130, 76 N. W. 746; Avery v. Stewart, (1898) 75 Minn. 106, 77 N. W. 560; Agne v. Skewis-Moen Co., (1906) 98 Minn. 32, 107 N. W. 415; Johnson v. Stone, (1910) 111 Minn. 228, 126 N. W. 720.

Between the years 1887 and 1905 a mortgage of crops for rent for more than one year in advance was void by statute, for it was not within the exception "for purchase price." Ward v. Rippe, (1904) 93 Minn. 96, 100 N. W. 386. In G. S. 1905 Sec. 3475, G. S. 1913 Sec. 6980, the words "or rent" were put into the exception. But the cases considered above between 1887 and 1905 were contracts for one year only.

to or defaults by the tenant. Disregarding, for the moment, the reservation of title, if the tenant were to give, as security, an undivided half interest in the crop, it would create a tenancy in common as far as the title is concerned,[24] for a chattel mortgage passes title in Minnesota.[25] A mortgage of this sort, where no express transfer of title is made, but which will be regarded in equity as a chattel mortgage, was found in *Merrill v. Ressler*,[26] where the lessee of a store agreed that the lessor should have a "lien" on the stock of goods. The "lien" was worthless as such because it was neither a statutory one nor was it coupled with possession. To operate as a mortgage, there must be an interest greater than a lien and none such was expressly passed. The court said:

"A chattel mortgage is a transfer of the title as security. But so strongly are the courts inclined to so construe the agreements of the parties as to make them effectual, that no formal words of transfer, and no particular form of instrument are required to make an instrument operate as a mortgage."

It is possible that such an interest as this creates the tenancy in common of which the court speaks. It is not so difficult to see the tenant mortgaging a portion of his crop in this way as it is to see him parting with it completely. If this view be taken the result would be that the landlord must record his contract if he is to have priority even as to the portion of the crop which he is to receive. At first glance, *McNeal v. Rider*[27] appears to controvert this. There the mortgagee of the tenant, though taking priority on account of the failure to record the contract with the reservation of title, was limited on recovery to the tenant's share. But the mortgage to the third person in that case purported to cover only the tenant's share. As the law stands now there is no case in which the landowner's rights were protected other than those cases in which he held a chattel mortgage in the form of a reservation of the whole title. The tenancy in common in the crops has not been defined, nor is there anything in the Minnesota cases inconsistent with the idea that it operates as a chattel mortgage securing to the landlord his share of the crop.

[24] Melin v. Reynolds, (1884) 32 Minn. 52, 19 N. W. 81.
[25] Merrill v. Ressler, (1887) 37 Minn. 82, 33 N. W. 117, 5 Am. St. Rep. 822; Dunnell, Minn. Digest Sec. 1424.
[26] (1887) 37 Minn. 82, 33 N. W. 117, 5 Am. St. Rep. 822.
[27] (1900) 79 Minn. 153, 81 N. W. 830, 79 Am. St. Rep. 437.

RELATION BETWEEN THE WORKMEN'S COMPENSATION AND FEDERAL EMPLOYERS' LIABILITY ACTS.—Prior to the enactment of the Federal Employers' Liability Act of April 22, 1908,[1] the various states under the police power could legislate in respect to the liability of employers engaged in interstate commerce.[2] Congress had not up to that time acted on the matter. It is of course settled that under the commerce clause of the constitution Congress may regulate the obligations of common carriers and the rights of their employees arising out of injuries sustained by the latter where they both are engaged in interstate commerce; and it is also settled that when Congress acts upon the subject all state laws covering the same field are automatically superseded by virtue of the supremacy of the national authority.[3]

The Federal Employers' Liability Act provides, in substance, that railroads engaged in interstate commerce shall be liable in damages for their negligence resulting in injury or death of employees while so engaged. Recovery therefore under this act is predicated entirely upon negligence being shown on the part of the carrier. This leaves uncovered the broad field of accidents which occur to employees through no fault or negligence of the employer, and for this reason some of our state courts have taken jurisdiction of such cases and allowed the injured employee to recover under the state workmen's compensation acts.[4] If, when the Federal Employers' Liability Act was passed, Congress manifested an intention to cover the entire field of accidents, such a result is absolutely wrong, but if Congress intended only to cover that field of accidents caused by negligence of the employer, the view taken by the states would be correct.[5]

Previous to May of this year four states had passed upon the matter, New York and New Jersey holding that the Federal

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[1] 35 U. S. Stat. at L. 65, 8 U. S. Comp. 1916, Secs. 8657-65.

[2] Cooley v. Board of Wardens, (1851) 12 How. (U. S.) 299, 13 L. Ed. 996; Welton v. Missouri, (1875) 91 U. S. 275, 23 L. Ed. 347; Northern Pac. R. Co. v. Washington, (1912) 222 U. S. 370, 32 S. C. R. 160.

[3] Second Employers' Liability Cases, (1912) 223 U. S. 1, 32 S. C. R. 169; Seaboard Air Line Ry. v. Horton, (1914) 233 U. S. 492, 34 S. C. R. 635, 58 L. Ed. 1062, L. R. A. 1915C 1.

[4] Matter of Winfield v. N. Y., etc., R. Co., (1915) 216 N. Y. 284, 110 N. E. 614; Winifield v. Edie R. Co., (1916) 88 N. J. L. 619, 96 Atl. 394.

[5] New York, etc., R. Co. v. Winfield, (1917) 244 U. S. 147, 61 L. Ed. 1045, 37 S. C. R. 546.

Employers' Liability Act "relates only to injuries resulting from negligence;"[6] California and Illinois holding "that it has a broader scope and makes negligence a test,—not of the applicability of the act, but of the carrier's duty or obligation to respond pecuniarily for the injury."[7] In May the Supreme Court of the United States reversed the New York decision, holding that Congress had manifested an intention to cover the entire field, and that therefore the Federal Employers' Liability Act was paramount to any state legislation.[8] The court said that the act was mainly for the purpose of obtaining uniform legislation pertaining to the liability of the railroads, and that Congress purposely stipulated that recovery could be had only where negligence was shown on the part of the employer. Although Congress made no mention of the great field of accidents arising through no negligence of the employer, the court seemed to feel that the silence of Congress expressed their intention just as much as did their direct provisions covering the accidents caused by the employers' negligence. Two justices dissented in an elaborate opinion.[9]

Upon going into the origin of the Federal Employers' Liability Act it will be noted, that it was in a sense emergency legislation, passed primarily to standardize equipment by the Safety Appliance Acts; and to bring about a uniform set of laws governing the liability of common carriers engaged in interstate commerce, with a view to doing away with various defenses which made it practically impossible to recover from an employer for an injury. "This act modified the rigor of the common law defenses, abrogating the common law defenses of the 'fellow-servant rule,' introducing the doctrine of 'comparative negligence' and abolishing the common law defense of 'assumed risk' in certain cases,"[10] thus increasing by over 20 per cent the chances of recovery for injured workmen engaged in interstate commerce.[11]

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[6] See note 4, supra.

[7] Smith v. Industrial Accident Commission, (1915) 26 Cal. App. 560, 147 Pac. 600; Staley v. Illinois, etc., R. Co., (1915) 268 Ill. 356, 109 N. E. 342, L. R. A. 1916A 450.

[8] See note 5, supra.

[9] Justices Brandeis and Clark.

[10] 25 Yale Law Jour. 548. See also dissenting opinion of Brandeis, J., 37 S. C. R. 546 (549).

[11] See Boyd, Economic and Legal Basis of Compulsory Industrial Insurance for Workmen, 10 Michigan Law Rev. 345.

The scope of the act is narrowed down so as to cover only those employees engaged in interstate commerce, who are injured through the negligence of the employers, leaving out the fifty or more per cent that are injured through the natural hazard or risk of the occupation.[12] The dissenting justices were of the opinion that being so narrow, and having been emergency legislation, Congress could not have intended to deny to the states the power to provide compensation or relief for injuries not covered by it. They also seized upon the fact that the purpose of the act was mainly to promote common justice by removing various defects in the common law method of giving compensation to injured employees, which would indicate no intention on the part of Congress to deny to the states the right to legislate on this subject.

Under the common law very few injured workmen recovered compensation of any sort, thus placing a tremendous burden on the community.[13] This led to the passage of the Workmen's Compensation Laws, New York being the first state to adopt such a law in 1910.[14] In all states where such laws have now been enacted the principle underlying them is the same. They are based primarily on the idea of insurance, the employers generally paying the premiums by a tax-levying process. These laws therefore came into being for economic reasons. When Congress passed the Federal Employers' Liability Act these economic reasons were not generally recognized, and therefore the purpose and reasons for the passage of these acts were radically different. As Justice Brandeis points out, the state is the one vitally concerned in an injured workman, as upon it falls the heavier burden of providing for him, and it would therefore seem to be going very far to impute to Congress the will to deny the state the right to provide for its workmen merely because they were engaged in interstate commerce.

The reason this matter has not come up more often is because some of the states, Minnesota included, have expressly stipulated in their Compensation Acts that all employees of interstate carriers injured while engaged in interstate com-

[12] See note 11, supra.
[13] See note 11, supra.
[14] New York Workmen's Compensation Act as amended (N. Y. Laws 1913), Chap. 816; Laws 1914, Chaps. 41, 316).

merce be exempt from the operation of the state law.[15] Such states would be only indirectly affected by this controversy. A very troublesome question arises upon attempting to determine when an employee is engaged in interstate commerce, and the Supreme Court has gone very far in holding that almost any conceivable connection with interstate carriers will bring the employee within the laws applicable to such commerce.[16] Therefore the vast majority of all railroad employees in the various states would come under the laws and regulations pertaining to interstate commerce.[17] Inasmuch as about 25 per cent of injured workmen can recover under the Federal Employers' Liability Act,[18] it can readily be seen that the non-recovery of the balance places a tremendous economic burden on the individual state, with a corresponding loss of morale among its citizens. Modern state legislation tends to do away with this economic loss by dividing the burden among the employers.

The number of carriers engaged in purely intrastate commerce is very small. Under the doctrine of *New York, etc., R. Co. v. Winfield*[19] only this small per cent would be subject to the state workmen's compensation acts. The great majority, engaged as they are, in interstate commerce, operating in the same territory as the intrastate corporations, would in no way pay a proportionate share of the economic loss of the state except in cases where negligence could be shown on the part of the employer. It can readily be seen, therefore, that this decision of the Supreme Court creates a controversy which can only be settled by appropriate Federal legislation.[20] It is sub-

[15] Minn. G. S. 1913, Sec. 8202.

[16] Pennsylvania Co. v. Donat, (1915) 239 U. S. 50, 36 S. C. R. 4. See Berry, What Employees are within the Federal Employers' Liability Act, 84 Central Law Jour. 248.

[17] It is interesting to note that the "number of cases on the October 1915, term of the Supreme Court, was 1,069. Of these 93 involved one or more questions arising under the Federal Employers' Liability Act of April 22, 1908. Of these 93 cases, 37 presented the question whether or not the employee was engaged in interstate commerce or intrastate commerce. In 52 of the cases the question was presented whether there was evidence of negligence on the part of the defendant. In 24 of the cases the question was also presented whether or not the employee had assumed the risk." See New York, etc., R. Co. v. Winfield, (1917) 244 U. S. 147, 61 L. Ed. 1045, 37 S. C. R. 546.

[18] See note 11, supra.

[19] (1917) 244 U. S. 147, 61 L. Ed. 1045, 37 S. C. R. 546.

[20] "The experience of the organization, (Brotherhood of Locomotive Firemen and Enginemen) shows that more than 60 per cent of all deaths

mitted that Congress ought either to amend the Federal Employers' Liability Act so as in some manner to do away with this economic waste, or repeal the Act altogether, thereby leaving to the states the whole subject of indemnity or compensation for employees, whether engaged in interstate or intrastate commerce, and whether such injuries arise from negligence or without fault of the employer.

RECENT CASES

ASSIGNMENTS—FUTURE BOOK ACCOUNTS—ASSIGNABILITY.—The assignor of the plaintiff lent to the defendant $5,000.00 and received defendant's promissory notes therefor. As security for the loan the defendant also executed an instrument purporting to assign to the assignor of the plaintiff, all the present and future book accounts of the defendant. Some of the notes are due and remain unpaid. Plaintiff now brings suit to enforce his rights under the assignment. Defendant goes into bankruptcy, and his trustee in bankruptcy is defending the action. *Held*, the assignment of book accounts to come into existence in the future cannot be enforced. *Taylor v. Barton-Child Co.*, (Mass. 1917) 117 N. E. 43.

For a discussion of the principles of this case, see NOTES, p. 38.

BANKRUPTCY—TRUSTEES—MORTGAGES—RENTS.—A trustee in bankruptcy took possession of real estate incumbered by several mortgages and retained possession and collected rents between the adjudication and the foreclosure of the prior mortgages. The proceeds from the foreclosure sale were insufficient to discharge the last mortgage. *Held*, that the mortgagee can require the application of the rents in liquidation of his mortgage, and such rents cannot be claimed by the mortgagor on the theory that they were collected by the trustee as the mortgagor's representative. *In re Donner & Smith*, (D. C. N. J. 1917) 243 Fed. 984.

As between the mortgagor and the mortgagee, the principal case holds that the mortgagor is entitled to the rents and profits so long as he is in possession, and until the mortgagee takes possession upon showing that the mortgage security is insufficient to pay his indebtedness. The reason given is that possession of the premises, either by the mortgagor or the mortgagee draws to it the right to receive the rents, and ownership of the equity of redemption entitles the owner to the rents and profits. Assuming then that the right to rents is dependent upon possession, the question arises as to who is entitled to the rents when the mortgagor is

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and disabilities are caused by railroad accidents. W. S. Carter, Sen. Doc. 549, p. 137, 64th Cong. 1st. Sess." See New York, etc., R. Co. v. Winfield, (1917) 244 U. S. 147, 61 L. Ed. 1045, 37 S. C. R. 546.

out and his assignee in bankruptcy is in actual possession. It was held in the case of *In re Hasie*, (1913) 206 Fed. 789, 30 A. B. R. 83, that such a trustee in bankruptcy succeeds to all the rights of the bankrupt mortgagor and is thus entitled to the rents and profits until the mortgagee asserts his right of entry and forecloses his lien. This conclusion seems to be based on the great protection which the courts give to the mortgagor in possession as against the mortgagee. The mortgagee is not entitled to rents until he takes actual possession. *Teal v. Walker*, (1884) 111 U. S. 242, 4 S. C. R. 420, 28 L. Ed. 415. Similarly it has been held that where a mortgage of a railroad includes the income, the mortgagor cannot be required to account to the mortgagee for the earnings while the property remains in his possession. *Dow v. Memphis, etc., R. Co.*, (1888) 124 U. S. 652, 8 S. C. R. 673, 31 L. Ed. 572. Even an agreement by the mortgagor to collect the rents and pay them on the mortgage debt does not give the mortgagee title to those uncollected, nor does the mortgagor become the agent of the mortgagee to collect them, according to the case of *In re Dole*, (1901) 110 Fed. 926, 7 A. B. R. 21. The Minnesota court, in the case of *Cullen v. Minnesota Loan & Trust Co.*, 60 Minn. 6, 61 N. W. 818, held that where the mortgage gives a power of attorney to the mortgagee to collect rents in default of payments and apply them to the payment of such sums as may be then due under the terms of the mortgage bond, such power cannot be given the effect of pledging the rents to the payment of either the principal or interest of the bonds. The New York court lays down the rule that it is only where the mortgagee has commenced suit, taken possession, or has demanded and has been refused possession that he is entitled to rents as against the mortgagor. *Argall v. Pitts*, (1879) 78 N. Y. 239; see also *Dow v. Memphis, etc., R. Co.*, supra. So also persons claiming under the mortgagor are entitled to the rents, as it is the land only that is pledged. *Kountze v. Omaha Hotel Co.*, (1882) 107 U. S. 378, 27 L. Ed. 609, 2 S. C. R. 911. The right of the mortgagor to collect rents up to the time of entry or foreclosure inheres in the trustee in bankruptcy according to the rule laid down in the Federal Courts. *In re Chase*, (1904) 133 Fed. 79, 13 A. B. R. 294; *In re Foster*, (1872) 6 Ben. (U. S. D. C.) 268, 9 Fed. Cas. 523, 10 N. B. R. 523; *Foster v. Rhodes*, (1874) 9 Fed. Cas. 573, 10 N. B. R. 523. Brandenburg, Bankruptcy, 4th ed., Sec. 846, quoting from *In re Cass*, (1901) 6 A. B. R. 721, says: "The rents and profits that arose from the bankrupt estate after bankruptcy, and were collected by the trustee, belong to the general estate, and not to the mortgagee, notwithstanding the mortgagee's security is insufficient, the mortgage itself not pledging them by its terms and no proceedings having been taken to sequestrate them, as by obtaining the appointment of a receiver before bankruptcy, or by direct application to the bankruptcy court afterward." The mortgagee must act. He must foreclose or enter, but until he does, the mortgagor, even after the debt is due may collect the rents for himself. *St. Louis Nat'l Bank v. Field*, (1900) 156 Mo. 306, 56 S. W. 1095.

A different conclusion has been reached in some cases as to the right of the assignee to rents and profits, but on different grounds than posses-

sion. Thus, it was held that the rent so partakes of the nature of land that the assignee holds it as trustee of the mortgagee rather than for the general creditors. *Hutchinson, assignee v. Straub,* (1897) 16 Ohio Cir. Ct. 452, 9 O. C. D. 171. Again it was held that rents belong to the lien creditors who have become the virtual owners. *In re Torcia,* (1911) 188 Fed. 207, 110 C. C. A. 248. Another view was taken by the Pennsylvania court, holding that rents of land not being the product of business but the product of the land itself, should be applied to those liens which would be entitled to the proceeds of the land if sold. *Wolf's Appeal,* (1884) 106 Pa. St. 545; and so the assignee held in trust for the benefit of creditors of the assignor according to their legal and equitable rights, in *Bausman's & Herr's Appeal,* (1879) 90 Pa. St. 178. A mortgagee of realty whose mortgage exceeded the value of the property, was held to be equitably entitled to have the rents and profits applied by the trustee to the payment of interest on the mortgage. *In re Industrial Cold Storage & Ice. Co.,* (1908) 163 Fed. 390, 20 A. B. R. 914. Regardless of the result reached by this class of decisions, as compared to that arrived at by the former, it is clear that the grounds of the latter are varied and seem more concerned with ownership, substantial, virtual or equitable.

As stated, the case under consideration places the right to rents and profits, as between mortgagor and mortgagee, on ground of possession, but as between mortgagee and assignee in bankruptcy of the mortgagor, the case follows *Hutchinson v. Straub,* supra, *In re Industrial Cold Storage & Ice Co.,* supra, and *In re Torcia,* supra, stating that "The question depends upon the nature of the interest of the mortgagee in the premises in such circumstances."

BANKS AND BANKING—NATIONAL BANKS AS TRUSTEES, ETC.—CONSTITUTIONAL LAW.—The Federal Reserve Act, Dec. 23, 1913, Sec. 11-K, conferring on national banks power to act as trustee, executor, administrator, or registrar of stocks and bonds, when authorized by the Federal Reserve Board, has been *held* constitutional. *First National Bank v. Fellows,* (1917) 37 S. C. R. 734, *reversing* the same case, (Mich.) 159 N. W. 335. This is an interesting illustration of an implied power superimposed upon another implied power, since the authority to create a bank at all is an implication.

For a discussion see 1 MINNESOTA LAW REVIEW 232, 274.

COMMERCE—CONFLICTING STATE AND FEDERAL LEGISLATION—FEDERAL EMPLOYERS' LIABILITY ACT—STATE WORKMEN'S COMPENSATION ACT.—The plaintiff was working as section hand on one of the defendant's railroad lines, which was engaged in interstate commerce. Plaintiff received an injury in the course of his employment, not caused by any fault or negligence on the part of the defendant. The plaintiff tries to recover under the New York state Workmen's Compensation Act, which allows recovery without showing negligence on the part of the employer. The plaintiff prevailed in the state courts of New York. Upon appeal by the defendant to the Supreme Court of the United States, it was *held* that the Federal Employers' Liability Act, Comp. Statutes of 1916, Sec. 8657-8665, was

exclusive, and no recovery could be had under the state laws for injuries incurred while engaged in interstate commerce. *New York, etc., R. Co., v. Winfield,* (1917) 244 U. S. 147, 61 L. Ed. 1045, 37 S. C. R. 546.

For a discussion of this case, see NOTES, p. 49.

CONSTITUTIONAL LAW — POLICE POWER — PROHIBITING EMPLOYMENT AGENCIES.—The people of Washington, by Initiative Measure No. 8, Washington Laws 1915, Chap. 1, had provided that employment agencies should be prohibited, under penalty of criminal prosecution, from charging a fee for securing employment for patrons. Plaintiff, representing such an agency, brought a bill in equity to enjoin the district attorney from enforcing the provisions of the act, claiming that his property was being taken without due process of law in violation of the fourteenth amendment. The act was sustained by the supreme court of the state and by the lower federal court. On appeal to the United States Supreme Court, it was *held,* that the measure is unconstitutional as not a legitimate exercise of the police power. *Adams v. Tanner,* (1917) 244 U. S. 590, 61 L. Ed. 1336, 37 S. C. R. 662.

It is well settled that the state, in the absence of constitutional restrictions, has the power of unlimited taxation of persons, property and occupations. *License Tax Cases,* (1866) 5 Wall. (U. S.) 462, 18 L. Ed. 497; *Nathan v. State of Louisiana,* (1850) 8 How. (U. S.) 73, 12 L. Ed. 992. Occupation taxes are not a violation of the rule that taxes must be uniform. *Youngblood v. Sexton,* (1875) 32 Mich. 406, 20 Am. Rep. 654. Occupations have been held not subject to license under the police power where no element of the public welfare, health or morals is involved. *Bessette v. People,* (1901) 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558, (horseshoer); *State v. Ashbrook,* (1900) 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 Am. St. Rep. 765, (department stores); *Joseph v. Randolph,* (1882) 71 Ala. 499, 46 Am. St. Rep. 347, (emigrant agent). This latter case was overruled in *Kendrick v. State,* (1904) 142 Ala. 43, 39 So. 203. That an emigrant agent is under the police power was held in *State v. Hunt,* (1901) 129 N. C. 686, 40 S. E. 216, 85 Am. St. Rep. 758. As early as 1890 the question of the constitutionality of an ordinance of the city council of Minneapolis which licensed employment agencies was passed on. The Minnesota court held that a business of such a nature, coming in contact with such a class of people, and having in it the inherent possibilities of vice, was a proper subject of control. *Moore v. City of Minneapolis,* (1890) 43 Minn. 418, 45 N. W. 719. In accord, *People ex rel. Armstrong v. Warden N. Y. City Prison,* (1905) 183 N. Y. 223, 76 N. E. 11, 2 L. R. A. (N. S.) 859; *Price v. People,* (1901) 193 Ill. 114, 61 N. E. 844, 55 L. R. A. 588, 86 Am. St. Rep. 306, overruled by *Mathews v. People,* (1903) 202 Ill. 389, 67 N. E. 28, 63 L. R. A. 73, 95 Am. St. Rep. 241, on the ground that the statute involved contained discriminating provisions. But where there has been an attempt to prohibit a calling, trade, or employment under the guise of the power of license, when such avocation was not injurious to public morals, offensive to the senses, nor dangerous to public health and safety, the legislation has been held unconstitutional as an improper and excessive application of the police power. *In re Quong Woo,*

(1882) 13 Fed. 229, 7 Sawy. (U. S. C. C.) 526. Nor can the fixing of the compensation which an employment agency can demand of employees be sustained as an exercise of the police power. *Ex Parte Dickey,* (1904) 144 Cal. 234, 77 Pac. 924, 1 Ann. Cas. 428, 66 L. R. A. 928, 103 Am. St. Rep. 82. In the principal case the court imputes to the people of Washington an intention to prohibit the employment agencies from existing, by cutting off their source of revenue. This they cannot do under the police power. Under the power of taxation the same result might be and has been accomplished in particular instances, but the courts say that an intention to prohibit a particular business cannot properly be imputed from the amount of tax payable. *Williams v. Fears,* (1900) 179 U. S. 275, 21 S. C. R. 130, 45 L. Ed. 186; *Sperry & Hutchinson Company v. Blue,* (1912) 202 Fed. 82, 120 C. C. A. 354. Advocates of the Washington act hold that it does not take away the right of the employment agencies to carry on business, but merely compels them to secure their fees from the employers instead of from the employees. *Wiseman v. Tanner,* (1914) 221 Fed. 694; *State v. Rossman,* (Wash. 1916) 161 Pac. 349, L. R. A. 1917B, 1276. These two decisions are upon the theory advanced by Justice Brandeis in his dissenting opinion in the principal case, that the business of the employment agency is of such a nature and capable of so much harm to a class of people who need the protection of the government, that it comes within the police power of the state.

CONSTITUTIONAL LAW—RACE SEGREGATION ORDINANCE.—Defendant contracted to purchase of plaintiff a certain lot in the city of Louisville upon condition that he might use it as a residence, the contract to be of no effect if he should be restrained from so using it by any law of the state of Kentucky or the city of Louisville. Plaintiff sought specific performance of the contract, and defendant sets up as a defense that an ordinance of the city of Louisville prohibits him, a colored man, from establishing a residence on the lot in question, which is in a block more than half of the residents of which are white. The ordinance in question forbids colored persons from establishing a residence in a block more than half the residents of which are white, with like provisions against whites gaining residences in colored blocks. Plaintiff maintains that the ordinance is unconstitutional, and that he is therefore entitled to specific performance. *Held,* that the ordinance is an interference with and a restriction of the right to acquire and dispose of property, and a violation of the fourteenth amendment to the constitution of the United States. *Buchanan* v. *Warley,* (U. S. Supreme Court, Nov. 5, 1917).

Where there have been attempts to control social rights by so-called "Jim Crow" statutes and ordinances, they have pretty generally been upheld as constitutional. For example, acts forbidding intermarriages of the colored and white races, a matter which was held not to come under the protection of the fourteenth amendment, but left solely to the control of state legislation. *State v. Gibson,* (1871) 36 Ind. 389, 10 Am. Rep. 42; *Ex parte Kinney,* (1879) 3 Hughes (U. S. C. C.) 9, 3 Va. Law J. 370, 14 Fed. Cas. 602. It has been held not to be repugnant to the fourteenth amend-

ment to require separate cars for colored persons. *Plessy v. Ferguson,* (1896) 163 U. S. 537, 41 L. Ed. 256, 16 S. C. R. 1138; *McCabe v. Atchison, etc., Ry. Co.,* (1911) 186 Fed. 966, 109 C. C. A. 110, affirmed without argument by United States Supreme Court, (1914) 235 U. S. 151, 59 L. Ed. 169, 35 S. C. R. 69. But the accommodations offered the two races must be similar. *McCabe v. Atchison, etc., Ry. Co.,* supra. Or prohibiting the members of different races from attending the same public school. *Berea College v. Commonwealth of Kentucky,* (1906) 123 Ky. 209, 94 S. W. 623, 29 Ky. Law Rep. 284, 124 Am. St. Rep. 344, affirmed in 211 U. S. 45, 29 S. C. R. 33. It is equality and not identity of privileges which is guaranteed to all citizens of the United States by the constitution in the fourteenth amendment. *Lehew et al. v. Brummel et al.,* (1890) 103 Mo. 546, 15 S. W. 765, 11 L. R. A. 828, 23 Am. St. Rep. 895. Where there has been an attempt to restrict the civil rights of the negro, as to deprive him of the right to serve on a jury, it has been held unconstitutional because it deprives him of equality of privileges. *Strauder v. West Virginia,* (1879) 100 U. S. 303, 25 L. Ed. 644; *The Commonwealth v. Johnson,* (1880) 78 Ky. 509, 1 Ky. Law Rep. 108. Because it has proved to be detrimental to the adjoining property where a member of one of the races goes into a community inhabited by members of the other race, there has been an attempt made to segregate the races in the larger cities of the South. Such an attempt was made in Maryland in 1913 but proved to be unsuccessful because it affected property rights already vested. *State v. Gurry,* (1913) 121 Md. 534, 88 Atl. 228, 47 L. R. A. (N. S.) 1087. Georgia held a similar statute unconstitutional. *Cary v. City of Atlanta,* (1915) 143 Ga. 192, 84 S. E. 456. Another ordinance was passed with an additional provision that any property rights vested at the time should not be affected, basing it upon the statute involved in the principal case, which had been held constitutional by Kentucky in *Harris v. Louisville,* (1915) 165 Ky. 559, 177 S. W. 472. This ordinance was upheld by the Georgia court. *Hardin v. The City of Atlanta,* (Ga. 1917) 93 S. E. 401. Those provisions of a similar segregation ordinance, which were not retroactive, were upheld in *Hopkins v. Richmond,* (1915) 117 Va. 692, 86 S. E. 139. The North Carolina supreme court adopted a similar view to that of the Supreme Court in the principal case, saying that such an ordinance did not tend toward the better government of a town and hence is not within the police power. *State v. Darnell,* (1914) 166 N. C. 300, 81 S. E. 338, 51 L. R. A. (N. S.) 332. The United States Supreme Court admits that there is a serious problem involved, but denies that its solution can be promoted by depriving citizens of their constitutional rights and privileges.

CONTRACTS—RIGHT OF BENEFICIARY TO SUE—MUNICIPAL CORPORATIONS.—Contract was entered into between the mayor of the city of Auburn and a gas company, stipulating the rates to be charged to consumers. The contract specifically provided that the consumers were to be entitled to all rights and privileges under the contract as if they were parties. *Held,* that a consumer may enjoin the removal of meters and the cutting off of supply by the company which attempted such action after refusing to be

bound by the schedule of the contract. *Wackenhut v. Empire Gas & Electric Co.*, (1917) 166 N. Y. Supp. 29.

The broad principle of contracts here involved is the right of a beneficiary, a stranger to the promise and to the consideration, to sue on a contract made for his benefit. As a general rule, a contract cannot confer rights on a person who is not a party to it. *Baxter v. Camp*, (1898) 71 Conn. 245, 41 Atl. 803, 42 L. R. A. 514, 71 Am. St. Rep. 169, and note. In England, it is settled that a third party cannot sue upon a promise made for his benefit, where he is a stranger both to the promise and to the consideration. *Tweddle v. Atkinson*, (1861) 1 B. & S. 393, 30 L. J. Q. B. 265. The one apparent exception recognized by the English courts is that of the third party who has a beneficial right as cestui que trust under the contract. *Lloyd's v. Harper*, (1880) L. R. 16 Ch. Div. 290, 50 L. J. Ch. 140, 1 Eng. Rul. Cas. 686. Insurance cases are covered by the Married Women's Property Act, 45 & 46 Vict., Chap. 75, Sec. 11, under which a husband, wife or child, named as beneficiary in a policy, may have the proceeds of the policy, though they may not sue for them directly. The English rule has been adopted in a number of American jurisdictions. *Wheeler v. Stewart*, (1892) 94 Mich. 445, 54 N. W. 172; *Exchange Bank v. Rice*, (1871) 107 Mass. 37, 9 Am. Rep. 1.

Broadly stated, the American rule is to the effect that a third party has a right of action upon a promise made for his benefit, though he is a stranger both to the promise and to the consideration. *Lawrence v. Fox*, (1859) 20 N. Y. 268. The rule has been variously stated as resting on trust relationship; equitable right of subrogation; privity of contract by substitution; or, the broad equity of the transaction. 6 R. C. L. 885, 71 Am. St. Rep., note at pages 187-189. The generally accepted basis seems to be that of *Lawrence v. Fox*, supra, that the law operates on the act of the parties so as to create the duty, establish the privity, and imply the promise and obligation sued upon. *Thorp v. Keokuk Coal Co.*, (1872) 48 N. Y. 253, adopts the rule stated and holds that the third party may adopt the contract and be brought into privity. The privity doctrine has been reaffirmed in *Vrooman v. Turner*, (1877) 69 N. Y. 280, 25 Am. Rep. 195, where, however, a legal duty or obligation from the promisee to the third party seems to be required. A more recent New York case holds that a moral obligation from the promisee to the third party is sufficient to support the action. *Buchanan v. Tilden*, (1899) 158 N. Y. 109, 52 N. E. 724, 44 L. R. A. 170, 70 Am. St. Rep. 454. The case of *Jefferson v. Asch*, (1893) 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 Am. St. Rep. 618, is in accord with the later New York doctrine. Many of the states which have adopted the American rule do not require any obligation, either legal or moral, running from the promisee to the third party. *Dean v. Walker*, (1883) 107 Ill. 540, 47 Am. Rep. 467. It would seem that all jurisdictions that allow the third party to sue require a clear intent to benefit the stranger, an incidental intent being held insufficient. *Baxter v. Camp*, supra. While most of the American jurisdictions allow the third party to sue, either with or without some obligation, legal or moral, running from the promisee to the third party, when a municipality chances to be the prom-

isee, the courts very generally deny recovery. *Lovejoy v. Bessemer Water Works,* (1906) 146 Ala. 374, 41 So. 76, 6 L. R. A. (N. S.) 429, (lack of privity). In *Ancrum v. Camden Water, etc., Co.,* (1909) 82 S. C. 284, 64 S. E. 151, 21 L. R. A. (N. S.) 1029, the South Carolina court, while affirming the competency of a city to contract with a water company for liability to its inhabitants, as individuals, for fire losses due to neglect to keep an adequate water supply, construed the particular contract as not covering such liability. In *German Alliance Ins. Co. v. Home Water Supply Co.,* (1912) 226 U. S. 220, 57 L. Ed. 195, 33 S. C. R. 32, the United States Supreme Court finds that a majority of the American courts deny to the citizen any such direct interest in the contract as would enable him to sue either in contract or in tort for its breach. North Carolina, Kentucky, Tennessee, Florida, New Jersey, and perhaps South Carolina, seem to be the only proponents of the contrary doctrine. *Gorrell v. Greensboro Water Supply Co.,* (1899) 124 N. C. 328, 32 S. E. 720, 46 L. R.A. 513, 70 Am. St. Rep. 598; *Graves County Water Co. v. Ligon,* (1902) 112 Ky. 775, 66 S. W. 725, 23 Ky. L. Rep. 2149; *Mugge v. Tampa Water Works Co.,* (1906) 52 Fla. 371, 42 So. 81. The North Carolina and Kentucky cases support the recovery on the ground that the citizen is the real party in interest, for whom the city is acting merely in a representative capacity; and that otherwise, the third party's property would be destroyed by a breach of a contract, really made for his benefit, without any recovery for the loss. This reductio ad absurdum, as it has been termed, is fully discussed in a note in 29 Am. St. Rep. 856. A further objection to any recovery by the third party in this class of cases was raised in *German Alliance Ins. Co. v. Home Water Supply Co.,* supra, that the damages to be recovered are speculative; but the United States Supreme Court said that if the third party had any cause of action it would not be defeated for lack of a proper measure of damages. The New York case of *Pond v. New Rochelle Water Co.,* (1906) 183 N. Y. 330, 76 N. E. 211, 1 L. R. A. (N. S.) 958, 5 Ann. Cas. 504, is directly in point with the instant case. It was there held that a consumer may maintain a suit to compel a water company to furnish water at the rates stipulated for in a contract between the company and the municipality. The decision is based on *Lawrence v. Fox,* supra, though ignoring some of its later modifications. See note in 1 L. R. A. (N. S.) 958. The principal case is an application of the above rule to a contract with a gas company. While in the latter case there was a specific provision that the consumer should have the same rights and privileges under the contract as if he were a party, the court did not advert to that fact in sustaining its decision. The two latter cases are, no doubt, correctly decided on the basis of *Lawrence v. Fox,* supra, unless they have departed too far from the modifications of that case which have been found necessary for the practical application of the rule. A basis for recovery, by the third party in these cases, could, it is submitted, be found without doing violence to established principles, even in those states which now refuse recovery, for one reason or another, by adopting the reasoning of *Gorrell v. Greensboro Water Supply Co.,* and, *Graves County Water Co. v. Ligon.* In Minnesota, the same result might be reached by holding that the "moral obligation" is broad enough to include this situation.

CORPORATIONS—ALIEN ENEMY SHAREHOLDERS—RIGHT OF COMPANY TO SUE.—The plaintiff, a corporation, was organized under the laws of New Jersey before the United States was at war with Germany. All its shareholders were citizens of Germany. It sued to recover debts due before the war. The defendant moved that the prosecution be restrained, pendente bello, upon the ground that the plaintiff was an alien enemy *Held,* the corporation is a legal entity, distinct from its shareholders, American in character, which may sue in our courts in time of war. *Fritz Schulz, Jr., Co., Inc., v. Raimes & Co.,* (1917) 164 N. Y. Supp. 454.

The court in this case declined to follow the judgment of the House of Lords in the leading English case holding that a corporation, organized under the laws of England by German stockholders, may not sue in English courts in time of war to recover money due before the war. *Daimler Co. Ltd., v. Continental Tyre and Rubber Co.,* [1916] 2 A. C. 307; 32 T. L. R. 624, Ann. Cas. 1917 C. 170 and note. It preferred to base the decision on the principle that a corporation is an entity apart from its corporators. *Continental Tyre and Rubber Co. v. Daimler Co., Ltd.,* [1915] 1 K. B. 893, 31 T. L. R. 159; *Amorduct Manufacturing Co., Ltd., v. Defries Co.,* (1914) 31 T. L. R. 69, 112 L. T. 131; *Society for the Propagation of the Gospel v. Wheeler,* (1814) 2 Gall. 105, 22 Fed. Cas. 756. The decision of the House of Lords has reversed the holding of the court in the first two of these cases. The latter case, cited as the American authority, does not wholly support the decision in the instant case. Justice Story stated that a plea, to bar an action by a corporation established in a neutral country, "that all its members were alien enemies, would have required great consideration." *Society for the Propagation of the Gospel v. Wheeler,* supra. To have adopted the English holding would not have been inconsistent with the American case, and would have the support of independent reasoning. To place an impenetrable bar between the legal entity of a corporation and the real character of its members is to be bound by a fiction to the exclusion of reality.

For discussion of principles involved in *Continental Tyre and Rubber Co. v. Daimler Co., Ltd.,* supra, see 1 MINNESOTA LAW REVIEW 89.

DOWER—EQUITABLE INTERESTS—LAND CONTRACT.—Dalton and Mertz jointly entered into a land contract with Restrick. An assignment was made by Dalton to Mertz, to which assignment Dalton's wife was not a party. Some time later Dalton brought an action to have said assignment declared a mortgage, but the evidence failed to sustain his complaint and the court dismissed the action, thus making Mertz the absolute owner of the land, which he subsequently sold. Dalton brought a second action, in which he joined his wife as plaintiff and asked the court to decree a one-half interest in the land in them as husband and wife, regardless of any form of assignment to which his wife was not a party. *Held,* that a wife has no dower in property held by a land contract, nor any vested interest therein. *Dalton, et ux. v. Mertz, et ux.,* (Mich. 1917) 163 N. W. 912.

At common law, a widow was not entitled to dower in lands to which her husband had merely an equitable title. *Blakeney v. Ferguson,* (1859)

20 Ark. 547; *Harris v. Powers,* (1907) 129 Ga. 74, 58 S. E. 1038, 12 Ann. Cas. 547 (equity of redemption). Seisin of a freehold estate in possession was necessary. *King v. King,* (1878) 61 Ala. 479. Many American states have passed statutes specifically providing that a widow shall have an interest, either in fee or for life, in the legal and equitable estates of the husband, which statutory interest usually replaces the common law dower. Some of these jurisdictions, under the provisions of their statutes, hold that such interest attaches to those equitable estates only, of which the husband dies seised. *Smallridge v. Hazlett,* (1902) 112 Ky. 841, 66 S. W. 1043, 23 Ky. L. Rep. 2228. Other states allow the widow her dower in any equitable estates of which the husband was seised during coverture. *Atkin v. Merrell,* (1865) 39 Ill. 62. It must be remembered that these cases are based on the statutes in the particular states, some of which provide that the widow shall have dower in such equitable estates of which the husband was seised at any time during coverture, while others provide similarly in the case of estates of which the husband was seised at the time of his death. As to when an equitable estate, to which dower attaches, has been created there is considerable conflict. In *King v. King,* supra, it is held that the Alabama statute requires that the husband must have a perfect equity at the time of his death, that is, he must have paid the whole purchase price. The North Carolina court, in *Phifer v. Phifer,* (1911) 157 N. C. 221, 72 S. E. 1006, expresses a similar view, holding that the widow is entitled to dower in the equitable estates of her husband only when the husband has an immediate right to possession or enjoyment of this estate. See, also, *Reed v. Whitney,* (1856) 7 Gray (Mass.) 533; *Everitt v. Everitt,* (1887) 71 Ia. 221, 32 N. W. 273. Another line of decisions is to the effect that a widow is dowable in land purchased by the husband under contract, although the latter has paid only a part of the purchase price at the time of his death. *James v. Upton,* (1898) 96 Va. 296, 31 S. E. 255. The court said in this case that a contrary policy would enable a husband to enter upon a contract to purchase land, paying all but a trifling part of the purchase price, after which he could sell the contract without the concurrence of his wife, have legal title conveyed to his vendee, and thus defeat his widow's dower right. New Jersey, semble, *Young v. Young,* (1889) 45 N. J. Eq. 27, 16 Atl. 921. Minnesota is in accord with this rule. *Wellington v. St. Paul, etc., Ry. Co.,* (1913) 123 Minn. 483, 144 N. W. 222. Those courts, however, which hold that the widow's marital interest attaches to equitable interests of the husband, require possession of such right by him at the time of his death; he must not have aliened the contract. *Smallridge v. Hazlett,* supra. A different doctrine is maintained in Minnesota, which has gone a step farther than any other state, in *Kasal v. Hlinka,* (1912) 118 Minn. 37, 136 N. W. 569, where it was held that the wife's marital rights in her husband's realty attaches to an equitable estate created by a land contract, where the vendee has paid little or nothing on the contract, and there has been an assignment without the concurrence of the wife. This too, under a statute that does not expressly mention equitable estates as being subject to such right, Minn. G. S. Sec. 7238. *James v. Upton,* supra, while maintaining that assignment does not

defeat the wife's right, was based on a contract on which part of the purchase price had been paid. It is clear enough where something has been paid on the contract, and where the husband's rights thereunder have not been alienated during his lifetime, that there is something to which the widow's right may attach. *Stearns v. Kennedy,* (1905) 94 Minn. 439, 103 N. W. 212. It can well be said that the widow should have dower in the land to the extent of what the husband had paid. *James v. Upton,* supra. The latter case would also allow the widow's interest to attach to the same extent where the land was aliened during the husband's life. But it is submitted that to allow such a right where substantially nothing has been paid on the contract raises puzzling obstacles, since there is nothing to which the dower can equitably attach. Yet this is just what the Minnesota court will have to do, if it carries the doctrine of *Kasal v. Hlinka,* supra, to its logical conclusion. The predicament of the Minnesota court is, perhaps, more apparent than real, since it has been held, in *Smith v. Glover,* (1892) 50 Minn. 58, at page 75, 52 N. W. 912, that an equitable right in land under a contract of purchase may be lost by abandonment. This would dispose of the husband's rights but, query: Does it have any effect on the wife's right of dower, in view of the fact that an alienation of the husband's right does not, in this state, divest dower? The Michigan rule obviates these difficulties, but is open to the objection made in *James v. Upton,* supra, that fraud is thereby allowed even where only a nominal part of the purchase price remains to be paid. Another interesting problem arises in connection with *Kasal v. Hlinka,* supra, in view of the wording of the Minnesota statute, which allows the statutory right in all land "of which the husband was seised or possessed during coverture." In the *Kasal case,* supra, it appears that no possession had ever been taken by the vendee, of the land in controversy, and it is clear that the vendee had no seisin. The court would seem to have taken a rather extreme stand in order to allow the wife her statutory interest.

HOMESTEAD—CONVEYANCE BY HUSBAND AND WIFE.—The plaintiffs, husband and wife, are joint owners of a homestead which the wife entered into a contract to sell. Three hundred dollars was paid down and another payment was to be made October first when the parties were to execute a contract for a deed, the seller furnishing an abstract showing a marketable title in the plaintiffs. On September 23d the defendant informed the plaintiff that he would not take the premises, and brought an action for the $300 already paid. On October 2d (the first being on Sunday) the plaintiffs tendered a contract for a deed but the defendant refused to go on with the contract. Plaintiffs bring suit for the payment due October first. *Held*: Plaintiffs can recover. The statute requiring husband and wife to join in a contract to sell the homestead was enacted to protect the owners of the homestead only. The purchaser cannot repudiate the contract so long as the owners of the homestead are ready and willing to carry out their part of the contract. *Lennartz et al. v. Montgomery,* (Minn. 1917) 164 N. W. 899.

In the present case the Minnesota supreme court holds that a contract for the sale of the homestead executed by the wife alone is not void for all purposes, but being made for the protection of the husband and wife is voidable at their election. Minn. G. S. 1878 Chap. 69 Sec. 4, 1913 Sec. 7147, which provides that no power of attorney from husband to wife or vice versa to convey real estate, or any interest therein shall be valid, has been construed in a similar manner by the Minnesota supreme court. The husband acted as the wife's agent in selling her real estate. She afterwards confirmed his act and was ready to perform. Held: The other party cannot take advantage of the statute to repudiate the obligation undertaken by him. *Keystone Iron Co. v. Logan,* (1893) 55 Minn. 537, 57 N. W. 156. An undisclosed principal may get specific performance of a contract to sell real estate made by an agent in his own name although the agent was not authorized in writing to do so. *Unruh v. Roemer,* (1916) 135 Minn. 127, 160 N. W. 251, 1 MINNESOTA LAW REVIEW 463, and note. There is some conflict as to the interpretation which should be given to statutes of this kind. The general trend of decisions has seemed to be toward a construction which would render an agreement or contract affecting the homestead not executed in the manner provided by statute as void for all purposes. *Teske v. Dittberner,* (1903) 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802; *Lichty v. Beale,* (1906) 75 Neb. 770, 106 N. W. 1018; *Weitzner v. Thingstad,* (1893) 55 Minn. 244, 56 N. W. 817. It cannot be validated by estoppel: *Delisha v. Minneapolis, etc., Co.,* (1910) 110 Minn. 518, 126 N. W. 276. A conveyance of the homestead with the wife's consent by the husband alone, though to a grantee for the purpose of having the grantee reconvey to the wife has been held void. *Ellingwood v. Ellingwood,* (Vt. 1917) 99 Atl. 781. Contra: *Weaver v. Michello,* (Mich. 1916) 160 N. W. 612. A deed signed by the husband only, intended as a mortgage, is void and acquires no validity by the subsequent joint declaration of abandonment of the homestead by the husband and wife. *Gleason v. Spray,* (1889) 81 Cal. 217, 22 Pac. 551, 15 Am. St. Rep. 47. A wife's separate deed of the homestead in connection with a conveyance by the husband is without effect as far as making a contract enforceable in equity. *Lott v. Lott,* (1906) 146 Mich. 580, 109 N. W. 1126, 8 L. R. A. (N. S.) 748. The Wisconsin supreme court has held that a conveyance of the homestead by the husband without the wife's signature conveys an equitable right to the legal title enforceable on the extinguishment of the homestead right by the death of the wife or otherwise. *Jerdee v. Furbush,* (1902) 115 Wis. 277, 91 N. W. 661. The court in that case considered the homestead a mere right in land and that the creation of an equitable right to the legal title upon the termination of the homestead privilege did not interfere with that right and therefore such equitable right could be created. This rule has been changed by an amendment to their statutes. Wis. Statutes, 1917, Sec. 2203. The statute now expressly provides that no legal or equitable interest can be acquired by such a conveyance. A deed of the homestead executed by the husband alone is void ab initio and subsequent signing by the wife will not validate the conveyance. *Alvis v. Alvis,* (1904) 123 Ia. 546, 99 N. W. 166. The Min-

nesota supreme court has even gone so far as to hold a conveyance by the husband without the wife's signature void even when she was at the time living apart from him in open adultery. *Murphy v. Renner,* (1906) 99 Minn. 348, 109 N. W. 593, 8 L. R. A. (N. S.) 565, 116 Am. St. Rep. 418. The decision in the instant case seems in harmony with the new tendency of the Minnesota court as shown in the later cases, to carry prohibitory statutes no further than is necessary to protect the interests involved, (See *Lucy v. Lucy,* (1909) 107 Minn. 432, 120 N. W. 754, 131 Am. St. Rep. 502; *Unruh v. Roemer,* supra,) and not to hold such contracts utterly void.

LANDLORD AND TENANT—RENTING ON SHARES—TENANT'S SHARE IN CROPS—CHATTEL MORTGAGES—PRIORITY OVER LIEN OF GARNISHMENT.—The defendant entered into a contract with one Erickson, the owner of a certain farm, the defendant to cultivate the land, and the crop to be divided equally between the parties. The contract contained a provision "that the title and possession of all crops or grain so raised on said land during the time of such contract shall be and remain in the landlord until division thereof." While the crop was growing the defendant mortgaged his share to the intervenor. After it was harvested and stored in a grain elevator, the plaintiff attempted to garnish the defendant's interest in the grain. In answer to the intervenor's complaint, the plaintiff alleges that there has been no division of the crop; that the defendant had not acquired title to the grain, and, for this reason, the mortgage had not attached. *Held*: the contract is a lease; the lessor and lessee are tenants in common of the crop from the time it appears above the ground; the reservation of title in the lessor is only a chattel mortgage lien to secure contemplated advances to the tenant; and the tenant retains both his title and mortgagable interest. *Minneapolis Iron Store v. Branum,* (N. D. 1917) 162 N. W. 543.

For a discussion of this case, see NOTES, p. 43.

MORTGAGES—FORECLOSURE—BAD FAITH—REDEMPTION.—Plaintiff was the owner of premises valued at $4,800 subject to a first mortgage of $850 and subject to second and third mortgages in favor of defendant for $1,500 and $220 respectively. At the sale on foreclosure of the third mortgage, defendant bid in the premises at $300. Thereafter and before the expiration of the period of redemption, he collected out of other securities the full amount of the indebtedness secured by the second mortgage. Defendant failed to answer inquiries of plaintiff as to the date of the expiration of the period of redemption. After the period for redemption had expired, plaintiff brought action to redeem. *Held,* that plaintiff may redeem. *Sletten v. First National Bank,* (N. D. 1917) 163 N. W. 534.

The opinion of Robinson, J., in this case, as published in the Grand Forks Herald, February 25, 1917, and therein stated to be concurred in by the other members of the court, is commented upon in 1 MINN. L. REV. 534. It now appears that Mr. Justice Robinson's brethren are unwilling to base their decision upon alleged analogies from Aesop and

Shakespeare, and while reluctantly approving the trial court's finding of bad faith, affirm its judgment principally upon grounds neither assigned by that court nor mentioned by Mr. Justice Robinson.

When a junior mortgage is foreclosed, the purchaser at the foreclosure sale takes the premises subject to the senior mortgage. *Buzzel v. Still,* (1891) 63 Vt. 490, 22 Atl. 619, 25 Am. St. Rep. 777. As between such purchaser and the mortgagor, the premises become the primary fund for the payment of the senior mortgage. *Dickason v. Williams,* (1880) 129 Mass. 182, 37 Am. Rep. 316; *National Investment Co. v. Nordin,* (1892) 50 Minn. 336, 52 N. W. 899. And if the mortgagor is compelled to pay the senior mortgage, he will be subrogated to the rights of the senior mortgagee against the premises. *Howard v. Robbins,* (1902) 170 N. Y. 498, 63 N. E. 530. When a mortgagee acquires the equity of redemption, his mortgage is satisfied, for his security is lost by merger and the debt is cancelled because he possesses the fund primarily liable for its payment. *Belleville Savings Bank v. Reis,* (1891) 136 Ill. 242, 26 N. E. 646; *National Investment Co. v. Nordin,* (1892) supra. And equity will prevent this result only to avoid manifest injustice or to effectuate the intention of the parties. 27 Cyc. 1377 et seq.; 2 Jones, Mortgages, Secs. 848 et seq.; Cf. *Hospes v. Almstedt,* (1884 83 Mo. 473. A mortgage may be revived after its foreclosure by conduct on the part of the mortgagee which treats it as still subsisting, as where he accepts payments of interest or principal from the mortgagor upon that basis. *Lounsbury v. Norton,* (1890) 50 Conn. 170, 22 Atl. 153; *Scott v. Childs,* (1888) 64 N. H. 566, 15 Atl. 206; *Clarke v. Robinson,* (1887) 15 R. I. 231, 10 Atl. 642. It is by an application of the resultant of the foregoing doctrines that the majority of the court purport to justify redemption by plaintiff. It is intimated that defendant acted wrongfully in collecting the amount secured by the second mortgage after the foreclosure sale under the third mortgage. But it is obvious that before the expiration of the period of redemption, defendant was entirely within its rights in so doing, for the debt was due, defendant did not then own the fund primarily liable for its payment, it had only a right to acquire that fund in case plaintiff elected not to redeem, and it certainly had the right to act upon the assumption that plaintiff might redeem. The doctrine of merger is clearly inapplicable until the expiration of the period of redemption, for it is not until that time that the estates of the mortgagor and mortgagee merge. *Belleville Savings Bank v. Reis,* supra. It is true that when the title to the premises vested in defendant, plaintiff had the right to be reimbursed therefrom for the amounts paid on the second mortgage; but it seems very far fetched to say, as must be said if the decision is to be upheld, that the failure of defendant to tender such reimbursement to plaintiff amounted to such recognition of the subsistence of the third mortgage as to revive plaintiff's right to redeem, especially since the tendency of the decisions is to discourage claims of revival of the right of redemption. 27 Cyc. 1823.

PATENTS—RESTRICTION ON USE—SPECIFIC SUPPLIES—FUTURE CONDITIONS—NOTICE.—Petitioner is patentee of a device insuring the smooth

running of a film through a motion picture projector. He granted the manufacturing rights to another under a "license agreement," which provided that the machine was to be used only with films manufactured under a certain patent, and upon other terms to be fixed by the patentee, or his assignee. Each machine carried a stamped notice to this effect. Defendant, a lessee of the purchaser of a machine exhibited a film not made under the designated patent. *Held,* patentee or his assignee cannot, by mere attached notice, control the supplies to be used with the machine, which are no part of the patented article. *Motion Picture Patents Co. v. Universal Film Mfg. Co.,* (1917) 243 U. S. 502, 61 L. Ed. 871, 37 S. C. R. 416.

The leading case on this question is the one commonly known as the "Button Fastener Case." *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.,* (1896) 77 Fed. 288, 22 C. C. A. 267, 35 L. R. A. 728. The court held in that case that a notice stamped on each machine, to the effect, that only fasteners made by patentee, but which were unpatented, could be used with the machine, was enforcible by the patentee, as against purchasers of the machines. It is well settled that the vendee of a patented article under an unconditional sale, acquires the right to an unrestricted use of the article, as the chattel passes without any limitation on the monopoly. *Adam v. Burke,* (1873) 17 Wall. (U. S.) 453, 21 L. Ed. 700; *Mitchell v. Hawley,* (1872) 16 Wall. (U. S.) 544, 21 L. Ed. 322; *Keeler v. Standard Folding Bed Co.,* (1895) 157 U. S. 659, 39 L. Ed. 848, 15 S. C. R. 738. But where the article carries a notice of the restrictions on its use, the general holding of the courts has been that the vendee does not get such unlimited rights; the theory being that while he gets title to the material in the article, he is a mere licensee of the rights to use the article, and the condition imposed by the notice will bind any ultimate vendee who takes with notice of such conditions. *Victor Talking Machine Co. v. The Fair,* (1903) 123 Fed. 424; *Edison Phonograph Co. v. Kaufman,* (1901) 105 Fed. 960; *Edison Phonograph Co. v. Pike,* (1902) 116 Fed. 863. But if notice of the license restriction is not brought home to the vendee, the opposite result has been reached in *Cortelyou v. Johnson & Co.,* (1907) 207 U. S. 196, 28 S. C. R. 105. The doctrine of the "Button Fastener Case" was adopted in *Henry v. A. B. Dick Co.,* (1912) 224 U. S. 1, 56 L. Ed. 645, 32 S. C. R. 364, which upheld the right of a patentee to restrict his vendee to the use of specific supplies for the patented article, which were made by the patentee, but were unpatented. The English authorities are in accord with the Button-Fastener and Dick Co. cases, and contra to the principal case. *National Phonograph Co. of Australia, Ltd., v. Merick,* (1911) 27 T. L. R. 239; *Incandescent Gas Light Co. Ltd. v. Cantelo,* (1895) 11 T. L. R. 381. It is held that the doctrine of *Henry v. A. B. Dick Co.,* supra, does not grant patentee a monopoly in an unpatented article, for the reason that he cannot prohibit its use in some other combination than that stated in the condition. *Davis Electrical Works v. Edison Electric Light Co.,* (1894) 60 Fed. 276; *Thomson-Houston Electric Co. v. Kelsey Electric Ry. Specialty Co.,* (1896) 72 Fed. 1016. In cases similar to *Henry v. A. B. Dick Co.,* supra, the court reached an opposite result. Accordingly it has been held, that where a retailer of a patented

article sells it for less than the retail price fixed by the patentee, no infringement occurs. The court distinguishes the cases, however, on the ground that one is a patent, and the other a copyright case. *Bauer v. O'Donnell,* (1913) 229 U. S. 1, 27 L. Ed. 1041, 33 S. C. R. 616. So it has been held that the owner of a copyright cannot enjoin a retailer from selling the book for less than the price fixed by the holder of the monopoly. *Bobbs-Merrill Co. v. Straus,* (1908) 210 U. S. 339, 52 L. Ed. 1086, 28 S. C. R. 722. And where the owner of a patented device for tying cotton bales, consisting of a buckle and a band, sold them under a license that they be used once only, it was held that it was an infringement on the patent, when defendants buying them as scrap iron repaired and resold them. But quære, would sale of the buckle apart from band be an infringement? *Cotton-Tie Co. v. Simmons,* (1882) 106 U. S. 89, 27 L. Ed. 79. That the patentee has within certain limits the right to attach conditions to sales made under his license is held in *National Phonograph Co. v. Schlegel,* (1904) 128 Fed. 733. The principal case runs counter to a strong line of authorities, and expressly overrules the case of *Henry v. A. B. Dick Co.,* supra, which antedates it by only five years. This decision seems to be indicative of the tendency to construe strictly the monopoly granted to a patentee and thus effect a complete change in the court's attitude towards patent rights.

PRINCIPAL AND AGENT—RIGHT OF EXCLUSIVE AGENT TO COMMISSIONS.—Plaintiff appointed defendant exclusive representative for the sale of its goods in Iowa and Minnesota, agreeing to pay a stated commission on accepted orders. Another agent of plaintiff met a resident of defendant's territory and sold to him outside of defendant's territory, but the goods were shipped directly to defendant's territory and the defendant now claims his commission on such sale. *Held,* not entitled to a commission on the sale not made by him, though made to a resident of his territory. *Aluminum Products Company v. Anderson,* (Minn. 1917) 164 N. W. 663.

Where the principal agrees to pay his agent a commission regardless of whether the agent makes the sale, or the principal makes it himself, it seems clear that the agent is entitled to a commission though the sale is consummated by the principal. *Lapham v. Flint,* (1902) 86 Minn. 376, 90 N. W. 780; *Kimmell v. Skelley,* (1900) 130 Cal. 555, 62 Pac. 1067. Or where the agent is to get a commission on all sales if he canvasses his territory thoroughly, the performance of the condition will give him a right to commission on goods sold by the principal. *Keene et al. v. Frick Company, (Iowa* 1903) 93 N. W. 582. Some courts draw a sharp line of distinction between cases involving the exclusive right to sell and those involving an exclusive agency. *Dole v. Sherwood,* (1889) 41 Minn. 535, 43 N. W. 569, 5 L. R. A. 720, 16 Am. St. Rep. 731; *Mott v. Ferguson,* (1904) 92 Minn. 201, 99 N. W. 804; *Golden Gate Packing Company v. Farmers' Union,* (1880) 55 Cal. 606. In the former class it is generally held that the agent has the right to sell and he only, and a sale by the principal violates his contract and gives rise to a cause of action for damages by the agent. *Metcalfe v. Kent,* (1898) 104 Iowa 487, 73 N. W.

1037. Some of the courts refuse to allow the agent recovery in such cases unless he can show that he would have made a sale but for the previous sale by the principal. *Fairchild v. Rogers,* (1884) 32 Minn. 269, 20 N. W. 191; *Waterman v. Boltinghouse,* (1890) 82 Cal. 659, 23 Pac. 195. Where only the exclusive agency is given, it is construed as an agreement by the principal that he will not appoint another agent for that territory, and there is nothing to prevent the principal from making sales in the territory assigned to the agent. *Dole v. Sherwood,* supra; *White Company v. White Motor Company, et al.,* (1913) 159 App. Div. 716, 144 N. Y. S. 960. Some courts, however, expressly refuse to draw any distinction between a grant of an exclusive agency and an exclusive right to sell. Accordingly it has been held in Massachusetts that an exclusive agency entitles the agent to commissions on sales made by the principal to a resident of the agent's territory, though the sale was made outside of the territory. *Garfield v. Peerless Motor Car Co.,* (1905) 189 Mass. 395, 75 N. E. 695. The court in that case took into consideration the usage of the trade. A case arose in Illinois which has identically the same facts as the principal case, but the Illinois court reached an opposite result from the Minnesota court and allowed the exclusive agent to collect the commission. The court also in that case refused to recognize the distinction between exclusive agency and exclusive right to sell. *Illsley v. Peerless Motor Car Company,* (1913) 177 Ill. App. 459. The Minnesota court in the principal case seemingly has aligned itself completely with that line of authority which is represented by a number of cases in California and which refuse to allow an exclusive agent a commisson on sales made to residents of his territory while outside of the territory temporarily. *Golden Gate Packing Company v. Farmers' Union,* supra. Even though the grant is one of the exclusive right to sell in a certain territory and the principal sells to a resident of the agent's territory, while such resident is outside of the territory, the agent cannot recover the commission on such a sale. *Parry v. American Motors California Company,* (1914) 25 Cal. App. 706, 145 Pac. 165; *Haynes Auto Co. v. Woodill Auto Company,* (1912) 163 Cal. 102, 124 Pac. 717, 40 L. R. A. (N. S.) 971. In both of these cases the court intimated, however, that a contrary trade usage might bring about a different result. It would seem that the principal case, though apparently in accord with the California decisions, runs contra to a strong current of authority in the East and seemingly out of harmony with local trade usage.

STREET RAILROADS—BRIDGES—REPAIRS—LIAB LITIES.—Dale street in St. Paul, and the right of way of the defendant, the Great Northern Railway, intersect. In 1890, the defendant constructed a bridge over its tracks at the intersection. The city of St. Paul by ordinance, directed the street railway to extend and operate a line between points on each side of the bridge, and later directed the defendant to strengthen the bridge for the use of the street railway. The defendant refused, whereupon the city strengthened the bridge at a reasonable cost, and now brings action to recover the money expended in said work. *Held,* that the duty of the

railroad to strengthen the bridge was one for which it was not entitled to compensation. *City of St. Paul v. The Great Northern Railroad Company,* (Minn. 1917) 163 N. W. 788.

There rests upon the railroad the common law duty to bridge its tracks at street crossings at its own expense, when it is reasonably necessary for the safety, welfare, and convenience of the traveling public. *State ex rel. City of St. Paul v. Chicago, etc., Ry. Co.,* (1913) 122 Minn. 280, 142 N. W. 312; *Attorney General v. Fort Street Union Depot Co.,* (1898) 117 Mich. 609, 76 N. W. 85. As a rule a municipality with properly delegated police power, from the legislature, may enforce this common law duty. *State ex rel. City of Duluth v. Northern Pacific Ry. Co.,* (1906) 98 Minn. 429, 108 N. W. 269, affirmed by the Supreme Court of the United States in 208 U. S. 583, 28 S. C. R. 341, 52 L. Ed. 630; *Cincinnati, etc., Ry. Co. v. City of Connersville,* (1908) 170 Ind. 316, 83 N. E. 503, affirmed in 218 U. S. 336, 31 S. C. R. 93, 54 L. Ed. 1060. The duty resting upon the railroad is a continuing one. The street must be repaired from time to time, according as conditions change and increased traffic renders it necessary. *State of Minnesota ex rel. City of Minneapolis v. St. Paul, etc., Ry. Co.,* (1886) 35 Minn. 131, 28 N. W. 3, 59 Am. Rep. 313. Upon the question whether a railroad company must strengthen a bridge for the use of a street railway the courts are not agreed. The court in the principal case adopted the theory that the use of a street for street-car purposes is an ordinary use, for it is in aid of, and facilitates public travel. It is a proper mode of using the streets by the public and cannot be said to impose an additional servitude upon the abutting property. A few cases may be cited illustrating the conflict as to what is an additional servitude. It has been held that abutting property holders are not entitled to compensation for the use of a street for a horse railway. *Sears v. Marshalltown Street Ry. Co.,* (1885) 65 Ia. 742, 23 N. W. 150. A street railway is not an additional burden. *People v. Ft. Wayne, etc., Ry. Co.,* (1892) 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752. The operation of a street railway by steam motors is not an additional burden, but is a modern and improved use of the street. *Newell v. Minneapolis, etc., Ry. Co.,* (1886) 35 Minn. 112, 27 N. W. 839, 59 Am. Rep. 303. The use of electricity for propelling street cars does not impose a new servitude upon the streets. *Koch v. North Ave. Ry. Co.,* (1892) 75 Md. 222, 23 Atl. 463, 15 L. R. A. 377. Some cases are contra, on the theory that electric cars are not a natural use of the streets, and that when an existing railway bridge is adequate for ordinary traffic, a requirement that a railway strengthen it to meet the necessities of street car traffic is an imposition of an additional burden which it ought not to be required to bear without compensation. *Carolina Central Ry. Co. v. Wilmington St. Ry. Co.,* (1897) 120 N. C. 520, 26 S. E. 913; *Briden v. New York, etc., R. Co.,* (1906) 27 R. I. 569, 65 Atl. 315; *People ex rel. Western New York, etc., Ry. Co. v. Adams,* (1895) 88 Hun. (N. Y.) 122, 34 N. Y. Supp. 579, 68 N. Y. St. Rep. 643, affirmed without opinion in 147 N. Y. 722, 42 N. E. 725. A horse railway has been held to impose an additional burden upon adjoining property owners. *Craig v. Rochester City, etc., Ry. Co.,* (1868) 39 N. Y. 404. A street railway using steam is an additional burden. *Stanley v. Davenport,* (1880)

54 Ia. 463, 6 N. W. 706, 37 Am. Rep. 216. A railway, whose cars are propelled by a dummy steam engine and are used for passengers only, is an additional burden. *East End St. Ry. Co. v. Doyle,* (1890) 88 Tenn. 747, 13 S. W. 936, 9 L. R. A. 100, 17 Am. Rep. 933. The instant case takes a progressive stand, for it recognizes that the mode of travel may change and yet not be a burden upon abutting property owners, while contra cases hold a change from foot to street car traffic is such a change as to impose such a burden.

TORTS—INTERFERENCE WITH CONTRACTUAL RELATIONS—A counterclaim, alleging that the plaintiff for the purpose of inducing his wife to violate and breach her contract with defendant, a professional booking agent, "interfered with" and "impeded" defendant in obtaining engagements for her, and actively persuaded and prevailed upon the wife to breach the contract, *held,* insufficient, since these things might have occurred without the plaintiff having been guilty of a tort. *Turner v. Fulcher,* (1917) 165 N. Y. Supp. 282.

In America there are two broad rules of law on this point. The majority holding is that a wrongful and malicious interference by a stranger with contractual relations existing between others, by causing a breach thereof, amounts to an actionable tort. *Walker v. Cronin,* (1871) 107 Mass. 555; *London v. Horn,* (1903) 206 Ill. 493, 69 N. E. 526. The minority holding is that the remedy in such cases is an action against the party to the contract who committed the breach, and not against the wrongful intermeddler. *Glencoe v. Hudson,* (1897) 138 Mo. 439, 40 S. W. 93, 36 L. R. A. 804, 60 Am. St. Rep. 560. The English law on this point was enunciated by the famous case of *Lumley v. Gye,* (1853) 2 El. & Bl. 216, which held that if the defendant persuades another to break his contract, even without using fraudulent or otherwise illegal means, plaintiff has a cause of action against the defendant. It seems that *Allen v. Flood,* [1898] A. C. 1, limited the scope of *Lumley v. Gye,* supra, but whatever the effect of *Allen v. Flood,* the doubt is removed by *Quinn v. Leathern,* [1901] A. C. 495, where is was held that for a violation of a legal right committed knowingly there is a cause of action, and that it is a violation of a legal right to interfere with contractual relations recognized by law, if there is no sufficient justification. As applied to the relations between master and servant, this doctrine is vigorously denied in this country. *National Protective Association v. Cumming,* (1902) 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648; *De Jong v. Behrman Company,* (1911) 131 N. Y. Supp. 1083. On the question of malice the decisions differ. It has been held that it is not necessary that the interference should have been malicious in its character. If it is wrongful, it is equally to be condemned and it is just as much a violation of a legal right. *Gore v. Condon,* (1897) 87 Md. 368, 39 Atl. 1042, 40 L. R. A. 382. Several cases lay down the rule that an intentional interference with a contract right, without lawful justification, is malice in law, even if it is done from good motives and without express malice. Such a justification can be lawful only in the case of one who is acting in the exercise of an

equal or a superior right, which comes into conflict with the other. *Holder v. Cannon Manufacturing Co.*, (1904) 135 N. C. 392, 50 S. E. 681. The majority rule holds that interference may be unlawful solely on account of the motive which actuates it. If persuasion be used for the indirect purpose of injuring the plaintiff or of benefiting the defendant at the expense of the plaintiff, it is a malicious act and therefore actionable if injury ensues from it. *Quinn v. Leathern*, supra. A respectable line of authorities hold that an act which in itself is lawful does not become actionable solely because done maliciously, and that an interference producing a breach is actionable only when the means of interference employed are such as amount to a tort. *Asheley v. Dixon*, (1872) 48 N. Y. 430, 8 Am. Rep. 559, and the other New York cases cited, supra. The instant case is an illustration of this doctrine. For a collection of the cases involving the doctrine of *Lumley v. Gye*, supra, see 62 L. R. A. 673, note, at p. 678.

BOOK REVIEWS

THE LAW OF AUTOMOBILES. By Xenophon P. Huddy, Fourth Edition, by Howard C. Joyce. Albany: Matthew Bender & Co. 1916. Price, $5.50.

One evidence of the rapid growth of the automobile business is the fact that the present work is now in its fourth edition. The introductions to two of the editions state that the work is designed both for the legal profession and for the layman. The interest of the layman is provided for by the fact that the volume, besides stating the law of automobiles in all its different phases, goes into the history and philosophy of the automobile and the automobile business besides giving some very good advice to drivers relative to safe driving.

We are reminded by the authors that while in 1899 there were few automobiles in the United States, still as early as the year 1680 Sir Isaac Newton proposed a steam carriage. "The law," the authors state, "keeps up with improvement and progress" and the law of automobiles is nothing more than the application of the "law of the highway" applied to the latest improved means of locomotion. The layman will also be interested in reading and memorizing the 22 rules for safe driving found on page 320 and in reading the author's discussion of "the heart regardless of social duty." This phrase is taken from East's Pleas of the Crown, Vol. 1 p. 263 and is quoted by the authors in the chapter on criminal negligence—"the most serious and atrocious aspect of dangerous automobile driving."

Again the authors have a chapter for the special benefit of the manufacturer of automobiles. The authors claim that the manufacturer occupies a position toward the public of trust and confidence. Manufacturers who construct unsafe cars are condemned and on ac-

count of the intricate mechanism of an automobile it is claimed that the rule of caveat emptor does not apply in the purchase and sale of an automobile.

Both lawyers and laymen will be pleased to read in the chapter on the chauffeur that this word was first applied to members of a band of outlaws during the reign of terror in France. The reason for its present day application may not be hard to trace.

This volume is especially valuable to the trial lawyer. All phases of the "law of the road" and of negligence are thoroughly covered. The chapters relating to proof of speed and the defending of speed cases contain many practical suggestions as well as reference to citations. The reliability and unreliability of the stop watch and the photo speed-recorder are discussed and suggestions are given for the cross-examination of police officers and others testifying to rates of speed based on records of these instruments.

Attention is called to a law in one state to the effect that non-resident automobile owners must appoint a resident agent to accept service of process in cases of injuries caused by negligent driving.

Other phases of automobile law are also well covered, such as recent legislation on the subject, federal control, insurance, safety of roads and the jitney business. In another edition a new chapter might well be added on the law of liens for storage, repair, etc., in its relation to this business.

The chapter defining a motor vehicle as referred to in the various statutes takes the subject up with reference to autos, motor cycles, bicycles, carriages, stage coaches and traction engines. The discussion reminds one of the recent problems before the Minnesota courts over the proposition that a mule was not a horse within the meaning of the exemption law.

In conclusion it is well to call attention to two tendencies noted by the authors with relation to the law of automobiles. First, the courts do not hold that the automobile is a dangerous instrumentality per se. Second, the law is definitely settled as to the non-responsibility of the owner for the acts of another to whom he has loaned his machine or for the acts of his chauffeur who commits an injury while driving for himself.

Taken as a whole this work is readable and interesting as well as being an authoratitive statement of the law.

PAUL J. THOMPSON.

MINNEAPOLIS.

CASES ON THE LAW OF PROPERTY, VOLUME 1, PERSONAL PROPERTY.—By Harry A. Bigelow. American Casebook Series. St. Paul: West Publishing Company. 1917. Pp. xx, 404. Price $3.50.

CASES IN QUASI CONTRACT SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS.—By Edward S. Thurston. American Casebook Series. St. Paul: West Publishing Company. 1916. Pp. xv, 622. Price $4.00.

HANDBOOK OF THE LAW OF TORTS.—By H. Gerald Chapin. St. Paul: West Publishing Company. 1917. Pp. xiv, 695. Price $3.75.

THE MINNESOTA STATE BAR ASSOCIATION

The Editor welcomes pertinent communications from members of the Bar.

ANNUAL MEETING, 1917

The meeting of the Minnesota State Bar Association at Minneapolis, in August this year, was one of the most remarkable the Association has ever had. For months before the meeting, it looked as though it were going to be extremely difficult to obtain speakers or interest generally in the meeting. The entrance of the United States into the war, the continuous session of Congress, the activity of leading men all over the country in public matters concerning the war, and the focusing of the attention of all serious-minded people upon the stupendous struggle into which we had entered, all combined to make it difficult to prepare a program which would entice the fraternity to attend the meeting. But the very circumstances which made it difficult to prepare a program, finally turned out to be the circumstances which made the meeting an unqualified success.

The meeting opened on August 7th with the reading of the President's address upon "The Trend Toward Fraternalism."

This was followed by a well-prepared address by Mr. John F. D. Meighen on "The Minnesota Drainage Statutes," in which Mr. Meighen showed the overlapping and inconsistent nature of such statutes and the necessity of a codification thereof. The subject, affecting as it does a very large part of the State, is one of great interest, especially to the country districts; and after some discussion the President was authorized to appoint a committee, of which Mr. Meighen should be chairman, to draw up a proposed codification of the drainage laws to be presented at the next meeting of the Association. There being no meeting of the Legislature before that time, the codification can be considered at the next meeting of the Association and referred to the Legislative Committee to endeavor to obtain action thereon in the 1919 Legislature.

At the afternoon session Mr. E. M. Morgan, late of Minnesota University, purloined by Yale from Minnesota, and now Judge Advocate with the rank of Major in the American army, read a scholarly address on "Judicial Regulation of Court Procedure."

From the opening address on the second morning, until the end of the session, a patriotic flavor permeated all the addresses.

President Burton, of the University of Minnesota, opened with a speech on "Opportunities of the War," a subject which, as might be expected, was skilfully handled, eloquently presented and convincingly expressed. The opportunities suggested were the learning of self-sacrifice, discipline, and a new and more abiding faith in morality and religion.

Judge Hallam discussed "Some Aspects of the Hague Convention," and gave a most interesting history of the sessions of such convention and the results so far obtained, together with the reasons for the failure to obtain other results, and showed how the optimistic hopes of the

originators of the convention had failed. The subject was an especially timely one on account of the war.

Ex-Congressman Tawney, one of the members of the International Joint Commission, told of "The Plans, Purposes and Actual Workings" of the Commission, and this included, of course, the matters which come before this Commission, which has jurisdiction over nearly all classes of disputes between citizens of the United States and citizens of Canada, or between Canada and the United States. The Commission is composed of an equal number of men from Canada and from this country, and their decision upon matters has in almost every instance been unanimous. The fact that two nations, with a border line between them of some 3,000 miles of lake and river and prairie and mountain, but without a fort or a hostile vessel, can settle the disputes which arise between them, or between their people, in so amicable a manner, is the best evidence of the high ideals, the honesty and good faith of the peoples and governments of these two countries.

During this second day a strong loyal tone was given to the meeting by a resolution offered by Ivan Bowen of Mankato, reciting the newspaper accounts of the New Ulm meeting and the action of Albert Pfaender, a member of the Association, at such meeting. The resolution, after some recitals, called for the appointment of a committee to investigate the matter, and if the reports were found correct as to the action and speech of Mr. Pfaender, that then they should report the same and the Association should take such steps as might be necessary to have him disbarred and expelled from the Association; and speeches upon this resolution, notably one by Mr. John E. Regan of Mankato, aroused great enthusiasm.

On the morning of the last day, a remarkably able address by Mr. Charles H. Hamill of Chicago, upon "War and Law," was delivered. He contrasted the American view of international law with the French view, as expressed by a member of the faculty of law in the University of Paris, and the German view as expressed by a privy councillor and professor in the University of Berlin, and showed the necessity of some development whereby nations would respond to a call to punish a criminal nation in a manner similar to that in which men were required to respond to the "hue and cry" in the olden times in England. So able and impressive was this address that a motion was made, and unanimously carried, that 5,000 copies of the same be printed and circulated in the State of Minnesota, the expense thereof being guaranteed by the Duluth Bar. Every member of the profession in the State, we believe, has since received a copy.

We were favored in the afternoon of the last day in having with us Sir James Aikins, Lieutenant-Governor of Canada and President of the Canadian Bar Association, who addressed us on "The Responsibility of the American and Canadian Lawyer in Respect of Government." The address naturally had an international tone and went far to draw closer together the Bars of this State and of the great province to the north of us, and to tend to a closer and friendlier feeling between the United States and Canada. He referred to the causes of the misunderstandings between the countries, and to the fact that the great masses, including

the leaders of the people in England, were really in favor of the revolution, and that it was as a matter of fact a German king, thrice German as he expressed it, Saxe, Coburg and Gotha, who drove the thirteen states into revolt, and not the people of England, and that the lesson learned at that time has always been remembered in England, and the effect of it is shown by the loyalty and devotion of the over-seas dominions, Canada, Australia, New Zealand and South Africa, in the present conflict.

Mixed in between these most interesting and able addresses were reports of committees and discussions thereon, the details of which it would be impossible to mention here; time and space would not allow it. The fact, however, that we have in our officers, board of governors and committee men, over one hundred and forty members of the Association actively at work in behalf of matters affecting the legal fraternity and the people of the State, is sufficient evidence of the activity of the Association and the devotion of its members, who give gratuitously of their time and money to maintain and extend the work and influence of the Association.

The banquet on the last evening was a notable one. It was held in the gold room of the Radisson Hotel, and from first to last was a most whole-souled, enthusiastic and patriotic meeting. The toastmaster was Judge Lancaster of Minneapolis, and no better could have been obtained. Judge Fish, who was on the program for an address, was unfortunately unwell and could not appear, but Mr. Charles H. Hamill, of Chicago, kindly took his place in an extemporaneous address. Mr. Albert R. Allen, of Fairmont, had as his subject, "Some Changes of the Bar," but this only formed a small part of his address, and he began to talk of the war and our part in it. One statement was particularly appreciated, when he said that he had a boy who had already gone into the service, and that from that time on not only that boy, but every boy in khaki, would be his boy. Judge William A. Cant, of Duluth, talked on "The Operative Field," and injected considerable of his dry, Scotch humor into the address. Sir James Aikins, in a very eloquent address, impressed all with the task which is before us; told of what the Canadians have done and are doing, and congratulated the United States upon its entrance into the war. Prior to his address, the Association had stood and sung "God Save the King" in deference to the distinguished guest, and in his address he referred to the fact that in Canada, as in England, they had added another verse to that national hymn, which could be very well used by us, namely:

God save our splendid men,
Send them safe home again,
God save our men;
Keep them victorious,
Patient and chivalrous,
They are so dear to us,
God save our men.

As a climax, Ex-Mayor William Henry Eustis, of Minneapolis, although not on the program, was so wrought upon by the patriotic wave which

swept the assembly, that he rose and asked that Mr. Bowen, who introduced the Pfaender resolution, rise so that he and all could see him. Unfortunately, Mr. Bowen had been obliged to return home and was therefore not present; but Mr. Eustis took advantage of his being upon his feet to deliver a fervent, eloquent and ringing patriotic address, which brought to and end this intensely interesting meeting.

The State can rest assured, from the tone and temper of all the members of the Association present during the various sessions, that the Bar of Minnesota is intensely loyal and will do everything in its power to assist in the various causes affecting the carrying out of the war policies of the Government, the suppression of sedition, and the standing back of the boys the country is drilling, training and sending abroad to fight the battles of this country and of humanity; and the President, the Governor of this State and the Safety Commission, if there is anything to be done, need only look through the membership list of the Minnesota State Bar Association to find men who will be willing to sacrifice their time and money to do it.

It was my good fortune to attend the meeting of the American Bar Association at Saratoga Springs in September; and in its wave of patriotism it was a repetition of our own Bar Association meeting. Splendid addresses were delivered there by, among others, the Russian Ambassador; the Belgian lawyer, Gaston de Leval, who made strenuous efforts to save Edith Cavell; Judge Hughes, Job Hedges and Senator Root, the address of the latter at the close of the banquet being a most wonderful and inspiring one. Yet, in spite of the eminence and ability of these men, I think I am safe in saying that in true, heartfelt patriotism, the American Bar Association meeting was in no way superior to our own.

In writing this brief account of the meeting of our Association, I have not had before me the report of the meeting ,and the foregoing is all a matter of recollection. Some errors may therefore occur, but I believe that my recollection is substantially correct; and in any event the main feature of the meeting was the outpouring of the heart of the lawyers of this State in support of the Government in this crisis, and of the fraternization between ourselves and Canada as allies in the same cause.

FRANK CRASSWELLER.*

DULUTH.

*Retiring President.

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JUDICIAL REGULATION OF COURT PROCEDURE[1]

ANCIENTLY, regulations of pleading and practice were principally of judicial origin. Some were the result of judicial decisions in individual cases; others were court rules formally declared;[2] some few were enactments of parliament, the latter of which were attempts to mitigate some of the most technical

[1] In preparation of this paper the following were freely consulted, and material therefrom has been liberally used:

Procedure through Rules of Court. I Journal of American Judicature Society 17 (June 1917).

The Proposed Regulation of Missouri Procedure by Rules of Court, Manley O. Hudson. University of Missouri Bulletin, Law Series 13, p. 3 (Dec. 1916).

Regulation of Judicial Procedure by Rules of Court, Roscoe Pound. 10 Ill. Law. Rev. 163; 2 Amer. Bar Association Journal 46 (Oct. 1915).

Ontario Courts and Procedure, Herbert Harley. 12 Mich. Law Rev. 339-447 (March-April 1914).

English Courts and Procedure, William E. Higgins. Bulletin 11, Amer. Jud. Society 32.

A Criticism of the Colorado Act for Procedure by Rules of Court (Laws of Colorado 1913, p. 447), E. L. Regennitter. 18 Col. Bar Association Reports 131.

Procedure by Rules of Court. 83 Central Law Journal 394 (1916).

Reforming Procedure by Rules of Court, Roscoe Pound. 76 Central Law Journal 211 (1913).

Report of Committee on Reform of Judicial Procedure. 28 Va. State Bar Association Reports 71 (1915).

Report of Board of Statutory Consolidation, New York. Vol. I p. 170 et seq. (1915).

Committee Report, 37 Ohio State Bar Association Reports 18.

Rosenbaum, Rule-Making Authority in the English Supreme Court. Boston, 1917.

Studies in English Civil Procedure, Samuel Rosenbaum. 63 University of Pennsylvania Law Rev. 105, 151, 273, 380, 505.

[2] Jenks, Short History of English Law 188.

of the asperities of common law pleading. By the beginning of the nineteenth century the rules of common law procedure had become so rigid and formal that some relief, other than from the courts themselves was imperative. In England it took the form of the civil procedure act of 1833, which provided for the formulating of rules by the common law judges for the simplification of pleading and practice. The Hilary Rules of 1834 were accordingly promulgated. In this country various statutory modifications of the ancient rules were enacted. The early experiences of England under the Hilary Rules and the experience generally with patchwork procedural reform led to the adoption of the Field Code in New York in 1848. Whereas the English act of 1833, while commanding simplification, left with the judiciary the methods of accomplishing it, the New York experiment effectuated a practically complete transfer of procedural regulation from the courts to the legislature. The Field Code has been widely copied and is the basis of most of the systems of procedure in our country today. The American Bar Association is now advocating a system of uniform judicial procedure, the first step in which requires the enactment by the Congress of the United States of the provisions of the so-called Clayton Bill as introduced in the sixty-third Congress. That bill provides that the Supreme Court of the United States shall have "the power to prescribe, from time to time, and in any manner, the forms of writs and all process, the mode and manner of framing and filing proceedings and pleadings, of giving notice and serving writs and process of all kinds, of taking and obtaining evidence, drawing up, entering and enrolling orders; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all actions, motions and proceedings at law of whatever nature by the district courts of the United States and the courts of the District of Columbia; that in prescribing such rules, the Supreme Court shall have regard to the simplification of the system of pleading, practice and procedure in said courts, so as to promote the speedy determination of litigation on the merits," and that, when and as the rules of court shall be promulgated, all laws in conflict therewith shall become of no force or effect. It is planned to have similar

statutes enacted in the several states and to have rules adopted thereunder conforming to those promulgated by the Supreme Court of the United States. In short, it is proposed to revest the control of procedure in the courts, but to prescribe that it shall be exercised by rules formally promulgated rather than by regulations evolved through judicial decisions.

The sole object of any procedure system should be the attainment of a just and speedy decision upon the merits, according to the principles of substantive law, at the lowest practicable cost, of all disputes between litigants. The attainment of this end is possible only under a plan which recognizes the impossibility of foreseeing the effects of the application of any procedural rule in all contingencies, and the impossibility of devising a code which will cover every procedural contingency. Consequently, a satisfactory system must be flexible and must provide an easy method for wise amendment. Other things being equal, the object is more likely to be attained if the rules are made by those best qualified by learning and experience to appreciate the practical problems of the administration of justice. Fairness demands that, so far as practicable, authority to cure procedural defects and popular responsibility therefor should be with the same body. And obviously any suggested change should be workable, should promise improvement over the existing system and should be practicable of adoption. The present proposal, therefore, involves a comparison of the present system and the suggested plan as to flexibility, ease of amendment, and qualifications of the respective rule-making bodies, and the consideration of popular responsibility for faults in the administration of justice, and of the practicability of the proposed system.

Legislative control of the details of procedure is based upon the obviously erroneous theory that the courts can be furnished a set of rigid orders, devised in advance by a farseeing legislature, to fit every possible circumstance, so that in any case the court has but to select the particular rule designed therefor, which will automatically apply. This results in an absolutely rigid system. The courts can, of course, do much to soften the rigor by process of interpretation, if they be so inclined, but they cannot properly disregard or suspend positive statutory enactments, even to avoid an outrageous result.

Rules of court, however, may be waived, or their operation suspended, to prevent a manifest injustice.[3] As to flexibility, the advantage, therefore, is clearly with the proposal.

The same is true with reference to amendment. Legislative amendment is difficult because legislative sessions are infrequent, are overcrowded with business, and are of limited duration. Furthermore, it is nobody's duty to bring to the attention of the legislature in the proper way, procedural matters needing amendment. The attorney who has found the code inadequate or ambiguous, or positively misleading in some particular, forgets it as soon as the case involving it is disposed of; and no one takes the time to anticipate troublesome questions of pleading or practice. Legislative amendment is usually unscientific, because the bills are not carefully drawn, or if carefully drawn, are carelessly amended in committee or upon the floor; because frequently a rule is enacted or altered without sufficient consideration of its effect upon other portions of the code, and because bills are sometimes passed as personal favors to meet individual cases. Under a system of procedural regulation by rule of court, on the other hand, the rule-making body is in almost continuous session, is always available and may issue its regulations at any time. Suggestions for amendments may be made by attorneys and trial judges, as and when difficulties in pleading and practice arise. Many such matters can be anticipated. The court will have accessible the whole body of procedural law, and can easily consider the effect thereon of any proposed change. Being under no restriction as to time, and having in mind the necessity of interpreting the rules, it may and should insist upon careful drafting and accurate phrasing. It will be under no temptation to make regulations as personal favors to give advantages to favored counsel or litigants, but will be much more amenable to suggestion by the bar than is the legislature.

It would seem too clear for argument, that judges are in a much better position than legislators to know and appreciate the practical problems of administration of justice. The rules of pleading and practice are the tools of their trade. They

[3] United States v. Breiling, (1887) 20 How. (U. S.) 252, at 254, 15 L. Ed. 900; Gillette-Herzog Mfg. Co. v. Ashton, (1893) 55 Minn. 75, 56 N. W. 576; Picket v. Wallace et al., (1880) 54 Cal. 147.

must use them every day. And as the skilled workman knows the defects in his tools, and the difficulties and the imperfections in the product caused thereby, so the judges, much more clearly than any legislative body, know the inconsistencies and shortcomings of many procedural regulations and the effects thereof in the delay and denial of justice. And with this knowledge they are obviously better qualified to devise the remedies in the way of new or altered rules.

People generally are impatient of the workman who complains of his tools. And during the past decade or more the public has paid little attention to the plea that delays and miscarriages of justice are due to legislative stupidities, and has placed the responsibility upon the courts, with the result that, constitutional provisions and statutes in several jurisdictions were enacted providing for the recall of judges. The courts and the lawyers know that much of the criticism heaped upon the courts belongs rightfully to the legislature; but the public does not know it, and can with difficulty, ever be made to believe it. If the courts are to bear the responsibility for the defects in the machinery or the administration of justice, theirs should be the authority to design and repair that machinery.

Theoretically, then, the proposed revesting of the control of procedure in the courts has everything to commend it. What of its practicability? It has been said that it could not work worse than the present system. And in fact, legislative control has produced some well-nigh intolerable results. The original codes have generally been inadequate, have been variously interpreted and have been voluminously and carelessly amended. The Field Code contained fewer than four hundred sections; the present code of New York, without the 1917 amendments, contains more than thirty-four hundred sections. With its annotations it covers some five thousand pages. The experience has doubtless been worse in New York than elsewhere; but it has been bad enough everywhere. A great portion of the time and energy of the trial and appellate courts is consumed in determining mere questions of practice. Mr. Frank C. Smith prepared for the American Bar Association a table covering the general digest for the first three months of 1910, showing the number of points on prac-

tice and on substantive law decided by the courts.[4] In a total of 5927 cases, a total of 22,986 points were decided, of which 12,259 or 53.32% were points on practice. In Minnesota, of 332 points, decided in 115 cases, 183 or 55.1% were points on practice.[5] These figures show the vast amount of time, labor and money expended on matters not going to the merits. They do not purport to show the percentage of cases lost in the trial courts, or reversed in appellate courts on points of practice. It must not be taken that in all of these cases justice was denied or even delayed by procedural faults. In many of them, such was doubtless the fact. But even if it were not so in a single case, the waste of work and money involved in making the points, preparing the records and briefs, and making and writing the decisions, is sufficient to bring condemnation upon the system. Such a mass of procedural litigation must tend to develop the procedural specialist, whose aim is to win upon technicalities and to prevent adjudication upon the merits. And the development of such specialists in turn tends to increase the amount of procedural litigation. Thus the evil grows upon itself.

Past experience with judicial regulation of procedure has not been uniformly satisfactory. Indeed, the failure of the courts to show a proper appreciation of the true function of rules of pleading and practice was the chief cause for legislative interference. It must be remembered, however, that most of these rules were developed by judicial decision, as were the principles of substantive law, and the doctrine of stare decisis was applied to them. Consequently, they became practically as formal and rigid as legislative enactments. Regulation by rule of court will, of course, not be subject to this objection. And such data as are available with reference to the practical operation of regulation of this sort, while far from demonstrating its perfection, do indicate the possibility of its producing much more satisfactory results than the present system.

Procedure has been regulated by rules of court in England

[4] West Publishing Co.'s Docket, II. p. 1752, 1753.

[5] At the 1917 meeting of the Minnesota State Bar Association, Hon. William A. Cant, Judge of St. Louis County District Court, voiced his protest against the use of so great amount of time and energy of court and counsel upon points not going to the merits.

since before 1875,[6] in Ireland since 1877, and in Scotland since the sixteenth century.[7] Our federal courts have controlled equity practice by rule since 1822,[8] admiralty practice since 1842,[9] bankruptcy since 1898,[10] and copyright since 1909.[11] New Hampshire courts have exercised such rights of regulation since before 1859.[12] The courts of Michigan have had the constitutional power to do so since 1850;[13] those of Delaware, statutory authority since 1852.[14] The various commissions and courts created to handle such matters as workmen's compensation, railroad and warehouse affairs, etc., are generally given power to prescribe their own rules of procedure. The municipal courts of Chicago and Cleveland have enjoyed a somewhat restricted privilege of the same sort. Until 1909, however, no particular stress seems to have been laid upon the right and duty of American courts to work out their own procedural salvation. In that year the Committee of the American Bar Association to Suggest Remedies and Formulate Proposed Laws to Prevent Delay and Unnecessary Cost in Litigation pointed out the desirability of such a program. In 1912 New Jersey,[15] in 1913 Colorado,[16] in 1915 Alabama,[17] Michigan,[18] and Vermont,[19] and in 1916 Virginia[20] enacted practice codes upon this principle. The Colorado,

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[6] Common Law Procedure Acts were enacted in 1852 and 1854, and Judicature Acts in 1873, 1875, 1877, 1879, 1881, 1884, 1890, 1891, 1899, 1902, 1909, 1910. See Proposed Regulation of Missouri Procedure, Manley O. Hudson, University of Missouri Bulletin, Law Series 13, p. 18.

[7] Ibid., pp. 19, 20; Rosenbaum, Rule Making in the Courts of the Empire, 15 Jour. Comp. Legislation (N. S.) 128, 132, Rosenbaum, Rule-Making Authority, 228.

[8] 1 U. S. Statutes at Large 276. See rules in 7 Wheat. (U. S.) pp. v-xxiv.

[9] See rules in 1 How. (U. S.) pp. xli-lxx. The Act of 1842, Chap. 188, confirmed the court's power. 5 U. S. Statutes at Large 516.

[10] National Bankruptcy Act, 1898, Sec. 30. 30 U. S. Statutes at Large 552. See rules in 172 U. S. 653.

[11] 35 U. S. Statutes at Large 1075 Chap. 320 Sec. 25. See rules in 214 U. S. 533.

[12] Jeremiah Smith, in 10 Ill. Law Rev. 364. See also Owen v. Weston, (1885) 63 N. H. 599, 604.

[13] Mich. Constitution, 1850, Art. VI. Sec. 5.

[14] Del. Revised Code 1852 Chap. 106.

[15] N. J. Acts 1912 Chap. 231 Sec. 32. See also N. J. Acts 1915 Chap. 93.

[16] Col. Laws 1913 Chap. 121.

[17] Ala. Laws 1915 p. 607.

[18] Mich. Public Acts 1915 No. 314 Sec. 14, Mich. Judicature Act 1915 p. 5.

[19] Vt. Laws 1915 No. 90 Sec. 10.

[20] Va. Acts 1916 p. 939.

Vermont, Virginia and Alabama enactments place in the courts the control of procedure almost without restriction, as does the English act. The New Jersey plan provides a short legislative code covering in outline the general principles of practice and leaving details to be cared for by rules of courts.

It is apparent that it is too early to make accurate deductions from the American experience. Prior to 1909, the possibilities of procedural progress by court rules was not realized. The courts of Michigan had taken no advantage of their authority to regulate procedure by rule. The Supreme Court of the United States in its dealings with equity practice rivalled the average legislature. The old equity rules were almost as badly drawn and as fruitful of litigation as the ordinary procedural statute; and no substantial amendment after 1842 was made, notwithstanding the fact that even their phraseology had become obsolescent. Furthermore, judicial regulation made no gain by the promulgation of the 1914 rules of the supreme court of Colorado. They were inartistically drawn, inaccurately phrased, and in some respects unwisely enacted.[21] In fact they seemed to offer absolutely no improvement over the usual legislative act. On the other hand, the federal supreme court in 1913, of its own motion, made a thorough and satisfactory revision of the equity rules. The Colorado court was quick to appreciate the criticisms of the bar and to respond by amending and revising its rules.[22] But it is the working of the English system that proves the superiority of court regulation over legislative regulation. The rules are, on the whole, accurately worded and carefully drawn. They are readily but not hastily amended, as experience in applying them shows the need of amendment.[23] They are administered with due regard to the fact that their purpose is the attainment of adjudication upon the merits. Thus, reliance upon technicalities is discouraged, and the law of procedure is relegated to its proper place. The result is that American lawyers, who see the system in operation, are astonished at the rapidity and accuracy with which the merits of a case are presented for decision. This end, of course, could not be

[21] See 18 Col. Bar Ass'n Reports 131 et seq.
[22] See 1 Journal of American Judicature Society 17.
[23] See Rosenbaum, Studies in English Procedure, 63 Univ. of Pa. Law Rev. 111.

attained without a proper attitude of both bench and bar. If the court did not appreciate the tremendous responsibility and opportunity given it in the right to control procedure and did not take the proper steps for a wise and scientific exercise of that right; if the bar did not unselfishly and intelligently lend its aid to the court, the English system would function as badly as our own.

It is believed that the American bench and bar have come to realize the folly of making a fetich of procedure, the stupidity of sacrificing merits to technicalities, and the importance of a proper making and interpreting of rules of pleading and practice. Of course, where courts are so constituted intellectually as to reverse a conviction because the indictment concludes "against the peace and dignity of state," instead of "against the peace and dignity of the state," [24] or to reverse a judgment on the merits because the complaint uses the word "promise" instead of the word "agree," [25] counsel will continue to raise such senseless objections; and relief will be had not in the adoption of the new system of procedure, but in the appointment or election of new judges. It is noteworthy that when decisions of this kind are now announced, they are accompanied by profuse apologies, and attempts to place the blame upon the legislature or upon the doctrine of stare decisis.

The attitude of the majority of the courts is well illustrated by the language of the Minnesota supreme court in dealing with the matter of inconsistent defenses in the McAlpine case:[26]

"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.

"...When the rule of consistency, technically applied, prevents the interposition of a fair defense, it must yield to the insistent demand of the law that a party be given a hearing on all his causes of action and all his defenses. This is the paramount consideration. Substantive rights must not be sacrificed to preserve a rule no more important and no better accredited than the consistency rule."

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[24] State v. Campbell, (1907) 210 Mo. 202, 109 S. W. 706.
[25] McGinnity v. Laguerenne, (1848) 10 Ill. 101.
[26] McAlpine v. Fidelity & Casualty Co. of New York, (1916) 134 Minn. 192, 200, 158 N. W. 967. See also 1 MINNESOTA LAW REVIEW 94.

With the courts taking this position, with the bar realizing its justice and good policy, with the public calling for simplification and expedition of court procedure, and with both bench and bar recognizing the need and their responsibility, there would seem to be no reason why the proposed plan should not work here as well as in England.

But even though it is theoretically sound and practicable, is its adoption feasible? It has been objected that the present system while cumbersome and inartistic is fairly well understood, and that to substitute a new one will cause a tremendous increase in procedural litigation; that in the first fifteen years under the English Judicature Act some four thousand decisions dealt with the interpretation of rules.[27] It is answered that the present system is not sufficiently understood to avoid constant litigation, and that there is no necessity for sudden and complete change in procedure. The court might well prescribe that the procedure shall remain as formerly except where specifically changed. Then changes might be made gradually, beginning with those matters most urgently calling for alteration.

It is also objected that the adoption of such a plan calls for a constitutional amendment, and that in most jurisdictions it would be quite impossible to secure its adoption, because of the difficulties in the way of all constitutional amendments, and particularly because of the unfamiliarity of the public with the merits of the plan. In considering this objection, attention must be given to the particular method of accomplishing the desired result.

The method suggested by the American Judicature Society involves the reorganization of our entire judicial system, and places control of procedure in a judicial council composed of representatives of the different branches of a single state court.[28] This would clearly require an amendment to the constitution and the adoption of a project for which extensive propaganda would be necessary.

Another suggestion makes the rule-making body a committee of bench and bar. This committee would, of course, be separate from both the legislature and the courts; and

[27] Hepburn, History of Code Pleading, Sec. 224.
[28] 1 Journal of Amer. Judicature Society 17.

powers either judicial or legislative would have to be delegated to it. This might well be subject to constitutional objection.

The suggestion of the American Bar Association is to vest the rule-making power for all the courts of a jurisdiction in the court of last resort of that jurisdiction. This proposal has been opposed for the practical reasons, that courts of last resort are usually overworked, that some of their members have never been either trial judges or trial lawyers, that none of them are likely to be very familiar with the offices and duties of masters, referees, clerks,[29] and for the further reason that the legislature has no right to delegate to the judiciary the legislative function of prescribing rules of procedure. The practical objections are overcome by pointing out that the appellate courts can do as the federal supreme court did in preparing the revision of the equity rules. They can get whatever assistance they need from committees of trial judges and attorneys. Indeed the various bar associations would be glad to cooperate with the courts, and there would be no difficulty whatever in getting aid from any of the officers of any court in the jurisdiction.

As to the constitutional objection, it is true that most of our state constitutions provide for a separation of powers between the legislative, executive and judicial departments, and forbid the exercise of the powers of any department. But in the application of this provision the following well-settled propositions must be borne in mind: (1) While such a separation of powers seems theoretically sound, yet in the practical operation of government, it is absolutely impossible. As Mr. Justice Story said:

"Notwithstanding the memorable terms in which this maxim of a division of powers is incorporated into the bills of rights of many of our state constitutions, the same mixture will be found provided for, and indeed, required in the same solemn instruments of government.....Indeed, there is not a single constitution of any state in the Union which does not practically embrace some acknowledgment of the maxim and at the same time some admixture of powers constituting an exception to it." [30]

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[29] Ibid.

[30] Story, Constitution of the United States, 5th ed., I, Sec. 527.

(2) This provision does not prevent the legislature from delegating to the courts all powers which the legislature might rightfully exercise itself, but only those powers which are strictly and exclusively legislative. [31] (3) The assignment of powers not specifically distributed by the constitution is a legislative function, and when powers of an ambiguous character are assigned to the judiciary, any doubt will be resolved in favor of the validity of the statute. [32] (4) In determining whether a particular power belongs exclusively to a particular department, regard must be had to its history and especially to the exercise of it at and prior to the adoption of the constitution. [33]

From the foregoing it would seem to follow that if the history of judicial procedure shows the power to regulate it to have been exercised by the courts exclusively, or by the courts and the legislature in common, there can be no constitutional objection to vesting such power in the judiciary by legislative enactment.

As already stated, the regulation of procedure was in England, from the earliest times, regarded as chiefly a judicial function. At the time of our separation from the Mother Country, parliament had rarely interfered, although its power to do so was undoubted. The theory of all later English legislation, beginning with the civil procedure act of 1833, is that the courts should largely control their own procedure. [34]

That the theory of our early federal legislation was the same appears from the large measure of control of procedure placed in the courts by the Judiciary Act of 1789 and the Process Act of 1792. That the Supreme Court and the bar accepted the same principle is evidenced by the fact that the attorney general in 1792 moved the court for information relative to the system of practice to be used therein and the court responded that it considered "the practice of the courts of King's Bench and Chancery in England, as affording outlines for the practice of this court; and that they will, from time to time, make such alterations therein, as circumstances

[31] Wayman v. Southard, (1825) 10 Wheat. 1, 42, 6 L. Ed. 253.
[32] State ex rel. Patterson v. Bates, (1905) 96 Minn. 110, 116, 104 N. W. 709, 113 Am. St. Rep. 612.
[33] State v. Harmon, (1877) 31 Ohio St. 250, 258.
[34] See enactments referred to in note 6, supra.

may render necessary." [35] In 1825, Chief Justice Marshall said:

"The 17th section of the Judiciary Act, and the 7th section of the additional act empower the courts respectively to regulate their practice. It certainly will not be contended that this might not be done by Congress.

"The courts, for example, may make rules, directing the returning of writs and processes, the filing of declarations and other pleadings, and other things of the same description. It will not be contended that these things might not be done by the legislature, without the intervention of the courts, yet it is not alleged that the power may not be conferred upon the judicial department." [36]

In the same year, Mr. Justice Thompson declared: "Congress might regulate the whole practice of the courts, if it was deemed expedient so to do; but this power is vested in the courts; and it never has occurred to anyone that it was a delegation of legislative power." [37]

Ten years later Mr. Justice Story referred to the cases in which these statements were made and said:

"It was there held that this delegation of power by Congress was perfectly constitutional; that the power to alter and add to the process and modes of proceeding in a suit embraced the whole progress of the suit, and every transaction in it from its commencement to its termination, and until the judgment should be satisfied; and that it authorized the courts to prescribe and regulate the conduct of the officer in the execution of final process, in giving effect to its judgment. And it was emphatically laid down, that 'a general superintendence over this subject seems to be properly within the judicial province and has always been so considered.' " [38]

The court's action in regulating equity practice, and the subsequent legislation and court rules regarding admiralty, bankruptcy and copyright practice are in harmony with the earlier history. It is, therefore, apparent that both in England and in our federal governmental system, the regulation of procedure has not been regarded as an exclusively legislative function.

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[35] 2 Dall. (U. S.) 411, 1 L. Ed. 436.

[36] Wayman v. Southard, (1825) 10 Wheat. (U. S.) 1, 43, 6 L. Ed. 253.

[37] U. S. Bank v. Halstead, (1825) 10 Wheat. (U. S.) 51, 61, 6 L. Ed. 264.

[38] Beers v. Haughton, (1835) 9 Pet. (U. S.) 329, 359, 9 L. Ed. 145.

And such has been its history in Minnesota also. In the Northwest Ordinance of 1787 and the act of August 17, 1789, to provide for the government of the Northwest Territory,[39] there was no original separation of powers, for the governor and judges had legislative powers until the organization of a general assembly. In 1800 Indiana Territory was carved out of the Northwest Territory,[40] and in 1805 Michigan Territory was carved out of Indiana Territory.[41] In December, 1820, the governor and judges of Michigan Territory adopted an act concerning the supreme and county courts of the territory, section 12 of which gave the courts power to make "all such rules respecting the trial and conduct of business both in term and vacation, as the discretion of said court shall dictate," and in order that the rules might be uniform the county courts were directed to make their rules conform as near as might be to the rules of the supreme court.[42] In 1825 the general assembly enacted a more elaborate bill, section 18 of which made it the duty of the supreme court to prescribe rules and orders for the proper conducting of business in said court and in the circuit courts and for the regulating of the practice of said courts, "so as shall be fit and necessary for the advancement of justice, and especially for preventing delay in proceedings." A direction to the county courts similar to that contained in the former act was made for the sake of securing uniformity.[43]

This law was in force when, in 1836, Wisconsin Territory was established by an act which, among other things, continued the laws of Michigan Territory in force until changed by the proper authorities.[44] The policy of regulating the practice of the supreme and circuit courts by rules adopted by the supreme court was continued in the legislation of the state of Michigan.[45] And in 1850 a similar provision was written into the constitution of Michigan.[46]

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[39] 1 U. S. Statutes at Large 50.
[40] 2 U. S. Statutes at Large 58.
[41] 2 U. S. Statutes at Large 309.
[42] Mich. Territory Laws, I, 714, 718.
[43] Mich. Territory Laws, II, 264, 268.
[44] 5 U. S. Statutes at Large 10.
[45] Mich. Rev. Statutes 1838, Part III Title 1 Chap. 1 Sec. 5; Mich. Rev. Statutes 1846 Chap. 88 Sec. 13.
[46] See note 13, supra.

In 1836 the legislative assembly of Wisconsin Territory passed an act concerning the supreme and district courts which, in terms almost identical with those of the Michigan enactment of 1820, conferred upon the courts the power to make rules, and directed the district courts to conform their rules to those of the supreme court.[47] When Wisconsin was admitted to the Union in 1848, this act was in force. The above-mentioned provision was continued in Section 2 of Chapter 87 of the Revised Statutes of 1849; and Section 4 of Chapter 82 gave the supreme court power to make rules for the circuit courts also. Because in 1856 a code of procedure was adopted in Wisconsin, this latter section appears in Chapter 115 of the Revised Statutes of 1858 with the qualifying clause requiring the rules to be "not inconsistent with the constitution and the laws."

The act of March 3, 1849, which established the territory of Minnesota provided that the laws in force in the territory of Wisconsin at the date of the admission of the state of Wisconsin should continue valid and operative in Minnesota.[48] This clearly made the Wisconsin act of 1836 part of the laws of Minnesota Territory. In 1851, Minnesota Territory adopted a code of civil procedure. At the same time it gave the supreme court power to prescribe rules for the conduct of its business. In 1852, Section 6 of Chapter 69 of the Revised Statutes was amended so as to provide that the supreme court might "by order from time to time, make and prescribe such general rules of practice both at law and in equity, and regulations for the said supreme court and the government of the several district courts, not inconsistent with the provisions of this act, as it may deem proper." This provision continued in force after Minnesota was admitted to the Union, until the revision of 1866.

It will, consequently, be seen that in Minnesota and in the jurisdictions from which she inherited her laws, as well as in England and the federal government, the power to regulate procedure has been regarded not as an exclusively legislative power, nor yet as an exclusively judicial power, but certainly as a power properly within the judicial province when not

[47] Wis. Laws 1836 p. 35.
[48] 9 U. S. Statutes at Large 403, 408.

otherwise directed by the legislature. The United States Supreme Court has said that it is for the state to determine whether or not the legislative, executive and judicial powers shall be kept altogether distinct and separate. [49] And the Minnesota supreme court is with the overwhelming weight of authority when it says:

"But it is not always easy to discover the line which marks the distinction between executive, judicial, and legislative functions, and when duties of an ambiguous character are imposed upon a judicial officer, any doubt will be resolved in favor of the validity of the statute, and the powers held to be judicial." [50]

It is, therefore, submitted that there is in Minnesota no valid constitutional objection against the adoption of the proposal of the American Bar Association. Even the minor objection that the supreme court has no power to prescribe rules for the government of inferior courts is covered by the foregoing history and authorities.

As may be gathered from what has already been said, the proposal favors the Colorado plan of entrusting the entire subjects of pleading and practice to the courts, rather than the New Jersey plan of having the legislature prescribe the general principles and outline, leaving only the details to the courts. If judicial control is to have a fair trial, there should be as little legislative interference as possible.

The movement for the control of court procedure by rules of court is growing. It is only a question of time when Congress will pass a bill embodying the principle. Six states have already done so. Similar legislation has been recommended in New York by an official board of revision. [51] Many state bar associations have, after full discussion, gone on record in favor of it. But it would be a mistake to adopt it in any jurisdiction until the bench and bar thereof realize the great responsibility thereby imposed upon them and are willing to make the necessary sacrifices of time and labor to formulate rules which shall be accurately phrased and scientifically drafted so as to remedy old abuses and prevent new ones.

WASHINGTON, D. C. EDMUND M. MORGAN.*
*Major in U. S. Army,
Judge Advocate General's Office.

[49] Dreyer v. Illinois, (1902) 187 U. S. 71, 84, 47 L. Ed. 79.
[50] State ex rel. Patterson v. Bates, (1905) 96 Minn. 110, 116, 104 N. W. 709, 113 Am. St. Rep. 612.
[51] Report of Board of Statutory Consolidation, N. Y., I, pp. 170 et seq.

THE LAW OF PRIMARY ELECTIONS

INTRODUCTION.

"The primary system has been so long and so generally recognized that it has become an essential part of our political system."[1] The first primary law was enacted in California in March, 1866, closely followed by a New York act of April of the same year. In 1871 Ohio and Pennsylvania and in 1875 Michigan followed suit. Since then the primary has spread to all parts of the country.

The primary is not only a comparatively recent development, but the great body of decisions relating either to the principles of primary legislation or to details or regulations of primaries have occurred in very recent years; not enough, indeed, have taken place to enable us to say that a well-defined body of primary election law exists at the present time.

The present paper proposes, nevertheless, to examine the decisions of recent years especially, with the purpose of classifying them and indicating possibly the general trend and the possible future decisions of the courts on primary laws. We shall first examine the decisions relating to primary acts per se and then the various features of these acts and the subsequent laws passed to regulate primary elections.

1. THE GENERAL PRINCIPLE OF PRIMARY LEGISLATION.

There have been very few cases in which primary laws were attacked on the general principle involved; nearly all of the attacks are devoted to specific points contained in the acts. "The right of the legislature to require that nominations shall be by primary and to prescribe additional qualifications for the voters participating in same has been recognized by the weight of authority in the states of the Union."[2] The attacks that have been made have taken the form of declarations that primary laws deprive citizens of the right of forming political parties—voluntary associations of men, holding political be-

[1] State v. Cole, (1911) 156 N. C. 618, 72 S. E. 221.

[2] Ledgerwood v. Pitts, (1910) 122 Tenn. 571, 125 S. W. 1036. The decision in this case is one of the best discussions of the questions arising from primary legislation.

liefs in common (such, at least, is the legal view of the reason for party organization)—or that the legislature undertakes to form parties for them; in other words, it is alleged that the destruction of political parties is threatened. This view, however, is not upheld by the courts.[3] It has even been declared that where a statute attempts to regulate nominations, political parties must be recognized, though they are voluntary associations, since "we live in the days of party government."[4] This is analogous to the recognition of partnerships as actual entities.

The following powers held to be inherently vested in the legislature give it constitutional authority to enact a primary law; authority to provide for registration, to regulate the suffrage, to protect the purity of elections, its power to determine the manner of holding elections and the making of returns therefrom; the only limitation that it cannot violate is a section of the constitution in terms fixing who are entitled to the right of suffrage.[5] In line with this it has been held that the legislature may provide for primary laws and the regulation of the same when not prohibited by the constitution from so doing.[6] "The general assembly being, then, the depository of all legislative power except when restrained by the organic law, it follows that it is clothed with full power to enact a primary election law, if there is no provision in the constitution depriving it of that authority."[7] Primary election laws, being of a highly remedial nature, are not in contravention of the common law.[8]

It would seem that in many cases the courts have adroitly avoided being forced to declare as to the relative merits of the primary and convention systems and the wisdom of primary legislation by supporting such acts under the police power and asserting that they are of a political nature with which the court is not concerned. An appeal from the legislative

[3] Hopper v. Stack, (1903) 69 N. J. L. 562, 56 Atl. 1; Katz v. Fitzgerald, (1907) 152 Cal. 433, 93 Pac. 112; Riter v. Douglass, (1910) 32 Nev. 400, 109 Pac. 444. This case probably embodies a discussion of a greater number of primary law problems than any other.

[4] State v. Houser, (1904) 122 Wis. 534, 100 N. W. 964.

[5] Riter v. Douglass, (1910) 32 Nev. 400, 109 Pac. 444.

[6] Kenneweg v. County Commissioners, (1905) 102 Md. 119, 62 Atl. 249; State v. Miles, (1908) 210 Mo. 127, 109 S. W. 595; Primary Election Case (McInnis v. Thames), (1902) 80 Miss. 617, 32 So. 286.

[7] Kenneweg v. County Commissioners, supra.

[8] State v. Swanger, (1908) 212 Mo. 472, 111 S. W. 7.

decision must be made to the people rather than to the courts.[9] "A proper administration of the affairs of a sovereign state vitally affects the welfare of the existence of its citizens, and, where such a matter of vital importance is at stake, the state has the right, under the police power vested in its legislature, to make such reasonable regulations in the interest of public welfare for the nomination of the candidates of the various parties as it may determine" and the advisability of such legislation "is a matter solely for the legislature to determine."[10]

Primary laws, as any other laws, must not contravene general constitutional provisions. They must be reasonable.[11] Primary laws have been upheld as not invalid as denying electors the right to determine the political principles their candidates must espouse or enabling the electors of opposite political faith to name the candidates of their opponents;[11] they are not invalid as impairing the right of citizens to assemble together and instruct their representatives.[12] Nor are they invalid as using public funds for the use of private or voluntary associations.[13] It was argued that taxation to support primaries was not due process of law. This view was untenable, said the court, since the protection of the purity and expedition of elections is a fundamental function of state governments, unabridged by the constitution.

The completeness of the law and the sufficiency of the title are technical questions which have been invoked against primary legislation. Such laws should be complete in all their terms and conditions.[14] Not only must the title be sufficient but there must be only one subject and that expressed in the title.[15] The legislature has the power to frame regulatory

[9] State ex rel. Zent v. Nichols, (1908) 50 Wash. 508, 97 Pac. 728.

[10] Riter v. Douglass, (1910) 32 Nev. 400, 109 Pac. 444. In accord see Hopper v. Stack, (1903) 69 N. J. L. 562, 56 Atl. 1; State v. Felton, (1908) 77 Ohio St. 554, 84 N. E. 85.

[11] Ladd v. Holmes, (1901) 40 Ore. 167, 66 Pac. 714. See also State ex rel. Nordin v. Erickson, (1912) 119 Minn. 152, 137 N. W. 385.

[12] Katz v. Fitzgerald, (1907) 152 Cal. 433, 93 Pac. 112. See also State ex rel. Van Alstine v. Frear, (1910) 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633.

[13] State v. Felton, (1908) 77 Ohio St. 554 84 N. E. 85. Cf. Kenneweg v. County Commissioners, (1905) 102 Md. 119, 62 Atl. 249.

[14] People v. Election Commissioners, (1906) 221 Ill. 9, 77 N. E. 321; Rouse v. Thompson, (1906) 228 Ill. 522, 81 N. E. 1109.

[15] Rouse v. Thompson, supra; Ledgerwood v. Pitts, (1910) 122 Tenn. 571, 125 S. W. 1036; State v. Drexel, (1904) 74 Neb. 776, 105 N. W. 174; State v. Mitchell, (1909) 55 Wash. 513, 104 Pac. 791.

Laws held not to violate such provisions in: State v. Cox, (1911)

laws and decide their terms; this power cannot be again delegated.[16]

Primary laws and laws to regulate primary elections must likewise meet the requirement of uniformity. The problem is to see just how this requirement has been interpreted by our courts. Citations are not necessary to support the general statement that all laws and regulations must be reasonable, uniform, and impartial. But the mere fact that a law has only a local application does not prevent its being a general or public law, for it may be uniform in its operation as to a particular class.[17] And legislation may be class legislation but not be repugnant to the constitution if it is at the same time general.[18] Let us now examine some of the laws considered.

Laws exempting certain offices from the primary election are not unconstitutional on the ground of special or class legislation.[19] A law providing for and regulating the holding of primaries in a certain county was upheld with, seemingly, little opposition.[20] That but one city falls in a class attempted to be regulated does not make a law invalid.[21] Both these latter

234 Mo. 605, 137 S. W. 981; Commonwealth v. Wilcox, (1911) 111 Va. 849, 69 S. E. 1027; State v. Bethea, (1911) 61 Fla. 60, 55 So. 550; Socialist Party v. Uhl, (1909) 155 Cal. 776, 103 Pac. 181; Morrow v. Wipf, (1908) 22 S. D. 146, 115 N. W. 1121; State ex rel. Zent v. Nichols, (1908) 50 Wash. 508, 97 Pac. 728; State v. Michel, (1908) 121 La. 374, 46 So. 430.

[16] People v. Election Commissioners, (1906) 221 Ill. 9, 77 N. E. 321. Power given the county central committee to decide whether nominations should be by (1) voters or delegates chosen at primary, or (2) by majority or plurality vote: Held, invalid delegation. Cf. Morrow v. Wipf, supra.

In Rouse v. Thompson, supra, the county committee was given power to determine the delegate districts in county. Void.

[17] Ladd v. Holmes, (1901) 40 Ore. 167, 66 Pac. 714.

[18] Hodge v. Bryan, (1912) 149 Ky. 110, 148 S. W. 21.

[19] Hodge v. Bryan, supra; Ledgerwood v. Pitts, (1910) 122 Tenn. 721, 125 S. W. 1030.

[20] State v. Cole, (1911) 156 N. C. 618, 72 S. E. 221. A California law of 1895 applying to two counties only was declared unconstitutional, since in this case it was held that a law having uniform operation could be made applicable. Marsh v. Hanley, (1896) 111 Cal. 368, 43 Pac. 975. An act applying a different standard to Cook than to the other counties in Illinois was held to conflict with the constitutional prohibition of special laws regulating county affairs. People v. Commissioners, (1906) 221 Ill. 9, 77 N. E. 321.

[21] Ladd v. Holmes, (1901) 40 Ore. 167, 66 Pac. 714. In accord see Hopper v. Stack, (1903) 69 N. J. L. 562, 56 Atl. 1; Commonwealth v. Commissioners, (1914) 22 Pa. Dist. 674; Kesler v. Commissioners, (1914) 22 Pa. Dist. 678. Contra: opposing the last two cases is Commonwealth v. Commissioners, (1914) 22 Pa. Dist. 654. A law applying only to cities of the first grade of the first class was declared unconstitutional. City of Cincinnati v. Ehrmann, (1899) 6 Ohio N. P. 169.

statements have, however, been denied by the courts, as will be seen by an examination of notes 20 and 21. The legislature has been held to have the power to distribute the expense of primary elections by imposing the expense of a city primary on the county wherein it is located,[22] but it is doubtful, in the writer's opinion, whether such legislation would be generally upheld by the courts.

Summing up the doctrines set forth in the decisions of the courts we may say that primary laws and statutes regulating primary elections are upheld because of the public importance of securing proper party nominations; but that they must not contravene constitutional provisions. Many of these provisions relate specifically to elections; the question, which will be treated in the following section, therefore arises, as to whether primary elections are "elections" in the sense in which the term is used in the constitution or in general statutes. The conservative view is that they are, even though the primaries were not a part of the election system at the time of framing the constitution or passing the acts.[23] Other courts, however, question the applicability of provisions framed when the primary system was not in use.[24]

The whole primary act or regulatory statute may or may not fall when a particular portion of the same is declared unconstitutional. If the invalid part goes to the root of the act and is vital to its existence, then the whole law will be invalid. But if the void part is not of such a nature as to render the continued operation of the other sections of the law impossible or illogical then the remaining portions will stand. To put it in another way, we should ask the question, "Would the legislature have passed the act, or statute without the section regarded as invalid?"

2. Is a Primary an "Election?"

Introduction. The importance of this question, as just stated, is very great. If the primary is to be regarded as an election within the meaning of every reference to that term in the constitution and general statutes then the ability to legally include many provisions in primary election laws is either

[22] Ladd v. Holmes, supra.
[23] People v. Election Commissioners, (1906) 221 Ill. 9, 77 N. E. 321.
[24] Winston v. Moore, (1914) 244 Pa. St. 447, 91 Atl. 520, Ann. Cas. 1915C 498, L. R. A. 1915A 1190.

abolished or greatly restricted. To illustrate: the constitution, let us say, provides for the secrecy of the ballot. Granting, for the sake of argument, though the courts are not unanimous by any means on the point, that the secrecy of the ballot is invaded by requirements for the voter to designate his party affiliation, then the very important question arises as to whether the primary should be included in the constitutional provision. Or bets on any election are prohibited. Does the primary come within the term "any election?" An attempt will be made to analyze the decisions on various laws and provisions before forming our conclusions as to what the judgment of the courts seems to be.

A. *Laws and Statutes in General Considered.* It has been held that the word "election" as used in some constitutional or statutory provisions includes primary elections.[25] And primaries have been held to be "elections" within a constitutional provision prescribing qualifications of electors at "all elections authorized by law"[26] and within the provision of the Bill of Rights saying "all elections shall be free and equal."[27] The effect of these decisions is to say that primary laws and regulations must not contravene constitutional and statutory provisions relationg to elections.[28]

On the other hand many cases hold that laws and constitutional provisions regulating elections in general do not apply to primaries.[29] They are not within a constitutional require-

[25] Commonwealth v. Commissioners, (1914) 22 Pa. Dist. 654. A qualified decision.

[26] Spier v. Baker, (1898) 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196. In accord Marsh v. Hanley, (1896) 111 Cal. 368, 43 Pac. 975; and Britton v. Election Commissioners, (1900) 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115.

[27] People v. Election Commissioners, (1906) 221 Ill. 9, 77 N. E. 321. This is but one of a number of Illinois cases in accord: People v. Deneen, (1910) 247, Ill. 289, 93 N. E. 437; People v. Strassheim, (1909) 240 Ill. 279, 88 N. E. 821; Rouse v. Thompson, (1906) 228 Ill. 522, 81 N. E. 1109; Sanner v. Patton, (1895) 155 Ill. 553, 40 N. E. 290.

[28] Other cases holding on principle that a constitutional or statutory reference to "any election" includes primaries are: Leonard v. Commonwealth, (1886) 112 Pa. St. 622, 4 Atl. 220; State v. Hirsch, (1890) 125 Ind. 207, 24 N. E. 1062, 9 L. R. A. 170; Ex parte Wilson, (1912) 7 Okla. Cr. 610, 125 Pac. 739; State ex rel. Ragan v. Junkin, (1909) 85 Neb. 1, 122 N. W. 473; Johnson v. Grand Forks County, (1907) 16 N. D. 363, 113 N. W. 1071.

[29] State v. Johnson, (1902) 87 Minn. 221, 91 N. W. 604, 840; in accord see State ex rel. Nordin v. Erickson, (1912) 119 Minn. 152. 137 N. W. 385; Ledgerwood v. Pitts, (1910) 122 Tenn. 571, 125 S. W. 1036; State v. Flaherty, (1912) 23 N. D. 313, 136 N. W. 76; Line v. Board of

ment that "all elections shall be equal."[30] Primary elections to choose delegates to conventions are not within constitutional or statutory requirements.[31] Primary elections are not part of the general election because held at the same time as the latter, and using the same machinery merely for convenience and economy;[32] the same case held that primaries were not "general elections" within the constitutional guaranty of the secrecy of the ballot at a general election. Primaries are not elections within the common-law meaning of the term.[33]

A typical illustration of the reasoning of those holding that a primary is an election is found in the following:[34]

"The words 'primary election,' we may say, are as well understood to mean the act of choosing candidates by the respective political parties to fill the various offices, as the word 'election' is to mean the final choice of all the electors of the persons to fill such offices. So that the words 'any election' clearly include primary elections, and such elections come within the letter of the statute."

By courts taking the opposite stand it has been declared that the words in the constitution referred to elections for office and not to elections for party nominations;[35] a similar view was taken by another court in saying the primary is merely a

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Election Canvassers, (1908) 154 Mich. 329, 117 N. W. 730, 16 Ann. Cas. 248; People v. Cavanaugh, (1896) 112 Cal. 674, 44 Pac. 1057, later overruled; State v. Simmons, (1915) 117 Ark. 159, 174 S. W. 238.

In the opinion in United States v. Gradwell, (1917) 243 U. S. 476, 61 L. Ed. 857, 37 S. C. R. 407, Justice Clarke seems to believe that the word "elections" as used in the constitution would not include primary elections. He says: "Primary elections, such as it is claimed the defendants corrupted, were not only unknown when the constitution was adopted, but they were equally unknown for many years after the law (in question) was first enacted." But Justice Clarke is very careful to note that the court is not called upon to decide the question whether primaries are "elections," as "such admission would not be of value in determining the case before us."

[30] Montgomery v. Chelf, (1904) 118 Ky. 776, 82 S. W. 388, 26 Ky. Law Rep. 638. Cf. with People v. Election Commissioners, (1906) 221 Ill. 9, 77 N. E. 321.

[31] State v. Woodruff, (1902) 68 N. J. L. 89, 56 Atl. 204; People v. Cavanaugh, (1896) 112 Cal. 674, 44 Pac. 1057, overruled in Spier v. Baker, (1898) 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196.

[32] State ex rel. McCue v. Blaisdell, (1908) 18 N. D. 55, 118 N. W. 141.

[33] State v. Woodruff, (1902) 68 N. J. L. 89, 56 Atl. 204. Decision applied only to primaries to choose delegates to convention. Quaere, would the same rule be applied to primaries to choose candidates to represent the party in the general election?

[34] State v. Hirsch, (1890) 125 Ind. 207, 24 N. E. 1062, 9 L. R. A. 170.

[35] Hester v. Bourland, (1906) 80 Ark. 145, 95 S. W. 992.

substitute for the caucus or convention.[36] "A primary election is not an election to public office. It is merely the selection of candidates for office by the members of a political party in a manner having the form of an election." The elections referred to in the statute were "elections where persons are given public offices by a plurality of the votes of all the electors voting thereat.[37]

B. *Some Specific Provisions of Primary Laws.* Primary elections have been held not to be within the meaning of a statute permitting the use of voting machines at all state, county, city, village and township elections;[38] nor within a constitutional declaration of the necessary qualifications of electors.[39] A primary election law making no provision for leaving blank spaces on the ballots as required in the constitution at all elections, is not void.[40] In another case the court distinguished between the oath of fealty to a party as a candidate and the oath made on taking office.[41] Laws providing for the determination of contested elections do not apply to primary election.[42] The above cases all declared, directly or indirectly, that primaries are not elections.

But there is no unanimity of opinion on the question even in interpreting specific statutes or provisions and saying whether they shall be put into effect. Primaries have been declared within constitutional provisions prescribing the qualifications of voters at "any election.[43] Constitutional provisions as to the mode of nominating and number of nominees must be regarded.[44]

C. *Criminal Statutes and Corrupt Practices Provisions.* Primary acts have been held not to be within the meaning of

[36] Ledgerwood v. Pitts, (1910) 122 Tenn. 571, 125 S. W. 1036.

[37] Line v. Board of Election Canvassers, (1908) 154 Mich. 329, 117 N. W. 730, 16 Ann. Cas. 248.

[38] Line v. Board of Election Canvassers, supra.

[39] State v. Johnson, (1902) 87 Minn. 221, 91 N. W. 604, 840; State ex rel. Zent v. Nichols, (1908) 50 Wash. 508, 97 Pac. 728.

[40] State v. Johnson, supra.

[41] Riter v. Douglass, (1910) 32 Nev. 400, 109 Pac. 444.

[42] Jones v. Fisher, (1912) 156 Iowa 582, 137 N. W. 940; Hester v. Bourland, (1906) 80 Ark. 145, 95 S. W. 992.

[43] Johnson v. Grand Forks County, (1907) 16 N. D. 363, 113 N. W. 1071, later overruled; People v. Strassheim, (1909) 240 Ill. 279, 88 N. E. 821.

[44] People v. Strassheim, supra; Rouse v. Thompson, (1906) 228 Ill. 522, 81 N. E. 1109; People v. Election Commissioners, (1906) 221 Ill. 9, 77 N. E. 321; People v. Deneen, (1910) 247 Ill. 289, 93 N. E. 437.

statutes prohibiting a wager on the success of any candidate at "any election," in a leading case.[45] Similarly, statutes making it a misdemeanor to place any bet or wager on any election do not apply to primaries.[46] Going still further in this line, a statute disqualifying a person from holding office during term elected for when he shall have given a bribe, threat, or reward to secure his election, was held not to apply to primaries.[47] Nor is it an offence for officials at primaries to electioneer, when the general election laws forbid it.[48]

But a statute forbidding fraudulent voting at a primary was sustained as valid under the Pennsylvania constitution[49] providing for the disqualification for holding office and the deprivation of the right of suffrage of anyone convicted of wilful violation of the election laws.[50] Primaries have been held to be within the letter and spirit of a statute prohibiting the sale of intoxicants on "the day of any election."[51] A general criminal statute referring to "elections" applies to the "September primary."[52]

Analysis and Conclusions. Can any general conclusions as to the tendencies of our courts be drawn from the conflicting opinions cited? Let us review the cases and discover how many courts adopt each view.

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[45] Commonwealth v. Wells, (1885) 110 Pa. 463, 1 Atl. 310. Overruled in Leonard v. Commonwealtth, (1886) 112 Pa. 622, 4 Atl. 220.

[46] Lillard v. Mitchell, (Tenn. Ch. App. 1896) 37 S. W. 702; Commonwealth v. Helm, (1887) 9 Ky. L. Rep. 532; Dooley v. Jackson, (1904) 104 Mo. App. 21, 78 S. W. 330.

[47] Gray v. Seitz, (1904) 162 Ind. 1, 69 N. E. 456.

[48] State v. Simmons, (1915) 117 Ark. 159, 714 S. W. 238.

[49] Pa. Constitution, Art. 8, Sec. 9.

[50] Leonard v. Commonwealth, (1886) 112 Pa. 622, 4 Atl. 220.

[51] State v. Hirsch, (1890) 125 Ind. 207, 24 N. E. 1062, 9 L. R. A. 170. Overruled in Gray v. Seitz, (1904) 162 Ind. 1, 69 N. E. 456. The decision in State v. Hirsch may be explained by the general tendency which has existed for the courts to interpret laws in a way they would not otherwise do when the liquor interests are concerned.

[52] State v. Robinson, (1912) 69 Wash. 172, 124 Pac. 379. But it is doubtful if this should be considered as fully upholding the principle that primaries are elections, since the court upheld Commonwealth v. Wells, (1885) 110 Pa. 463, 1 Atl. 310, and endeavors to distinguish the facts in this case from those in the Pennsylvania case. What the court says in effect is: The words "any election" as used in general election laws or a constitutional article on elections do not apply to primaries; as used in general criminal statutes or other statutes not aimed at or concerned with elections per se they will apply.

Supporting the view that primaries are elections we have a number of decisions from the Illinois supreme court.[53] Most of the Illinois cases rest on the cumulative voting provisions of the constitution, the courts declaring they must be made to apply at the primaries. In Oklahoma and Nebraska the courts have supported the Illinois view; in California, Pennsylvania, and Washington they have done so by overruling former decisions, but in the latter state the decision applies only to a limited extent.

In the following states the contrary position has been uniformly taken: Minnesota, Tennessee, Michigan, Arkansas, Kentucky, Missouri, Nevada and Iowa. In Indiana and North Dakota decisions holding that primaries are elections have been overruled. A New Jersey decision to this effect applies only to a limited extent. The Tennessee and Nevada cases are perhaps the best discussed of the recent cases involving the validity of primary laws and provisions.[54]

Eliminating the Washington and New Jersey decisions, as offsetting each other, we have five courts supporting the view that primaries are elections and ten holding that they are not. In the writer's opinion the tendency is to hold that they are not; but as new state constitutions are framed and statutes drawn with more skill the problem will to some extent be solved in the future. At present, however, it must be considered in the framing of any primary bill or regulation of primaries, and in determining their constitutionality.

3. Regulations Regarding Parties.

The principal question arising in this connection is the attempt to exclude the smaller parties from the primaries. Such laws typically say that parties not having polled a certain percentage of the total vote cast at the last general election shall not be entitled to a place on the primary ballot.

The principle underlying such laws is upheld by the courts, and the author has been unable to find any cases in which laws were declared unconstitutional merely because smaller parties

[53] These decisions are reviewed and attacked by Professor L. M. Greeley of Northwestern University in 4 Ill. L. Rev. 227-42 and 5 Ill. L. Rev. 502-08. People v. Czernecki, (1912) 256 Ill. 320, 100 N. E. 283, seems to in some measure hold the opposite view, but not sufficiently so to permit us to say that they are overruled.

[54] Ledgerwood v. Pitts, (1910) 122 Tenn. 571, 125 S. W. 1036; Riter v. Douglass, (1910) 32 Nev. 400, 109 Pac. 444.

were excluded. "The legislature has the undoubted right, in the regulation of primary elections, to prescribe qualifying classification for political parties who desire to avail themselves of the privilege of getting on the official ballot through the means prescribed by law."[55]

The necessity for such classification has been pointed out. "Some classification is made necessary, else any two, three, or four men might call themselves a party, and impose the burden of placing their candidates upon the ballot provided by the state law . . . a condition which could easily be made intolerable to the state, as well as to the voter."[56] The court in its argument from a hypothetical case has, as courts are prone to do, greatly exaggerated and magnified the possible evils; still, there is a germ of truth in the court's statement, at least as far as the principle goes. One of the best analyses is that made in *State v. Phelps,*[57] "Some test of party capacity, having reference to numbers, for representation on the official ballot is necessary. Otherwise the number of parties and names of candidates might be so great as to render the single ballot sheet unsuitable for exercise of the constitutional right to vote." Three arguments were used to uphold the court's conclusion; (1) to keep the ballot within a reasonable size such regulation is necessary; (2) "to promote such party integrity as the only legitimate basis for legal conservation of party existence, as to discourage electors, claiming to belong to one organization from invading the primary of another;" (3) "to stimulate exercise of the right to participate by voting in the activities of the social state," with particular emphasis on the first of these, the latter two, indeed, seeming to be somewhat stretched for the purpose of argument.

It would seem that restrictions of the nature referred to are constitutional only when independent nominations may be made by petition.[58]

Laws have been upheld in which parties not having polled 1 per cent of the total vote in the last preceding general election

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[55] Riter v. Douglass, supra.
[56] Katz v. Fitzgerald, (1907) 152 Cal. 433, 93 Pac. 112.
[57] State v. Phelps, (1910) 144 Wis. 1, 128 N. W. 1041.
[58] Ex parte Wilson, (1912) 7 Okla. Cr. 610, 125 Pac. 739; Riter v. Douglass, (1910) 32 Nev. 400, 109 Pac. 444.

were excluded from the primary;[59] 2 per cent;[60] 3 per cent;[61] 5 per cent;[62] 10 per cent;[63] and 20 per cent.[64] A law restricting the primary to the two parties which had polled the largest vote was upheld.[65] The primary of the largest party was to be held first.

Unless such restrictions were imposed there would be no limit to the number of parties and candidates whose names would appear on the official ballot. Where a party is unable to hold a primary or to participate in the general party, either because of legal restrictions, or because it would be impracticable for it to do so, it may nominate by convention. While it is lawful to prescribe a condition as to numerical strength and to classify, yet such classification cannot be arbitrary. The court may very properly inquire as to (1) the rationality of the classification; (2) the imposition of unequal burdens; (3) the conferring of special privileges.

A primary law providing for a limitation of 20 per cent in Cook county and 10 per cent in the state as a whole was declared unconstitutional as being special and local legislation and as interfering with equality of rights and the freedom of the voters in the different counties.[66] A law that only parties having polled 3 per cent of the total vote could use the primaries to elect delegates to state conventions, was held invalid as class legislation; the smaller parties were practically prevented from having conventions, though they might place their

[59] State v. Drexel, (1904) 74 Neb. 776, 105 N. W. 174.

[60] Corcoran v. Bennett, (1897) 20 R. I. 6, 36 Atl. 1122.

[61] Ladd v. Holmes, (1901) 40 Ore. 167, 66 Pac. 714; State v. Poston, (1898) 58 Ohio St. 620, 51 N. E. 150, 42 L. R. A. 237; De Walt v. Bartley, (1892) 146 Pa. 529, 24 Atl. 185; Katz v. Fitzgerald, (1907) 152 Cal. 433, 93 Pac. 112; Matter of Ward, (1902) 36 Misc. Rep. 727, 74 N. Y. S. 403, (affirmed 69 App. Div. 615, 75 N. Y. S. 1134).

[62] Ransom v. Black, (1892) 54 N. J. L. 446, 24 Atl. 489, 16 L. R. A. 769; State ex rel. Hagerdorn v. Blaisdell, (1910) 20 N. D. 622, 127 N. W. 720.

[63] State v. Jensen, (1902) 86 Minn. 9, 89 N. W. 1126; Davidson v. Hanson, (1902) 87 Minn. 211, 91 N. W. 1124, 92 N. W. 93; State ex rel. Webber v. Felton, (1908) 77 Ohio St. 554, 84 N. E. 85; State v. Michel, (1908) 121 La. 374, 46 So. 430; Ledgerwood v. Pitts, (1910) 122 Tenn. 571, 125 S. W. 1036.

[64] State v. Phelps, (1910) 144 Wis. 1, 128 N. W. 1041. The vote must have been 20 per cent of that cast for governor in the official district.

[65] Kenneweg v. County Commissioners, (1905) 102 Md. 119, 62 Atl. 249. Slightly different from the general form of primary law; for our purposes, it must be remembered, it makes little difference whether a law is mandatory or optional.

[66] People v. Election Commissioners, (1906) 221 Ill. 9, 77 N. E. 321.

candidates on the general election ballot in another way.[67] A provision that the primary should not be used by any party to make nominations in any district where the party's vote had not been at least 30 per cent of that cast for secretary of state at the last general election, was unconstitutional as arbitrary, unnatural, and not uniform.[68]

A law providing that nominations by petition must be, for certain offices, of 5,000 votes, not over 500 in any county, was declared unconstitutional, as depriving the voters in counties where there were 5,000 and more voters of equal rights.[69]

(To be concluded.)

NOEL SARGENT.

ST. THOMAS COLLEGE,
ST. PAUL, MINNESOTA.

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[67] Britton v. Election Commissioners, (1900) 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115.

[68] State v. Hamilton, (1910) 20 N. D. 592, 129 N. W. 916; overruling State v. Anderson, (1908) 18 N. D. 149, 118 N. W. 22. But cf. State v. Phelps, (1910) 144 Wis. 1, 128 N. W. 1041.

[69] State ex rel. Ragan v. Junkin, (1909) 85 Neb. 1, 122 N. W. 473. This question of nomination by petition is also discussed in People v. Smith, (1912) 206 N. Y. 231, 99 N. E. 568; People v. Britt, (1912) 206 N. Y. 246, 99 N. E. 573.

THE CIVILIAN AND THE WAR POWER

THE war is raising many constitutional problems of the most far reaching importance, all of which may perhaps be grouped under the single question: What is the reach of the war power? The purpose of this paper is by no means so ambitious as to attempt an answer to that question: it is rather to inquire into the nature of the war power with respect to the rights of civilians, and specifically with respect to the jurisdiction of military tribunals over persons not members of the military or naval service.

The war power in the United States rests upon as secure a constitutional foundation as any other of the great powers of sovereignty. The express grants are too familiar to need quoting.[1] But over and beyond these specific grants rises the towering fact that the United States is a nation; that under the constitution a sovereign state has arisen endowed—at least so far as the war-power is concerned—with all the inherent powers of national sovereignty not withheld by the constitution. Mr. Justice Strong, writing the opinion of the Supreme Court and speaking of the early amendments to the constitution restricting the powers of the government,[2] says:

"They tend plainly to show that in the judgment of those who adopted the constitution there were powers created by it neither expressly specified nor deducible from any one specified power or ancillary to it alone, which grew out of the aggregate of power conferred upon the government or out of the sovereignty instituted."

And Mr. Justice Bradley in the same case declares boldly that "The United States is not only a government, but it is a

[1] Const. U. S., Art. I, Sec. 8, pars. 11, 12, 13, 14, 15, 16, 18; Sec. 10, pars. 1, 3.

[2] Legal Tender Cases, (1870) 12 Wall, 535, 20 L. Ed. 287. See also opinion of Gray, J., in Juilliard v. Greenman, (1884) 110 U. S. 421, 28 L. Ed. 204, 4 S. C. R. 122.

This theory of "inherent powers of sovereignty" as a test of the powers of the National Government, is vigorously opposed by Justice Brewer in Kansas v. Colorado, (1907) 206 U. S. 46, 51 L. Ed. 956, 27 S. C. R. 655, and is regarded by Professor Willoughby as not only "constitutionally unsound," but as "revolutionary." Willoughby, Constitutional Law, II, Sec. 38. But when properly understood, and con-

national government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, negotiations and intercourse with other nations; all of which are forbidden to the state governments." And he draws the conclusion that the government "is invested with all those inherent and implied powers which at the time of adopting the constitution were generally considered to belong to every government as such, and as being essential to the exercise of its functions." He declares that it is absolutely essential to the independent national existence that the government should have a firm hold on the two great sovereign instrumentalities of the sword and the purse, and the right to wield them without restriction on occasions of national peril.

It is of course true that the war power comes into play only in time of war; in peace it is latent; but when the time arrives for its exercise, whatever is within the scope of the war power is as much authorized by the constitution as any other of the great governmental functions. It is a mere fallacy to say that inter arma leges silent means military dictatorship. If, in the exercise of the war power, individual rights which clash with it are suspended, such suspension is authorized by the constitution and is not a violation of it.

Light may be thrown upon the relation of the war power to the constitution by considering the relation of the constitution to the treaty-making power. This power like the war power is expressly granted; and the treaties made "under the

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fined within proper limits, it does not seem to the author inconsistent with the fundamental conception of the federal government as one of enumerated powers. In its international relations—and certainly war is one of these—the government of the Union is national. Professor Willoughby recognizes this: "Starting from the premise that in all that pertains to international relations the United States appears as a single sovereign nation, and that upon it rests the constitutional duty of meeting all international responsibilities, the Supreme Court has deduced corresponding federal powers. In Fong Yue Ting v. United States, [149 U. S. 696, 13 S. C. R. 1016, 37 L. Ed. 905] that Court says: 'The United States are a sovereign and independent nation, and are vested by the constitution with the entire control of international relations, and with all the powers of government necessary to maintain that control and to make it effective.' " Likewise, the power of eminent domain, nowhere expressly granted, must be conceded to the federal government as a necessary incident of sovereignty. "The right is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law." Strong, J., in Kohl v. United States, (1875) 91 U. S. 367, 23 L. Ed. 449.

authority of the United States" are declared to be part of the supreme law of the land; but when we look for some definition of the scope of the treaty-making power it is to be found only in the inherent nature of sovereignty. Every war ends in a treaty, and the fruits of the war, whether of victory or disaster, are expressed in the treaty of peace. Hence the two powers are inextricably blended together as the supreme expressions of the national sovereignty. No constitution, in the last analysis, can limit either the one or the other, because the right and the duty of the government to protect the life of the state must of necessity be paramount over all other rights and duties. For the purposes of this discussion it is not necessary, however, to carry the point to that extent; it is only necessary to assert that the United States possesses the war power and the treaty-making power in as full and perfect a degree as any other sovereign state except in so far as it is limited by the terms of the constitution itself. The states are expressly excluded from both fields. Either the war power in its entirety is vested in the government of the United States, or so far as not vested cannot be exercised at all, and the United States, unlike other sovereign states, is obliged to fight with its hands tied.

With respect to the treaty-making power the Supreme Court has said:[3]

"The treaty-making power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

But if the treaty-making power embraces the right to acquire territory by purchase or as the result of a successful war (as was said by Bradley, J., in *Mormon Church v. United*

[3] Geofroy v. Riggs, (1890) 133 U. S. 258, 33 L. Ed. 642, 10 S. C. R. 295.

States[4]), it cannot be doubted that it extends to the cession of territory in case of defeat in war; and it is difficult to resist the conclusion that the president and senate might by treaty transfer any of the outlying dependencies to a foreign country even in time of peace. This latter power has indeed been expressly conferred upon congress by the constitution,[5] but there is no reason to think that the treaty-making power is incompetent to do so when the terms of the treaty are dictated by a victorious enemy.

The line of cleavage between state and federal power is totally ignored in the exercise of the treaty-making power, as Mr. Root has conclusively shown:[6]

"The treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation, acting in direct relation to and representation of every citizen in every state. . . . It is of course conceivable that under pretense of exercising the treaty-making power, the president and senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power; but so far as the real exercise of power goes, there can be no question of state rights, because the constitution itself, in the most explicit terms, has precluded the existence of any such question."

When state laws excluding aliens from the ownership of land, alien children from the enjoyment of school privileges, alien laborers from working in factories, are overridden and nullified by a treaty (as they may be) the constitution is not violated. When in the exercise of the war power civilians are prevented from enjoying rights indisputably theirs in time of peace but which interfere with the successful prosecution of the war, can it be said that their rights are unconstitutionally invaded?

To state the question shortly: Is congress, in the exercise of the war power, limited by the Bill of Rights? Or, let us subdivide the question, and inquire specifically:

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[4] Mormon Church v. United States, (1890) 136 U. S. 1, (42), 34 L. Ed. 481, 10 S. C. R. 792.

[5] Art. IV, Sec. 2.

[6] Address before the American Society of International Law, April 19, 1907, 1 Am. J. Int. Law, 273, 278.

(1) May Congress try by court-martial, without a jury, and punish any person not in the military or naval service for an act prejudicial to the conduct of the war?

(2) May Congress abridge the freedom of speech or of the press where it hampers the exercise of the war power by discouraging enlistment, or weakens the morale of the armies by maligning the military chiefs?

(3) May Congress fix the prices of commodities and services, compel the sale of goods and the performance of services in war time in ways which in peace time would be a deprival of liberty and property without due process?

(4) May Congress by law compel civilians to labor on ships or railroads in transporting troops and munitions? This question perhaps is not fairly embraced within the general problem under discussion, as it may be claimed that such persons, when their labor is commandeered for the transportation of troops or military supplies, are in the military service as much as soldiers.

A somewhat similar question seems to have been raised by the conviction before a court-martial of Charles E. Gerlach,[7] second officer of an army transport, for refusing to serve as a lookout for submarines and torpedoes while his ship was in the European danger zone. Gerlach was sentenced to five years at hard labor in army disciplinary barracks, in spite of his claim that his constitutional rights were violated in that he was a civilian and therefore not amenable to court-martial. He claimed that though a civilian officer in the transport service, he was returning to the United States merely as a passenger. The government contended that he was still amenable to orders, although he was not on the ship to which he was regularly detailed.

Doubtless all these questions may be considered as embraced within the first, since if Congress has the power, as a war measure, to provide for the trial of a civilian before a military tribunal, without presentment by a grand jury or trial by a petit jury, and may authorize such a tribunal to order him hanged or shot, all the other guaranties of the constitution must be regarded as intended for a time of peace only, and as in abeyance during war. It is of course, predicated,

[7] See New York Times, Nov. 24, 1917.

that the act for which the civilian in question is tried and punished is committed in a place where no actual fighting with the enemy is going on, and where the courts are open and performing their usual functions, for otherwise the question is not debatable; it must also be assumed that it is in a place where military preparations are being made, such as the enlistment, training, or transportation of troops, or the manufacture, storage, or transportation of military supplies; but it would be difficult to find any place in the United States at the present time in which some or all of these things are not being done.

The question is precisely that which confronted the Supreme Court of the United States in the celebrated *Milligan Case*.[8] Milligan, an American citizen, not a member of the army or navy, nor in any way connected with the service, was seized in 1864 in his home in Indiana by order of the military commandant of the district of Indiana, confined in a military prison at Indianapolis, tried by a military commission convened by General Hovey's order and condemned to death by hanging. The charges were conspiracy against the government of the United States, affording aid and comfort to the rebels, inciting insurrection, disloyal practices, and violation of the laws of war. The sentence was approved by the President and on the point of being carried into effect when he was discharged upon habeas corpus by the Supreme Court of the United States. All of the justices agreed that he was entitled to be discharged because the act of Congress required that military prisoners other than prisoners of war, citizens of states in which the administration of the laws had continued unimpaired in the federal courts, should be entitled to their discharge if they were not indicted within twenty days after their arrest. The federal courts had been in the undisturbed performance of their functions in Indiana, and Milligan had not been indicted within the time named. Technically his right to discharge was clear. But the court went further, and declared—unnecessarily so far as Milligan was concerned—that the military tribunals organized during the civil war, in states not invaded and not engaged in rebellion, in which the federal courts were open and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offense a citizen who was neither a

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

resident of a rebellious state nor a prisoner of war nor a person in the military or naval service; and that Congress could not invest them with any such power. The Court declared that "martial law cannot arise from a threatened invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration."

Four of the justices dissented, among them Chief Justice Chase, declaring that Congress had the power though not exercised to authorize military commissions. Both sides regarded the question as of momentous importance for the future. To the majority the concession of such a power to the military would one day mean the overthrow of constitutional freedom; to the minority, its denial meant the paralysis of the military authority in the hour of public danger. The case was decided in 1866, after the exigency of the war had passed away. It is likely to come up again before the same court, now that a war of vastly greater magnitude is upon us.

If it be true that the acts of military officers in making the arrest of such a person and of the military commission in trying him and in carrying the sentence into effect, are all null and void, the approval of those acts by the president is of no avail to protect the officers; and if as seems probable, even statutes of indemnification by Congress are unconstitutional, it is easy to see how loath army officers are likely to be to act with vigor and promptitude in districts where there is no actual invasion but where wrecks, fires and explosions are paralyzing military preparations and an insidious propaganda is poisoning the springs of national patriotism.

The essence of the question seems to be this: admitting that in any possible case Congress may declare martial law, is the right founded upon the constitution or upon necessity? If the former, it is a mere exercise of the war power and Congress is the sole judge of the imminence of the danger; it is a political and not a judicial question; the power existing, the courts cannot inquire whether the facts justify its exercise either in the actual theater of war or in places remote from the field of action. If it rests upon necessity alone, and not upon the constitution, it is a judicial question, and every soldier when held to answer after the war for his conduct must be prepared to justify himself before a jury, not by the command

of his military superiors nor by the act of Congress, but solely by the necessity which alone gave his act validity. In the *Milligan Case* the majority of the judges took the latter position, the minority the former.

It is asserted that the war power is subject to certain constitutional limitations. The fundamental rights of the citizen as against the exercise of arbitrary power are secured to him by the clauses of the constitution guaranteeing to him freedom of speech and of the press, freedom of assembly for the purpose of petition, trial by jury, immunity from unreasonable searches and seizures and from prosecution for a capital or otherwise infamous crime unless on presentment by 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. In general, he is not to be deprived of life, liberty, or property without due process of law. It is said that all of these guaranties are swept away if a citizen who is not a member of the military or naval service can be tried before a military tribunal unknown to the judicial system of the country, and condemned and executed under the authority of the President. The authority to set aside these express provisions of the constitution must be found if at all in the war power, and in that particular exercise of the war power known as martial law.

Martial law must be distinguished from (a) military law and (b) military government. The former is that body of specific rules governing the army and navy, as a separate community, which may be described as the military state. It applies both at home and abroad, in peace and in war. It is partly written and partly unwritten. Its written part is composed of the statutory code or Articles of War, other statutory enactments relating to the discipline of the army, the army regulations, and general and special orders.[9] Persons entering

[9] Winthrop, Military Law and Precedents, II, 2nd ed., p. 1, 4.
"Military law is as clearly defined as any system of statute, common, or civil law. It consists of the Articles of War enacted by Congress, the regulations and instructions sanctioned by the President, orders of commanding officers, and certain usages and customs constituting the unwritten or common law of the army." Ex parte Bright, (1874) 1 Utah 145. The persons subject to military law are not merely the officers and soldiers of the army, and the militia when called into active service, but may include civilian employees serving with the army, in the Indian country, during offensive operations against the Indians. 14 Op. Atty. Gen. 22, (1872). A clerk in the employ of a paymaster in the army. In re Thomas, (U. S. C. C. 1869) Fed. Cases

the military state subject themselves to this jurisdiction and no longer are entitled to the protection, in respect of criminal procedure, which the constitution guarantees to civilians. The tribunals by which this law is enforced are not a part of the judicial system, and their judgments are not subject to review under certiorari or habeas corpus by the Supreme Court.[10] It is not arbitrary in character but is as definite and precise as the body of law governing civilians. It does not supersede the civil laws in the sense of exempting the soldier from liability to trial and punishment in the ordinary courts the same as civilians. Military government is "that dominion exercised in war by a belligerent power over territory of the enemy invaded and occupied by him and over the inhabitants thereof.[11] In his dissenting opinion in *Ex parte Milligan,* Chief Justice Chase described it as "military jurisdiction to be exercised by the military commander under the direction of the President, in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states and districts occupied by rebels treated as belligerents." In the exercise of military government, the commander may adopt, for the purposes of temporary civil administration, the existing system of the country, including its laws and courts, but the jurisdiction of such laws and courts is not ex proprio vigore, but solely by virtue of the authority conferred by him. It is therefore the arbitrary will of the commander; it may be suspended, modified, or superseded at his discretion. Military government is a species of civil government existing under the sanction of the war power in the enemy's country—foreign, if the war be foreign, in occupied rebellious territories if it be a civil war.

No. 13, 888. The Articles of War, adopted Aug. 29, 1916, C. 418, Sec. 3, declares that among the persons subject to military law are: "d. All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these Articles." 4 U. S. Compiled Stat. Annotated, Sec. 2308a, p. 3950. It is of course true, as a general rule, that a citizen of the United States, not in the military service, is not amenable to a court-martial, because he is not subject to the Articles of War. Smith v. Shaw, (1815) 12 Johns. (N. Y.) 257; Ex parte Merryman, (1861) Taney (U. S. C. C.) 246, Fed Cas. No. 9487, Taney, C. J.; In re Kemp, (1863) 16 Wis. 359.

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

[11] Winthrop, II, 1245.

Martial law, on the other hand, is a jurisdiction exercised over civilians, at home, within a territory not rebellious, not occupied by the army. It does not apply to the army nor to enemies. It is established not by military occupation, but by proclamation. It is accompanied either by an express or tacit suspension of the writ of habeas corpus, since its exercise cannot tolerate the supervision of the regular courts.

The distinction between military law and martial law has often been confused. Blackstone seems to confuse it. He says:[12]

"Martial law, which is built on no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observed, in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when the King's courts are open for all persons to receive justice according to the laws of the land."

But martial law, as at present understood, has nothing to do with the order and discipline in an army; it is more nearly an application of military government to persons and property at home, in time of war and within the theater of war, or so near to it that the unrestricted operation of the ordinary municipal laws would impair the efficiency of the exercise of the war power. The commander, in this discussion, must be understood to be the President, acting of course under the authority of Congress, in whom the war power is constitutionally vested.

"Martial law," says Professor Dicey,[13] "in the proper sense of that term, in which it means the suspension of ordinary law and the temporary government of a country or parts of it by military tribunals, is unknown to the law of England. We have nothing equivalent to what is called in France 'declaration of a state of siege,' under which the authority ordinarily vested in the civil power for the maintenance of order and police passes entirely to the army." In the sense that every subject, whether a civilian or a soldier, policeman or private citizen, has the right and owes the duty to assist in putting down breaches of the peace, repelling invasion, quelling riots, and

[12] Blackstone, Comm., I, *413. For discussion of distinction between martial law and military law, see 1 Cooley's Blackstone, *413, note.

[13] Dicey, The Law of the Constitution, 4th ed., p. 268.

restoring the supremacy of law, this right and duty is recognized by the common law.[14] But considered as a part of the common law, every officer, soldier, policeman, and civilian is liable to be held accountable for any unnecessary or excessive use of force, before the civil courts.[15] Dicey[16] well observes that "the estimate of what constitutes necessary force formed by a judge and jury, sitting in quiet and safety after the suppression of a riot, may differ from the judgment formed by a general or magistrate, who is surrounded by armed rioters, and knows that at any moment the riot may become a formidable rebellion, and the rebellion if unchecked become a successful revolution."

After the decision of the Supreme Court in the *Milligan Case,* General Hovey was sued by Milligan. The court held that he was liable, but the jury considering all the circumstances, gave only nominal damages.[17]

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[14] Dicey, p. 269.

[15] Rex v. Pinney, (1832) 5 C. & P. 254, 3 St. Tr. (N. S.) 11.

[16] Dicey, p. 271.

[17] Milligan v. Hovey, (1871) 3 Biss. (U. S. C. C.) 13, Fed. Cas. 9605. See also, Griffin v. Wilcox, (1863) 21 Ind. 372, 386, in which the Indiana court holds unconstitutional the Act of Congress, passed in 1863, exempting any officer from civil or criminal liability for any act done under the order of the President or by his authority. Major Lyon, at Indianapolis, in 1863, by military order prohibited the sale of liquor to soldiers. Plaintiff was arrested by defendant for violating the order. The court says: "The war power of the President, then, may be stated thus: He has a right to govern through his military officers by martial law when and where the civil power of the United States is suspended by force. In all other times and places the civil excludes the martial law—excludes government by the war power. Where force prevails martial law may be exercised. But in all parts of the country where the courts are open, and the civil power is not expelled by force, the constitution and laws rule, the President is but the President, and no citizen, not connected with the army, can be punished by the military power of the United States, nor is he amenable to military orders. If, in such parts of the country, men commit crimes defined by law, they must be punished according to the constitution and the law, in the civil courts. If, in such parts of the country, men have not perpetrated acts constituting, in law, crimes, their arrest, trial, and punishment, by military courts, is but a mode of applying lynch law; is, in short, mob violence. This is so unless the old English Tory doctrine of government is secretly included in our constitution. That doctrine, as expressed by Filmer, is that 'a man is bound to obey the King's command against the law; nay, in some cases, against divine laws.'" This is precisely the position afterwards taken by the majority in the Milligan case. So far as this case holds unconstitutional an act of Congress depriving a citizen of all redress for an illegal arrest, there can be no doubt of its correctness. Cooley, Const. Lim., 7th ed., 518, note; Johnson v. Jones, (1867) 44 Ill. 142, 92 Am. Dec. 159. In support of the doctrine that the arrest was illegal, see Ex parte McDonald, (1914) 49 Mont.

The kind of martial law sought to be enforced by the military commission in the *Milligan Case* corresponded to that which prevails in France under a declaration of a "state of siege," in which the constitutional guarantees are suspended, the military authority has the right to make searches, by day and night, in the domiciles of citizens; to remove persons accused and individuals who do not have their domicile in the places which are subject to the state of siege, to order the surrender of arms and munitions, and to interdict publication and meetings deemed of a nature to incite disorder.[18] "This kind of martial law," says Professor Dicey,[19] "is in England utterly unknown to the constitution. Soldiers may suppress a riot as they may resist an invasion, they may fight rebels just as they may fight foreign enemies, but they have no right under the law to inflict punishment for riot or rebellion." This can mean nothing more, however, than that such things cannot be done without the authority of an act of Parliament; for the recent history of England has abundantly demonstrated that under proper parliamentary authority anything may be done.

During the Boer war it became necessary on account of the presence of a disaffected population, to proclaim martial law in Cape Colony in districts remote from actual hostilities. One Marais was arrested without a warrant under instructions from the military authorities, and detained without trial. He petitioned the supreme court of the Cape of Good Hope for release on the ground that his arrest and imprisonment were in violation of the fundamental liberties secured to subjects of His Majesty. The court refused his petition on the ground that martial law having been proclaimed in that district, the court ought not to go into the necessity for the proclamation. The Privy Council denied his petition for leave to appeal, laying down the rule that where actual war is raging, acts done by the military authorities are not justiciable by ordinary tribunals, and that the fact that for some purposes some tribunals have been permitted to pursue their ordinary course in the

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454, 143 Pac. 947, L. R. A. 1915B 988; Francis v. Smith, (1911) 142 Ky. 232, 134 S. W. 484, L. R. A. 1915A 1141. For elaborate note on Civil or Criminal Liability of Soldier or Militiaman for Injury to Person or Property see Ann. Cas. 1917C 8.

[18] Dicey, p. 272.

[19] Dicey, p. 273.

district in which martial law has been proclaimed is not conclusive that war is not raging.[20]

The extent to which the exigencies of the present war have driven the British government is shown by the fact that the courts are sanctioning the internment—that is, imprisonment—of civilian Germans long resident in England, declaring them prisoners of war, and refusing them the ancient privilege of the writ of habeas corpus. The difficulty of fixing any exact limit to the "actual theater of war" is shown in the opinion of the court in *Rex. v. Superintendent Vine Street Police Station.*[21]

"War at the present moment is not as it was in the olden times, confined to easily ascertained limits. The inventions and discoveries of recent years, and especially the existing means of communication, have so widened the field of possible hostilities that there is scarcely any limit on the earth, in the air, or in the waters which it is possible to put upon the exercise of acts of hostility, and real danger to the realm may therefore exist, although impossible of discovery, at distances far from where the actual clash of arm is taking place. In addition to this, methods of warfare, or methods ancillary to warfare, have come into practice on the part of our foes which involve the honeycombing of the realm with enemies, not only to obtain and despatch information, but to serve purposes directly helpful to the conduct of enterprises either actually warlike or eminently calculated to assist the prosecution of the war."

In that case the court made it very emphatic that they were dealing only with the case of alien enemies; but in January, 1916, they sustained an executive order of a very much more drastic character. A regulation had been issued under the Defense of the Realm Act, 1914, (authorizing the Council to issue regulations for securing the public safety), "that where on recommendation of competent naval or military authorities . . . it appears to the Secretary of State that . . . it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith . . . to be interned." This regulation was held not to be ultra vires.[22] In

[20] Ex parte Marais, [1902] A. C. 109, 85 L. T. 734.

[21] Rex. v. Superintendent Vine St. Police Station, (1915) 32 Times L. R. 3.

[22] Rex v. Halliday, (1916) 32 Times L. R. 245; affirmed, [1916] 1 K. B. 738, 114 L. T. 303, 32 T. L. R. 301.

the case cited, one Zadig, a naturalized British subject, was confined in an internment camp, and a rule nisi to the commandant to show cause why habeas corpus should not issue was refused. The Attorney General said: "The power to intern a British subject had been acted upon in a great number of cases, and a considerable number of persons who claimed British nationality had been interned and were detained at the present moment." Lord Chief Justice Reading said that under this act trials might be had by court-martial, "thus making persons subject, in certain circumstances, to martial law."[23]

In debate in the House of Commons March 2, 1916,[24] the Home Secretary, defending the exercise of quasi martial law under the conditions existing in the present war, stated that there were at the time sixty-nine persons under restraint who were technically British subjects but who were suspect because of hostile origin or associations. Some of them were persons against whom it would be difficult if not impossible to frame a legal indictment upon which they could be brought to trial. In other countries, he said, such cases were dealt with under martial law, but the British government considered that to establish martial law would be going beyond what was necessary. There had been no suspension of the habeas corpus act, and the particular Home Office regulation under the Defense of the Realm Act to which exception had been taken had been pronounced in accordance with the law by the seven justices of the High Court of Justice and three lords justices of the Court of Appeal.

There is a considerable difference between merely interning for the period of the war persons suspected of hostile intentions, and trying a civilian as for a crime and executing him by the authority of a military commission, as in the *Milligan Case*. But if the power exists to suspend the ordinary laws and the jurisdiction of the civil courts under the war power, it would seem to follow that military necessity might justify the infliction of punishment as well as mere detention.

It is said that the military commander may proclaim martial law "in time of war" within "the actual theater of war;" and time of war is said to mean, when the ordinary courts are not in the usual and open exercise of their functions. In the case

[23] Id.
[24] See New York Times, March 4, 1916.

of military government of occupied foreign territory, as has been seen, the military commander may think proper to permit the courts of the country to exercise their usual functions, but in so doing they act merely as licensees of the military authority. In like manner, after a proclamation of martial law, in territory where no actual fighting is going on, the commander-in-chief may permit the courts to exercise their usual functions within such limits as he may prescribe. In doing so the courts are the licensees of the military authority, but this does not authorize them to supervise the acts of the power to which they owe their existence. In the *Marais Case*[25] the Lord Chancellor said: "Where acts of war are in question the military tribunals alone are competent to deal with such questions." And again:[26]

"The truth is that no doubt has ever existed that where war actually prevails the ordinary courts have no jurisdiction over the military courts. Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established. And it may even be a question whether a mere riot, or disturbance neither so serious nor so extensive as really to amount to a war at all, has not been treated with excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established, and there is a universal concensus of opinion that the civil courts have no jurisdiction to call in question the propriety of the action of military authorities."

War having been declared to exist between the United States and Germany, must the military authority wait before proclaiming martial law until a hostile army has actually effected a landing on American soil, or may it do so in the vicinity of arsenals, munition factories, storehouses of munitions, flour mills, ship yards, wireless stations, bridges, railway lines, training camps, internment camps, centers of population in which there are evidences of disaffection? If the president proclaims martial law in a certain place, does the proclamation conclusively establish the existence of a state of war in that place, so as to protect an officer carrying into effect the sentence of a military commission? Sir Frederick Pollock[27] thinks that an Order in Council could neither add to nor derogate from the authority of a magistrate in the exercise of martial

[25] Note 20, supra.
[26] Ex parte Marais, [1902] A. C. 109 (115).
[27] 18 Law Q. Rev. 156; see also p. 158.

law. On the other hand, in a case arising in Colorado[28] where a person brought suit against the governor for causing his arrest and detention during a period of riot and disturbance, the Supreme Court of the United States said: "It is admitted, as it must be, that the governor's declaration that a state of insurrection existed is conclusive of that fact." It has been held in an unanimous opinion by the Supreme Court of the United States that when a question arises as to the existence of an exigency requiring the calling of the militia into the active service of the United States, the authority to so decide belongs exclusively to the President, and his decision is conclusive upon all other persons.[29]

It is true the privilege of the writ of habeas corpus cannot be suspended, "unless when, in cases of rebellion or invasion, the public safety may require it;"[30] but "invasion" is not limited to the actual landing of a hostile army. The danger of such invasion, it should seem, would justify the suspension of the writ. But the majority of the Supreme Court in the *Milligan Case*[31] said that martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration." The Court was not speaking of the suspension of the writ of habeas corpus but of the exercise of martial law; but in either case, knowing what we do of the destructiveness of the submarine, of the almost incredible efficiency of the aeroplane in securing and of the wireless telegraph in transmitting intelligence, of the effectiveness of explosives, all these undreamed of by the judges of that period, it is hard to imagine any court at the present day declaring that the military authority must wait until a hostile army has actually landed on our coast before taking necessary steps to guard itself against the activities of secret enemies within our gates. It is equally absurd to suppose that a bench of judges would assume to pass upon a question of military necessity, the elements of which in the nature of things they can know next to nothing about.[32]

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[28] Moyer v. Peabody, (1908) 212 U. S. 78, 29 S. C. R. 235, per Holmes J.

[29] Martin v. Mott, (1827) 12 Wheat. (U. S.) 19, 6 L. Ed. 537.

[30] Const. Art. 1, Sec. 9.

[31] (1866) 4 Wall. 2 (127), 18 L. Ed. 281.

[32] When the President, under the authority of Congress, calls forth the militia "to execute the laws of the union, suppress insurrections,

The war power is vested in Congress alone, or in Congress and the President. It is submitted that when the President, under the authority of Congress, during war, proclaims martial law in any part of the United States, no court will enter upon a judicial investigation of the necessity of so doing or question the validity of the act.

It must not be forgotten that the law military applies only to members of the military system, while martial law applies to civilians: yet Article 82 of the Articles of War[33] covers the case of spies, who are dealt with thus:

"Art. 82. Spies. Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by general court-martial or by a military commission, and shall, on conviction thereof, suffer death."

Winthrop[34] says that "To be charged with the offense of spying it is not essential that the accused be a member of the army or a resident of the country of the enemy; he may be a citizen or even a soldier of the nation or people against whom he offends and at the time of his offense legally within their lines." If the statute quoted is constitutional, then any person accused of the specific offense of spying is not entitled to the guaranties of the constitution; and the reason must be that the particular offense is so peculiarly fatal to the successful exercise of the war power that it must be dealt with in a prompt and summary manner, unknown to the procedure of the civil courts. Incidentally, it is an interesting speculation why the Articles of War,[35] which in every other respect purport to be limited in their application to members of the mili-

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and repel invasions," his determination of the existence of the exigency is conclusive upon the courts. Martin v. Mott, (1827) 12 Wheat. (U. S.) 19. The authority of the President to call out the militia and establish martial law was before the Supreme Court in Luther v. Borden, (1848) 7 How. 1, 12 L. Ed. 581, Taney, C. J., significantly asked: "After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? . . . It is said that this power in the President is dangerous to liberty and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which the power would be more safe, and at the same time equally effectual."

[33] 4 U. S. Compiled Stat. Annotated, 1916, Sec. 2308a, p. 3983.

[34] Winthrop, II, 2nd ed., 1194.

[35] See note 33, supra.

tary establishment, should, in this particular instance, be extended to cover persons in no way connected with the army. But whatever be the explanation, the question immediately arises, if Congress may confer upon courts-martial or military commissions jurisdiction to try and hang spies, why not train wreckers, bomb planters, incendiaries, food poisoners, disease spreaders, inciters to desertion? If it be said that military necessity dictates the summary trial of spies in disregard of the constitutional guaranties, may not the same military necessity apply in the other cases mentioned? And if it may, in whom does the constitution lodge the responsibility of determining when that necessity arises—in those who wield the war power, or in the courts? Which is likely to be the better judge?

That precisely similar emergencies arose during the civil war is well illustrated by the following quotation from Winthrop:[36]

"In the leading cases of Beall and Kennedy, though the accused were charged and convicted inter alia as *spies*, their offenses were rather or mainly those of violators of the laws of war as prowlers (Lieber's Instructions, Sec. 84) or guerrilas; the crimes of Beall consisting mostly in seizing and destroying steamers and their cargoes on Lake Erie, and attempting to throw passenger trains off the track in the state of New York, in September and December, 1864; and the principal crime of Kennedy being his taking part in the attempt to burn the city of New York by setting fire to Barnum's museum and ten hotels on the night of November 25, 1864."

War-traitors,[37] if captured by the military authorities, are liable to be condemned to death in the exercise of martial law, or by the law military. The inference inevitably suggested is this: if the constitutional rights of the spy are not violated by his trial before a court-martial, it must be because the state

[36] Winthrop, II, 2nd ed., 1196-97. Sec. 84 of Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, and issued under the authority of the government during the civil war, is as follows: "Armed prowlers, by whatever names they may be called, or persons of the enemies' territory, who steal within the lines of the hostile army, for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoners of war." Sec. 89: "If a citizen of the United States obtains information in a legitimate manner and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death."

[37] See Lieber's Instructions, Secs. 90, 91, 92.

of war and the exercise of the war power has temporarily suspended those rights. Are the rights of the bomb planter, the train wrecker, the incendiary, the food poisoner, the disease spreader, the inciter to desertion, more sacred than those of the spy?

Those who adopt the view of the majority in the *Milligan Case* admit that in the "actual theater of war" martial law may be legally applied to civilians. But there is no more warrant in the constitution for the exercise of such authority within the theater of war than without. If the letter of the Bill of Rights be the test, a civilian, within the lines in Maryland during Lee's invasion, caught setting fire to military stores would have been entitled to jury trial. The fifth and sixth amendments entitle *all persons* to a jury trial except those in the military or naval service. The admission just mentioned is a recognition that the constitution was never meant to cover such a case. But is the exercise of martial law in such a case extra-constitutional and therefore illegal? It seems very plain that it is perfectly legal, because the state of war has suspended the fifth and sixth amendments, at least in "the actual theater of war." But the constitution uses no such phrase; it was invented by those who saw that in such a situation individualism must yield to the welfare of the state. And the phrase itself has no legal meaning; it involves a vast complex of technical military science, of secret information jealously guarded, of plans concerted by the government and its allies, of projects of possible invasion and of intrigue by the enemy which must be foreseen and thwarted. The folly of submitting such a question to the decision of a jury is too evident to need comment.

To the timid who, in order to justify martial law, require that it be exercised only in "the actual theater of war," it should be sufficient answer that that phrase embraces every place in which any military activities are going forward. If they insist that there must be actual invasion, it fairly may be said that every ship flying the United States flag is United States territory, and an attack on such a ship is as much an invasion of our territory as the bombardment of an American port.

As is indicated at the beginning of this article, the questions growing out of martial law are closely bound up with questions

involving other constitutional rights, e. g., the right not to be deprived of liberty or property without due process of law. This right is as much guaranteed by the constitution as the right to trial by jury. In the presence of war the two must stand or fall together. Can the citizen be compelled to sell his food products at a price to be fixed by law, or punished criminally for selling at a higher price? The determination of this question will test the scope of the war power as well as any other.

In the case of *Farey v. Burvett*,[38] the High Court of Australia determined that the Commonwealth of Australia does possess this power in time of war, although in time of peace the constitution reserves any such power to the states. The legislation in question was adopted to subserve the interests of the civil population, and its bearing upon the maintenance of armies and the conduct of the war was only indirect and incidental. The court in substance holds that the line of cleavage between state and federal power which obtains in time of peace is not binding when the very existence of the commonwealth is imperiled by war; that the power and duty of national defense is paramount; and that the system of checks and balances devised for a time of peace is temporarily suspended because the "organic power of defense" is supreme and commensurate with the peril, as Parliament sees the peril. This power, granted by the constitution itself, "is a power to command, control, organize and regulate, for the purpose of guarding against that peril, the whole resources of the continent, living and inert, and the activities of every inhabitant of the territory. The problem of national defense is not confined to operations on the battle field or the deck of a man-of-war; its factors enter into every phase of life, and embrace the co-operation of every individual with all that he possesses—his property, his energy, his life itself . . ." And in the midst of a struggle of the gigantic proportions of the present world-contest, the question of necessity is declared to be one for the legislature and the executive and not for the court.

It was held by the majority in the *Milligan Case* that martial law is "confined to the locality of actual war," and that it "can never exist when the courts are open and in the proper

[38] (1916) 21 C. L. R. 433. For a discussion of this case, see 2 MINNESOTA LAW REVIEW 132.

and unobstructed exercise of their jurisdiction." A decision on so momentous a matter by a bare majority cannot be regarded as settling it. The opinion of the four dissenting judges, written by the Chief Justice, is that the fact that the courts are open is not conclusive since they "might be open and unobstructed in the execution of their functions and yet wholly incompetent to avert threatened danger or to punish with adequate promptitude and certainty the guilty." Even in the most critical periods of war it may be possible to keep the courts open for the administration of ordinary justice; but when the military authority permits the court to sit in a district where martial law has been proclaimed, and the writ of habeas corpus is temporarily suspended, whatever functions the court may exercise are permissive only. If it should become necessary, in the opinion of Congress and the President, to place New York harbor under martial law, and suspend therein the writ of habeas corpus, it ought not to be necessary to close up the courts entirely in order to create a condition in which the military authority will not be interfered with by the courts. If in such an eventuality a civilian should be arrested while endeavoring to plant a bomb in the hold of an army transport, it is submitted that the question whether he shall be tried before a military commission or indicted by a federal grand jury is wholly a matter for Congress and the President to determine.

There are those who think that to suspend during a period of martial law certain individual liberties is equivalent to suspending the whole constitution and handing the country over to a military dictator. But this involves a fundamental misconception. No one would seriously claim that the military authority should be placed above the constitution. In providing for the suspension of the privilege of habeas corpus the constitution does not decree its own abolition; and when it provides for the temporary suspension of the individual rights which the habeas corpus was designed to protect until the ship of state emerges from the danger zone, the constitution merely shifts the responsibility for safeguarding the interests of the state and its citizens from one set of officers to another.[39]

[39] Moyer v. Peabody, (1908) 212 U. S. 78 (85), 29 S. C. R. 235, 53 L Ed. 410. The Court in this case says: "When it comes to a decision by the head of the State upon a matter involving its life, the

Every department of the government is as much subject to the constitution as before, but certain rights of the individual are for the time being subordinated to the safety of the state.[40]

If—as seems probable—the fate of democracy itself is involved in the present war, it is evident that the ability or inability of democracy to place all its resources at the disposal of its leaders will be the determining factor in the struggle. This is autocracy's supreme merit. If it be the true meaning of the constitution that the war power has been fettered by provisos which put the liberty of the citizen above the safety of the state, then either the experiment of self-government will prove a failure, or the chosen leaders of the people must when necessary disregard mere paper barriers. Unquestionably the war-leaders will use every weapon within reach, and it would be wiser to adopt that interpretation of the fundamental law which legalizes whatever imperative necessity compels, than to endeavor to put bounds to that which is essentially absolute and unlimited.

HENRY J. FLETCHER.

UNIVERSITY OF MINNESOTA.

ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process." Per Holmes, J.

[40] For exhaustive discussions of the subject of this article, and supporting the opposite view, see Willoughby, Constitutional Law, II, Secs. 723-737; Lieber, "The Justification of Martial Law," 163 N. A. Rev. 549; Professor Ballentine, "Martial Law," 12 Col. L. Rev. 529.

The discussion in this article has been purposely limited to problems raised in a regularly declared war, as distinguished from the exercise of martial law by state authorities for the purpose of quelling riots and suppressing local disorder not amounting to civil war. The scope of the war power under the latter circumstances is probably greatly restricted by the exclusive constitutional grants to the federal government, and by the fact that such a disturbance can be "war" only in a very qualified sense. That the exercise of martial law in times of merely constructive war has been very greatly extended in recent years may be seen in the following cases: Moyer v. Peabody, supra; Hatfield v. Graham, (1914) 73 W. Va. 759, 81 S. E. 533, Ann. Cas. 1917C, 1; Mays v. Brown, (1912) 71 W. Va. 519, 77 S. E. 243, 45 L. R. A. (N. S.) 996. As illustrating the utter paralysis of the military authority resulting from an application of the doctrine of the Milligan Case, to local disorders, see Franks v. Smith, (1911) 142 Ky. 232, 134 S. W. 484. L. R. A. 1915A 1141.

In accord with the views of the author, see valuable article by Geerge S. Wallace, The Need, the Propriety, and Basis of Martial Law, Jour. Am. Inst. of Crim. L. & C. VIII, 167, 406.

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Resignation of Mr. Graven—The Editorial Board of the Review has received, with greatest regret, the resignation of Mr. Henry N. Graven, who, after several previous unsuccessful efforts to enter the military service of the United States, has been accepted as an enlisted man in the Engineering Corps. Mr. Graven's work on the Editorial Board has been of great value, and his personality stimulating to his co-workers. His colleagues on the Board regret his absence and hope for his safe return.

CONSTITUTIONAL LAW — DEFENSE — POWER OF COMMONWEALTH PARLIAMENT TO FIX PRICE OF BREAD.—In a recent case, *Farey v. Burvett*,[1] the High Court of Australia has been called

[1] (1916) 21 C. L. R. 433.

upon to determine a question of great concern to the American public, namely, the power of the federal government to regulate the sale of food products. The legislative powers of the federal government in Australia, as those of Congress, are expressly enumerated, all other powers being reserved to the states.[2] By section 51 of the constitution, Parliament is empowered to make laws for the peace, order, and good government of the commonwealth with respect to "the naval and military defenses of the Commonwealth and of the several states and the control of the forces to execute and maintain the laws of the Commonwealth." Soon after the outbreak of the war, Parliament passed the War Precautions Act to enable the Governor General in Council to make such regulations as he might think desirable for the more effectual defense of the Commonwealth and prescribing, inter alia, "the conditions, including times, places, and prices of the disposal or use of any property, goods, articles, or things of any kind." In accordance with this authorization, the Governor General proceeded to fix the maximum price of bread in certain designated areas. The defendant was convicted and fined for selling bread at a price higher than that laid down in the order in council.

It was contended by the appellant[3] that the outbreak of war did not of itself supersede the express limitations of the constitution. The powers of Parliament in respect to defense were undoubtedly brought into greater prominence during war, nevertheless, the legislative competency of that body remained "the same whether there were peace or war." The defense power, therefore, should be restricted to such acts as were directly contributory to the prosecution of the war; it could not authorize the passage of social or industrial legislation in violation of the residuary powers of the states, under the guise of emergency measures for the promotion of national efficiency. And even though the most liberal interpretation were placed upon the war-power of Parliament at a moment of national exigency, the necessity and desirability of such legislation, it was maintained, would be a question of fact to be determined by the court in view of the surrounding circumstances. In other words, the exercise of the discretionary military power of Parliament was subject to judicial review where private rights were in question.

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[2] Commonwealth of Australia Constitution Act, 63 & 64 Vict. Chap. 12, Sec. 107.

[3] (1916) 21 C. L. R. 433.

The court, however, two judges dissenting, rejected this attempt to limit the power of Parliament in time of war. The judgment of the court is perhaps best expressed in the trenchant concurring opinion of Isaacs, J.[4]

"As I read the constitution, the Commonwealth when charged with the duty of defending Commonwealth and states is armed . . . with a power which is commensurate with the peril it is designed to encounter, or as that peril may appear to the Parliament itself; and if need be, it is a power to command, control, organize, and regulate, for the purpose of guarding against that peril, the whole resources of the continent, living and inert, and the activities of every inhabitant of the territory. The problem of national defense is not confined to operations on the battlefield or the deck of a man-of-war; its factors enter into every phase of life and embrace the co-operation of every individual with all that he possesses, his property, his energy, his life itself; and in this supreme crisis we can no more sever the requirements and efforts of the civil population, whose liberties and possessions are at stake, from the movements of our soldiers and sailors who are defending them than we can cut away the roots of a living tree and bid it still live and bear fruit deprived of the sustenance it needs."

The judgment of the court is well supported by citations of leading American cases. Upon the primary question of the competency of Parliament to make provision for the national defense, the High Court accepts the sound principle of a liberal construction of the powers of the national government so clearly laid down by Chief Justice Marshall[5] and most effectively re-affirmed during the Civil War by Gray, J., in the Legal Tender Cases, *Juillard v. Greenman*.[6] "A constitution establishing and framing a government, declaring fundamental principles and creating a national sovereignty, and intended to endure for ages and to be adapted to the various crises of human affairs is not to be interpreted with the strictness of a private contract." The same doctrine, it may be added, has been enunciated by the English and Canadian courts in interpreting the powers of the federal government in Canada.[7]

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[4] Ibid. 450.

[5] M'Culloch v. Maryland, (1819) 4 Wheat. (U. S.) 316, 4 L. Ed. 579; United States v. Fisher, (1805) 2 Cranch. (U. S.) 358, 2 L. Ed. 304.

[6] (1883) 110 U. S. 421 (439), 28 L. Ed. 204, 4 S. C. R. 122.

[7] Attorney General of Ontario v. Attorney General of Canada (1912) A. C. 571, 28 T. L. R. 446, 106 L. T. 916. The British North America Act, said Sanborn, J., in Paige v. Griffith, (1873) 18 L. C. J. 119 (122), "is not to be construed rigorously like a penal Act conferring judicial powers."

But the powers of Parliament were not restricted to those which were expressly enumerated. By section 39 of the constitution, Parliament was authorized to legislate in respect to matters "incidental" to the execution of any power vested in Parliament, the government, or any department or officer of the Commonwealth. Thanks to this provision, Parliament could deal with price regulation "incidentally" to the exercise of its defense power, even though it did not possess an independent jurisdiction in respect to that particular economic matter. In other words, it might make "ancillary provision on a subject as to which substantive legislation on its part would be unconstitutional and invalid." This provision, as Barton, J., pointed out,[8] is very similar in character to the "necessary and proper" clause of the United States constitution and should be given a like broad interpretation. In short, the provision should be construed so as to afford to Parliament as wide a choice of means as was conducive to the exercise of its expressly enumerated powers.

The court had little difficulty in disposing of the secondary question as to the necessity or expediency of this particular legislation on price regulation. For the determination of this question the court was again able to appeal to American precedents. The opinion of Chief Justice Marshall in *M'Culloch v. Maryland*[9] clearly covered the case. "Where the law is not prohibitive and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread upon legislative ground." The same principle has been read into the Commonwealth constitution.[10] The Australian courts have been much more chary about interfering with the legislative discretion of Parliament than the American courts have been in dealing with federal and state legislation.[11] In all matters of an essentially political character it has been recognized that the legislature,

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[8] (1916) 21 C. L. R. 433 (445).

[9] (1819) 4 Wheat. (U. S.) 316 (423). 4 L. Ed. 579. See also United States v. Fisher, (1805) 2 Cranch. (U. S.) 358, 2 L. Ed. 304.

[10] Jumbunna Coal Mine No Liability v. Victoria Coal Miner's Association, (1908) 6 C. L.R. 309 (345).

[11] The difference between the Australian and American courts in this respect is largely due to the greater freedom of parliamentary action, owing to the absence of personal and property guarantees in the Australian constitution.

rather than the judiciary, is the primary guardian of the rights and liberties of the nation.[12]

But the High Court was not forced to rely upon American precedents only. The Judiciary Committee of the Privy Council had recently asserted the wide discretionary powers of Parliament to deal with national defense. In the case of *The Zamora*[13] Lord Parker declared:

"Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law, or otherwise discussed in public."

The decision in this case, it is true, is not properly applicable to a non-sovereign legislative body such as the Australian Parliament. But it is none the less true that the powers of the colonial legislature within the limits of their legislative competency are as full and plenary as those of the Parliament at Westminster.[14]

We may, then, conclude that the defense power of Parliament in time of war is practically unlimited. Before that power, in a national emergency, the constitutional guaranties of citizens and the residuary rights of the states must both give way. The belligerent powers of the nation supersede, in part, the constitutional rights of the individual, in case of conflict. The federal government for all war purposes is transformed into a truly national government endowed with all the powers, express or ancillary, which are necessary for the prosecution of the war. As these powers are essentially political in character, the courts will not venture to review the mode of their parliamentary exercise, provided that the measures in question are bona fide war measures and not a mere colorable attempt to legislate upon a prohibited subject matter under the guise of defense legislation.[15] From the very necessity of the case, the safety of the state itself, as distinct from the particular interest of its citizens or component members,

[12] See also to the same effect the opinion of Holmes, J., in Missouri, etc., Ry. Co. v. May, (1904) 194 U. S. 267 (270), 48 L. Ed. 971, 24 S. C. R. 638.

[13] (1916) 2 A. C. 77, 32 T. L. R. 436 (445), 114 L. T. 626.

[14] The Queen v. Burah, (1878) L. R. 3 A. C. 889; Hodge v. The Queen, (1883) L. R. 9 A. C. 117 (132), 50 L. T. 301; Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick, (1892) A. C. 437, 67 L. T. 126.

[15] On the subject of colorable legislation see Union Colliery Co. v. Bryden, (1899) A. C. 580 (587), 81 L. T. 277; Lefroy, Canada's Federal System 76; Pomeroy, Constitutional Law, 1st ed., p. 218.

becomes the supreme law of the land. This is the moment when for the nation as for the individual the principle of self-preservation is the first law of nature. During such time the citizen must look primarily to the executive and legislative branches of the government for the protection of his constitutional rights. The political departments are charged with the defense of the nation and they alone are in a position to determine the extent to which individual or state rights must be subordinated to the higher demands of the nation itself.[16] The constitution, as Isaacs, J., well said, "is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperiled."[17]

ADVERSE POSSESSION AS AGAINST A REMAINDERMAN. That one who has never had a cause of action cannot sue would seem to go without saying; but, that one whose legal action has not accrued may be barred from using it when it does accrue, because he failed to bring a totally different sort of action in equity, would seem to be another matter. Such, however, is the present condition of affairs with regard to remaindermen in Nebraska.[1] It is a generally accepted rule of the common law that the statute of limitations does not begin to run against a remainderman until the life or other particular estate has terminated. This is due to the fact that a possession cannot be construed as hostile to one who having no right of possession, cannot sue to protect it.[2] As a corollary to this proposition, the possession of the life tenant cannot be deemed adverse to the remainderman.[3] The disseisor of the life tenant can only ac-

[16] Ex parte Marais, (1902) A. C. 109, 85 L. T. 363.

[17] (1916) 21 C. L. R. 433 (451).

[1] Criswell v. Criswell, (Neb. 1917) 163 N. W. 302.

[2] Tiedeman, Real Property, 3rd ed. Sec. 300, and note 33, p. 449; Tiffany, Real Property, II, Sec. 443, and note 65, p. 1012. See note to Allen v. De Groodt, (1889) 98 Mo. 159, 11 S. W. 240, in 14 Am. St. Rep. 626 (629), where it is said: "From the fact that the tenant is entitled to the possession of the property, it necessarily follows that the reversioner or remainderman is not, and that the latter cannot successfully resort to any remedy to the maintenance of which an immediate right of possession is essential, and he can be in no default for not having resorted to such remedy, when a resort to it would manifestly have been unavailing." See also, Lindley v. Groff, (1887) 37 Minn. 338, 34 N. W. 26.

[3] Grout v. Townsend, (1842) 2 Hill (N. Y.) 554; Austin v. Stevens, (1845) 24 Me. 520; Mixter v. Woodcock, (1891) 154 Mass. 535, 28 N. E. 907; Maurer v. Reifschneider, (1911) 89 Neb. 673, 132 N. W. 197, Ann. Cas. 1912C 643, contra, where remainderman has notice of adverse

quire his interest, because the life tenant can only transfer his own interest.[4] By analogy, it would seem that a void conveyance of the fee by an administrator of the life tenant could have no more effect.[5] The latter situation has been complicated in a number of American jurisdictions by legislation which permits an action to be brought by any one, "whether in actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse estate or interest therein, for the purpose of determining such estate or interest, and quieting title."[6] In Iowa and Nebraska, reversioners and remaindermen are expressly "entitled to all the rights and benefits" of the provisions.[7]

The recent case of *Criswell v. Criswell*,[8] in Nebraska, has laid down the rule in the case of one who held under a void administrator's deed, that the statute of limitations begins to run against a remainderman from the time he has notice of an adverse holding, or, in the exercise of reasonable care for his own rights should have known that the land was so held by one in possession.[9] When it is remembered that one other state has a statute that has been interpreted exactly as that in Nebraska,[10] and that several other states have somewhat similar statutes,[11] which with equal justice could be interpreted in

holding. See Woodstock Iron Co. v. Fullenwider, (1888) 87 Ala. 584, 6 So. 197, 13 Am. St. Rep. 73, criticized severely in note to the latter, and also in the note to Allen v. DeGroodt, supra.

[4] Pickett v. Doe ex dem. Pope, (1883) 74 Ala. 122; Mellus v. Snowman, (1842) 21 Me. 201; Stevens v. Winship, (1823) 1 Pick. (Mass.) 317, 11 Am. Dec. 178; Coulson v. La Plant, (Mo. 1917) 196 S. W. 1144.

[5] It has been so held in Hobson v. Huxtable, (1907) 79 Neb. 334, on rehearing, 340, 112 N. W. 658.

[6] Neb. Rev. St. 1913 Sec. 6266; Ark. Kirby's Dig. 1904 Sec. 6517; Mont. Code of Civil Procedure 1907 Sec. 6870, semble, at least to the extent of giving one out of possession a right to bring action to quiet title; Iowa, Revision of 1860, Sec. 3601; Code of 1873, Sec. 3273. There is an apparent discrepancy in the latter section, in that while the former expressly gives a reversioner or remainderman the right to an action to quiet title, the latter makes no mention of the fact. However, in the recent case of Marray v. Quigley, (1902) 119 Ia. 6, 92 N. W. 869, 97 Am. St. Rep. 276, it seems to be taken for granted that the section in the code must be read in the light of the wording as found in the revision.

[7] Neb. Rev. St. 1913 Sec. 6268; Iowa, Revision of 1860, Sec. 3601.

[8] (Neb. 1917) 163 N. W. 302.

[9] Ibid. A similar holding will be found in the case of Crawford v. Meis, (1904) 123 Ia. 610, 99 N. W. 186, 66 L. R. A. 154, 101 Am. St. Rep. 337, which will be found criticized in Bohrer v. Davis, (1913) 94 Neb. 367 (374), 143 N. W. 209, Ann. Cas. 1915A 992.

[10] See notes 6 and 9.

[11] See note 6.

the same manner, the effect of this decision is mischievous, indeed. The situation is rendered more serious by the fact that Nebraska, in common with other states, has given the surviving spouse of one dying intestate, a life interest in the homestead,[12] thus making all the children remaindermen.

The earliest case arising under the Nebraska statute appears to have been that of *Foree v. Stubbs,*[13] where the general rule that legal title is necessary in order that one out of possession may maintain an action to quiet title[14] was held no longer to have any effect. There it was said that the evident purpose of the statute was to abolish the fiction of adverse possession and prevent multiplicity of suits.[15] Soon, two groups of decisions began to develop about this statute. One, based on *Foree v. Stubbs,* laid down the rule that a remainderman was barred from his action to quiet title if he allowed ten years to elapse after such action had accrued.[16] Again it was held that a remainderman was barred if he allowed ten years to elapse after he had attained his majority.[17] *Holmes v. Mason,*[18] is authority for the proposition that an adverse possessor can bring an action against a remainderman to quiet title in himself as against the latter after the lapse of a like period.

The other line of decisions which grouped itself about this statute developed out of attempts by the remainderman to bring ejectment within the statutory period of ten years after the death of the life tenant, the statutory period having in the meantime run against an action to quiet title. Prior to the *Criswell Case,* it was considered that ejectment would lie under such circumstances.[19] Closely allied to these cases, particularly in its effect

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[12] Minn. G. S. 1913 Sec. 7237; Neb. Cobbey's Annot. St. 1911 Sec. 4901; N. D. Compiled Laws 1913 Sec. 5627.

[13] (1894) 41 Neb. 271, 59 N. W. 798.

[14] State v. Sioux City, etc., Ry. Co., (1878) 7 Neb. 357 (376).

[15] See Holland v. Challen, (1883) 110 U. S. 15, 28 L. Ed. 52, 3 S. C. R. 495; Whitehead v. Shattuck, (1890) 138 U. S. 146, 34 L. Ed. 873, 11 S. C. R. 276, where the Nebraska and Iowa statutes are discussed and their application limited so far as federal equity practice is concerned, to cases where the land is unoccupied.

[16] Lyons v. Carr, (1906) 77 Neb. 883, 110 N. W. 705.

[17] First National Bank v. Pilger, (1907) 78 Neb. 168, 110 N. W. 704, 126 Am. St. Rep. 592.

[18] (1908) 80 Neb. 448, 114 N. W. 606.

[19] Hobson v. Huxtable, (1907) 79 Neb. 334, 112 N. W. 658; Bohrer v. Davis, (1913) 94 Neb. 367, 143 N. W. 209, Ann. Cas. 1915A 992; Helming v. Forrester, (1910) 87 Neb. 438, 127 N. W. 373; McFarland v. Flack, (1910) 87 Neb. 452, 127 N. W. 375. The court in the Criswell Case, supra, distinguishes this case because there was no notice to the

on the decision in the latter case, is the holding in *Maurer v. Reifschneider.*[20]

It was held there that the possession of land by the life tenant will not be construed to be adverse and hostile to the remainderman until he has knowledge of the life tenant's claim to the entire estate. The implication arises that the statute will run from that time, and such is the interpretation in the *Criswell Case.* The *Maurer Case* is, of course, contrary to the general rule as stated above. Ordinarily it is considered an utter impossibility for the life tenant, or one holding under him, to set the statute in motion against a remainderman.[21] It fairly may be said that the *Criswell Case* must necessarily follow from *Holmes v. Mason,* where it was said that an adverse possessor could have title quieted in himself as against a remainderman after holding adversely to the latter for the statutory period. But, it is submitted that the court erred in rendering both decisions.

The Nebraska act, it is apprehended, purported to give a new right to persons out of possession. As to remaindermen in particular, it could merely have the effect of giving the additional right of an action to quiet title for the purpose of rendering the remainder more saleable. As a matter of fact, it might well be said that the act merely took such right out of the realm of doubt, since other states have allowed the remainderman his equitable right of an action to quiet title without the aid of statute.[22]

In Tennessee and West Virginia, moreover, it has been held that despite this equitable right, the statute of limitations in ejectment cannot run against a remainderman until the particular estate has terminated.[23]

As was pointed out in *First National Bank v. Pilger,*[24] in construing that statute giving the right to bring an action to quiet

remainderman of any adverse holding, and overrules all other cases having a similar result.

[20] (1911) 89 Neb. 673, 132 N. W. 197, Ann. Cas. 1912C 643.

[21] See notes 3 and 4.

[22] Aiken v. Suttle, (1879) 4 Lea (Tenn.) 103, where it is said: "A remainder is a present right, though the enjoyment is future, and the owner may desire to dispose of it, or in some way make it available to his needs; and he is entitled to have it relieved from a cloud impairing its value, and perhaps rendering it totally unavailable." See also Alexander v. Davis, (1896) 42 W. Va. 465, 26 S. E. 291; Depue v. Miller, (1909) 65 W. Va. 120, 64 S. E. 740; Wright v. Miller, (1853) 8 N. Y. 9, 59 Am. Dec. 438.

[23] Sautelle v. Carlisle, (1884) 13 Lea. (Tenn.) 391, Depue v. Miller, supra, where it is said: "It may be repeated that the statute does not run against a purely equitable demand."

[24] (1907) 78 Neb. 168, 110 N. W. 704, 126 Am. St. Rep. 592.

title: "This form of action must be distinguished from one where the *right of possession* is involved, and is not affected by the rule that an action for possession cannot be maintained by the remainderman until the life estate is terminated by the death of the life tenant." Further than this, Section 6 of the Code of Nebraska which is the statute of limitations, should not, it is submitted, apply in such a case. This section reads: "An action for the *recovery* of title or possession of lands, tenements, or hereditaments can only be brought within ten years after the cause of action shall have accrued." The manifest injustice of applying this statute, and that relating to the action to quiet title, so as to accomplish the result reached in the *Criswell Case,* renders it imperative that the former statute be taken literally, and applied only where there is an action to *recover* title or possession, and not where there is merely an action to remove a cloud on the title. Additional argument against the policy of allowing limitations to run against a suit by remaindermen may be found in the fact that it might well be subversive of the intention of the statute permitting an action to quiet title even to the meager extent to which that intention was interpreted in *Force v. Stubbs.* It would in many cases result in increased litigation instead of preventing multiplicity of suits. Under favorable circumstances, the life tenant surviving for twenty or thirty years after the remainderman had attained his majority, the latter might be compelled every ten years to bring an action to quiet title. True, the first decree would quiet title in him, but not putting him in possession, what is to prevent the adverse holder from staying on the land and again occupying it for ten years under a claim of right?

On the whole, the results of the decision in the *Criswell Case* would seem so pernicious as to validate almost any plausible means necessary to arrive at the result of the earlier case of *Bohrer v. Davis,*[25] in which the doctrine of the common law was sanctioned.

CONFISCATION OF THE INTERESTS OF INNOCENT PARTIES UNDER STATUTES IN REM.—At the common law if a defendant was convicted of a felony the law attached certain forefeitures of the property of such felon. But such forfeiture was never effective until the criminal was convicted of the crime charged

[25] (1913) 94 Neb. 367, 143 N. W. 209 Ann. Cas. 1915A 992.

against him. Thus the validity of the seizure was not dependent upon any use made of the property itself but was conditioned solely on the guilt or innocence of the owner.[1] But in forfeitures under statutes *in rem* the property seized is considered the defendant in the action and the fact that it is itself interwoven with the violation of the law is sufficient to warrant its forfeiture.[2] England early applied this law in the case of vessels plying a forbidden trade and although the reason underlying this custom was never distinctly brought out the law in this respect had become so settled that the United States courts accepted the precedent without question.[3] These forfeiture statutes were early used to enforce the Embargo Acts of 1807 and the Internal Revenue Laws.[4] With the growth of the nation these statutes have been extended to include many subjects, among them the importation of intoxicating liquors into territory dry by federal statute or treaty.

It is unquestioned that when the owner himself intentionally uses his property to violate such laws he cannot thereafter complain if the government confiscates the property so used,[5] but the law is not so definite when the property of an innocent person is confiscated.[6] Apparently the only line of demarcation beyond which the courts cannot go is that laid down in *Peisch v. Ware*,[7] where Marshall, Ch. J., said, "If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property." The doctrine established by that case, that an innocent owner of property which is wrongfully taken by another cannot be deprived of his interest therein by confiscation, has never been questioned, but where the offending party has legally obtained possession of the property from an innocent owner the courts have reached almost every conceivable holding in adjudicating the rights of such innocent owner.

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[1] 19 Cyc. 1356-7.
[2] The Palmyra, (1827) 12 Wheat. (U. S.) 1, 6 L. Ed. 531.
[3] Blewitt v. Hill, (1810) 13 East. 13; United States v. The Little Charles, (1818) 1 Brock. (U. S. C. C.) 347.
[4] United States v. The Little Charles, (1818) 1 Brock. (U. S. C. C.) 347; The Distilled Spirits, (1870) 11 Wall. (U. S.) 356, 20 L. Ed. 167.
[5] United States v. Blair, (1866) Fed. Case No. 14607.
[6] See note in L. R. A. 1916E 343.
[7] (1808) 4 Cranch. (U. S.) 347, 2 L. Ed. 643.

As early as 1796 it was held in South Carolina[8] that a widow retained her dower rights in the confiscated property of her husband. But when the Confiscation Acts in the Embargo of 1807 were passed, the courts strictly construed them and the rights of innocent property owners were severely dealt with, the court justifying their actions on the ground that the ultimate end of these statutes (the enforcement of the Embargo), justified the confiscation of the interests of such innocent owners.[9] However under the Confiscation Acts of 1861 and 1862 the courts had to entertain a milder view toward the innocent property owners as that statute (probably with this moderate end in view), expressly provided that only the property of certain classes could be confiscated and then only when the property was employed with the knowledge or consent of its owner in aid of insurrection[10] or the owner was actually embraced within the terms of the statute. Thus the rights of an innocent lien holder were held to be valid even after the confiscation and those proceedings placed the United States in no greater degree of ownership than the actual interest of the party whose rights were taken.[11] But in 1869 the court returned to their strict interpretation of forfeiture statutes and in an action under a law relating to customs held that an owner who sent his vessel on a legal voyage could have his property therein divested by forfeiture when the crew later, without the knowledge of the owner, engaged in an illegal traffic.[12] So, too, it was held that a mortgagee loses his interest in the property mortgaged when it was forfeited to the government by an act of the mortgagor in violation of the internal revenue laws, even though the mortgagee knew nothing of the fraud.[13] A few years later it was settled that the owner of lands and buildings used as a distillery could be deprived of his interest therein by the unlawful act of the lessee even though the owner was innocent.[14] However

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[8] Wells v. Martin, (1796) 2 Bay (S. C.) 20.

[9] The United States v. The Little Charles, (1818) 1 Brock. (U. S. C. C.) 347, (vessel condemned for illegal acts of master, the owner being innocent).

[10] United States v. 1,756 Shares of Capital Stock, (1865) 5 Blatchf. (U. S. C. C.) 231, Fed. Case No. 15961.

[11] Claims of Marcuard, (1873) 20 Wall. (U. S.) 114, 22 L. Ed. 327; Day v. Micou, (1873) 18 Wall. (U. S.) 156, 21 L. Ed. 860.

[12] United States v. The Cuba, (1869) 2 Hughes 489, Fed. Case No. 14898.

[13] United States v. Seven Barrels of Distilled Oil, (1868) 6 Blatchf. (U. S. C. C.) 174, Fed. Case No. 16253.

[14] Dobbins' Distillery v. United States, (1877) 96 U. S. 395, 24 L. Ed. 637.

the courts in all cases have not carried this doctrine to the extreme to which it might be. Thus in *The City of Mexico*[15] a lien of sailors for wages was given priority to the government's title by forfeiture, and the same doctrine was followed in *The Jennie Hayes*.[16] A number of years later in another maritime case the federal court afforded still further protection to innocent parties and the claims of creditors who furnished supplies to a ship prior to the voyage on which it illegally sailed were given precedence to the government's forfeiture.[17] But this inclination of the courts toward the protection of innocent parties in maritime cases was not very noticeable in the case of *U. S. v. 220 Patented Machines*,[18] where it was held that one who leases his machines for the manufacturing of cigars loses all title to them when the government confiscates such machines for an illegal act of the manufacturer regardless of whether the lessor knew of the lessee's fraud or not.

These cases are to be distinguished from those arising under state laws providing for the summary destruction of certain kinds of property seized, as gambling outfits or guns being used by persons without a hunting license. The question involved there has not been the constitutional right of the government to seize the property by confiscation but whether such a law was constitutional when it provided for the destruction of the property without giving the owners a hearing. The courts have generally held them constitutional or unconstitutional depending on whether the property seized was capable of being used legally. Thus a gun may be used in a legal manner; but the law will imply that any one, even an innocent owner, must have known that a gambling outfit could only be used in violation of the law;

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[15] (1886) 28 Fed. 207.

[16] (1889) 37 Fed. 373.

[17] North American Commercial Co. v. U. S., (1897) 26 C. C. A. 591. 48 U. S. App. 365, 81 Fed. 748. Under the majority of these statutes the commission of the act prohibited by them vests the government's right to the property at once and the title secured by the government under the condemnation proceedings relates back to the time of the commission of the act and avoids all intermediate sales and alienations. United States v. 1,960 Bags of Coffee, (1814) 8 Cranch. (U. S.) 398, 3 L. Ed. 602. But the apparent leniency of the courts in the above mentioned maritime cases regarding sailor's lien secured after the illegal act had been committed is founded more on a maritime custom than on a desire of the court to protect innocent parties. The St. Jago de Cuba, (1824) 9 Wheat. (U. S.) 409, 6 L. Ed. 122.

[18] (1900) 99 Fed. 559.

in the latter case the statute strikes at the thing itself, and not at any act or intent of the owner.[19]

The case of *United States v. One Buick Automobile Roadster*[20] was one arising under the Indian Appropriation Act, March 2, 1917, Chap. 146, 39 Stat. 969, 970, which extends the penalty for carrying intoxicating liquor into territory where it is prohibited by federal statute, or by treaty, or into the Indian country, to include the confiscating of any automobile, vehicle or conveyance and irrespective of whether or not it was in charge of the owner. This power of confiscation is justified on the ground that the government has the right to use any means to collect its taxes or to use stringent measures to eradicate certain statutory offenses, but it is doubtful if the ends justify the means when they deprive an innocent party of his property. The present case is in line with the authority in this country and is of importance chiefly because it shows to what surprising limits the doctrine of forfeiture may be carried.

RELATION BETWEEN THE WORKMEN'S COMPENSATION ACTS AND ADMIRALTY LAW.—In May of this year the Supreme Court held that any railroad employee engaged in interstate commerce, was subject to none of the state workmen's compensation acts, but would have to recover for an injury only under the Federal Employer's Liability Act.[1] In the same month the same court held that a longshoreman, engaged in loading an ocean-going vessel, could only recover for an injury under the laws of admiralty, and no state workmen's compensation act could be applied.[2] Two large classes of employees are therefore exempted from the state acts, leaving them without the same kind of remedies possessed by their fellow workers throughout the states.[3]

In the admiralty case, the court construed Article 3, Sec. 2, of the United States constitution. "The judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction," to mean that an individual state has no right to legislate on matters pertaining to admiralty, especially in view of

[19] McConnell v. McKillip, (1904) 71 Neb. 712, 99 N. W. 505, 115 Am. St. Rep. 614, 8 Ann. Case 898 and note, 65 L. R. A. 610; State v. Soucie's Hotel, (1901) 95 Me. 518, 50 Atl. 709.

[20] (1917) 244 Fed. 961.

[1] Matter of Winfield v. N. Y., etc., R. Co., (1917) 244 U. S. 147, 61 L. Ed. 1045, 37 S. C. R. 546.

[2] Southern Pacific Co. v. Jensen, (1917) 244 U. S. 205, 61 L. Ed. 1086, 37 S. C. R. 524.

[3] See 2 MINNESOTA LAW REVIEW 49.

Article 1, Sec. 8, conferring on Congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this constitution in the government of the United States or in any department or officer thereof." Therefore it is settled that in regard to matters of admiralty, Congress has the same paramount power to legislate as it has in respect to interstate commerce. While Congress has paramount power to legislate concerning interstate commerce, it is well settled that until it does so, the individual states can pass laws on matters within the police power of the states.[4] Thus until Congress by passing the Federal Employer's Liability Act in 1908,[5] did act in regard to the liability of the interstate carriers to their employees for an injury received while engaged in interstate commerce, the various states could legislate in respect to this matter.[6] In admiralty matters Congress possesses the same paramount power, but this decision allows the states no right to legislate under the police power, so as to enlarge the common law liabilities of a steamship company to its employees. This is arrived at in spite of the fact that Congress has been silent as to such matters, in admiralty, and no legislation has been passed such as the Federal Employer's Liability Act. This surely seems inconsistent, and the explanation that admiralty matters would be subject to various conflicting state legislation appears inadequate, inasmuch as the same is true of interstate commerce. Justice Pitney, dissenting in *Southern Pacific Co. v. Jensen*,[7] seems to feel that the power given Congress over admiralty is more or less of an implied power, while that conferred on Congress regarding interstate commerce, is by express grant, so that in effect the result of the decision is to give greater strength to this implied power, than to a power expressly conferred.

The decision directly overruled several state decisions,[8] as well

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[4] Second Employer's Liability Cases, (1912) 223 U. S. 1, 32 S. C. R. 169; Seaboard Air Line Ry. v. Horton, (1914) 233 U. S. 492, 34 S. C. R. 635, 58 L. Ed. 1062, L. R. A. 1915C 1.

[5] 35 U. S. Stat. at L. 65, 8 U. S. Comp. 1916, Secs. 8657-65.

[6] See Note 1, supra.

[7] See Note 2, supra.

[8] Lindstrom v. Mutual S. S. Co., (1916) 132 Minn. 328, 156 N. W. 669, L. R. A. 1916D 935; Kennerson v. Thames Towboat Co., (1916) 89 Conn. 367, 94 Atl. 372, L. R. A. 1916A 436; North Pacific S. S. Co. v. Industrial Acci. Commission, (Cal. 1917) 163 Pac. 199; Jensen v. Southern P. Co., (1915) 215 N. Y. 514, 109 N. E. 600, L. R. A. 1916A 403, Ann. Cas. 1916B 276, 9 N. C. C. A. 286.

as two federal cases;[9] in fact only one other case has been in accord with that of the Supreme Court.[10] That the question was deemed of considerable importance is shown by the fact that in *Southern Pacific Co. v. Jensen,* four justices dissented.[11]

The entire question really seems to hinge on just what is meant by the "saving clause" of Sec. 9, Judiciary Act of 1789,[12] giving to the district courts of the United States "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, . . . saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it." The majority of the court comment but slightly in regard to this, while all the contra decisions and a large part of the dissenting opinions are based on this clause. Inasmuch as there is no national common-law of the United States,[13] this clause applies to the common-law of the various states. The question then is, can only the common-law be relied on, or can the states create new rights and liabilities in the absence of legislation by Congress. The law is settled that by state statute a lien can be created upon a vessel for repairs in her own port, though none existed by the rules of admiralty;[14] pilotage fees fixed;[15] and right created to recover for death by wrongful means, although occurring on the high seas.[16] Question is whether such proceedings were in personam or in rem, as it is settled that if it were the latter, the state could not legislate, admiralty having exclusive jurisdiction.[17] In *The Hamilton,*[18] recovery by an heir was allowed under a state law, for a death on the high seas caused by a tort. The court here said, "The saving clause leaves open, where common-law is competent to give it, the common-law jurisdiction of the state courts over torts committed at sea. . . . As the state courts in their decisions would follow their own notions about the law and might change them from time to time, it would be strange if the state might not make changes by its other mouth-piece, the legislature."

[9] Keithley v. North Pacific S. S. Co., (1916) 232 Fed. 255; Stoll v. Pacific Coast S. S. Co., (1913) 205 Fed. 169.
[10] Schuede v. Zenith S. S. Co., (1914) 216 Fed. 566.
[11] See Note 2, supra.
[12] 1 Stat. at L. 76 (77), Chap. 20.
[13] Wheaton v. Peters, (1834) 8 Pet. (U. S.) 591, 8 L. Ed. 1055.
[14] The Lottawanna, (1874) 21 Wall. 558, 22 L. Ed. 654.
[15] Cooley v. Board of Wardens, (1851) 12 How. (U. S.) 299, 13 L. Ed. 996.
[16] The Hamilton, (1907) 207 U. S. 398, 52 L. Ed. 264, 28 S. C. R. 133.
[17] Knapp, Stout & Co. v. McCaffrey, (1900) 177 U. S. 638, 44 L. Ed. 921, 20 S. C. R. 824.
[18] See Note 16, supra.

It is hard to see why this case is not conclusive and authority for a decision contra to the one just rendered. In *Steamboat Co. v. Chase,*[19] the court held to be unsound a contention that the "saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the Judiciary Act." Under this doctrine any growth of the common law could be aplied to matters in admiralty, and it seems very strange not to allow state legislation to take the place of the growing common law. Much of our common law in most states has undergone a radical change due to changes in conditions. Some states have almost entirely coded their common law. Where a direct statute was passed making some change in the common law, under *Southern Pacific v. Jensen*[20] such a state statute could not be applied, as it was no longer a part of the common law. On the other hand, if by judicial decision our common law was changed, it would appear that such a change would not invalidate it as far as admiralty is concerned; the law would be applied in its new shape. This would give jurisdiction to our judicial system, and not to the legislative system. It would seem that the only way in which a state could retain any jurisdiction whatsoever, would be by retaining its common law, however greatly antiquated, and failing to change it by legislative enactment. Surely this is a reactionary doctrine, and a dangerous one.

Economic reasons are the basis for the various workmen's compensation acts, as they aim to do away with various defects in the common law method of recovery for injured workmen.[21] They are therefore nothing more nor less than substitutes for the common law which has proved inadequate. Proceedings provided for by them can in no sense be called proceedings in rem,[22] and it therefore seems that greater weight is given to an inadequate and obsolete method of recovery, than to modern methods brought about by economic demands.

This decision vitally affects Minnesota due to the lake traffic, and the future river traffic, not merely because the workmen's compensation act is held not to be binding where the employee is engaged in admiralty service, but because it virtually decides that Minnesota has absolutely no police power rights over any of this traffic, it being subject only to the laws of admiralty, or those passed by Congress.

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[19] (1872) 16 Wall. (U. S.) 522, 21 L. Ed. 369.

[20] See Note 2, supra.

[21] See Note 3, supra.

[22] Matter of Walker v. Clyde S. S. Co., (1915) 215 N. Y. 529, 109 N. E. 604.

RECENT CASES

ADMIRALTY—EXCLUSIVENESS OF FEDERAL JURISDICTION—WORKMEN'S COMPENSATION LAWS.—A longshoreman was injured while unloading in a New York port an ocean-going steamship owned by the defendant, a common carrier. Upon a claim regularly presented, the Workmen's Compensation Commission of New York made an award to his dependents according to the provisions of the New York statute. Defendant appeals. *Held*, that the rights and liabilities of the parties were matters clearly within admiralty and governed exclusively by the rules of admiralty, and that the workmen's compensation act has no application. *Southern Pacific Co. v. Jensen*, (1917) 244 U. S. 205, 61 L. Ed. 1086, 37 S. C. R. 524.

For a discussion of the principles involved in this case see NOTES, p. 145.

ADVERSE POSSESSION—STATUTE OF LIMITATIONS—REMAINDERS.—Defendant secured land under an administrator's deed which was void because land was part of the homestead of the intestate. By the law of Nebraska the widow of one dying intestate has a life interest in the homestead and the children are remaindermen. Another statute gives a remainderman an action to quiet title before the death of the life tenant. Action was brought in ejectment within the statutory period after the death of the life tenant. *Held*: The statute of limitations commences to run so as to bar an action for the recovery of title and possession of land as against a remainderman from the time he has notice of an adverse holding, or in the exercise of due care for his interests should have notice of such holding by one who claims the fee. *Criswell v. Criswell*, (Neb. 1917) 163 N. W. 302.

For a discussion of this case, see NOTES, p. 137.

BILLS AND NOTES—DEFENSES—PHYSICIANS AND SURGEONS.—A negotiable note was given by defendant to a physician for services rendered. The physician was practicing without a license, contrary to a criminal statute of Alabama, and a statute providing that a physician whose certificate of qualification is not on record in the county in which he resides shall not be entitled to recover at law any compensation for services rendered. Defendant sets up these facts as a defense against a bona fide holder for value who acquired title before maturity. *Held*, that the note was void ab initio, and it is not cured even in the hands of a holder in due course without notice of any infirmity. *Whitehead v. Coker*, (Ala. 1917) 76 So. 484.

As between the original parties the defense would be good by the clear terms of the statute. For a discussion of the invalidity of a contract made in connection with a transaction which is illegal, see 1 MINNESOTA LAW REVIEW 364. Where the statute shows a clear intention on the part of the legislative body to consider the paper so tainted with the crime

as to be void even in the hands of a bona fide holder in due course, the courts have protected the maker. *Kuhl v. M. Gally Universal Press Co.,* (1898) 123 Ala. 452, 26 So. 535, 82 Am. St. Rep. 135, (note given for sale of slot machine); *Voreis v. Nussbaum,* (1891) 131 Ind. 267, 31 N. E. 70, 16 L. R. A. 45, (note given by woman as surety); *Bohon's Assignee v. Brown,* (1897) 101 Ky. 354, 41 S. W. 273, 72 Am. St. Rep. 420, 38 L. R. A. 503, 19 Ky. L. Rep. 540, (peddler's note not so indicated); *Ater v. Rotan Grocery Co.,* (Tex. Civ. App. 1916) 189 S. W. 1106, (note given for increased corporate stock). But because of their jealousy in securing to commercial paper freedom of circulation, the courts have refused to extend the application of these exemptions beyond the strictest limits. *Boughner v. Meyer,* (1879) 5 Col. 71, 40 Am. Rep. 139; *Sondheim v. Gilbert, Assignee,* (1888) 117 Ind. 71, 18 N. E. 687, 10 Am. St. Rep. 23, 5 L. R. A. 432; *Lynchburg National Bank v. Scott,* (1895) 91 Va. 652, 22 S. E. 487, 50 Am. St. Rep. 860, 29 L. R. A. 827. Merely because the act upon which the contract is based is prohibited by law or made a crime, a note based upon the transaction should not be void in the hands of a bona fide holder in due course. *Union Trust Company v. Preston National Bank,* (1904) 136 Mich. 460, 99 N. W. 399, 112 Am. St. Rep. 370, 4 Ann. Cas. 347; *Citizens' State Bank of Newman Grove v. Nore,* (1903) 67 Neb. 69, 93 N. W. 160, 2 Ann. Cas. 604, 60 L. R. A. 737. This last case is on all fours with the facts in the principal case, but the court reached an opposite conclusion. The principal case has seemingly adopted the doctrine of those courts which say that a contract made unlawful by a statute is void by implication, and therefore void even in the hands of a bona fide holder in due course. *Snoddy v. American National Bank,* (1890) 88 Tenn. 573, 13 S. W. 127, 17 Am. St. Rep. 918, 7 L. R. A. 705. The court seems to have taken a step backward in so far as it restricts the free circulation of negotiable paper.

CONSTITUTIONAL LAW—FREEDOM OF THE PRESS—POSTAL SERVICE.—Plaintiff was denied the use of the mails by the defendant because the paper published by it, *"The Masses,"* was held to contain matter objectionable as coming within the terms of the Espionage Act, Title XII, Sec. 1, Acts of Congress, June 15, 1917. Plaintiff secured an injunction restraining the enforcement of the order of the postmaster general. Upon appeal to the United States circuit court of appeals, *held,* that the act is not unconstitutional as depriving plaintiff of its right of freedom of speech and of the press, and injunction dissolved. *Masses Publishing Company v. Patten,* (C. C. A., 1917) 45 Washington Law Reporter 706.

The validity of legislation by Congress prescribing what should be carried and what excluded, and its weight and form and the charges to which it should be subjected, has never been questioned. *Ex Parte Jackson,* (1877) 96 U. S. 727, 24 L. Ed. 877. Transportation by any other method is not forbidden, so that the constitutional prohibition against interference with freedom of the press does not apply. *In Re Rapier,* (1891) 143 U. S. 110, 36 L. Ed. 93, 12 S. C. R. 374; *Public Clearing House v. Coyne,* (1904) 194 U. S. 497, 48 L. Ed. 1092, 24 S. C. R. 789. The division of the governmental functions allows the courts to compel the performance of a purely ministerial duty by an administrative official.

Marbury v. Madison, (1803) 1 Cranch. (U. S.) 137, 2 L. Ed. 60. But they cannot enforce the performance of an act when the discretion of the official must be exercised. *Decatur v. Paulding,* (1840) 14 Pet. (U. S.) 497, 10 L. Ed. 559; *Riverside Oil Company v. Hitchcock,* (1903) 190 U. S. 316, 47 L. Ed. 1074, 23 S. C. R. 698. The postmaster general has been given discretionary power in excluding matter from the mails, the exercise of which is not subject to review by the courts so long as he does not make a clearly erroneous ruling. *Bates & Guild Co. v. Payne,* (1904) 194 U. S. 106, 48 L. Ed. 894, 24 S. C. R. 595. The court in the principal case held that the defendant was not clearly wrong in deciding that the publication of plaintiff's "*The Masses*" contained matter objectionable under the Espionage Act as tending to hamper the operation of the conscription act and embarrass the government in the prosecution of the war.

CONSTITUTIONAL LAW—EMINENT DOMAIN—TAKING OF PROPERTY FOR PRIVATE USE—BUILDING RESTRICTIONS.—The Massachusetts St. 1915, Chap. 112, Sections 1 and 2, confers upon the land court the jurisdiction to determine whether equitable restrictions should be enforced. If the land court finds the restrictions inequitable, it shall register title to the land free from the restrictions, but if any person or property entitled to the benefits may be damaged, the case shall be sent to the superior court for the assessment of damages. In a petition for the registration of land, the land court found that it would be inequitable to enforce certain restrictions and sent the case up for the assessment of damages. *Held,* that the statute allowed the petitioner to take private property for private use, contrary to the constitution. *Riverbank Improvement Co. v. Chadwick et al.,* (Mass. 1917) 117 N. E. 244.

The overwhelming weight of authority considers building restrictions as a servitude or an equitable easement. *Korn v. Campbell,* (1908) 192 N. Y. 490, 85 N. E. 687, 37 L. R. A. (N. S.) 1 (note); *Godley v. Weisman,* (1916) 133 Minn. 1, 157 N. W. 711. An easement may consist, either in suffering something to be done, or in abstaining from doing something upon the servient estate. *McMahon v. Williams,* (1885) 79 Ala. 288. Where such a reservation was made for the benefit of the adjoining lot, such a right was in the nature of an equitable easement appurtenant to that lot. *Tinker v. Forbes,* (1891) 136 Ill. 221, 26 N. E. 503. It is an incorporeal hereditament or easement appurtenant to the contiguous property. *Thruston v. Minke,* (1870) 32 Md. 487. An equitable restriction is a property right in the person in favor of whose estate it runs, or to which it is appurtenant. It has been held that "property" embraces every species of valuable right and interest, including real and personal property, easements, franchises, and hereditaments. *Caro v. Metropolitan, etc., R. Co.,* (1880) 46 N. Y. Super. Ct. 138. All such easements, franchises, and hereditaments are property rights under the bill of rights. *Metropolitan, etc., Ry. Co. v. Chicago, etc., Ry. Co.,* (1877) 87 Ill. 317. But if the original "building plan" has been abandoned or the character of the neighborhood changed so as to defeat the purpose of the covenant or agreement, it will not be enforced in equity. *The Duke of Bedford v. The Trustees of the British Museum Co.,* (1822) 2 Myl. & K. 552; *Trustees of Columbia College v. Thacher,* (1882) 87 N. Y. 311, 10 Abb. N. C. 235, 41 Am. Rep. 365.

In Massachusetts it was held that a court of chancery will refuse to enforce oppressive and inequitable restrictions, but it will assess damages in favor of the owner thus deprived of the enjoyment of his easement. *Jackson v. Stevenson*, (1892) 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476. The statute in question seems intended to accomplish the same result in the reverse order, that is by removing the restrictions upon compensation being paid.

The decision of the instant case leaves the Massachusetts court in the contradictory position of sanctioning the doing by a court of equity of that which is unconstitutional when provided for by statute.

INDIANS—INTRODUCING LIQUOR INTO INDIAN COUNTRY—FORFEITURE OF VEHICLE.—The innocent mortgagee of an automobile confiscated under a proviso of the Indian Appropriation Act of March 2, 1917, claimed exemption for his interest in the property seized. *Held*, the statute expressly confiscating the vehicle whether used by the owner or another, was constitutional and the mortgagee was not entitled to recover for his interest in the automobile seized. *United States v. One Buick Roadster Automobile*, (1917) 244 Fed. 961.

For a discussion of the principles involved in this case, see NOTES, p. 141.

INTOXICATING LIQUORS—PROHIBITION—STATUTE—MANUFACTURE.—The defendant extracted the juice from grapes and placed it in a receptacle to ferment and thus made wine for home consumption. He was charged with violating an act (Laws of 1915, p. 3, Sec. 4) of the state of Washington, which made it a criminal offense to manufacture intoxicating liquor. He was convicted in the lower court and the case was appealed to the supreme court. *Held*, that the conviction was proper though the wine was made solely for his personal use, and the statute was not unconstitutional. *State v. Fabbri*, (Wash. 1917) 167 Pac. 133.

It is universally agreed in this country that a state has a right under the police power to legislate on the liquor question with regard to the manufacture, sale or the manner of distribution of the same. *Mugler v. State of Kansas*, (1887) 123 U. S. 623, 31 L. Ed. 205, 8 S. C. R. 273. That the manufacture and sale of intoxicating liquor is not one of the inherent privileges and immunities of a citizen of the United States, and thus not protected under the fourteenth amendment against state interference is held in *Grozza v. Tiernan*, (1893) 148 U. S. 657, 37 L. Ed. 599, 13 S. C. R. 721. Until recently, however, the tendency of the courts has been to hold that the state is exceeding its police power when it attempts to make it unlawful for a private individual to have liquor at his home for his own consumption with no intent to sell. Accordingly it has been held that legislation pertaining to the private use of liquor was unconstitutional, *Sullivan v. City of Oneida*, (1871) 61 Ill. 242; and that the limit of police power was reached in regulating the sale and manufacture of liquor; that the state had no concern with the private conduct of an individual which affects only himself, and does not operate to the detriment of others. *Commonwealth v. Campbell*, (1909) 133 Ky. 50, 117 S. W. 383, 19 Ann. Cas. 159, 24 L. R. A. (N. S.) 172; *Commonwealth v. Smith*, (1915)

163 Ky. 227, 137 S. W. 340, L. R. A. 1915D 172. In North Carolina a statute was held to be unconstitutional which forbade an individual to carry into a county, where liquor was prohibited, more than a certain amount of liquor, regardless of his intention, on the ground that this deprived him of his constitutional property rights. *State v. Williams,* (1908) 146 N. C. 618, 61 S. E. 61, 14 Ann. Cas. 562, 17 L. R. A. (N. S.) 299. An Oklahoma statute, limiting the amount of liquor an individual could have in his possession at one time was held unconstitutional as not a reasonable use of police power, but in conflict with the fourteenth amendment of the constitution of the United States. *Ex Parte Wilson,* (1911) 6 Okla. Cr. Rep. 451, 119 Pac. 595. Until recently the general holding of the courts seems to have been to the effect that the keeping of intoxicating liquor for private consumption with no illegal intent to sell can by no possibility injure or affect the public health or morals, and therefore the enacting of a statute prohibiting such keeping is not a legitimate exercise of police power. It is an abridgment of the privileges and immunities of the citizen without legal justification and therefore void. *Ex Parte Brown,* (1897) 38 Tex. Cr. Rep. 295, 42 S. W. 554, 70 Am. St. Rep. 743; *State v. Gilman,* (1889) 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847. A recent California decision was to the effect that a municipality exceeded its police power in making it a crime to have liquor in one's possession without intent to sell. Mere possession, the court said, could not in itself constitute a crime, and in support of the decision cited all of the above cases. *Matter of Application of Juan Lucra,* (1915) 28 Cal. App. 185, 152 Pac. 748. The principal case seems clearly out of harmony with a large and formidable array of authorities. The modern tendency of the courts, however, seems to be in favor of the view taken by the principal case, and a number of states in recent decisions have upheld so-called "bone-dry" legislation. This recent change of view by the courts is especially brought out by the Alabama court which held that the private consumption of liquor could not be legislated against. *Eidge v. Bessemer,* (1909) 164 Ala. 599, 51 So. 246, 26 L. R. A. (N. S.) 394; and six years later the same court held that the state could legislate regarding the private consumption of liquor, it being within the police power. *Southern Express Co. v. Whittle,* (Ala. 1915) 69 So. 652. The court tried to distinguish the case of *Eidge v. Bessemer,* supra, but in effect virtually overruled it. The Idaho court in *Ex Parte Crane,* (1915) 27 Idaho 671, 151 Pac. 1006, in a similar case bases its decision on the ground that the harm of liquor lay in the consumption, and not in the possession or sale, and therefore if legislation regarding possession and sale were constitutional under the police power, surely private consumption and keeping could also be legislated against. In a case of identically the same facts as the principal case the Oregon court held that the state could legislate so as to shut off private manufacture and consumption under the police power. *State v. Marastoni,* (Ore. 1917) 165 Pac. 1177. The Georgia court, passing on the validity of a statute prohibiting an individual from having more than a certain amount of liquor at one time, said that the question of whether or not intoxicating liquor was harmful was a matter for the legislature to pass on, because it came

under the police power. The statute was therefore held constitutional. *Delaney v. Plunkett,* (Ga. 1917) 91 S. E. 561, L. R. A. 1917D 926. The decision of the principal case is based very largely on a dictum by Justice Harlan, in *Mugler v. State of Kansas,* supra, to the effect that if it is necessary for the best interests of all to prohibit the private manufacture as well as private consumption of intoxicating liquor the court would sustain legislation to that effect, in order to help defeat any evasion of the existing prohibition laws.

LIBEL AND SLANDER—GRAND JURY REPORT—PRIVILEGE—GOOD FAITH.—A grand jury brings in a report censuring and reflecting on the conduct of an official. In an action against the members for libel, *held,* a grand jury has no authority to make such report not followed by an indictment; such report, even though made in good faith, is not even qualifiedly privileged. *Bennett v. Stockwell,* (Mich. 1917) 163 N. W. 482.

In the return of an indictment or presentment, the grand jury is performing the very duty for which it was created; but is a report of an investigation by the jury, or a written opinion of the jury, not followed by an indictment, such a duty as to prevent the party injured thereby from bringing action against the jurors? *Rector v. Smith,* (1860) 11 Ia. 302, held that a grand jury report reflecting on the conduct of a public official was not actionable if made in good faith in the belief that it was in the performance of their duties, although the grand jury had no power to present to the court otherwise than by indictment. The recent tendency is to confine the jury strictly to their well defined duties of bringing in indictments or presentments. *In re Osborne,* (1910) 68 Misc. Rep. 597, 125 N. Y. Supp. 313, holds that the presentation of a report which reflects on the integrity of the attorney-general was without legal right and may therefore be stricken from the records. Where such report was used merely for the purpose of accusing an official of laxity in the enforcement of the law, it will be expunged. *In re Woodbury,* (1915) 155 N. Y. Supp. 851. And where by statute the jury is authorized to investigate the conduct of public officials, a report, assailing the official's conduct where no impeachable offense is found, is unauthorized and will be stricken. *Bennett v. Kalamazoo Circuit Judge,* (1913) 183 Mich. 200, 150 N. W. 141; *Parsons v. Age-Herald Publishing Co.,* (1913) 181 Ala. 439, 61 So. 345. Squarely in point with the instant case is *Rich v. Eason,* (Tex. Civ. App. 1915) 180 S. W. 303, in which a report of the grand jury questioning the moral character of the sheriff but not finding an indictment against him was considered not privileged. In *Poston v. Washington, etc., R. Co.,* (1911) 36 App. D. C. 359, the defendant published a report which practically charged the plaintiff with perjury in giving testimony before the grand jury relative to the defendant's conduct. It was held not privileged and the defendant was therefore liable for publication of a libel.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT.—The plaintiff a messenger boy, 17 years of age, was sent by the defendants on an errand, a distance of about five blocks. There was evidence to show that the messengers were given car-fare for long errands but were not provided

with any for short errands like the one here. Plaintiff had a busy afternoon ahead of him, and on returning he climbed on the back of an automobile truck proceeding in his direction. He slipped on a roller upon the floor of the truck and becoming entangled in the gears was severely injured. On an action under the Workmen's Compensation Act, *held*, plaintiff cannot recover. The act was within the scope of his employment but did not arise out of the same. *State ex rel. Miller v. District Court, Hennepin County*, (Minn. 1917) 164 N. W. 1012.

It is generally conceded that liability imposed by the workmen's compensation acts has no connection with the negligence of either the employer or employee; and an injury arising out of and in the course of the employment creates liability without either party being at fault. *Decatur Railway & Light Co. v. Industrial Board of Illinois*, (1917) 276 Ill. 472, 114 N. E. 915. See note Ann. Cas. 1913C 17. It is difficult to fix any rule to determine what acts are within the scope of the employment and arise out of it. The *McNicol's case*, (1913) 215 Mass. 497, 102 N. E. 697, lays down the following test: "It 'arises out of' the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed, and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work, and to have been contemplated by a reasonable person familiar with the whole situation as a result of exposure occasioned by the nature of the employment then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment." The American courts are practically unanimous in holding that the words "by accident arising out of and in the course of the employment," as used in the workmen's compensation acts should be given a broad and liberal construction in order to realize the humane purpose of their enactment. *Holland, St. Louis Co. v. Shraluka*, (Ind. 1917) 116 N. E. 330. In *Beaudry v. Watkins*, (1916) 191 Mich. 445, 158 N. W. 16, L. R. A. 1916F 576, a delivery boy was returning from lunch at home, having been given permission to stop there on a delivery. He was riding his bicycle and caught on the rear of a truck for a tow on the way to collect another package. The truck turned a corner and he was thrown off, the wheel passing over him. The court held that he could recover under the workmen's compensation act, the injury arising out of and in the course of employment. In *Decatur Railway & Light Co. v. Industrial Board of Illinois*, supra, the plaintiff's business was to unload coal at the plant near the tracks. He was sent to the railroad yards to arrange to have some cars switched over to the plant. The switchman was on the rear of the moving switch engine. The plaintiff attempted to get on the engine and fell, losing both his legs. The court held that injury occurred out of and in the course of his employment and that he could recover. He was attempting to perform a duty to his employer. It has been held that an injury to a tree trimmer, whose duty required him to go around the city to supervise work, by being struck by an automobile while attempting to board a street car, is an accident arising "out of" and "within the scope of" his employ-

ment. *Kunze v. Detroit Shade Tree Co.,* (1916) 192 Mich. 435, 158 N. W. 851, L. R. A. 1917A 252. A factory employee had quit work at noon and was combing her hair preparatory to going home for lunch. Her hair caught in the machinery and she was injured. Held, the plaintiff can recover. The accident arose in the course of her employment, under the workmen's compensation act. *Terlecki v. Strauss,* (1914) 85 N. J. L. 454, 89 Atl. 1023, affirmed without opinion in 86 N. J. L. 708, 92 Atl. 1087. The English courts seem to give a stricter construction to the clause "out of" the employment. In *Symon v. Wemyss Coal Co.,* (1912) S. C. 1239, 49 Scot. L. R. 921, 6 B. W. C. C. 298, a messenger on a delivery had been provided by his employer with money to pay his fare and was injured while attempting to board a tram-car moving five miles an hour, contrary to a notice on the car. Held, that was not an accident arising out of and in the course of his employment. His doing this act in no way facilitated or promoted his employer's business. In *Revie v. Cumming,* (1911) S. C. 1032, 48 Scot. L. R. 831, 5 B. W. C. C. 483, a brakeman's duty was to walk behind a lorry and be ready to apply the brakes when told to do so by the driver. He had seated himself on the front with the driver, and, when told to put on the brakes he jumped down, slipped, and went under the wheel. The court held that the accident did not arise out of his employment, saying that it was an added risk incidental to his employment. In another English case a servant was sent to mail a letter and while doing so slipped on a banana peel in the street breaking her leg. The court allowed no recovery saying that the risk was common to all the public and not a hazard peculiar to her employment. *Sheldon v. Needham,* (1914) W. C. Ins. Rep. 274, 30 T. L. R. 590. In Minnesota in *State ex rel. Duluth Brewing & Malting Co. v. District Court, St. Louis County,* (1915) 129 Minn. 176, 151 N. W. 912, the court seems to follow the broad interpretation. The plaintiff was a helper in a brewery, one of his duties being to replace broken electric light bulbs which were enclosed in locked wire screens to prevent stealing of them. It was necessary for him to get the key to these screens from the foreman whenever he wished to replace bulbs. One day he attempted to make a key out of an empty cartridge shell, and it exploded, destroying the sight in his right eye. He was allowed to recover. Teamster struck by lightning while standing by a tree out of the rain. Held, the injury arose out of his employment. *State ex rel. Peoples Coal & Ice Co. v. District Court, Ramsey County,* (1915) 129 Minn. 502, 153 N. W. 119. Teamster hit by iron falling from a building in the course of construction while he was driving in the street below. Held, the injury arose out of his employment. *Mahowald v. Thompson-Starrett Co.,* (1916) 134 Minn. 113, 158 N. W. 913. In the instant case the Minnesota court seems to follow the strict construction of the English courts and not the broader one of the American courts.

MONOPOLY—PRICE RESTRICTION—INTERSTATE COMMERCE.—Plaintiff was a manufacturer of watches in New York and sold them to retailers with a printed notice accompanying each article to the effect that the dealer was licensed to vend it at a minimum price fixed by the plaintiff. Defendant, a retailer in New Jersey, disregarded this notice by selling below

this minimum price. *Held*: Motion to dismiss plaintiff's bill denied and defendant restrained until final hearing. *Ingersoll and Bro.*, (N. J. 1917) 101 Atl. 1030. The court in deciding this case had before it the case of *Motion Picture Patents Co. v. Universal Film Co.*, (1917) 243 U. S. 502, 61 L. Ed. 871, 37 S. C. R. 416, but refused to follow it, adopting instead the view of the dissenting opinion in *Dr. Miles Medical Co. v. John D. Parks & Sons Co.*, (1911) 220 U. S. 373 (409), 31 S. C. R. 386, 55 L. Ed. 502.

For a discussion of the principles involved in the principal case see 2 MINNESOTA LAW REVIEW 66.

MORTGAGE—FORECLOSURE—NOTICE—SUFFICIENCY.—A notice of foreclosure of a mortgage gave the date of the mortgage, the names of the parties, and the volume and page of the record where the mortgage was recorded, but did not give the date of record. *Held*, that such notice was sufficient as a substantial compliance with the statute. *Lau v. Scribner*, (Mich. 1917) 163 N. W. 914.

The decision restates the liberal view of the Michigan court in holding that substantial conformity to the requirements of the statute is sufficient. *Lee v. Clary*, (1878) 38 Mich. 233; *Reading v. Waterman*, (1881) 46 Mich. 107, 8 N. W. 691. The object of the statutes calling for such notices is obviously to inform the public of the nature and condition of the property to be sold, and also the date, place and terms of the sale. *Hoffman v. Anthony*, (1862) 6 R. I. 282, 75 Am. Dec. 701. Although the statutes enumerate several requirements to constitute a valid notice, it has been repeatedly held that errors in the notice will not render the proceedings had thereunder void if the general purpose of the statute has been complied with. Thus it was held that when the statute required the notice to state the date of record of the mortgage, the hour and minute of the day need not be given. *Lee v. Clary*, supra. The notice is substantially regular when the error does not operate to the prejudice or deception of the reader. *Reading v. Waterman*, supra; *Iowa Inv. Co. v. Shepard*, (1896) 8 S. D. 332, 66 N. W. 451; 3 Jones, Mortgages, 7th ed., Sec. 1839. This rule is best applied when the mistake is clerical in its nature and not intended to deceive. Where a notice on April 7th advertised the sale to take place on March 3rd of the same year it was considered such a palpable clerical error as could not vitiate the sale. *Mitchell v. Nodaway County*, (1883) 80 Mo. 257. Mere inaccuracies not calculated to deceive or mislead will not vitiate a sale in absence of a claim that someone has been injured. *Iowa Inv. Co. v. Shepard*, supra. An extension of the application of the principle was had when the court held the advertising of the date of the mortgage as March 31st, instead of March 21st, did not render the sale invalid as no one could be misled since the mortgage was otherwise identified. *Brown v. Burney*, (1901) 128 Mich. 205, 87 N. W. 221. In other cases the courts have gone beyond the matter of prejudice and held a notice sufficient if it so described the mortgage, or so informed the public that anyone interested could, with the exercise of ordinary care, find the record, ascertain the error and determine the conditions of the sale. *Colgan v. McNamara*, (1889) 16 R. I. 554, 18 Atl. 157; *Stevens v.*

Bond, (1876) 44 Md. 506; *McCardia v. Billings,* (1901) 10 N. D. 373, 87 N. W. 1008.

On the other hand there are those courts, represented by Minnesota, which adhere to the strict construction of the statute. Since the statutory proceeding is in derogation of the common law, the statute is absolute and must be strictly pursued. *Clifford v. Tomlinson,* (1895) 62 Minn. 195, 64 N. W. 381. It is not sufficient that the notice furnishes the reader with the means of knowing the conditions of the sale. *Martin v. Baldwin,* (1883) 30 Minn. 537, 16 N. W. 449. Nor can the question of prejudice to the mortgagor be raised if the wrong page of the record is given in the notice. *Peaslee v. Ridgway,* (1901) 82 Minn. 288, 84 N. W. 1024. Whether the reader has been actually misled or not is immaterial as the proceedings are void if the notice did not conform to what the statute required.

In referring to the doctrine of strict adherence to the statute as set forth in *Clifford v. Tomlinson,* supra, the North Dakota court said, "We deem the rule of substantial compliance sustained by the weight of authority, more consonant with principles of justice and less liable to work hardship." *McCardia v. Billings,* supra. The Michigan statute involved in the principal case required that the notice state "when and where recorded." The notice did not attempt to state when, but did state where recorded. The difficulty with the decision is that it in effect declares nonessential a specific requirement of the statute, and holds a total omission to be a substantial compliance.

MUNICIPAL CORPORATIONS—DUE PROCESS OF LAW—LOCAL SELF-GOVERNMENT.—An order making a county primarily liable on an obligation, when the county has no notice of hearing is not due process of law; and Minn. G. S. 1913, Sec. 5571, authorizing a judge of the district court, in judicial ditch proceedings where no ditch was established, to order that the engineer's expenses in excess of the petitioners' bond be paid by the county is unconstitutional because it provides for no notice to the county. *State ex rel. County of Murray v. District Court,* (Minn. 1917) 164 N. W. 815.

There is one view of the power of the state over the municipality which contemplates complete control over the latter body in matters of purely local as well as matters of general state interest. The power of the state to compel a municipality to levy taxes and incur expense where the state at large has no general public purpose is well shown in the city hall of Philadelphia case. *Perkins v. Slack,* (1878) 86 Pa. St. 270. The theory of these cases rests on the well-nigh universal rule that the state may exercise every power not limited by its own or the federal constitution, and that the repository of this power is the legislature. Inasmuch as many constitutions contain no guaranty in so many words of any right of local self-government, the existence as well as all the rights of public corporations has been held dependent on the will of the state. *Coyle v. McIntire,* (1884) 7 Houst. (Del.) 44, 30 Atl. 728, 40 Am. St. Rep. 109. See *Barnes v. District of Columbia* (1875) 91 U. S. 540 (546), 23 L. Ed. 440. Whether or not the matter be stated as broadly as this, it has been argued that a municipality cannot be said to have been deprived of its property without

due process of law where a state compels it to incur a debt. See 14 Col. Law Review 407. On the other hand a number of judicial opinions have asserted that there is an inviolable right of local self-government. Cooley, J., gave the doctrine impetus in his opinion in *People v. Common Council of Detroit,* (1873) 28 Mich. 228, 15 Am. Rep. 202, where the city successfully resisted an application by the state for mandamus to compel it to purchase and pay for a park. He said that there is an implied constitutional guaranty of local self-government, and consequently, that the constitutional guaranty that no person shall be deprived of his property without due process of law applies to municipal corporations, and that the right of the state is one of regulation, not of appropriation.

The doctrine has received the approval of text writers: See McQuillin Municipal Corporations, I, Sec. 70; Dillon, Municipal Corporations, I, 5th ed., Secs. 119, 120. A large number of courts have used language of this nature; but in the majority of these cases, and even in the original Michigan cases, some express constitutional provision was actually found which by implication supported the doctrine. 16 Col. Law Review 190 and 299. The right has been held to exist without the aid of a constitutional provision in four jurisdictions. *State ex rel. Holt v. Denny,* (1888) 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; *Lexington v. Thompson,* (1902) 113 Ky. 540, 68 S. W. 477, 24 Ky. Law Rep. 384, 57 L. R. A. 775, 101 Am. St. Rep. 361; *State ex rel. White v. Barker,* (1902) 116 Ia. 96, 89 N. W. 204, 57 L. R. A. 244, 93 Am. St. Rep. 222; *Ex Parte Lewis,* (1903) 45 Tex. Criminal Rep. 1, 73 S. W. 811, 108 Am. St. Rep. 929.

The Minnesota decision in the instant case rests on the point of notice of hearing. If the court should see fit to adopt the doctrine of local self-government, then, regardless of notice, the legislature could not fasten this burden on the county, for due process would prevent the appropriation of funds by a government which had no jurisdiction over the subject. But if the supremacy of the state be admitted, if the state's right to regulate extends to matters of purely local business, it is not clear that the municipality is such a person as to set up against the state personal guarantees in the constitution. The court refers to Taylor on Due Process of Law, Sec. 133. But none of the cases there discussed hold that the municipality was entitled to notice. Nor does the author advance the idea that a municipal corporation is entitled to notice where it is the object of the administration of a statute. The requirement of notice seems consistent with the doctrine of local self-government only; and whether the court will go to this length is doubtful.

PUBLIC LANDS—HOMESTEAD EXEMPTION—DEBTS CONTRACTED.—In construing Sec. 4551 of the United States Compiled Statutes of 1916, which provides that no lands acquired under the federal homestead laws "shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of patent therefor," it was *held* that the exemption did not apply to a judgment for alimony, but only to a debt arising out of contract. *Miller v. Miller,* (Neb. 1917) 163 N. W. 335.

The rule in this case was laid down earlier in *Brun v. Mann,* (1906) 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154, in which case the

meaning of the words "debts contracted" was restricted so that it included only obligations incurred by the express agreement of the parties. Because of the failure to use the broader terms "liabilities incurred" the court was of the opinion that the legislative intent was to protect the homestead from obligations incurred innocently but which, through misfortune, could not be met by the debtor, and not to exempt it from those arising from a wrong. The defendant had a judgment docketed against him for the conversion of the plaintiff's cattle. The court held that such a judgment was a lien on the homestead because it did not arise out of contract. Although the plaintiff might have based his claim on implied contract, and though it was admitted that the judgment itself was a contract of record, the court said: "this fiction cannot convert a transaction wanting the assent of the parties into one which necessarily implies it." The Federal District Court had previously held that a similar provision in the homestead law of Virginia was an exemption from a judgment founded on tort. *In re Radway,* (1877) Fed. Cas 11,523, 3 Hughes 609. This case does not seem to have been considered specifically in *Brun v. Mann,* supra. The latter case has been cited with approval in *Doran v. Kennedy,* (1913) 122 Minn. 1, 141 N. W. 851; and in an appeal of *Doran v. Kennedy* to the United States Supreme Court, (1915) 237 U. S. 362, 35 S. C. R. 615, 59 L. Ed. 996. This same narrow meaning of the term "debts contracted" has been applied when used in state exemption statutes. Accordingly homesteads were held not exempt from judgments based on trespass, *Meredith v. Holmes,* (1880) 68 Ala. 90; on conversion, *McAfee v. Covington,* (1884) 71 Ga. 272, 51 Am. Rep. 263; and from a fine imposed by statute, *Whiteacre v. Rector,* (1878) 29 Grat. (Va.) 714, 26 Am. Rep. 420. And it has been held that a judgment founded on a breach of promise to marry, because of its "tortious" nature, was not a debt contracted within the meaning and purpose of the homestead exemption law. *Cook v. Newman,* (1876) 8 How. Pr. (N. Y.) 523; *Burton v. Mill,* (1884) 78 Va. 468.

A few decisions, however, have allowed much broader scope to the term "debts contracted." An Oklahoma case, in interpreting the federal statute, held that any cause for which assumpsit would lie is a debt contracted. *Flanagan v. Forsythe,* (1897) 6 Okla. 225, 50 Pac. 152. A similar provision in the Iowa statute was construed in the same way, *Warner v. Cammack,* (1873) 37 Ia. 642.

In *State v. O'Neil,* (1879) 7 Ore. 141, the meaning of the federal statute was said to be so broad as to include all liabilities incurred. There the homestead was exempted from attachment by the state for costs in a former bigamy prosecution. A number of courts have construed the term "debts contracted" where it occurs in state exemption laws to include all liabilities incurred, tort as well as contract. *Mertz v. Berry,* (1894) 101 Mich. 32, 59 N. W. 445, 24 L. R. A. 789, 45 Am. St. Rep. 379; *Dellinger v. Tweed,* (1872) 66 N. C. 206; *Smith v. Omans,* (1863) 17 Wis. 406; *Conroy v. Sullivan,* (1876) 44 Ill. 451.

BOOK REVIEWS

CASES ON THE LAW OF TORTS SELECTED FROM DECISIONS OF ENGLISH AND AMERICAN COURTS. By Charles M. Hepburn. American Casebook Series. St. Paul: West Publishing Company. 1915. Pp. xxx, 1462. Price $6.00.

An eminent teacher of Torts once made the statement that the problem of presenting the subject to the law student was one-third a question of subject matter and two-thirds arrangement. Certain it is that the method of arranging the material in Torts is a task of no small magnitude, for not only are the important topics numerous and court decisions legion in number, but the classification should if possible, give the student a conception of something more than a number of rules in more or less distinct topics. Probably no man's arrangement would be entirely satisfactory to anyone else.

Professor Hepburn's new case book involves a two-fold scheme of division, the first part concerning torts through acts of absolute, the second, torts through conditional, liability. Between these two, however, there is a hundred pages of cases on the troublesome topic of Legal Cause, so placed as a matter of convenience. The development of the topics is thorough, rather than unusual. First are considered the trespasses and excuse and justification therefor. Under the heading "Absolute Torts other than Trespasses" is found a miscellaneous collection of topics; cases on Detinue, a useful development of decisions on Nuisance, a topic generally slighted by compilers of Torts cases, a hundred pages devoted to Trover and Conversion in an arrangement which seems less effective than that of Professor Warren in his new Property cases. Herein also are treated Seduction, Defamation and "other acts of peril" as keeping fire, liability for animals (scantily treated) and extra-hazardous use. The questions in legal cause are presented in good cases, and as fully as consistent with adequate presentation of the many topics to be covered.

Negligence and Torts through malice are the subjects treated under "Conditional Liability." Under the former are considered the general principles of "due care," duties in specific relations and defenses. Under the latter come many others, malicious prosecution, abuse of process, deceit, and finally the increasingly important problems of modern industrial organization, trade competition, labor disputes and the like. Leading cases and many recent decisions are found here.

It seems a little unfortunate that the most important topics come in the second half of the book. As a practical matter the material does not get the full treatment in class given that which comes earlier, nor does the student work it over as much and understand it as well. And other topics, like legal cause, are easier to understand if the principles governing liability based on negligence are previously established.

Professor Hepburn's cases are well selected and carefully edited. The foot-notes, not excessive in number, are helpful and do not go too far afield. A table of cases and an index accompanies the collection.

The fifteen hundred pages would be easier to handle if bound in two volumes.

HERBERT F. GOODRICH.

UNIVERSITY OF IOWA.

CASES ON THE LAW OF PROPERTY, VOLUME I, PERSONAL PROPERTY.—By Harry A. Bigelow. American Casebook Series. St. Paul: West Publishing Company. 1917. Pp. xx, 404. Price $3.50.

This collection of cases is the first in order of use of five volumes in the American Casebook Series, intended to cover the whole field of the law of property as taught in the law schools. The volume deals with possessory interests in chattels, with some, mostly non-consensual, modes of acquiring ownership of chattels, and with rights in fixtures and emblements. The topics are elementary and meet for beginners.

The merits of a collection of cases for classroom use depend upon plan, proportion, selection and editing. Gray's Cases on Property have been the model for subsequent editors. The present volume makes two departures from the plan of Gray's collection. Possessory interests are treated before ownership, and the topics of fixtures and emblements are made a part of the personal property course. The first change is sound historically, and as it has been found to work well pedagogically, it seems a distinct improvement. The value of the change might perhaps have been enhanced by devoting some space at the beginning to the nature of possession, a fundamental concept on which there are interesting and stimulating cases, and which must be assumed in the study of possessory interests. The chapter on rights of action, on the other hand, tends to confuse the student of property and might well be relegated to an introductory course on pleading and history of law, where it logically belongs and where it may be adequately considered in its proper historical setting. The inclusion of the topics of fixtures and emblements is a logical means of filling out a half year course. They fit in here perhaps as well as anywhere.

Such excellent judgment is shown in apportioning space to the various topics and in choosing and editing the cases that the collection could scarcely be improved in these respects. The citations and footnotes are suggestive and valuable. The collection promises to stand well the ultimate test of classroom use.

EVERETT FRASER.

UNIVERSITY OF MINNESOTA.

TREATISE ON THE LAW OF INHERITANCE TAXATION. By Lafayette B. Gleason and Alexander Otis. Albany: Matthew Bender & Co. 1917. Pp. lviii, 836. Price $7.50.

STANDARDS OF AMERICAN LEGISLATION. By Ernest Freund. Chicago: University of Chicago Press. 1917. Pp. xx. 327. Price $1.50, plus postage.

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EXCLUSIVE REGULATION OF RAILROAD RATES BY THE FEDERAL GOVERNMENT

PRACTICALLY speaking, every railroad in the United States is a common carrier of foreign and interstate commerce. The exceptions are so few and unimportant that they do not affect the question to be discussed. Many of the steam railroads are adopting electricity as a motor power, but this does not affect the question. The term "railroad" is here used to designate all common carriers transporting passengers and freight, excepting "street railroads," and private lines operated by private industries in manufacturing plants. The question, which is now much debated, is whether Congress may regulate *all* rates, charges, and practices by railroads doing interstate and intrastate business, without an amendment to the federal constitution.

The constitution of the United States vests in Congress power "to regulate commerce with foreign nations, and among the several states. . . ."[1] There are a few fundamental and well settled rulings that should be stated before discussing the question presented.

A shipment from any point within the United States destined to a foreign port is foreign commerce, although the rail transportation to or from the port may be wholly within one state.[2] A

[1] U. S. Constitution Art. I Sec. 8 Cl. 3.
[2] Texas, etc., R. Co. v. Sabine Tram Co., (1913) 227 U. S. 111, 57 L. Ed. 442, 33 S. C. R. 229.

shipment from a point in one state to a point in, or over a part of the territory of, another state, is interstate commerce.[3] Whether a shipment is foreign or interstate commerce is determined by its essential character and not by mere billing.[4] Although a railroad may be wholly within a state, if it engages in any part of the movement of foreign or interstate commerce, it is subject to the act of Congress regulating commerce.[5] There must be a continuity of movement from the point of origin to point of final destination, intended by the shipper or consignee at the time the shipment starts, and the several carriers engaged in the movement must perform the transportation under some general arrangement or practice by which the shipment is moved from the point of origin to the point of final destination without the necessary intervention of, or reshipment by, the consignor or consignee. Under the practice prevailing on all railroads at the present time, commerce is facilitated and carried on either by through billing, or the observance of the practice by each carrier, under which the shipment is delivered from one carrier to the connecting carrier without the intervention of the shipper. By this practice a shipment delivered to the initial carrier never leaves the channel of interstate commerce until it is delivered to the consignee at the point of final destination. Under many decisions by the courts this has been held to make the shipment interstate or foreign commerce without any express agreement between the carriers participating in the transportation, and subjects all the carriers participating in such carriage, and the shipment, to federal control.

"Commerce," that may be regulated by Congress under the constitution, consists of three constituent parts, namely, the *agents,* the *instrumentalities,* and the *subjects,* of commerce. The power of Congress is plenary over each one of these constituent parts that comes under its jurisdiction; thus, as we have seen, the *subject* of commerce, that is, the shipment transported, may be interstate or foreign, while some agent of commerce transporting it a part of the way may be operating wholly within a state, and this may be true of instrumentalities used—road-bed,

[3] Baer Bros. v. Denver, etc., R. Co., (1914) 233 U. S. 479, 34 S. C. R. 641; United States v. Delaware, etc., R. Co., (1907) 152 Fed. 269.

[4] Pennsylvania R. Co. v. Clark Coal Co., (1915) 238 U. S. 456, 59 L. Ed. 1406, 35 S. C. R. 896; Southern Pacific Terminal Co. v. Interstate Commerce Commission, (1911) 219 U. S. 498, 31 S. C. R. 279.

[5] Cincinnati, etc., Ry. Co. v. Interstate Commerce Commission, (1896) 162 U. S. 184, 40 L. Ed. 935, 16 S. C. R. 700; United States v. Illinois Terminal R. Co., (1909) 168 Fed. 546.

cars, etc., but the fact that the shipment is interstate gives Congress the power over it, and by that grip it has jurisdiction over all the agents employed, and instrumentalities used, in its transportation.

If the federal government has control over an agent it may determine its liability to shippers and extend that liability so as to include acts done or omitted by connecting carriers.[6] It may determine the liability of the carrier to its employees, and extend such liability beyond the common law rule; and a state court is required to administer the law, although the law of the state, as to liability in such a case, may be different from the federal law.[7]

The Act to Regulate Commerce, approved February 4, 1887, as amended,[8] does not cover all the subjects which Congress has the constitutional power to regulate. Nor is any restriction in the Act, affecting its operation, to be considered as a legislative construction of the constitutional limits to which Congress may go in regulating commerce.

Coming now to the question whether Congress has power under the constitution to regulate *all* rates charged by interstate carriers, for intrastate as well as interstate carriage, we note first that the present Act expressly excludes transportation wholly within a state from its operation. The proviso in section 1 of the Act declares:

"That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one state, and not shipped to or from a foreign country. . . ."

This is a restriction which Congress has placed upon its own agency. It does not determine the limit of Congressional power. In the *Minnesota Rate Cases*,[9] the Supreme Court of the United States, speaking through Mr. Justice Hughes, said:

"The power of Congress to regulate commerce among the several states is supreme and plenary. It is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. . . . There is no room in our scheme of government for the assertion

[6] Atlantic Coast Line R. Co. v. Riverside Mills, (1911) 219 U. S. 186, 55 L. Ed. 167, 31 S. C. R. 164.

[7] Mondou v. New York, etc., R. Co., (1912) 223 U. S. 1, 56 L. Ed. 327, 32 S. C. R. 169, 38 L. R. A. (N. S.) 44.

[8] 8 U. S. Compiled Stat. Annot. 1916 Secs. 8563-8604.

[9] (1913) 230 U. S. 352 (398-9), 57 L. Ed. 1511, 33 S. C. R. 729, 48 L. R. A. (N. S.) 1151.

of state power in hostility to the authorized exercise of federal power. *The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on;* and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations."[10]

Again, referring to the proviso in section 1 above quoted, the Court said:[11]

"Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. . . . The fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the states to deal with that subject."

After reviewing the decisions recognizing the power of the states under existing law to regulate intrastate rates the opinion proceeds:[12]

"To suppose, however, from a review of these decisions, that the exercise of this acknowledged power of the state may be permitted to create an irreconcilable conflict with the authority of the Nation, or that through an equipoise of powers an effective control of interstate commerce is rendered impossible, is to overlook the dominant operation of the constitution which, creating a Nation, equipped it with an authority, supreme and plenary, to control National commerce and to prevent that control, exercised in the wisdom of Congress, from being obstructed or destroyed by any opposing action."

Referring to the interblending of operations by an interstate carrier conducting both interstate and intrastate business, the Court said:[13]

"But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without impos-

[10] Italics are the author's. [Ed.]
[11] (1913) 230 U. S. 352 (420), 57 L. Ed. 1511, 33 S. C. R. 729, 48 L. R. A. (N. S.) 1151.
[12] Ibid p. 431.
[13] Ibid p. 432-3.

ing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply. It is the function of this court to interpret and apply the law *already enacted,* but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. *Nor, in the absence of federal action,* may we deny effect to the laws of the state enacted within the field which it is entitled to occupy *until its authority is limited through the exertion by Congress of its paramount constitutional* power."[14]

The exertion of its plenary power over intrastate traffic, foreshadowed in the *Minnesota Rate Case,* has found expression in legislation, which has been sustained by the Supreme Court, controlling interstate carriers in matters affecting intrastate traffic. Prior to the passage of what is known as the Safety Appliance Act,[15] the states had the same control over instrumentalities—cars and engines, etc.—used in intrastate commerce that they had and now have over rates for intrastate traffic. The states passed safety appliance laws applicable to cars and engines engaged in intrastate traffic. Congress passed a safety appliance law and restricted the operation of the Act to *cars "engaged in interstate commerce."* This act did not cure the existing evils. The act was amended and made to apply to *all* cars and vehicles of every description "used on a railroad engaged in interstate commerce." The *agents* and *the railroad* were subject to the regulating power of Congress. This act, if constitutional, took from the states all control over cars and engines used in intrastate traffic. It came before the Supreme Court in *Southern Railway v. United States,*[16] and the Court, speaking through Mr. Justice Van Devanter, construed the act "to embrace all locomotives, cars and similar vehicles used on *any railroad which is a highway of interstate commerce."* And upon the question of its constitutionality, the Court said:[17]

"We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. The answer to this question depends upon another, which is, Is there a real or substantial relation or connection

[14] Italics are the author's. [Ed.]
[15] 8 U. S. Compiled Statutes, 1916, Secs. 8605-50.
[16] (1911) 222 U. S. 20, 56 L. Ed. 72, 32 S. C. R. 2.
[17] Ibid p. 26.

between what is required by these acts in respect of vehicles used in moving intrastate traffic, and the object which the acts obviously are designed to attain; namely, the safety of interstate commerce and of those who are employed in its movement? Or, stating it in another way, Is there such a close or direct relation or connection between the two classes of traffic, when moving over the same railroad, as to make it certain that the safety of the interstate traffic and of those who are employed in its movement will be promoted in a real or substantial sense by applying the requirements of these acts to vehicles used in moving the traffic which is intrastate as well as to those used in moving that which is interstate?"

Reviewing the facts showing an intermingling of cars used in interstate and intrastate traffic and the effect of differing appliances upon cars in the same train, the Court concluded:[18]

"These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative."

Again the question of a uniform system of accounting for all carriers in any way subject to the Act, was before the Court. The Commission insisted that carriers subject to the act, both rail and water carriers, should report and keep the accounts of all of their receipts and expenditures, from intrastate traffic as well as from interstate traffic, and from sources of private business where the accounts were mingled, in accordance with the uniform system formulated by the Commission. The carriers insisted that neither Congress nor the Commission had authority to regulate intrastate business, and therefore could not require reports, nor prescribe the accounting to be kept of such business. The Supreme Court speaking through Mr. Justice Day said:[19]

"Bookkeeping, it is said, is not interstate commerce. True, it is not, but bookkeeping may and ought to show how a business which, in part, at least, is interstate commerce, is carried on, in order that the Commission, charged with the duty of making reasonable rates and prohibiting unfair and unreasonable ones, may know the nature and extent of the business of the corporation, the cost of its interstate transactions, and otherwise to inform itself so as to enable it to properly regulate the matters which are within its authority. We think the uniform system of accounting prescribed and the report called for are such as it is within the power of the Commission to require under section

[18] Ibid p. 27.

[19] Interstate Commerce Commission v. Goodrich Transit Co., (1912) 224 U. S. 194 (216), 32 S. C. R. 436.

20 of the act. Nor do the requirements exceed the constitutional authority of Congress to pass such a law."

The states in the exercise of their police power may make quarantine regulations to prevent the introduction or spread of disease which affect interstate commerce, but these state regulations are subject to the paramount authority of Congress to regulate the subject matter.[20] The state regulation must give way whenever Congress legislates upon the subject. A state may determine the liability of a carrier for loss or damage to property within its territory; but only until such time as Congress legislates upon the subject matter.[21]

In the *Shreveport Case*,[22] the state of Texas had established rates between Texas cities which were lower than the interstate rates charged to and from Shreveport, La., to the same points in Texas. The Interstate Commerce Commission found that these intrastate rates created undue preferences and were unlawful, and ordered the interstate carriers to equalize the rates for like distances upon their lines. This gave the carriers the right to lower the interstate rates, which had been found reasonable by the Commission, or to raise the intrastate rates to the level of the interstate. The carriers elected to raise the intrastate rates. As this directly affected intrastate rates made by the state it was claimed that the order was beyond the power of Congress and the Commission to make. In passing upon this question the Supreme Court, speaking through Mr. Justice Hughes, said:[23]

"*It is for Congress to supply the needed correction where the relation between intrastate and interstate rates presents the evil to be corrected, and this it may do completely by reason of its control over the interstate carrier*, in all matters having such a close and substantial relation to interstate commerce that it is necessary or appropriate to exercise the control for the effective government of that commerce.

"It is also clear, that, in removing injurious discrimination against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to be a proper standard fair to the carrier and

[20] Compagnie Francaise de Navigation a Vapeur v. Louisiana State Bd. of Health, (1902) 186 U. S. 380, 22 S. C. R. 811; Asbell v. Kansas, (1908) 209 U. S. 251, 52 L. Ed. 778, 28 S. C. R. 485, 14 Ann. Cas. 1101.

[21] Adams Express Co. v. Croninger, (1913) 226 U. S. 491 (500), 57 L. Ed. 314, 33 S. C. R. 148, 44 L. R. A. (N. S.) 257.

[22] Houston, etc., Ry. Co. v. U. S., (1914) 234 U. S. 342, 58 L. Ed. 1341, 34 S. C. R. 833.

[23] Ibid p. 355.

to the public. Otherwise, it could prevent the injury to interstate commerce only by the sacrifice of its judgment as to interstate rates. Congress is entitled to maintain its own standard as to these rates and to forbid any discriminatory action *by interstate carriers* which will obstruct the freedom of movement of interstate traffic over their lines in accordance with the terms it establishes."

Referring to the proviso in section 1 above quoted, the Court said:[24]

"Congress thus defined the scope of its regulation and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates and thus to establish a unified control by the exercise of the rate-making power over both descriptions of traffic.

. . .

"We are of the opinion that the limitation of the proviso in section one does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one state.' . . . *Such a matter is one with which Congress alone is competent to deal* and, in view of the aim of the action and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation."

Again:[25]

"We are not unmindful of the gravity of the question that is presented when state and federal views conflict. *But it was recognized at the beginning that the Nation could not prosper if interstate and foreign trade were governed by many masters,* and, where the interests of the freedom of interstate commerce are involved, *the judgment of Congress* and of the *agencies it lawfully establishes must control.*"[26]

Many instances could be given which establish the doctrine that Congress has the constitutional power to regulate the practices of every agent of interstate commerce. It may declare by what instrumentalities and by what carriers interstate commerce shall be carried.[27] Jurisdiction over the *subject* of commerce, or over the *agents* of commerce, or the *instrumentalities* of commerce, gives to Congress the plenary right to regulate and determine all matters affecting such agencies, instrumentalities and subjects.

[24] Ibid p. 357-8.
[25] Ibid p. 359-60.
[26] Italics are the author's. [Ed.]
[27] Pipe Line Cases, (1914) 234 U. S. 548, 34 S. C. R. 956.

These broad powers necessarily include the right to determine *all* the rates and charges which a carrier engaged in interstate commerce shall make upon its line of railroad, if a condition has arisen requiring such regulation. That is to say, paraphrasing the language of the Supreme Court, if Congress determines that the regulation of intrastate rates, charged by interstate carriers, is necessary under present conditions to conserve and promote the interests of interstate commerce, it may assume control and regulate *all* the rates charged by such carriers. The regulation of rates is not a greater, nor a different power than that exercised in determining what safety appliances shall be used upon the cars and engines used upon a railroad carrying interstate traffic. If Congress has the power to take from the states their power to regulate the instrumentalities used in intrastate transportation; if it may, by its regulation of interstate carriers, supersede the police regulations made by a state; if it may determine the relation between intrastate and interstate rates, and authorize interstate carriers to raise an intrastate rate, it requires no additional power to fix *all* the rates for *any* distance, and for all distances, that shall be charged by such a carrier. If the power granted by the constitution is adequate for the purposes above detailed it is quite sufficient to warrant Congress in fixing all rates, if conditions exist requiring such additional regulation. It only remains, therefore, to consider whether the exigencies, at the present time, call for the broader exercise of its power by Congress.

The policy of the federal government, expressed in the Act to Regulate Commerce, is very aptly stated in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*,[28] where the court, speaking through the Chief Justice, said:

"That the Act to Regulate Commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the Act."

In *New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission*[29] the same justice, speaking for the Court said:

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[28] (1907) 204 U. S. 426 (439), 51 L. Ed. 553, 27 S. C. R. 350, 9 Ann. Cas. 1075.

[29] (1906) 200 U. S. 361 (391), 50 L. Ed. 515, 26 S. C. R. 272.

"It cannot be challenged that the great purpose of the Act to Regulate Commerce, while seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism."

If we go back of the Act to the commerce clause of the constitution we find the motive for introducing it very clearly stated in the opinion in the *Minnesota Rate Cases,* where Mr. Justice Hughes, speaking for the Court, said:[30]

"The conviction of its necessity sprang from the disastrous experience under the Confederation when the states vied in discriminatory measures against each other. In order to end these evils, the grant in the constitution conferred upon Congress an authority at all times adequate to secure the freedom of interstate commercial intercourse from state control and to provide effective regulation of that intercourse as the national interest may demand."

There exists today a serious and growing conflict between federal and state authority over the fixing, and effect of state-made rates. This conflict grows out of precisely the same fundamental conditions that existed under the Confederation. It expresses itself in a different way but in spirit, and in purpose, it is the same. Some states, in order to give undue preference to their own citizens and cities, have fixed intrastate rates much lower than existing interstate rates for the same distances. By this state policy, cities within a state are protected against competition in cities over the line in another state. This was the finding, and the basis of the decision in the *Shreveport Case.*

The *Minnesota Rate Cases* furnish striking examples of the demoralization of rate structures by the action of state commissions. In that case, *Shepard v. Northern Pac. Ry. Co.*,[31] Judge Sanborn states:

"Moorhead, Minn., Fargo and Bismarck, N. D., Billings and Butte, Mont., are so-called 'jobbing centers.' Prior to the taking effect of the order of September 6, 1906, they had always been accorded rates by the Northern Pacific Company which would allow them to compete in distribution of merchandise with their nearest neighbors and with St. Paul and Minneapolis and Duluth. The sum of car load rates from St. Paul, Minneapolis, and Duluth to these centers and the less than car load rates out from these centers to the territory geographically tributary to them, respectively, had been such as to compare favorably with rates in

[30] (1913) 230 U. S. 352 (398), 57 L. Ed. 1511, 33 S. C. R. 729, 48 L. R. A. (N. S.) 1151.
[31] (1911) 184 Fed. 765 (780).

and out of their local competitors as well as with less than car load rates from St. Paul, Minneapolis, and Duluth into the territory geographically served by them, respectively. The order of September 6, 1906, as supplemented by the order of May 3, 1907, substantially reduced car load rates from Duluth, St. Paul, and Minneapolis to Moorhead. This reduction would have given Moorhead a substantial advantage in territory accessible to its jobbing industry, and not only as against Fargo unless car load rates to Fargo should have been similarly reduced, but also as against Duluth, St. Paul, and Minneapolis unless less than car load rates from these points to points geographically accessible to Moorhead, which included a considerable territory in North Dakota, should have been proportionately reduced. This reduction, unless accompanied by a corresponding reduction in car load rates to Fargo from the eastern terminals, would have served to build up Moorhead at the expense of Fargo, and therefore to discriminate unduly and unjustly against Fargo as a matter of fact, and would destroy the relation in rates which had theretofore existed between the sum of car load rates into Moorhead and less than car load distributing rates on the one hand, and less than car load distributing rates from Duluth, St. Paul, and Minneapolis to localities accessible to Moorhead on the other. If Fargo were protected as against Moorhead by a like reduction in car load rates, it would have an advantage and preference over Bismarck in territory common to them both and an advantage over the eastern terminals in territory common to Fargo and them, unless car load rates from the eastern terminals to Bismarck and less than car load rates from the eastern terminals to the territory accessible to Fargo should be correspondingly reduced; and this advantage would constitute an undue and unjust preference to Fargo as against Bismarck, which competes in certain territory with Fargo, unless rates on car load lots from the eastern terminals to Bismarck should be correspondingly reduced. And so on, from distributing point to distributing point."

Commenting upon this situation Mr. Justice Hughes speaking for the Supreme Court of the United States in the *Minnesota Rate Cases,* said:[32]

"The situation is not peculiar to Minnesota. The same question has been presented by the appeals, now before the court, which involve the validity of intrastate tariffs fixed by Missouri, Arkansas, Kentucky and Oregon. Differences in particular facts appear, but they cannot be regarded as controlling. A scheme of state rates framed to avoid discrimination between localities within the state, and to provide an harmonious system for intrastate transportation throughout the state, naturally would embrace those places within the state which are on or near the state's

[32] (1913) 230 U. S. 352 (394-5). 57 L. Ed. 1511, 33 S. C. R. 729, 48 L. R. A. (N.S.) 1151.

boundaries; and, when these are included in a general reduction of intrastate rates, there is, of course, a change in the relation of rates as theretofore existing to points adjacent to, but across, the state line. Kansas City, Kansas, and Kansas City, Missouri; East St. Louis, Illinois, and St. Louis, Missouri; Omaha, Nebraska, and Council Bluffs, Iowa; Cincinnati, Ohio, and Covington and Newport, Kentucky; and many other places throughout the country which might be mentioned, present substantially the same conditions as those here appearing with respect to localities on the boundaries of Minnesota. It is also a matter of common knowledge that competition takes but little account of state lines and in every part of the land competitive districts embrace points in different states."

Some states have fixed intrastate passenger rates much lower per mile than are charged interstate passengers. As a result these state-protective rates create unfair discrimination between shippers and travelers, and between contiguous cities. This has resulted in grave friction between the federal and state authorities and produced much litigation. The federal government and the Interstate Commerce Commission have been brought into many of these suits and the action of the federal power has been bitterly attacked by state officials. While the law was settled, under the present Act, in the *Shreveport Case*, the efforts to secure undue preferences by states still continue and are increasing. Shippers try to reconsign their shipments at state lines to secure the lower state rates. Passengers alight from trains to get lower state fares or secure them in advance. Rate adjustments, covering large territories, are broken down by the action of a state, and a general demoralization of interstate traffic exists in many parts of the country.

The Act to Regulate Commerce expressly forbids "any undue or unreasonable preference or advantage to any particular . . . locality, or any particular description of traffic." This is the federal policy and the only policy which can result in fair treatment to all cities and shippers. Commercial competition between cities does not take account of state lines; two cities compete for trade within a state, and properly so, although a state line may run between them. Changes in modes of communication and in doing business have made the United States, industrially, one common territory. It is vastly more important to the country at large that its foreign and interstate commerce shall be maintained and advanced than that purely local intrastate commerce should be "protected," or that any state should be permitted to build up

the business of its cities to the prejudice and disadvantage of cities lying outside its borders. It is of grave importance that this conflict of laws should be terminated and that the policy of equality of treatment to all persons and localities should be universal throughout the nation. The interest of the people calls not merely for economical transportation, but for administration *without unfair discrimination or favoritism; it calls for a broad outlook and a unified national policy.* In determining whether undue preference or advantage exists upon the line of a railroad engaged in interstate commerce, state lines, as such, should receive no consideration. This is *one* Nation. Favoritism to one city, with disadvantage to another, is as injurious to the country as a whole, when such city is favored by state regulation as it is when it is preferred by a railroad company. In fact when such discrimination is caused by state regulation, it is a double evil; it creates favoritism that is contrary to the spirit and policy of the nation, and, at the same time, creates a conflict of laws and litigation that is destructive of national unity. If a city should not be unjustly preferred in rates to the disadvantage of another city, then it is equally true that a state should not be preferred to the disadvantage of other states. The law of equality and the prevention of favoritism should be uniformly applied throughout the country as a whole. It should not be left to the carriers, as it is now, to take out discrimination between interstate and intrastate traffic by raising the state-made rate to the level of the interstate rate. The federal government should exercise full and exclusive control of all rates charged by interstate carriers; the entire scope of rate-making would then be with the federal administrative commission to work out equal treatment to all in the process of regulation. The economic development of cities depends upon transportation. A comparatively small difference in a freight rate, upon a given commodity, may destroy the principal business of a city and give the business to another locality. The state cannot deal with the whole subject involved in a given case; it can only deal with the portion of the traffic within its border; the federal government alone can deal with the question as a whole. As was said by the Supreme Court, speaking through Mr. Justice McKenna, in *Interstate Commerce Commission v. Chicago, R. I. & P. R. R. Co.*:[33]

[33] (1910) 218 U. S. 88. 54 L. Ed. 946, 30 S. C. R. 651.

"The outlook of the Commission and its powers must be greater than the interest of the railroads or of that which may affect those interests. It must be as comprehensive as the interests of the whole country."

If the conditions existing under the Confederation justified the giving of exclusive jurisdiction to regulate interstate and foreign commerce to the federal government, and if the present well established policy of equality to all shippers and localities is to prevail over the entire Union, then the time has come when the regulation of *all rates* charged by interstate carriers, for any distance upon their lines, and the control of all regulations and practices, by such carriers, should be exercised exclusively by the federal government. That this can be done without any amendment to the constitution of the United States we believe is clearly established.

CHARLES WILLIS NEEDHAM.

WASHINGTON, D. C.

INDIAN LAND TITLES IN MINNESOTA

To the lawyer there are perhaps no more vexatious questions affecting real estate titles than those incident to Indian dominion, control and relinquishment. These questions are peculiar, and while they often determine titles of lands acquired or attempted to be acquired of both state and national sovereignties, as well as titles passing between individuals, they are referable to none of the established rules of real estate law; neither are they discussed nor analyzed in the standard text books upon public and private land titles.

Strangely enough, although practically every foot of our territory has at some time been burdened with Indian rights and titles, and although back of every fee patent, antedating it in time and superior to it in validity, there is an Indian treaty or compact; writers upon Indian subjects have usually limited themselves either to a discussion of the Red-man's personal life and habits, or to his political status, dismissing the more important but less easily understood question of how we acquired our Indian lands with certain self-righteous and ethical comments upon the supposedly shabby treatment accorded the natives in the acquisition of their dominions. Interesting as these questions of domestic and political economy may be to the student of politics and races, they have now become almost purely academic in their nature and of but little practical importance, either to the individual or to the nation, because the numerical inferiority of the Indian has become so pronounced that he no longer appreciably affects our political life and he has so closely affiliated himself with our domestic life as to be considered one of us as well as with us. For the most part he dwells among us as a citizen of the United States and of the State in which he lives; he votes and holds property, and by the same right as his white brother; he has changed his tepee for the house, and generally regulates his home life by the same rules as govern the home life of the white man.

While such questions have passed into the realm of the interesting but relatively unimportant, there still remains the vastly important one of how the Indians' previous methods of life and political status have affected land titles acquired from them.

The Minnesota investor in rural real estate, particularly in the newer and less populous sections of the state, and the lawyer who passes upon the titles are actively interested in these Indian land problems; probably from no other state in the Union, except Oklahoma, do so many and various legal questions of this nature reach the federal and state tribunals nisi prius and appellate. It will doubtless be a source of surprise to such lawyers as will read this article to learn that there have been on the dockets of our Minnesota federal and state courts, within the last five years, approximately fifteen hundred actions having their origin in these Indian questions, the variety and complexity of which have been such as to create a specialty.

The history of land titles in the United States and Canada is substantially the same. The first visitors to American shores found the land in the occupancy of native tribes who wandered over its extent unhindered, save by their own inclination, and the active opposition of other similar nomadic tribes. Their tenure was by occupancy only; the Indian seems never to have developed the white man's conception of a fee title or of any form of ownership whatever severable from possession. The yearly return of a certain tribe to a particular locality, with a claim of right thereto, likened by some writers to our titles, discloses itself on further investigation to have been nothing more abstract than a re-assertion of a right of occupancy,—the land in the interim being without a definable status. The claim was unrecognized by other tribes, save as a matter of expediency,—a sort of comity existing between those nations having a degree of friendliness toward each other.

The European discoverer, with his notion of a fee severable from possession, seized the opportunity thus presented, and planting a cross or a standard in the new land, claimed the fee thereof for his sovereign, salving his conscience the while with the thought that the Indian not knowing that he ever had a fee, would not realize that he lost one. Theoretically and juridicially we have here, then, the basic principle of Indian land titles—a right of occupancy in the Indian with the fee elsewhere. Eventually this became a recognized principle of international and national law, governing the conduct of the European nations among themselves in their absorption of the North American continent and establishing the rule of law which has governed legal tribunals from the day of discovery to the present time. Whether the question

be presented to the ancient courts of Virginia or the newer ones of Minnesota, it is stare decisis.

This created a strange situation, for clearly land has no value apart from occupancy and user; and a naked fee to the entire stretch from the Atlantic to the Pacific, with an outstanding eternal and exclusive right of possession thereto elsewhere would not produce sufficient funds to pay a notary for acknowledging its conveyance. So there became of necessity attached to this fee certain incidents of real value, among which were the exclusive right of the fee owner to acquire of the Indians their right of occupancy, and the further doctrine that such right once abandoned attaches itself automatically to the fee. Abreast these two principles, like gallant soldiers, took up their westward journey, the red-man giving ground before them until now there remain to him but a few scattered reservations of all his vast domain—eloquent testimony to the power of a fee (with incidents).

The principles set forth above have been enunciated by our courts in innumerable cases, the leading one of which is *Johnson, et al., v. McIntosh,*[1] in which the opinion was written by Chief Justice Marshall. It is to this opinion that courts and attorneys generally resort for the purpose of ascertaining the fundamental theory of Indian political status and the underlying principles governing Indian land titles. Another well considered and well known case states the rule of law as follows: Indians, while maintaining their tribal relations are domestic dependent nations that occupy a territory to which we assert a title independent of their will which must take effect in point of possession when their right of possession ceases.[2] Other cases elaborating upon this principle will be found in the foot-note.[3]

It was under this rule that the United States at one time held title to all of the territory now comprised within the limits of the state of Minnesota—the ultimate fee in the United States with the right of occupancy, user and possession in the Indians. This right of occupancy and user is no valueless transitory right, but

[1] Johnson v. McIntosh, (1823) 8 Wheat. (U. S.) 543, 5 L. Ed. 681.

[2] Cherokee Nation v. Georgia, (1831) 5 Pet. (U. S.) 1, 8 L. Ed. 25.

[3] Holden v. Joy, (1872) 17 Wall. (U. S.) 211, 21 L. Ed. 523; United States v. Cook, (1873) 19 Wall. (U. S.) 591, 22 L. Ed. 210; Beecher v. Wetherby, (1877) 95 U. S. 517, 24 L. Ed. 440; Buttz v. N. P. Ry. Co., (1886) 119 U. S. 55 (67), 30 L. Ed. 33, 7 S. C. R. 100; Jones v. Meehan, (1899) 175 U. S. 1, 44 L. Ed. 49, 20 S. C. R. 1; Worcester v. Georgia, (1832) 6 Pet. (U. S.) 515, 8 L. Ed. 483; United States v. Shanks, (1870) 15 Minn. 369 (302).

has always been accorded in the courts of our country a dignity and inviolability equal to that of the fee itself; consequently in determining the validity of a title in Minnesota, challenged at its source, one must first ascertain when and by what means the Indians' right to the same was relinquished. A failure to make this search may, and often has resulted in an opinion that the title to the land in question was in a certain party in fee, only to have it appear later that this fee was burdened with an exclusive right of occupancy either in an Indian tribe or individual.

Relinquishments of these Indian rights are to be found in the numerous treaties with the tribes formerly occupying this territory—chiefly with the Sioux or Dakota and the Chippewa or Ojibway tribes.

The boundary between these two nations having been fixed by the treaty of August 19, 1825,[4] thereafter the United States proceeded to acquire the Indian title through the medium of various treaties and compacts.[5]

About the year 1862 the federal government had obtained relinquishments to all of the Sioux lands within the boundaries of the state of Minnesota, except a few reservation tracts, and these were confiscated as a penalty for the Sioux up-rising, which occurred in that year. The Chippewa lands were acquired in the same way by treaty, but not so completely, and in the year 1889 steps were taken to obtain all of their remaining reservations in this state, except two. Congress, having declared in the year 1871 that thereafter no more treaties should be made with Indian tribes, but that they should be governed by the federal laws enacted independently of treaty agreements, passed in 1889 what is commonly known and referred to by lawyers and courts as the Nelson Act,[6] providing for the cession by the Chippewa Indians of all of their reserved lands in Minnesota, except the White Earth and Red Lake Reservations, so that in the entire state there now remain only these two reservations. Agencies are maintained

[4] 7 Stat. at L. 272.

[5] Sioux Treaties, Sept. 29, 1837, 7 Stat. at L. 538; July 23, 1851, 10 Stat. at L. 949; Aug. 5, 1851, 10 Stat. at L. 954; Chippewa Treaties, July 29, 1837, 7 Stat. at L. 536; Oct. 4, 1842, 7 Stat. at L. 591; Aug. 2, 1847, 9 Stat. at L. 904; Aug. 21, 1847, 9 Stat. at L. 908; Sept. 30, 1854, 10 Stat. at L. 1109; Feb. 22, 1855, 10 Stat. at L. 1165; Mar. 11, 1863, 12 Stat. at L. 1249; Oct. 2, 1863, 13 Stat. at L. 667; Mar. 7, 1864, 13 Stat. at L. 693; Mar. 19, 1867, 16 Stat. at L. 719.

[6] 25 Stat. at L. 642.

at other points, but these are the only two reservations in the true sense now existent within Minnesota.

In searching out land titles in this state, then, the lawyer may start with the assumption that the fee was in the United States by virtue of the principles set forth in *Johnson v. McIntosh*[7] and that at some time this fee was burdened with an exclusive right of occupancy in some Indian tribe.

Other Indian tribes than the Sioux and Chippewas have for short periods had a right of occupancy to limited portions of Minnesota territory, but the bulk of this state was held by the Sioux and Chippewa tribes and a resort must be had to the treaties and laws hereinbefore mentioned, to ascertain how, and under what conditions the right to occupancy passed from the Indian to the national government. It is in this manner and by this means that the right of the Indian has been extinguished to Minnesota and to substantially all the rest of the United Sstates.

Occasionally there finds its way into our courts a suit wherein the plaintiff claims title to immensely valuable tracts of land, generally located in some large city (Chicago being favored in this regard), by virtue of an ancient compact or agreement with some historic Indian chief or sachem. The leading case of *Johnson v. McIntosh* arose out of an attempt on the part of individuals claiming through Indian grantors to dispossess others claiming through the United States, and decided once for all the invalidity of such grants.

While this is the rule of law which has been applied by the courts generally when the transaction is between individual Indians or tribes and other individuals, a different rule obtains when the grant to an individual is incorporated in a treaty to which the United States itself is a party; in such a case the grant is valid.[9] If the treaty reservation is to an Indian member of the tribe, party to the treaty, he takes the reserved property in fee, and unless a restrictive clause is incorporated in the grant, may alienate the same.[10] However, if the reservation is for the benefit of the tribe itself and not for an individual member thereof

[7] (1823) 8 Wheat. (U. S.) 543, 5 L. Ed. 681.
[8] Ibid.
[9] Mitchell v. United States, (1835) 9 Pet. (U. S.) 711; Crews v. Burcham, (1861) 1 Black (U. S.) 352, 17 L. Ed. 91.
[10] Jones v. Meehan, (1899) 175 U. S. 1, 44 L. Ed. 49, 20 S. C. R. 1.

no fee passes, but the United States holds title in trust for the use and benefit of the tribe.[11]

It may be stated as a general rule that lands ceded by Indian tribes to the federal government, unless the treaty of cession stipulates otherwise, become public lands within the strict meaning of that term, as used in Congressional statutes dealing with the disposition of public lands and are subject to the usual homestead laws relative thereto.[12] Inasmuch as the general principles of public land law are incorporated in innumerable court decisions throughout this country, and in textbooks, nothing need be said in this article with respect to such lands as have reached the national government through proper cession; no special difficulty attaches to such titles. The great majority of suits have their origin in attempts by individual Indians to dispose of their lands, however obtained, to individual purchasers.

Until comparatively recent years, generally throughout the United States and its territories, the Indian tribes held their lands by tenure of common occupancy with the power of cession in the chiefs and head-men; neither their domestic or political economy demanded private property in land and it was only the federal policy toward them that wrought a change in this respect.

In the year 1887 Congress being of the opinion that the progress of the redmen towards civilization could best be accelerated by breaking up the large tracts held in common into individual and separate parcels, enacted what is called the General Allotment Act[13] providing for the allotment in severalty of the remaining reservations throughout the United States in the discretion of the President. This Act provided, in substance (so far as the same is material to this discussion), that there should be allotted to each individual Indian entitled thereto, eighty acres of land, such allotment to be evidenced by patents (so-called):

"which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs, according to the laws of the state or territory where such land is located, and that at the expiration of such period, the United States will convey the same

[11] Johnson v. Gearlds, (1914) 234 U. S. 422, 58 L. Ed. 1383, 34 S. C. R. 794.

[12] Selkirk v. Stephens, (1898) 72 Minn. 335, 75 N. W. 386, 40 L. R. A. 759.

[13] 24 Stat. at L. 388.

by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: *Provided,* That the President of the United States may in any case in his discretion extend the period, and if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided,* That the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered."

By this same Act those Indians who took allotments under it were made citizens of the United States and subject to the laws, both civil and criminal, of the state or territory in which they resided. By later Act[14] this citizenship and subjection to state laws was withheld until the issuance of fee patents.

Under the General Allotment Acts or acts predicated thereon, large areas in Minnesota and elsewhere were segregated from common ownership and allotted in severalty to individual Indians. What sort of title do such Indians take? They take an equitable inheritable interest, inalienable, non-taxable and not subject to judicial sale, lien or attachment in any form.[15] The legal title to the allotted lands remains in the United States which holds the same in trust for the allottee or his heirs throughout the statutory period of twenty-five years.

Much of the lands thus allotted is of great value—some as oil properties, as in the case of the Oklahoma lands; others for agricultural and timber products, such as the Minnesota lands; and innumerable attempts have been made to secure them through purchase either directly from allottees or by judicial procedure. Such attempts have been invariably frustrated by prompt action on the part of the United States bringing suit in its own name to set aside such liens and conveyances as violative of the restrictions imposed by the federal laws. It matters not whether these restrictions are those imposed by the General Allotment Act or by the terms of patents issued pursuant to some other restrictive law.[16]

So long then as lands are held by original Indian allottees under the General Allotment Act, or similar acts, they are inalien-

[14] May 8, 1906, 34 Stat. at L. 182.
[15] Beam v. United States, (1908) 162 Fed. 260.
[16] Heckman v. United States, (1912) 224 U. S. 413, 56 L. Ed. 820, 32 S. C. R. 424.

able; upon the death of the allottee the heirs may sell, but the conveyance does not become effective for any purpose until approved by the secretary of the interior, whereupon the title passes to the purchaser as though a fee simple patent had issued to the allottee.[17]

An inspection of the General Allotment Act and an acquaintance with the manner in which these provisions have been executed readily discloses the grounds for the multiplicity of suits which have arisen under it. In the main, the method by which an Indian obtains an allotment on a Minnesota reservation is for him to make an application for a certain described tract; this application along with others will then be held in the office of the Indian Agent until a sufficient number are on file to warrant the making of a schedule thereof, to be forwarded to the secretary of the interior for his approval. A long period of time (in some instances ten years), may intervene before the application and the approval by the secretary. What are the rights of the applicant during this time, and if he dies what are the rights of his heirs? Are his rights fixed and descendable as in the case of a homestead entryman, or does he have a mere personal expectancy—a float which perishes with him? In other words, when does an allotment become effective? Is it upon application or upon the approval thereof by the secretary or not until the trust patent has issued? Important as this question is it seems never to have been presented to the Supreme Court of the United States, nor so far as the writer knows, to a United States circuit court of appeals. Two federal trial courts have been called upon to answer this question upon demurrer, and they appear to have reached directly opposite conclusions. It was held in one case[18] that one who had gone no further than to apply for an allotment had a personal expectancy only and that upon his death his heirs took nothing. In a later case[19] the court was of the opinion that if selection had been made, an inheritable right was created entitling the heirs of the applicant to the allotment selected. Under the circumstances, the question is an open one so far as the courts are concerned, and a lawyer in giving his opinion must be governed by his own judgment and the appeal which the reasoning of the two cases makes to him. It is the opinion of the writer

[17] Act May 27, 1902, 32 Stat. at L. 245.
[18] Sloan v. United States, (1902) 118 Fed. 283.
[19] Smith v. Bonifer, (1904) 132 Fed. 889.

that if a selection has been made an inheritable interest vests and that the heirs of the applicant will take the same right to have the allotment completed that the applicant would have had if he had lived. This does not mean that the right to the allotment becomes absolute upon selection; it only means that whatever right or advantage the original selector gained will descend, and then if the selection is later approved and a trust patent issued the allotment becomes complete in the heirs. This is in line with the case of *Smith v. Bonifer.*[20] In a very recent case *United States v. Chase*[21] decided by the United States Supreme Court on November 5, 1917, it was held that a patent issued in the name of an Indian applicant after his death, inures to the benefit of his heirs under the United States Revised Statutes, Section 2448, and that if the selection had not at the time of the death of the applicant advanced to a point where the patent could properly issue, only the United States or the tribe could complain of its improper issuance. This disposes of the matter under discussion so far as individual contenders are concerned, but leaves undecided the point at which it may be said that the patent was properly issued.

Assuming that such an estate has been created as to be descendable a new difficulty presents itself. What tribunal shall determine the heirs of the deceased allottee? The General Allotment Act provides that the United States shall hold the allotted lands in trust for the allottee or his heirs, *according to the laws of the state in which the land is situate.* At first blush this would seem to indicate that the state probate courts have jurisdiction, but a more careful perusal and a consideration of the decided cases lead to a different conclusion. It will be observed that the Act does not say that the heirs are to be determined by the courts of the state, it merely provides that the United States will hold the land in trust for the heirs, according to the laws of the state. This means that those persons who are the heirs under the state law will become cestuis qui trustent upon the death of the allottee and that the United States will hold the lands in trust for them in the proportions provided by the state laws governing the descent of real property, but it does not mean that the jurisdiction to ascertain those persons has been surrendered by federal agencies to state probate courts.

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[20] Note 19 supra.
[21] (1917) 38 S. C. R. 24, U. S. Adv. Ops. 1917, p. 30.

Succinctly, it may be stated that prior to August 15, 1894, such jurisdiction was in the secretary of the interior; that by the Act of August 15, 1894,[22] this jurisdiction was transferred to the district courts of the United States[23] where it remained until the Act of June 25, 1910,[24] when it was restored to the secretary of the interior.[25]

In this latter case it was held that although the jurisdiction of a tribunal had attached for the purpose of determining heirs under Indian Allotment Acts, such jurisdiction ceased immediately upon the passage of a law vesting the same in another tribunal. Thus, although the jurisdiction of the district court to determine heirship had already been properly invoked, if during the pendency, either in the district court or in the circuit court of appeals, Congress should enact a law vesting jurisdiction elsewhere, the suit would be subject to dismissal on the grounds of lost jurisdiction. For a Minnesota case denying state probate jurisdiction over the estate of an allottee who died while his land was held in trust by the United States, see *Holmes v. Praun*.[26] In an earlier Minnesota case[27] it was held that over the estate of a tribal Indian not a citizen, even though he held title to his lands in fee simple, the probate court of the state had no authority.

On the White Earth Reservation in Minnesota, where for the last decade the greatest activity has prevailed, the situation has been complicated by an Act of Congress, passed June 21, 1906,[28] providing as follows:

"That all restrictions as to sale, encumbrance or taxation for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians are hereby removed and the trust deeds heretofore or hereafter executed by the Department for such allotments are hereby declared to pass the title in fee simple, or such mixed-bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full-bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that such adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue

[22] 28 Stat. at L. 286.
[23] McKay v. Kalyton, (1907) 204 U. S. 458, 51 L. Ed. 566, 27 S. C. R. 346.
[24] 36 Stat. at L. 855.
[25] Hallowell v. Commons, (1916) 239 U. S. 506, 36 S. C. R. 202.
[26] Holmes v. Praun, (1915) 130 Minn. 487, 153 N. W. 951.
[27] United States v. Shanks, (1870) 15 Minn. 369.
[28] 34 Stat. at L. 325.

to such Indian allottee a patent in fee simple upon application."

This innocent-looking and apparently clear statute has concealed within it a litigation germ of marvelous strength and activity, and the machinery of our federal courts has been almost clogged with the results following its enactment. Congress in its wisdom had provided that adult mixed-blood Indians might sell their allotments, but neglected to provide for any roll showing who were of that class, and also failed to define the term "mixed-blood." It might seem that no definition of such a term should be necessary, but a number of years after the passage of the Act, and after approximately one-half of the Reservation had passed into the hands of purchasers who had placed their own interpretation on the term, officials of the United States Department of Justice appeared and instituted suits in equity, praying the cancellation of all instruments, affecting about one thousand allotments, on the grounds that the same were violative of the restrictive clauses in the trust patents, and stoutly maintaining that when Congress enacted the law permitting mixed-bloods to sell, it meant by the term "mixed-blood" only such Indians as had such a quantum of white blood in their veins as would tend to make them competent to handle their own affairs. This position was maintained with such show of reason and authority, that on two occasions it was held by the federal district court that unless it could be shown that the allottee had at least one-eighth white blood, he should not be classed as a mixed-blood, and that his lands should remain under restraint. On appeal the circuit court of appeals reversed the trial court, holding that any Indian having an identifiable quantum of other than Indian blood, no matter how little, is a mixed-blood under the Act; which holding was confirmed by the Supreme Court of the United States.[29] It is of interest to know that in its argument before the Supreme Court, the United States shifted its ground somewhat and maintained that for the Indian to come under the classification "mixed-blood" he must have at least one-half white-blood, and that all those having less than one-half white blood are full-bloods.

This difficulty having been removed by the Supreme Court, the White Earth title question resolved itself into the problem of how to prove the facts required—how to show to a court that

[29] United States v. 1st Nat. Bk. of Detroit, Minn., (1914) 234 U. S. 245, 58 L. Ed. 1298, 34 S. C. R. 846.

an Indian allottee had some white blood. In those instances where the allottee was a quarter or a half or more white no serious difficulty would be encountered; it is in the upper registers, so to speak, in those cases where the presence of white blood in very small proportions, such as a one-eighth, a one-sixty-fourth, or a one-one hundred twenty-eighth is sought to be proven that trouble arises. What sort of testimony is admissible on such an issue? If the Indian whose blood status is in dispute has but a one-one hundred twenty-eighth of white blood, then its presence is not discernible to the eye and this white blood must have had its origin in some remote white ancestor concerning whom no living witness can speak, except from hearsay. A living witness might say that he had heard his grandfather say that his father or grandfather was a white man, and if this sort of testimony falls within any exception to the hearsay rule, proof of white blood in such instances might possibly be made out, if such testimony may be considered to have any probative value. No recent cases along this line are available, but it was early held by the Supreme Court of the United States in two cases arising on petitions for freedom by slaves, that race and status may not be proven by hearsay.[30] While it is probable that a modern court would relax somewhat the strict rule forbidding hearsay testimony so as to admit proof of reputation in the family, it is by no means certain that it would do so, and if this line of evidence is to be eliminated there remains only the appearance of the Indian and direct testimony as to his blood status, and of these the former in close cases is utterly unreliable.

Direct testimony will be either by experts or non-experts, and experience has shown that it is practically impossible so to qualify a non-expert as to make him competent. As a final expedient in disposing of the many cases involving this question, resort was had to the science of anthropology, and experts therein have been called upon to make personal examinations of the Indians and express opinions as to the blood status. There the matter rests.

The Act of Congress of June 30, 1913,[31] provides for the appointment of a commission with exclusive and conclusive powers to determine the age and blood status of White Earth allottees,

[30] Mima Queen v. Hepburn, (1813) 7 Cranch (U. S.) 290, 3 L. Ed. 348; Davis v. Wood, (1816) 1 Wheat. (U. S.) 6, 4 L. Ed. 22.
[31] 39 Stat. at L. 77.

and when its report has been properly approved, these vexatious questions will be eliminated.

Numerous isolated problems have arisen from the chaos of Indian laws and treaties, such as the extent of federal control of Indians' persons and property at the various steps of emancipation; the right of the state to tax Indian lands and the jurisdiction of state courts generally with respect thereto.

By an uninterrupted line of authorities it has been established that Indians holding allotments under the General Allotment Act or Acts equivalent thereto are dependent wards of the nation in whose behalf the federal government may in its own name institute and maintain legal and equitable actions almost ad libitum. Recently an attempt was made to continue this guardianship in the case of those Indians whose land had been freed of restrictions by the Act of June 21, 1906,[32] but the attempt was a failure.[33]

The same Act purported to make Indian lands belonging to certain classes taxable, and the state authorities acting thereunder proceeded to list and assess them, a process which was halted by an injunction from the federal district court, sustained by the circuit court of appeals.[34] The court held that the exemption from taxation created by the Nelson Act was a property right of which the Indians could not be divested by Act of Congress.

Among the questions unrelated to the foregoing is that of the validity of those titles originating in so-called half-breed scrip. Immense tracts of valuable timber land in the northern section of our state were located under authority of those scrip certificates, and some of the largest and proudest fortunes of the present day, will, upon investigation, disclose an origin due to adeptness of their founders in collecting this same lowly scrip. As originally issued these certificates were intended by Congress to start the mixed-blood Indians on the way to industry and civilization by providing them with agricultural homes within the limits of the lands ceded to the United States by treaties; but this purpose was soon lost sight of and the Indians, with the acquiescence of of the government officials, soon began to treat their certificates as assignable and those issued under the treaty of

[32] Note 28 supra.
[33] United States v. Waller, (1917) 243 U. S. 452, 61 L. Ed. 843, 37 S. C. R. 430.
[34] United States v. Morrow, (1917) 243 Fed. 854.

February 22, 1855, have been so held by our Supreme Court.[35] Certificates issued under the treaty of 1854 were held by the court to be not assignable,[36] but in practice, assignments were taken and the land located in the name of the Indian. An inspection of the records shows that these scrip certificates were located throughout the public land states of the nation; many valuable mineral lands in California and Colorado having been acquired in this way. Titles based upon them are generally good.

Despite the extent to which these Indian questions have been litigated, there remain innumerable sources of dispute. As an instance of the uncertainty which prevails, the following is a good illustration:

A certain White Earth Indian having an allotment applied to the secretary of the interior for a fee simple patent under the Act of June 21, 1906, which, as stated above, provided for the issuance of such patents to adult mixed-bloods. The secretary passed upon the application, decided that the applicant was an adult mixed-blood and issued a fee patent to him. The Indian then sold the land, the purchaser relying upon the fee patent. Later the same Indian sold to another party this same land, and the second purchaser brought suit against the first vendee in the state district court in an action to determine adverse claims, contending that when the first deed was given the Indian was a minor. The defendant answered, setting up the fee patent as determinative of the fact that the Indian was an adult, because fee patents could be issued only to adults. The case went to the Supreme Court of the United States, where it was held that so far as the United States was concerned, the Indian was an adult and the fee patent conclusive, but as between individuals contesting rights under the patent, the question of age was an open one permitting proof of the Indian's minority. Thus, we have a case of a person being conclusively an adult for the purpose of taking title, but a minor when he attempts to dispose of the same.[37]

No ambitious attempt has been made in this article comprehensively to state the law governing the many and varying Indian titles in Minnesota; a volume of respectable size would be required to do that. The basic principles have been touched upon

[35] Kipp v. Love, (1915) 128 Minn. 498, 151 N. W. 201.
[36] Dole v. Wilson. (1874) 20 Minn. 356.
[37] Dickson v. Luck Land Co., (1917) 242 U. S. 371, 61 L. Ed. 371, 37 S. C. R. 167.

and enough of the various features discussed to suggest to any one interested, the pitfalls which may be encountered. Any attempt to make a short review of this character a guide could only result in a disservice, for it is the experience of those having to do with these matters in large volume that in no other field of the law are decisions and interpretations in one case of so little value in another.

GORDON CAIN.

MINNEAPOLIS, MINN.

THE LAW OF PRIMARY ELECTIONS*

4. REGULATIONS AS TO THE ELECTIONS AND SUFFRAGE.

Under this head I shall consider primarily only those laws and provisos concerned with the conduct of elections so far as they relate to the suffrage. In this and the succeeding sections, it will be observed, many of the decisions hinge on the point already discussed of whether the primary is to be regarded as an election within the constitutional meaning of that term.

A Washington law requiring first and second choice voting was upheld, though the constitution said nothing of it.[70] Compulsory second choice voting does not limit or revoke the constitutional provision for "the free and lawful exercise of the right of suffrage."[71]

But a law limiting the voters to the right to cast one ballot for each of the nominees for representatives in the general assembly, said candidates being named by the senatorial committee, contravenes the constitutional provision allowing cumulation or division of votes.[72]

In the following section we shall consider the regulations affecting the voter and the suffrage.

5. THE VOTERS AND THE SUFFRAGE.

There are two main questions presented under this head: the problems of registration and the requirement of a test of party affiliation.

Registration. One of the special topics coming under the general head of "Registration," concerning the requirement of oaths of party membership, will be treated subsequently. In general, we may say that where a statute has the effect of disfranchising citizens who are legal voters under the constitution, it will not be upheld. This disfranchisement may be direct or indirect. Thus, in Michigan a law which amounted to a denial of the elective franchise to a large number of voters through no fault of their own, and making unjust and unlawful discrimination be-

*Continued from 2 MINNESOTA LAW REVIEW, 97.

[70] State ex rel. Zent v. Nichols, (1908) 50 Wash. 508, 97 Pac. 728.

[71] Adams v. Lansdon, (1910) 18 Idaho 483, 110 Pac. 280.

[72] People v. Strassheim, (1909) 240 Ill. 279, 88 N. E. 821.

tween the rights of native and naturalized citizens, is unreasonable and void.[73] A law forbidding persons to vote whose names did not appear on the precinct register used at the last general election or upon its supplement, was declared invalid. It was held to debar native-born becoming eligible since the last general election, as well as persons naturalized since then and those who had changed their place of residence.[74] Requirement of proof of naturalization by the foreign born is unconstitutional.[75] This is true generally as it would disfranchise those in other states when admitted to the union (and enfranchised by the enabling act of Congress) and subsequently moving to the state enacting the law; it is also true in those states containing foreign born living in the state at the time of its admission. One who is registered as a member of a political party cannot compel the registry agent to change his party affiliation before election.[76]

Tests of party affiliation. The question as to whether a voter can be compelled at the time of registry or at the primary election to put himself on record or take oath as to his general affiliation with a political party is one of some importance. These tests, which take various forms, are provided as a means of preserving the integrity of the party. Their success depends both on their form and on the manner in which they are enforced. For instance, even though one might have all the desire and reason in the world to enforce some particular test he might be unable to do so. An enormous sum of money, for example, would be required to have challengers provided at all the polls in Chicago or any other large city, and even if this could be done their acquaintanceship would be limited and they could only perform the services expected of them to a limited extent. There is no doubt that in many cases voters of one party participate in large numbers, often sufficiently so to determine the party candidate, at the primary of another party. Thus, in the primary elections of September, 1916, in the state of Washington, the Democrats, having few contests of any importance in their own party, took part in the Republican primary (by a concerted and precon-

[73] Attorney General v. Detroit, (1889) 78 Mich. 545, 44 N. W. 388, 7 L. R. A. 99, 18 Am. St. Rep. 458.

[74] Spier v. Baker, (1898) 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196; People v. Strassheim, (1909) 240 Ill. 279, 88 N. E. 821. Criticized in 4 Ill. Law Rev. 227-42, by Prof. Greeley.

[75] State v. Flaherty, (1912) 23 N. D. 313, 136 N. W. 76.

[76] State v. Keith, (1914) 37 Nev. 452, 142 Pac. 532.

ceived action and plan, many charge) with the avowed purpose of nominating Senator Poindexter for re-election and defeating Congressman Humphrey, Senator Poindexter's only formidable opponent. And there is no doubt that they accomplished their purpose.

We have just seen that the requirements of voters at primaries cannot be greater than those at general elections, as provided in the constitution. An exception, however, may be made in the case of tests of party affiliation, which are generally upheld.

The chief objection on principle to such tests is that they violate the secrecy of the ballot. But the right to vote a secret ballot is neither a natural nor a constitutional right.[77] And the oath required has been held not to violate the secrecy of the ballot.[78] Yet another court seems to admit that such tests violate the secrecy of the ballot when it says:[79] "It is the secrecy of the ballot which the law protects, and not secrecy as to the political party with which the voter desires to act." In short, there is, seemingly, no unanimity among the courts which do support the principle of such tests, as to why they do so.

A leading case has held that the legislature may provide that a party committee may establish qualifications for voters at primary elections in addition to those prescribed by the general election laws.[80] This would, however, probably be limited to qualifications connected with the party as such, and go no farther than to require some test of party affiliation. Provisions that voters not members of a political party are excluded are reasonable and proper, where independent nominations may be made by petition.[81] One case has even held that the absence of a test of party affiliation will render a primary law inoperative.[82] Personally, I doubt if that decision would be very generally followed,

[77] Hopper v. Stack, (1903) 69 N. J. L. 562, 56 Atl. 1; State v. Felton, (1908) 77 Ohio St. 554, 84 N. E. 85; Riter v. Douglass, (1910) 32 Nev. 400, 109 Pac. 444; State v. Michel, (1908) 121 La. 374, 46 So. 430.

[78] Hopper v. Stack, supra; Rebstock v. Superior Court, (1905) 146 Cal. 308, 80 Pac. 65.

[79] Katz v. Fitzgerald, (1907) 152 Cal. 433, 93 Pac. 112. Cf. Line v. Board of Election Canvassers, (1908) 154 Mich. 329, 117 N. W. 730. 16 Ann. Cas. 248.

[80] State v. Michel, (1908) 121 La. 374, 46 So. 430. Contra, In re Sweeney, (1913) 144 N. Y. S. 60, affirmed 209 N. Y. 567.

[81] Ex parte Wilson, (1912) 7 Okla. Cr. 610, 125 Pac. 739; Riter v. Douglass, (1910) 32 Nev. 400, 109 Pac. 444.

[82] Britton v. Election Commissioners, (1900) 129 Cal. 337, 61 Pac. 1115, 51 L. R. A. 115.

and believe the decision of the Wisconsin court, that a primary law permitting one to vote for candidates of another party, whom he does not intend to support, is not unconstitutional, is the more logical.[83]

Requiring a voter at the time of registration to declare his party allegiance and to vote only that party's ballot at the primary is not illegal.[84] He may also be required to express his intention at the time of enrollment to support generally the candidates of his party at the next general election.[85] One may be required either when enrolling or at the polls to declare that he voted for a majority of the candidates of the party at the last general election or intends to do so at the next.[86] That is, one may vote only in the party with which he is affiliated. Such requirements are not unconstitutional as prescribing added franchise requirements, or restricting the right of suffrage, or violating the secrecy of the ballot.[87] It has been held, though it is probably doubtful if it would be generally so, that one who has registered as a member of a political party cannot compel the registry agent to change his party affiliation before the time of election.[88] Requiring the elector to declare that he will not sign a petition for another candidate after voting at the primary has been upheld.[89] A provision that one could not vote at the primary who has signed the petition of a candidate of any other party has been upheld.[90] But provisions preventing signers of one petition from signing a second petition nominating other candidates for the same office, will not ordinarily prevent persons participating in nominating candidates at the primaries from signing an independent nominating petition for candidates for the same office.[91] It will be seen that while the requirements designed

[83] State ex rel. Van Alstine v. Frear, (1910) 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633.

[84] Schostag v. Cator, (1907) 151 Cal. 600, 91 Pac. 502.

[85] People v. Democratic General Committee, (1900) 164 N. Y. 335, 58 N. E. 124.

[86] Ladd v. Holmes, (1901) 40 Ore. 167, 66 Pac. 714; Hopper v. Stack, (1903) 69 N. J. L. 562, 56 Atl. 1; State v. Felton, (1908) 77 Ohio St. 554, 84 N. E. 85; Morrow v. Wipf, (1908) 22 S. D. 146, 115 N. W. 1121; State v. Michel, (1908) 121 La. 374, 46 So. 430; State v. Drexel, (1904) 74 Neb. 776, 105 N. W. 174.

[87] State v. Flaherty, (1912) 23 N. D. 313, 136 N. W. 76.

[88] State v. Keith, (1914) 37 Nev. 452, 142 Pac. 532.

[89] Katz v. Fitzgerald, (1907) 152 Cal. 433, 93 Pac. 112.

[90] Rouse v. Thompson, (1906) 228 Ill. 522, 81 N. E. 1109; State v. Michel, (1908) 121 La. 374, 46 So. 430.

[91] State v. Harmon, (1912) 35 Nev. 189, 127 Pac. 221; State v. Burdick, (1896) 6 Wyo. 448, 46 Pac. 854, 34 L. R. A. 845.

to determine party affiliation and to preserve the integrity of the political party vary in different states, yet in many respects, certainly so far as the underlying principle is concerned, they are similar in all. The various tests provide the only method by which the purposes of the statutes confining the voter to one ballot may be so effectuated as to in any appreciable degree prevent the voters of one party from invading the primaries of another, especially when there are contests in the latter.[92]

But a voter at a primary election cannot be required to declare his intention to support the nominee[93] or that he will support the nominees selected by delegates selected at the primary, since such a requirement is special legislation in favor of and against certain classes of individuals. However, this is not really inconsistent with the previously cited cases requiring an elector to state his intention to support *generally* the party nominees.

It has been held that the voter has a right to vote for persons not named in the printed ballot and that statutes specifically granting that right are not unconstitutional.[94] In Nevada, however, though provision is made for blank spaces on the ballot, the voter, with one exception, cannot write in names.[95]

6. Regulations Concerning Candidates.

A. *Definitions; Nominations; Withdrawals.* One who offers himself, or is offered by others, for an office is a candidate.[96] He may be a candidate even though not nominated.[97] Just when does a man become a candidate? Since the law of primary elections is still in a rather formative stage there have been few decisions upon the point. The two leading cases are in direct conflict. An Idaho law of 1909 [98] prohibited a candidate for nomination from expending to promote his nomination over 15% of the salary of the office sought and made mandatory the filing of an itemized statement of expenditures not over 10 days after the

[92] In addition to the previously cited cases upholding such tests, see Commonwealth v. Rogers, (1902) 181 Mass. 184, 63 N. E. 421; Sherman v. People, (1904) 210 Ill. 552, 71 N. E. 618; People v. Election Commissioners, (1906) 221 Ill. 9, 77 N. E. 321; State ex rel. Zent v. Nichols, (1908) 50 Wash. 508, 97 Pac. 728-31; Bell v. State, (1914) 11 Okla. Cr. 37, 141 Pac. 804.

[93] Spier v. Baker, (1898) 120 Cal. 370, 52 Pac. 659, 41 L. R. A. 196.

[94] Farrell v. Hucken, (1914) 125 Minn. 407, 147 N. W. 815; State v. Tallman, (1914) 82 Wash. 141, 143 Pac. 874.

[95] In re Primary Ballots, (1910) 33 Nev. 129, 126 Pac. 643.

[96] 1 Bouvier's Law Dictionary, 417. McCamant v. Olcott, (1916) 80 Ore. 246, 156 Pac. 1034, L. R. A. 1916E 706.

[97] Leonard v. Commonwealth, (1886) 112 Pa. 622, 4 Atl. 220.

[98] Idaho Laws 1909 p. 126.

primary election. In a case coming before it the court held:[99] (1) a person is a candidate when expending money in any way designed to increase or enhance his ultimate chances of nomination; (2) in the itemized statement must be included all items contracted or paid prior to filing the nomination papers as well as those subsequent thereto. In Minnesota the law[100] said all candidates must file within 30 days after the primary a verified statement of expenditures. The court declared[101] that one becomes a candidate at the time of filing his affidavit of intention to become a candidate, and the statement need not include items of expense incurred or paid prior to the time of filing such affidavit. The Minnesota view simply means that a man might delay filing his nomination papers until the last minute, in the meanwhile spending as much money as he wished to secure the nominations. The Idaho viewpoint on the whole seems more conducive to fair elections.[102] Candidates at the primaries for positions on party committees are not candidates for public offices.[103] Where nomination by convention is forbidden, the nominees of conventions may subsequently become candidates at the primaries.[104] Where the legislature forbids the withdrawal of candidates nominated at the primary, the court cannot allow a candidate to withdraw even for deserving reasons.[105]

B. *Qualifications.* Requiring a candidate to state that he is a member, and that he supported the ticket at the last general election, of the party in which he is a candidate, is valid.[106] Provisions by statute that votes cast for one as candidate of a political party with which he is not enrolled be not counted, have been upheld.[107] Yet one may become the candidate of a new party, though not enrolled as a member thereof.[108] A provision requir-

[99] Adams v. Lansdon, (1910) 18 Idaho 483, 110 Pac. 280.

[100] Minn. Rev. Laws 1905 Sec. 350.

[101] State ex rel. Brady v. Bates, (1907) 102 Minn. 104, 112 N. W. 1026, 12 Ann. Cas. 105.

[102] See discussion 9 Mich. L. Rev. 246-48.

[103] Usilton v. Bramble, (1911) 117 Md. 10, 82 Atl. 661, Ann. Cas. 1913E 743.

[104] State v. Dykeman, (1912) 70 Wash. 599.

[105] Donnelly v. Hamilton, (1910) 33 Nev. 418, 111 Pac. 1026.

[106] Socialist Party v. Uhl, (1909) 155 Cal. 776, 103 Pac. 181; Hager v. Robinson, (1913) 154 Ky. 489, 157 S. W. 1138; Gardner v. Ray, (1913) 154 Ky. 509, 157 S. W. 1147.

[107] Defoe v. Tucker, (1913) 174 Mich. 472, 140 N. W. 641; State ex rel. Murphy v. Graves, (1914) 91 Ohio 36, 109 N. E. 590.

[108] Defoe v. Tucker, supra; Hart v. Jordan, (1914) 168 Cal. 321, 143 Pac. 537.

ing one to say he is a candidate before placing his name on the ballot is unconstitutional, since it restricts the voters from choosing one who declines himself to seek office.[109]

C. *Name on Two Ballots.* Can a candidate have his name placed on two ballots—be the candidate of two parties—at the primary? So far as I am aware no cases have arisen where a man tried to be a candidate for two different offices at the same primary election, but any such attempt would probably be discountenanced by the courts. As to whether he may be a candidate in two parties for the same office is disputed by the courts. A New York statute forbidding a committee of a political party, said committee being authorized to make nominations, to nominate for an office on the party ticket a person who is the candidate of another party for the same office is unconstitutional.[110] Said Mr. C. J. Cullen: "Legislation to be valid, must not only not deprive the elector of his right to vote for whom he will, but for what candidate he will, and it must not discriminate in favor of one set of candidates against another set." On the filing of a legal petition in both parties, it has been held in Illinois, though not by the court, that the election commissioners must put a name on the primary ballots of both parties, and the board has no power to require the candidate to elect on which primary ballot his name shall appear.[111] Where the members of a party only may participate in the primary of that party and in the absence of legislative restrictions on the candidates, one may become the candidate of two parties for the same office.[112] "The right which the law gives a person to be the nominee of two parties is a valuable right, and it cannot be taken away by anyone or in any manner other than as provided in the code."[113]

On the other hand, it has been declared that under a "closed primary" law no political party can be compelled to present as its candidate at a general election one who does not affiliate with

[109] Dapper v. Smith, (1904) 138 Mich. 104, 101 N. W. 60.

[110] Matter of Callahan, (1910) 200 N. Y. 59, 140 Am. St. Rep. 626. In accord: Hopper v. Britt, (1912) 204 N. Y. 524, 98 N. E. 86. That a person has a right to vote for anyone eligible see also People v. Election Commissioners, (1906) 221 Ill. 9, 18, 77 N. E. 321. Supporting the view that one may be a candidate in two parties, see also State v. Seibel, (1914) 262 Mo. 220, 171 S. W. 69; In re Clerk, (N. J. 1913) 88 Atl. 694.

[111] Opinion to Election Commissioners by Donald R. Richberg, 47 Chicago Legal News 31-32.

[112] Hart v. Jordan, (1914) 168 Cal. 321, 143 Pac. 537.

[113] State v. Superior Court, (1912) 70 Wash. 662, 127 Pac. 310.

it.[114] Again, a candidate cannot file nomination papers under a second party.[115] Another court holds that one is not entitled to have his name on two ballots, though one party might nominate all the nominees of the other party.[116] That is the most radical and far-reaching decision on the point enunciated by our courts. In Kentucky it has been held that nominations on two party ballots are not practicable under their primary law.[117] On the whole, I think we may safely say that in general one will be permitted to have his name, if properly presented, on two, or even more, ballots at the primary election, provided there is no qualification that a candidate must be a member of the party whose nomination he seeks.

D. *Filing Fees.* There is no doubt that a filing fee may be required of a candidate at the primary.[118] A leading case[119] holds that the fee required is a regulation, and not an additional qualification for office-holding. The court declared that it was justified under the police power, since it would prevent persons from placing names on the ballots for fraudulent purposes, such as to draw strength in small localities from one candidate to benefit another. Yet such fees must be imposed with caution, since every eligible person has the right to be a candidate without being subjected to arbitrary and unreasonable burdens of any character.

With this is coupled the voter's right to choose any eligible person as a candidate. Such fees must be reasonable, and not arbitrary, unwarranted, and unnecessary.[120] They must bear a relation to the service performed by the recording officer.[121] The problem, in every case, is one of fact, as to whether the fee re-

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[114] State v. Wells, (1912) 92 Neb. 337, 138 N. W. 165.

[115] State ex rel. Thatcher v. Brodigan, (Nev. 1914) 142 Pac. 520.

[116] State v. Anderson, (1898) 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239.

[117] Francis v. Sturgill, (1915) 163 Ky. 650, 174 S. W. 753.

[118] Some leading cases are Riter v. Douglass, (1910) 32 Nev. 400, 109 Pac. 444; State ex rel. Larsen v. Scott, (1910) 110 Minn. 461, 126 N. W. 70 (citing other Minnesota cases in accord); Socialist Party v. Uhl, (1909) 155 Cal. 776, 103 Pac. 181; State ex rel. Zent v. Nichols, (1908) 50 Wash. 508, 97 Pac. 728.

[119] State ex rel. Ruggle v. Brodigan, (Nev. 1914) 143 Pac. 238.

[120] Riter v. Douglass, (1910) 32 Nev. 400, 109 Pac. 444; Johnson v. Grand Forks County, (1907) 16 N. D. 363, 113 N. W. 1071; Ballinger v. McLaughlin, (1908) 22 S. D. 206, 116 N. W. 70; State v. Drexel, (1904) 74 Neb. 776, 105 N. W. 174; Ledgerwood v. Pitts, (1910) 122 Tenn. 571, 125 S. W. 1036.

[121] Ballinger v. McLaughlin, (1908) 22 S. D. 206, 116 N. W. 70.

quired does bear a reasonable relation to the services performed in filing the petition.

Provisions for the payment of filing fees from $10 to $50 have been upheld.[122] In Nevada a $100 filing fee for a salaried state office has been upheld.[123] A requirement that 1% of the yearly salary be paid as a fee has been upheld.[124] For one, I do not believe that any fee based on a proportion of the salary to be received should be upheld, it being very difficult to see how this can be reconciled with the view, held by practically all the courts, that the fee should bear a relation to the services performed by the recording and filing officers. Surely there is no more service performed in filing the petition of a candidate for governor than for one who wishes to go to the state legislature. This, however, is not the attitude adopted by the courts, and even where requirements are not upheld, it is because they are exorbitant and unreasonable.

A requirement that a candidate should pay 2% of the salary of the office for which he filed was declared unconstitutional.[125] A requirement of 1% of the term's salary is invalid.[126] Fees ranging from $25 to $100 for the same primary election have not been upheld.[127] since they bore no relation to the services rendered in filing the papers or to the expenses of the election. The fees of an election can not be assessed among the candidates, the amount varying with the office sought.[128] No refund is allowed if the candidate withdraw before the election.[129] A defeated candidate cannot recover his fee, and the law is not invalid because of that fact, since he was not compelled to become a candidate and to deposit the money.[130] But where the fee has been exacted under an unconstitutional statute and paid under protest, it may be re-

[122] Socialist Party v. Uhl, (1909) 155 Cal. 776, 103 Pac. 181; Kenneweg v. County Commissioners, (1905) 102 Md. 119. 62 Atl. 249; State ex rel. Thompson v. Scott, (1906) 99 Minn. 145, 108 N. W. 828.

[123] State ex rel. Ruggle v. Brodigan, (Nev. 1914) 143 Pac. 238.

[124] State ex rel. Boomer v. Nichols, (1908) 50 Wash. 529, 97 Pac. 733.

[125] Johnson v. Grand Forks County, (1907) 16 N. D. 363, 113 N. W. 1071.

[126] Morrow' v. Wipf, (1908) 22 S. D. 146, 115 N. W. 1121; State v. Drexel, (1904) 74 Neb. 776. 105 N. W. 174.

[127] People v. Election Commissioners, (1906) 221 Ill. 9, 77 N. E. 321. Similarly, fees ranging from $10 to $500, Ledgerwood v. Pitts, (1910) 122 Tenn. 571, 125 S. W. 1036.

[128] Ledgerwood v. Pitts, supra.

[129] State ex rel. Thatcher v. Brodigan, (Nev. 1914) 142 Pac. 520.

[130] State v. Michel, (1908) 121 La. 374, 46 So. 430.

covered by action.[131] Where the voter has a legal right to write or paste on the ballot the name of any person, candidates are not required to pay any filing fee when nominated by the writing of their names on the ballots, or otherwise than by filing a regular declaration of candidacy or by seeking nomination at the hands of a nominating convention.[132]

E. *Contributions and Expenditures.* Limiting one's expenditures to a certain percentage of the salary of the office sought does not deprive one of the right of free speech.[133] Corrupt practice acts requiring candidates for public office at the primary to file statements of expenses in connection therewith do not apply to members of party committees elected at such elections,[134] they not being candidates for public offices.

F. *Election Pledges.* The pledges required or implied of legislators who, under our old system, were to vote for United States Senators, and of presidential electors, will be considered later. A provision requiring one to say he is a candidate before placing his name on the ballot has not been upheld.[135] It was held to restrict the voters from choosing one who declined himself to seek office. But a provision making mandatory the filing by a candidate of a declaration that if successful he will qualify for office is not invalid as prescribing qualification for office additional to the constitution.[136]

G. *Unsuccessful Candidates.* Laws forbidding defeated candidates to run on an independent ticket have been upheld.[137] In all of these cases the right has existed to write in names on the final ballot. It is doubtful if such laws would be upheld if such a provision did not exist, since it would absolutely preclude the voters from choosing for an office someone whom the majority desired to elect.

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[131] Johnson v. Grand Forks County, (1907) 16 N. D. 363, 113 N. W. 1071.

[132] State v. Tallman, (1914) 82 Wash. 141, 143 Pac. 874. Decided by a divided court, 3-2.

[133] Adams v. Lansdon, (1910) 18 Idaho 483, 110 Pac. 280.

[134] Usilton v. Bramble, (1911) 117 Md. 10, 82 Atl. 661, Ann. Cas. 1913E 743.

[135] Dapper v. Smith, (1904) 138 Mich. 104, 101 N. W. 60.

[136] State ex rel. Van Alstine v. Frear, (1910) 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633.

[137] State v. Moore, (1902) 87 Minn. 308, 92 N. W. 4; Lacombe v. Laborde, (1913) 132 La. 435, 61 So. 518; Winston v. Moore, (1914) 244 Pa. 447, 91 Atl. 520, Ann. Cas. 1915C 498, L. R. A. 1915A 1190.

7. Presidential Electors and Senatorial Primaries.

Before the direct election of senators was provided for by the seventeenth amendment many states had senatorial primaries, in which the voters were to ballot as to their choice for senator, and the party legislators were expected to select the choice of the people, as indicated by popular vote. The United States constitution, however, gave the choice to the legislators; the question arose as to whether they could be restricted in any manner in their choice of senators.

Many of the state laws required candidates for the legislature to pledge themselves to support the candidate receiving the majority vote of their party at the primary. Such laws, when brought before the courts, were not upheld.[138] In these two cases the court rather dodged the issue, however, by saying that in the last analysis the question could only be determined by the United States Senate anyway. There is only a moral obligation existing on the legislators.[139] These cases rest on the proposition that to permit the voters to choose senators, or to allow their selection to be binding on the legislators, would be an invalid delegation of legislative power.[140] A provision that United States senators be nominated in the primary does not bind the legislators to vote for the party nominee or restrict their choice to persons voted for at the primary, and hence is not in violation of the United States constitution and statutes.[141] Only in one case, so far as I am aware, was it held that the requirement of a promise from legislative candidates to support their party nominee was valid.[142]

In the state of Nebraska in 1912 certain men were selected by the Republicans as presidential electors. After the progressive revolt the majority of these men announced their intention to support Colonel Roosevelt. Suit was brought to compel the secretary of state to place on the ballot as Republican presidential electors the names of certain "regular" Republicans in place of the "bolters." The court upheld the right of the Republican party to place other names on the ballot,[143] declaring that presi-

[138] State ex rel. McCue v. Blaisdell, (1908) 18 N. D. 55, 118 N. W. 141; State v. Beery, (1908) 18 N. D. 75, 118 N. W. 150.

[139] State ex rel. McCue v. Blaisdell and State v. Beery, supra; Socialist Party v. Uhl, (1909) 155 Cal. 776, 103 Pac. 181.

[140] See note in 22 L. R. A. (N. S.) 1135.

[141] State ex rel. Van Alstine v. Frear, (1910) 142 Wis. 320, 125 N. W. 961, 20 Ann. Cas. 633.

[142] State v. Michel, (1908) 121 La. 374, 46 So. 430.

[143] State v. Wait, (1912) 92 Neb. 313, 138 N. W. 159.

dential electors impliedly pledge themselves to vote, if elected, for the persons who may subsequently be nominated by the national convention of their party. If they announce their intention to do otherwise after the convention their office is forfeited and a vacancy occurs. They cannot continue as electors of a party and refuse to support the party candidate.

8. Results of Elections; Contests; Vacancies.

A. *Election Results.* After an election the right of successful candidates to their offices is not affected by the unconstitutionality of the primary act under which they were nominated.[144] This is presumably on the ground that the people having spoken, and the popular will being above that of any department of the government, the judiciary would be powerless to put a man out of office on such a ground. The case is analogous to the adoption of a constitution framed in an unconstitutional manner. A provision that a candidate getting over 50% of the total vote for the office sought and of the total ballots cast be the sole nominee on the ballot at the general election has been upheld.[145] Limiting the names on the official ballot to the two candidates receiving the highest votes at the primary does not violate the provision that all elections shall be free and equal.[146]

B. *Contests.* In two Arkansas cases it was held that laws making the chancery court a tribunal to hear and determine primary election contests were invalid, holding in the first case[147] that primaries were not such elections as the legislature was in the constitution authorized to provide contest boards for, and in the second case[148] that parties being unincorporated and voluntary associations involving no rights of property or personal liberty could not come into equity and the Democratic party already having a tribunal to hear contests its decisions are final. "The legislature may, within constitutional limitations, regulate primary elections; but there is a diversity of opinion as to how far legislation may go in creating a tribunal to hear and determine contests outside and beyond the councils of the party and in regu-

[144] People v. Strassheim, (1909) 240 Ill. 279, 88 N. E. 821.
[145] Winston v. Moore, (1914) 244 Pa. 447, 91 Atl. 520, Ann. Cas. 1915C 498, L. R. A. 1915A 1190.
[146] Note 145, supra.
[147] Hester v. Bourland, (1906) 80 Ark. 145, 95 S. W. 992.
[148] Walls v. Brundige, (1913) 109 Ark. 250, 160 S. W. 230, Ann. Cas. 1915C 980.

lating the procedure therein."[149] It has been declared that the right of an ineligible person to hold office cannot be tested by the unsuccessful candidate at the primary, but only in a suit brought in the name of the state.[150] The county auditor or clerk cannot pass on the elegibility of candidates and refuse to place names on the ballot at the general election.[151] On mandamus the court will take cognizance of the question as to which candidate should appear on the official ballot, before the time for printing the ballot arrives.[152] The fact that votes were not challenged at the polls does not preclude showing their illegality.[153] Indeed, if that were to be the case the stuffing of the ballot box would be made much easier than it now is, owing to the difficulty and expense involved in challenging. The principal of estoppel may enter to prevent one from contesting the election of a successful candidate.[154] In case a contest is successful "no election" will be decreed and the office declared vacant.[155]

C. *Vacancies.* Vacancies may occur in several ways. In case a candidate dies before the general election ballots cast for him will not be counted.[156] In the latter of these two cases it was held that the ballots were counted as blanks and no vacancy occurred, even if a majority of the votes were cast for the deceased. A majority of the cases hold that the party committee has power to fill vacancies only after a candidate has been nominated at the primary. That is, no vacancy can occur until a candidate has been nominated.[157] If there is a tie vote a vacancy occurs which the party committee may fill.[158] A statute provid-

[149] Silas D. Campbell in 77 Cent. L. J. 450-62.

[150] Roussel v. Dornier, (1912) 130 La. 367, 57 So. 1007, 39 L. R. A. (N. S.) 1826. But cf. Francis v. Sturgill, (1915) 163 Ky. 650, 174 S. W. 753.

[151] Fuller v. Corey, (1910) 18 Idaho 558, 110 Pac. 1035; Whitaker v. Swanner, (1905) 121 Ky. 281, 89 S. W. 184.

[152] State v. Goff, (1906) 129 Wis. 668, 109 N. W. 628.

[153] Marrero v. Middleton, (1912) 131 La. 432, 59 So. 863.

[154] Fuerst v. Semmler, (1914) 28 N. D. 411, 149 N. W. 115. Cf. Francis v. Sturgill, (1915) 163 Ky. 650, 174 S. W. 753.

[155] Francis v. Sturgill ,supra.

[156] In re Primaries, 22 Pa. Dist. 149; State ex rel. Bancroft v. Frear, (1910) 144 Wis. 79, 128 N. W. 1068.

[157] Healey v. Wipf, (1908) 22 S. D. 343, 117 N. W. 521; State v. Secretary, (1909) 141 Iowa 196, 119 N. W. 620; State ex rel. Corser v. Scott, (1902) 87 Minn. 313, 91 N. W. 110. Contra, holding that if no nominations are made, a vacancy has "occurred" and that the proper party committee may fill it, State v. Wells, (1912) 92 Neb. 337, 138 N. W. 165.

[158] Usilton v. Bramble, (1911) 117 Md. 10, 82 Atl. 661, Ann. Cas. 1913E 743.

ing that the successful candidate must file an acceptance within ten days after the primary and that a vacancy occurs if he does not, which the party committee may fill, has been upheld.[159] If presidential electors refuse to support the nominees of their party their office is forfeited and a vacancy occurs.[160] In case a successful contest occurs "no election" will be decreed by the courts and the office declared vacant.[161] That is, the contesting party or the runner-up in the primary obtains no right to a place on the ballot because his rival's nomination is thrown out.

9. Conclusion.

The principle of primary laws has been upheld by all courts, due perhaps, in some cases at least, to the fact that the courts refrain, so far as is possible, from any attempt to pass on the validity of measures of a political nature. Many provisions of primary laws and of statutes passed to regulate them have, however, been declared invalid. Quite often this has occurred where the court has taken the view that primaries are within the meaning of constitutional references to "elections;" the more general view is that primaries are not "elections." On the whole, we may say that primary regulations are quite generally upheld, unless they are clearly arbitrary or unreasonable. "In no field of legislation has the judiciary shown itself more friendly to experiment than in the regulation of political organizations. . . . No particular property rights have been involved, the pressure of public opinion has been strong and steady, the judges have been conversant with the facts and the philosophy of the party system, and hence have experienced little difficulty in justifying almost every kind of a primary system that has been adopted by a legislative body. . . . If primary laws are not perfect, the courts cannot be blamed."[162]

St. Thomas College,
St. Paul, Minnesota.

Noel Gharrett Sargent.

[159] State ex rel. Sayer v. Junkin, (1910) 87 Neb. 801, 128 N. W. 630.
[160] State v. Wait, (1912) 92 Neb. 313, 138 N. W. 159.
[161] Francis v. Sturgill, (1915) 163 Ky. 650, 174 S. W. 753.
[162] Merriam, Primary Elections, 115. Written in 1908, but equally applicable today. Mr. Merriam states that "in California and in Illinois considerable difficulty has been experienced in securing the passage of a law that would meet the approval of the courts." (p. 115.) After repeated attempts, the legislatures of both of these states have partially succeeded in passing laws which meet the approval of the courts, though, especially in Illinois, the laws might be much improved if the courts took a different attitude towards the constitutional nature of primary laws.

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LIABILITY OF A MUNICIPAL CORPORATION FOR REMOVAL OF LATERAL SUPPORT IN MAKING A STREET GRADE.—The grading of a street may cause damage to the abutting owner in various ways. It may cut off his access;[1] it may cause water[2] or soil[3] to be thrown on his land; it may cause only a general depreciation in the value of his land;[4] and, finally, it may remove the lateral support of

*Resigned to enter military service.

[1] Joliet v. Blower, (1895) 155 Ill. 414, 40 N. E. 619.

[2] O'Brien v. St. Paul, (1878) 25 Minn. 331, 33 Am. Rep. 470; Gray v. Knoxville, (1886) 85 Tenn. 99, 1 S. W. 622.

[3] Vanderlip v. Grand Rapids, (1889) 73 Mich. 522, 41 N. W. 677, 16 Am. St. Rep. 597, 3 L. R. A. 247; Nelson v. West Duluth, (1893) 55 Minn. 497, 57 N. W. 149.

[4] Smith v. Eau Claire, (1891) 78 Wis. 457, 47 N. W. 830.

his land. A statement of the general rule as to the right of lateral support which is often quoted is that "each owner has the absolute right to have his land remain in its natural condition, unaffected by any act of his neighbor; and, if the neighbor digs upon or improves his own land so as to injure this right, may maintain an action against him, without proof of negligence."[5] What are the rights of the owner when his neighbor is a municipal corporation and the neighbor's land is a public street?

The great weight of authority is that there is no common law liability of a municipal corporation for removal of lateral support in grading a street.[6] Although only a few cases consider the question of liability solely from the common law standpoint yet the cases which deny liability under the constitutional provision that private property shall not be taken for public use without compensation necessarily imply that there is no common law liability. This is an important exception to the general rule as to lateral support stated above. The reasoning commonly followed is that the grading of the street is a contemplated and necessary improvement and that the abutter holds his property subject to the right of lawful public improvement of the street. A small minority refuse to make the exception and hold the municipal corporation liable on common law grounds.[7] The decided

[5] Per Gray, C. J., in Gilmore v. Driscoll, (1877) 122 Mass. 199 (201), 23 Am. Rep. 312 (314).

"The natural right of support from adjacent land does not give the right to a landowner to place an additional weight on the land, such as a building, and claim a right of support for the land with such added weight, since this would deprive the adjoining owner of the proper and natural use of his land." 1 Tiffany, Real Property 670.

[6] Rome v. Omberg, (1859) 28 Ga. 46, 73 Am. Dec. 748; Methodist Episcopal Church South v. Wyandotte, (1884) 31 Kan. 721, 3 Pac. 527; Callender v. Marsh, (1823) 1 Pick. (Mass.) 418; O'Connor v. Pittsburgh, (1851) 18 Pa. St. 187. The corporation is liable, however, if the grading is done without lawful authority. Meinzer v. Racine, (1887) 68 Wis. 241, 32 N. W. 139; (1888) 70 Wis. 561, 36 N. W. 260. But see Thomson v. Booneville, (1875) 61 Mo. 282.

[7] Dyer v. St. Paul, (1881) 27 Minn. 457, 8 N. W. 272; Keating v. Cincinnati, (1882) 38 Oh. St. 141, 43 Am. Rep. 421.

"Every person has a right ex jure naturae to the lateral support of the adjoining soil, and is entitled to damages for its removal. A municipal corporation has no greater rights or powers in that regard over the soil of the streets than a private owner has over his own land, and will be liable in damages for removing this lateral support the same as would a private owner if improving his property for his own use. It is no defence that the excavation was necessary for the purpose of grading the street." Per Mitchell, J., in Nichols v. Duluth, (1889) 40 Minn. 389, 42 N. W. 84, 12 Am. St. Rep. 743.

It is frequently said by way of dictum in cases which hold that the municipal corporation is not liable, that the corporation is liable

weight of authority also is that a municipal corporation is not liable under the constitutional provision against taking private property for public use without compensation.[8] The cases which so hold generally agree that the removal of lateral support is not a taking but a consequential damage and therefore damnum absque injuria. But some cases contain language to the effect that the right to remove lateral support was compensated for in the grant or condemnation of the street or included in the dedication of it.[9] They seem to imply that there is a taking but that it has already been compensated for. The soundness of this view is questionable. Whatever may be the fact in cases of minor injuries to the land, it is probable that the possibility of future damages by removal of lateral support was not in fact considered and if considered the impossibility of making anything but a

for the results of negligence in grading. Failure of the city to set up a wall to support "ashy kind of soil" has been held to be actionable negligence. Harper v. Lenoir, (1910) 152 N. C. 723, 68 S. E. 228. Likewise leaving a clay bank exposed with knowledge or charged with knowledge that disintegration will naturally result has been held actionable negligence. Lochore v. Seattle, (Wash. 1917) 167 Pac. 918. Such cases, although admitting no liability except for negligence, go far to grant the relief which the minority give.

[8] Fellowes v. New Haven, (1876) 44 Conn. 240, 26 Am. Rep. 447; Talcott Bros. v. Des Moines, (1907) 134 Ia. 113, 109 N. W. 311, 12 L. R. A. (N. S.) 696; Callender v. Marsh, (1823) 1 Pick. (Mass.) 418; Taylor v. St. Louis, (1851) 14 Mo. 20, 55 Am. Dec. 89; Radcliff's Executors v. Brooklyn, (1850) 4 N. Y. 195, 53 Am. Dec. 357; O'Connor v. Pittsburgh, (1851) 18 Pa. St. 187.

A few states do not have the constitutional provision. See 1 Lewis, Eminent Domain, 3rd ed., Sec. 9.

Some of the early American cases which hold that the municipal corporation is not liable cite, British Cast Plate Manufacturers v. Meredith, (1792) 4 Durn. and East 794, and other English cases in support of their holding. Rome v. Omberg, (1859) 28 Ga. 46, 73 Am. Dec. 748; Taylor v. St. Louis, (1851) 14 Mo. 20, 55 Am. Dec. 89; Radcliff's Executors v. Brooklyn, (1850) 4 N. Y. 195, 53 Am. Dec. 357. But the English case, (which is not even a case of removal of lateral support), merely holds that there is no right of action for damage which is done in consequence of authority given by an act of Parliament. The act of Parliament is supreme and even consequential damage done in the course of the proper execution of the authority granted by it gives no right of action unless the act itself expressly gives it. East Fremantle Corporation v. Annois, [1902] A. C. 213. In the United States the question involves not only what the statute authorizes but also what are the constitutional rights of the abutter. The acceptance of the English cases as authority by some of the earlier American cases may account in part at least for the holding of the majority in this country under the constitutional provision against taking private property for public use without compensation. See Crawford v. Delaware, (1857) 7 Oh. St. 459.

[9] Fellowes v. New Haven, (1876) 44 Conn. 240, 26 Am. Rep. 447; Talcott Bros. v. Des Moines, (1907) 134 Ia. 113, 109 N. W. 331, 12 L. R. A. (N. S.) 696.

speculative estimate of such damages would probably prevent including them in the assessment.[10] Furthermore the fact that the courts permit recovery of damages for the removal of lateral support under the constitutional provision against *damaging* private property for public use without compensation supports the conclusion that there was no compensation when the street was established. The courts in denying liability under the constitutional provision against taking sometimes add that it is also public policy to deny liability; that to permit recovery would place intolerable burdens on the municipal corporation and that each individual must expect to suffer incidental losses for the sake of public benefit.[11] A minority here again hold the municipal corporation liable. The removal of lateral support is held to be a taking within the constitutional provision.[12]

But the constitutional and statutory changes of the last fifty years have greatly altered the state of the law set forth above. About one-half of the states have adopted constitutional provisions prohibiting the *damaging* as well as the *taking* of private property for public use without compensation.[13] The few cases on lateral support are in accord with the almost uniform holding of the courts that under such provisions the general rule is that the municipal corporation is liable for damage done in grading a street.[14] A large number of the states whose constitutions do not prohibit *damaging* private property for public use without compensation now have statutes which give damages for change

[10] See 1 Lewis, Eminent Domain, 3rd ed., Sec. 126.

[11] See note 9, supra.

[12] Stearns v. Richmond, (1892) 88 Va. 992, 14 S. E. 847, 29 Am. St. Rep. 758; Damkoehler v. Milwaukee, (1904) 124 Wis. 144, 101 N. W. 706. And see Parke v. Seattle, (1892) 5 Wash. 1, 31 Pac. 310, 34 Am. St. Rep. 839, 20 L. R. A. 68.

In Crawford v. Delaware, (1857) 7 Oh. St. 459, it was held that a municipal corporation was liable for removal of lateral support in changing the established grade but it was said that it would not be liable in making the original grade.

[13] For a list of the states see 1 Lewis, Eminent Domain, 3rd ed., Sec. 346.

[14] Elgin v. Eaton, (1876) 83 Ill. 535, 25 Am. Rep. 412; Henderson v. McClain, (1897) 102 Ky. 402, 19 Ky. Law Rep. 1450, 43 S. W. 700, 39 L. R. A. 349. And see Dickerson v. Okolona, (1911) 96 Ark. 206, 135 S. W. 863, 36 L. R. A. (N. S.) 1194; Fyfe v. Turtle Creek, (1903) 22 Pa. Super. Ct. 292; Brown v. Seattle, (1892) 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; Rutherford v. Williamson, (1912) 70 W. Va. 402, 74 S. E. 682.

In Washington a distinction between the original grade and a regrade is made; the city is not liable, except for negligence, in making the original grade. Schuss v. Chehalis (1914) 82 Wash. 595, 144 Pac. 916.

of grade.[15] These statutes vary considerably. Some apply only to certain cities or classes of cities in the state. Some either in terms or by judicial construction apply only to changes from the established grade and not to the establishment of the original grade.

The clear and the sound tendency has been to abandon the earlier view that to hold the municipal corporation liable for removal of lateral support would be to place intolerable burdens upon it and that each abutting owner must expect to suffer the loss for the public good and to adopt the position that the public which receives the benefits should also bear the burdens.

RIGHT OF PRIVATE INDIVIDUAL TO DAMAGES FOR PUBLIC NUISANCE.—That the individual was not without a remedy as against a public nuisance was early established in England. The courts (probably recognizing that characteristic of the English,—that they would brook no imposition on their individual rights) soon laid down the rule that an individual had the right summarily to abate a common nuisance. Blackstone recognized this privilege[1] and although the law has been narrowed a great deal in later years it still is acknowledged as an inherent right of the individual. Thus in 1835[2] the New York court said: "But cases of palpable encroachment upon the highway, to the serious interruption of the use of the common right, might arise, of such urgent necessity as not to admit of delay, hence the existing remedies [abatement at common law] were not abrogated [by the statutes]." But according to the weight of authority now, this right of summary abatement does not exist from the mere fact that there is a common nuisance but there must be in addition some special injury to the individual.[3] The rule is tersely stated in *Brown v. Perkins,*[4] that: "An individual citizen may abate a common nuisance when it obstructs his individual right," and this is quoted

[15] For a list of the states with such statutes see 1 Lewis, Eminent Domain, 3rd ed., Secs. 316-335.

[1] Blackstone's Comm. Book 3, p. 5.

[2] Wetmore v. Tracy, (1835) 14 Wend. (N. Y.) 250, 28 Am. Dec. 525.

[3] Joyce on Nuisance 532; Roessler Chemical Co. v. Doyle, (1906) 73 N. J. L. 521, 64 Atl. 156; Hill v. New York, (1893) 139 N. Y. 495, 34 N. E. 1090; Viebahn v. Crow Wing Co., (1905) 96 Minn. 276, 104 N. W. 1089, 3 L. R. A. (N. S.) 1126.

[4] (1858) 12 Gray 89.

with approval in Cooley on Torts.[5] A few jurisdictions have refused to narrow this general right of abatement and as late as 1833[6] it was held in Kentucky that "A public nuisance may be abated by any one even though it may not have occasioned any special damage or inconvenience to him individually."

Although it was early established that an individual might under certain circumstances summarily abate a common nuisance, the rule was as clearly settled that there could be no private action at law against such nuisance. It was a general injury to the public and was only indictable. Blackstone states[7] that such nuisances "are indictable only and not actionable as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow subjects." But though this was true where the individual suffered only in common with others and the rule has remained unchanged to the present, it was laid down as early as 1593 by Lord Coke[8] that "if any particular person afterwards by the nuisance done, has more particular damage done than any other, there, for that particular injury, he shall have a particular action on the case." The law thus stated has been the basis of nearly all actions for damages sustained by private parties from public nuisances,[9] but much perplexity has arisen from the words "particular injury" in Lord Coke's definition,—whether the particular injury complained of must be different in kind from that sustained by the public and whether the damage must be the immediate result of the nuisance or may be the consequential damage resulting therefrom.

In 1792 the case of *Iveson v. Moore*[10] arose. The plaintiff had a leasehold interest in a coal mine and the defendant obstructed by a common nuisance the highway leading to the mine. The plaintiff sued for the loss of trade sustained through the inconvenience caused his customers and the court allowed a recovery on the ground that this was a particular injury distinct from that suffered by the public. However two years later[11] the doctrine laid down in *Iveson v. Moore* was overruled, the court believing

[5] Cooley on Torts 46.
[6] Gates v. Blincoe, (1834) 2 Dana (Ky.) 158, 26 Am. Dec. 440.
[7] Blackstone's Comm. Book 4, p. 166.
[8] William's Case, (1593) 3 Coke 73.
[9] Mehrhof Bros. Brick Co. v. Delaware, etc., Ry. Co., (1888) 51 N. J. L. 56, 16 Atl. 12.
[10] (1792) 1 Ld. Raym. 486.
[11] Hubert v. Groves, (1794) 1 Esp. N. P. 148.

that the injury sustained by the plaintiff was only that suffered in common with the public. In *Rose v. Miles*[12] the plaintiff was obstructed in his navigation of a public stream by a common nuisance placed therein by the defendant. The plaintiff was obliged to unload his ship and transport his cargo by a circuitous route entailing considerable expense. Lord Ellenborough held that this damage was particular and entitled the plaintiff to recovery. It was attempted to differentiate this case from *Hubert v. Groves,* but the effect of the decision was to overrule the law laid down in that case by Lord Kenyon. The rule laid down in *Rose v. Miles,* that in order to maintain an action for a public nuisance an individual must prove that he thereby suffers a particular, direct and substantial injury, has been adopted by the English courts and the majority in the United States, but in applying this rule the courts have held many diverging opinions. The difficulties under this definition have been almost as perplexing as under the rule laid down by Lord Coke. However, it generally has been accepted that the injury sustained by the individual must be different in kind from that suffered by the public,[13] and wherever this has been denied it has been due to the fact that the court has failed to note that although Lord Ellenborough's rule requires that the plaintiff's damage must be direct it need not be immediate.[14] Although this is not expressly stated in *Rose v. Miles,* it is an inevitable deduction from that case, for the pecuniary damage suffered by the plaintiff was not the immediate consequence of the obstruction, but merely the result of the inconvenience suffered by the plaintiff. The court took note of

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[12] (1815) 4 Maule & S. 101.

[13] Pedrick v. Raleigh, etc., R. Co., (1906) 143 N. C. 485, 55 S. E. 877, 10 L. R. A. (N. S.) 554; 29 Cyc. 1212.

[14] Thus in Rose v. Miles, (1815) 4 Maule & S. 101, the plaintiff was allowed recovery although the immediate damage to him was the inconvenience caused by the obstruction in the stream and this was a damage suffered by him in common with the public. The consequences of that inconvenience were that the plaintiff suffered a pecuniary loss. Thus though the immediate damage of the plaintiff was different only in degree from that suffered by the people in common, the consequential damage was a pecuniary loss and this differed in kind from that of the people at large. The courts that have refused to recognize this distinction, i. e., that the plaintiff's injury must differ in kind from that of the people have overlooked the full import of Rose v. Miles and neglected to note that this difference in kind is not limited to the immediate damages only but includes the consequential injury.

This, of course, raises the question of how remote the consequential damages must be before the court will refuse to recognize it. This phase of the question is noticed later. See cases cited in notes 21 and 25.

this fact and attempted to harmonize their decision with that of *Hubert v. Groves* by the following words, " . . . the damage might be said to be common to all, but this is something different, for the plaintiff was in the occupation, if I may so say, of the navigation; he had commenced his course upon it, and was in the act of using it when he was so obstructed. It did not rest merely in contemplation." But, at any rate, the court in *Rose v. Miles* allowed the plaintiff damages for the pecuniary loss sustained and, in spite of Lord Ellenborough's attempt to justify such action on the ground that in that special case the plaintiff was in actual "occupancy" of the navigation, the courts have, in the main, followed the full import of that case and allowed a recovery when the inconvenience to the plaintiff by the defendant's nuisance has resulted in a substantial pecuniary loss.[15] Some courts have drawn a very sharp distinction between the damages suffered by the individual and that by the public. Thus in 1863[16] the Massachusetts court would not allow the plaintiff to recover damage for the delay in his business due to his boat being damaged by an obstruction in the stream by the defendant although it allowed him recovery for the actual damage sustained by his ship. The court justified this decision on the ground that the damage sustained by the ship was different in kind from that of the public, but the delay in his business was merely a greater inconvenience than that suffered by the public and there could be no recovery for this.

A few courts have refused to recognize this distinction between the kind of injury sustained by the individual and the public but have reached the same result (*i. e.* allowed the plaintiff to recover), not on the theory that the injury he has sustained is different in kind but that the plaintiff's pecuniary loss is the immediate injury and recovery should be allowed because the injury to plaintiff is greater in degree than that of the public at large, even though not different in kind. Thus the federal circuit court said in *Carver v. San Pedro, etc., R. Co.*,[17] "The just rule it seems to me is that the relief should be granted in all cases where there is a special injury to the complainant, whether the injury complained of be a difference in kind from that of the public at large or only

[15] Little Rock, etc., R. Co. v. Brooks, (1882) 39 Ark. 403, 43 Am. Rep. 277.

[16] Benson v. Malden & Melrose Gas Light Co., (1863) 6 Allen (Mass.) 149.

[17] (1906) 151 Fed. 334.

greater in degree." Although the Minnesota court in *Page v. Mille Lacs Lumber Co.*[18] declares its concurrence in the majority rule, it uses these words:

"It would be highly unjust and inequitable to say that he has no right of redress in a private action on the ground merely that the injury had resulted from an act which is a public nuisance in itself, and because other persons might have been injured and damaged in the same manner and to the same extent had they met the obstruction under like circumstances."

An interesting phase of this right of an individual to sue for damages sustained from a common nuisance has arisen in suits brought for a loss of trade sustained from such public nuisance. One of the earliest English cases where it was definitely laid down that a tradesman might recover for a loss of customers due to a common nuisance was *Iveson v. Moore,*[19] decided in 1792. A number of years later (1835) this decision was given additional weight by the holding in *Wilkes v. Hungerford Market Co.*[20] The plaintiff kept a bookstore and was allowed to recover damages for a loss of customers due to defendant's obstruction of a road. The question seemed to be definitely settled in England by the House of Lords in 1867 in the case of *Ricket v. Metropolitan Railway,*[21] in which it was held that the loss of customers was "too remote to be the subject of an action." It was inferred that the rule in *Rose v. Miles* applied only to the immediate consequences of a nuisance and not to the remote injuries. But a few years later (1874) that decision was minimized to a great extent by the decision in *Benjamin v. Storr.*[22] The court there said:

"If by reason of the access to his premises being obstructed for an unreasonable length of time, and in an unreasonable manner, the plaintiff's customers were prevented from coming to his coffee shop, and he suffered a material diminution of trade, that might be a particular, a direct and substantial damage."

In the United States the overwhelming weight of authority[23] is that a loss of customers due to a public nuisance maintained by the defendant will give rise to a cause of action and the party so

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[18] (1893) 53 Minn. 492, 55 N. W. 608.
[19] (1792) 1 Ld. Raym. 486.
[20] (1835) 2 Bing. N. C. 281.
[21] (1867) 2 E. & I. App. 175.
[22] (1874) L. R. 9 C. P. 400.
[23] Harvey v. Georgia., etc., Ry. Co., (1892) 90 Ga. 66, 15 S. E. 783; Aldrich v. Wetmore, (1892) 52 Minn. 164, 53 N. W. 1072; Flynn v. Taylor, (1891) 127 N. Y. 596, 28 N. E. 418, 14 L. R. A. 556.

injured can recover damages. The Minnesota court in speaking of this kind of damage said:[24]

"The damage which the plaintiff suffered, and for which he is seeking to recover, is not that common to all persons who have been merely prevented from using the street for passage, but damage to his business, (which is property), resulting directly from the creation and maintenance of the nuisance complained of. For this he can recover."

An extreme case of this type arose in Georgia in 1913,[25] where the owner of a store sued the defendant for loss of trade due not directly to a property right injured by the public nuisance maintained on the defendant's premises, but because the nuisance injured the property rights of the plaintiff's customers and caused the town to be depopulated, thus indirectly causing plaintiff's trade to melt away. The court said that this damage was too remote.

The minority doctrine in the United States is that a loss of trade occasioned by a public nuisance is no ground for a suit, the damage in such a case being like in kind to that of the public.[26] A recent case in New Jersey, *Bouguet v. Hackensack Water Co.*,[27] involved this question and the court there tended toward the English and minority doctrine in the United States. The plaintiff owned a summer resort on the Hackensack River. The defendant installed a plant on the river above the plaintiff and the discharge from this plant made the water in front of plaintiff's resort so impure that the place was rendered unfit for fishing or boating. The court held that the plaintiff had suffered no particular damage as distinct from the public at large and there could be no recovery.[28] The court seems to have fallen into an error common to most of the cases following that doctrine, in saying that the damages suffered by the plaintiff are not particular. Under the

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[24] Aldrich v. Wetmore, (1892) 52 Minn. 164 (172).

[25] Central Georgia Power Co. v. Pope (1913) 141 Ga. 186, 80 S. E. 642, L. R. A. 1916D 358.

[26] Hohmann v. Chicago, (1892) 140 Ill. 226, 29 N. E. 671; Willard v. City of Cambridge, (1862) 3 Allen (Mass.) 574. These were cases where the injurious acts were authorized by municipalities. It has been expressly held by the Minnesota court that such acts may constitute a nuisance, Batcher v. Staples. (1912) 120 Minn. 86, 139 N. W. 140, and in the Massachusetts cases cited the rule as to public nuisance was applied.

[27] (N. J. 1917) 101 Atl. 379.

[28] See note 14, supra; also Bonner v. Welborn, (1849) 7 Ga. 296, where the court reaches a contrary result from the New Jersey court on almost the identical facts, although the New Jersey court found their decision on the rights of a riparian owner in the waters of a navigable stream.

rule laid down in *Rose v. Miles,* consequential damages are particular and special although the immediate damage is not different in kind.[29] Instead of basing their decision on the ground of lack of particular damage they should have denied recovery on the principle of *Ricket v. Metropolitan Ry. Co.,*[30] that although the damage (*i. e.,* loss of custom) is particular and special it is too remote.

RIGHTS OF EMPLOYEE HOLDING UNSATISFIED JUDGMENT IN EMPLOYERS' LIABILITY INSURANCE.—The cases involving employers' liability insurance fall into three classes. In the first class the assured is to be indemnified against liability. The contract usually stipulates that the insurer will pay all sums for which the insured may become liable through the injury of an employee.[1] The insurer's liability is fixed as soon as the employee's claim against the employer is liquidated. It is not necessary for the assured, the employer, to pay the amount of the claim before he can recover against the insurer.[2] The employee may garnish the amount of the indebtedness of the insurer to the employer.[3]

In the second class of cases the contract is one of indemnity against loss. The insured cannot recover unless he has actually paid out the amount of the loss or judgment. The language of the policy in these cases usually provides that the loss must be paid before the cause of action accrues against the insurer. The language used leaves no room for doubt, so that there is no conflict in these cases.[4] In each of these two classes the authorities are in accord; the only difficulty lies in determining in which class a particular case falls.

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[29] See note 14, supra.

[30] See note 21, supra.

[1] Different language is used in nearly all of the policies as the insurer agrees to pay "all damages with which the insured might be legally charged, or required to pay, or which it might become legally liable." American Employers' Liability Ins. Co. v. Fordyce, (1896) 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305: "all sums for which the employer shall become liable to his employees." Hoven v. Employers' Liability Assurance Corp., (1896) 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388; insurer agreed to "indemnify. . . . against liability for damages on account of fatal or non-fatal injuries." Pickett v. Fidelity and Casualty Co., (1901) 60 S. C. 477, 38 S. E. 160.

[2] Cases cited in note 1.

[3] Hoven v. Employers' Liability Assurance Corp., (1896) 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388.

[4] "No action shall lie against the company as respects any loss under this policy unless it shall be brought by the assured himself to re-

The conflict arises in the third class of cases where the contract of insurance provides, as in the cases of the second class, that no action shall lie against the insurer by the assured except for loss actually paid and judgment satisfied; but also further provides that the insured shall notify the insurer immediately of every summons for suit brought by an employee and then the insurer shall have exclusive control of the defense and the insured shall not interfere in any way. Most courts interpret the former clause strictly and do not allow the assured to recover unless he has actually paid the loss.[5] A leading case which upholds this view is *Fidelity & Casualty Company of New York v. Martin.*[6] It was decided on the ground that the clause pertaining to the paying of the loss by the assured before he has a right of action makes the payment of the loss a condition precedent and that this clause is not affected by the provision pertaining to defense.[7] The fact that the insurer assumed the defense did not obligate it to defend successfully or make it liable on the judgment if not successful.

The courts in the minority hold that when the insurer assumes exclusive control of the defense, he takes over the liability of paying the judgment if the suit is not successful. In *Sanders v. Frankfort, etc., Ins. Co.,*[8]—one of the first cases to take this view—the court said that "to defend" meant to defend successfully, so that if the case was lost, the insurance company would have

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imburse him for loss actually sustained and paid by him." Frye v. Bath Gas & Electric Co., (1903) 97 Me. 241, 54 Atl. 395, 59 L. R. A. 444, 94 Am. St. Rep. 500. See also, Cushman v. Carbondale Fuel Co., (1904) 122 Ia. 656, 98 N. W. 509; Allen v. Gilman, McNeil & Co., (1905) 137 Fed. 136; Kennedy v. Fidelity and Casualty Co., of New York, (1907) 100 Minn. 1, 110 N. W. 97, 9 L. R. A. (N.S.) 478, 117 Am. St. Rep. 658, 10 Ann. Cas. 673.

[5] Connolly v. Bolster, (1905) 187 Mass. 266, 72 N. E. 981; Ford v. Aetna Life Ins. Co., (1911) 70 Wash. 29, 126 Pac. 69; Carter v. Aetna Life Ins. Co., (1907) 76 Kans. 272, 91 Pac. 178, 11 L. R. A. (N.S.) 1155; Cayard v. Robertson, (1910) 123 Tenn. 392, 131 S. W. 864, 30 L. R. A. (N.S.) 1224; Stenborn v. Brown-Corliss Engine Co., (1909) 137 Wis. 564, 119 N. W. 308.

[6] (1915) 163 Ky. 12, 173 S. W. 307.

[7] In the case of Fidelity & Casualty Company of New York v. Martin, the court said: "The policy is one of indemnity against loss actually sustained and paid in money by the assured, without regard to who assumes the defense or whether it is successfully or unsuccessfully made. . . . The right to defend being given appellant [the insurer] by the policy we must suppose that the burden of making the defense was assumed for the reason that the award to be made in that action might finally be the measure of appellant's own responsibility." 163 Ky. 12 (19), 173 S. W. 307.

[8] (1904) 72 N. H. 485, 57 Atl. 655, 101 Am. St. Rep. 688.

to perform its agreement of indemnity against loss by assuming the liability. In the leading case of *Patterson v. Adan*,[9] the court said it would be unjust to allow the insurance company to step in and defend the suit exclusively and then make the assured pay the judgment rendered against it, thereby possibly forcing it to the wall because of temporary embarrassment, and leave the employee, for whose benefit the contract is indirectly made, without a remedy.

The theory of the courts in the majority is perhaps more logical and reasonable, but the courts in the minority go upon the justice and equity of the situation. The payment of the judgment by the assured is a mere formality in most cases, since the money paid by the insured to the employee must ultimately come from the insurer up to the amount of the policy. If the employee is allowed to sue the insurer as a co-defendant or garnishee, circuity of action will be eliminated. In cases where the insured has become insolvent the employee ought to be allowed to attach the amount of the policy as a debt owing by the insurer to the assured when the judgment is rendered, since the contract is undoubtedly made indirectly for his benefit.[10]

STATUTE OF LIMITATIONS BARRING DEBT AS AFFECTING MORTGAGE SECURITY.—Does the barring of a debt secured by a mortgage extinguish the mortgage security or prevent the maintaining of an action to enforce such security? This question has been the source of much litigation and the courts are not at all agreed upon the answer. The majority of the courts answer in the negative, holding that the barring of the debt does not do away with the mortgage security,[1] but the reasons advanced are varied. An explanation of the conflict requires a glance at the theory of mortgages as viewed at common law and as later de-

[9] (1912) 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N.S.) 184; and see in accord Elliott v. Aetna Life Insurance Co., (1917) 100 Neb. 833, 161 N. W. 579, L. R. A. 1917C 1061; Davies v. Maryland Casualty Co., (1916) 89 Wash. 571, 154 Pac. 1116 L. R. A. 1916D 395; and the recent case of Standard Printing Co. v. Fidelity & Deposit Co. of Maryland, (Minn. 1917) 164 N. W. 1022.

[10] See Patterson v. Adan, (1912) 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N.S.) 184.

[1] Fish v. Collins, (1916) 164 Wis. 457, 160 N. W. 163; Wood, Limitations, I, 4th ed., p. 312, and cases therein cited; Jones, Mortgages, II, 7th ed., p. 852, and cases therein cited.

veloped under the courts of equity. At common law a mortgage instantly vested the legal title in the mortgagee, subject to be defeated by strict performance of the condition of the mortgage and it was even held that the mortgagee was entitled to immediate possession of the mortgaged property as an incident to the title.[2] Some of our courts still hold to this view insofar as it holds the legal title vests in the mortgagee.[3] However the courts of equity came to regard the mortgage as only a security and this doctrine has been adopted by many of our courts of law.[4] In other states legislative enactments have been passed to the same effect.[5]

In those states which still adhere to the strict common law theory it is difficult to see just how the barring of the right to collect the debt could serve to revest title in the mortgagor unless it is also held that the statute of limitations not only bars the remedy but also discharges the debt and extinguishes the right, for under the common law view, the title is in the mortgagee subject only to defeat by payment of the debt when due. Wisconsin has held that the statute not only takes away the remedy for the enforcement of the claim, but also extinguishes the right.[6] In this holding, however, this court stands alone and not having adopted the common law view of mortgages this particular question could not arise in that jurisdiction. Generally the courts which still hold to the common law idea likewise have held that the barring of the right to collect the debt does not bar the right to enforce the mortgage.[7]

Turning now to a consideration of the other class of cases which have followed the equitable doctrine that the mortgage it-

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[2] Jones, Mortgages, I, 7th ed., p. 20.

[3] Kinney v. Treasurer and Receiver General, (1911) 207 Mass. 368, 93 N. E. 586, Ann. Cas. 1912A 902. "Under the laws of Massachusetts a mortgagee takes not merely a lien upon the land as security but he holds the legal title to it, subject to a right of redemption in the mortgagor," per Knowlton, C. J.; Colton v. Depew, (1900) 60 N. J. Eq. 454, 46 Atl. 728, 83 Am. St. Rep. 650; McKelvey v. Creevey, (1900) 72 Conn. 464, 45 Atl. 4, 77 Am. St. Rep. 321.

[4] Malsberger v. Parsons, (1910) 24 Del. 254, 75 Atl. 698; Buckley v. Daley, (1871) 45 Miss. 338; Jackson v. Johnson, (1912) 248 Mo. 680, 154 S. W. 759.

[5] Kerr's Civil Code, (Cal.) Sec. 2927. Fla. Gen. Stat. 1906, Sec. 2495. Wash. Codes & Stat. 1910, Sec. 8750.

[6] Eingartner v. Illinois Steel Co., (1899) 103 Wis. 373, 79 N. W. 433, 74 Am. St. Rep. 871. See Jones, Mortgages, II, 7th ed., p. 852.

[7] Northrop v. Chase, (1903) 76 Conn. 146, 56 Atl. 518; Jenkins v. Trustees of Andover Theological Seminary, (1910) 205 Mass. 376, 91 N. E. 552; Palmer v. White, (1900) 65 N. J. L. 69, 46 Atl. 706.

self does not vest title in the mortgagee, we find that the courts do not agree upon the point. While holding that the mortgage as security for the payment of the debt is a mere incident to such debt they nevertheless reach opposite results as to the barring of the security. The California court is probably the leading authority to the effect that the security is barred, and its early decisions were based upon the statute then in force which was held to apply as well to equitable actions as to legal ones. As Field, C. J., said in the case of *Lord v. Morris*:[8]

"The statute of limitations of this state differs essentially from the statute of James I., and from the statutes of limitations in force in most of the other states. Those statutes apply in their terms only to particular legal remedies, and hence courts of equity are said not to be bound by them except in cases of concurrent jurisdiction. . . . The case is entirely different in this state. Here the statute applies equally to actions at law and to suits in equity."

Under California Civil Code, 1907, Sect. 2911, the lien of a mortgage is extinguished by lapse of time which would bar an action on the debt.[9] The Texas court in reaching the California result bases its opinion on the ground that the right of the mortgagor in the land is superior to that of the mortgagee, that the mortgage is a mere incident to the debt, that the statute bars the debt, and that the distinction between law and equity has been abolished.[10] A recent case[11] in Indiana has extended the doctrine in that state and placed it in line with California and Texas. It was formerly held that a mortgage was barred in the same time as an action for the debt, unless the mortgage contained an express promise to pay[12] but the Indiana appellate court in the case of *Tennant v. Hulet*[13] held that not only was the mortgage lien and right to foreclose barred when the debt was, but the mere fact that the promise to pay is incorporated in the mortgage did not change the character of the instrument.[14] In this connection when speaking of the mortgage as a mere incident to

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[8] (1861) 18 Cal. 482.

[9] San Jose Safe Deposit Bank of Savings v. Bank of Madera, (1904) 144 Cal. 574; 78 Pac. 5.

[10] Duty v. Graham, (1854) 12 Texas 427, 62 Am. Dec. 534.

[11] Tennant v. Hulet, (Ind. 1917) 116 N. E. 748.

[12] Lilly v. Dunn, (1884) 96 Ind. 220.

[13] (Ind. 1917) 116 N. E. 748.

[14] For other cases in accord with this view see, Kulp v. Kulp, (1893) 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550; Vanselous v. McClellan, (Okla. 1916) 157 Pac. 923.

the debt it must be remembered that it is not essential to a valid mortgage that there be a debt at all, in the sense of a personal obligation. In a case where an infant disaffirmed her note but did not restore the consideration, it was held that the mortgage given to secure the note was still good and enforceable even though there was no personal obligation.[15] It is not easy to reconcile this ruling with *Tennant v. Hulet.*

Among the courts holding to the contrary view, that foreclosure is not barred when the debt is, the reasons differ widely. In Virginia it is so held on the ground that the statute bars the remedy but does not extinguish the debt and the lien of a mortgage or equitable remedy for its enforcement is not affected by the statute barring an action for the debt.[16] Connecticut bases its result on the ground that the remedies on the mortgage and note are different, for in that state a payment after the law day will not defeat an action of ejectment.[17] A further reason is advanced on the theory that it is not an equitable defense to foreclosure for the mortgagor to set up that the fact that the debt itself is barred should bar the action to foreclose. The Connecticut court in the case of *Belknap v. Gleason*[18] said:

"What analogy requires a court of equity to say, that the remedy at law is gone, and therefore, there is none in chancery? . . . . With what face could the debtor come here for relief? His case, if truly disclosed, would be this: 'I owed this debt; gave my notes for it; and mortgaged my land to make it secure. The creditor, by his kindness or his negligence, has suffered his notes to be barred, by the statute of limitations, and is attempting to collect his debt out of the only remaining security. I have not paid it; but I pray this court, as a court of equity, since the creditor has lost one security, to prevent his making use of the other."

Alabama,[19] Montana[20] and Wisconsin[21] are among the other states according with the view of the Virginia and Connecticut courts although the reasons vary somewhat.

In some of the states, statutes have been passed specifically providing that the remedy on the mortgage should be barred

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[15] United States Saving Fund & Investment Co. v. Harris, (1895) 142 Ind. 226, 40 N. E. 1072, 41 N. E. 451.
[16] Smith v. Washington City, etc., R. Co., (1880) 33 Gratt. (Va.) 617.
[17] Belknap v. Gleason, (1836) 11 Conn. 159, 27 Am. Dec. 721.
[18] Ibid.
[19] Harper v. Raisin Fertilizer Co., (1908) 158 Ala. 329, 48 So. 589.
[20] Berkin v. Healy, (1916) 52 Mont. 398, 158 Pac. 1020.
[21] Fish v. Collins, (1916) 164 Wis. 457, 160 N. W. 163.

when the remedy on the debt was barred,[22] thus bringing these states in line with those agreeing with the California result. A careful consideration of these cases and the theories involved tends to the conclusion that the view of the Connecticut court and those agreeing with it is much the more equitable doctrine and on grounds of policy should be favored. The statute of limitations, it is true, bars the legal obligation to pay the debt but the moral obligation to pay still remains as does the debt itself, although the remedy is barred. In the law of bankruptcy it has long been held that the discharge bars the obligation but does not affect any securities which the creditor may have whether in the form of mortgage or other lien,[23] and it is difficult to see why the courts should adopt a different view in the case of a debt barred by limitation, the underlying principle being the same.

[22] Mo. Rev. Stat. 1909, Sec. 1892. Iowa Ann. Code, 1897, Sec. 3447, par. 7. Fitzgerald v. Flanagan, (1912) 155 Ia. 217, 135 N. W. 738.

[23] Bankruptcy Act, 1898. Sec. 67; John Leslie Paper Co. v. Wheeler, (1912) 23 N. D. 477, 137 N. W. 412, 42 L. R. A. (N.S.) 292 and note.

RECENT CASES

ADMIRALTY—EXCLUSIVENESS OF FEDERAL JURISDICTION—WORKMEN'S COMPENSATION LAWS.—A longshoreman engaged in loading an ocean-going vessel being injured attempted to recover under the New York Workmen's Compensation Act. The New York courts allowed such recovery, but the United States Supreme Court reversed this decision, holding that the injured man could recover only under the laws of admiralty. *Southern Pacific Co. v. Jensen,* (1917) 244 U. S. 205, 61 L. Ed. 1086, 37 S. C. R. 524.

In order to overcome this apparent injustice, an amendment to the Judicial Code, sections 24 and 256, was enacted by Congress on October 6th, 1917, within five months after the above decision. Clause 3, of section 24 was amended to read as follows: "Of all civil causes of admiralty and maritime jurisdiction saving to suitors in all cases the right of a common law remedy where the common law is competent to give it, *and to claimants the rights and remedies under the workmen's compensation law of any state;* of all seizures on land or waters not within admiralty and maritime jurisdiction; of all prizes brought into the United States; and of all proceedings for the condemnation of property taken as prize." Clause 3, of Section 256, was similarly amended.

Whether the above amendments have properly disposed of the difficulties involved in this matter would seem to be a very open question.

For a discussion of the principles involved in *Southern Pacific Co. v. Jensen,* see NOTES, 2 MINNESOTA LAW REVIEW, 145.

BILLS AND NOTES—ACTIONS—RECOVERY.—A negotiable paper was executed, the consideration for which was a transaction in violation of the laws relating to foreign corporations. The note came into the hands of a bona fide purchaser for value before maturity, and the maker interposed the defense of the unlawful character of the transaction of which it was a part. The note, being fair on its face, was *held* valid and enforceable in the hands of a bona fide holder. *Finseth v. Scherer,* (Minn. 1917) 165 N. W. 124.

For a discussion of the principles involved in this case, see 2 MINNESOTA LAW REVIEW 149, and 1 MINNESOTA LAW REVIEW 164.

CARRIERS—SLEEPING CAR COMPANIES—LIABILITY.—Plaintiff left his satchel alongside his berth when he retired for the night and in the morning it was gone. He showed these facts and rested. Upon dismissal and appeal and order for a new trial, defendant excepted. *Held,* that after the passenger on a sleeping car shows his loss to have occurred the defendant must explain the loss although plaintiff still has the burden of showing negligence. *Goldstein v. Pullman Co.,* (N. Y. 1917) 116 N. E. 376.

The courts have held almost uniformly that the sleeping car companies are not common carriers or innkeepers in determining their liability for the baggage of the passengers, but are liable only for negligence. *Pullman's Palace Car Co. v. Hall,* (1899) 106 Ga. 765, 32 S. E. 923, 44 L. R. A. 790, 71 Am. St. Rep. 293. Although there has been some authority to the effect that they are to be treated as innkeepers. *Pullman Palace Car Co. v. Lowe,* (1889) 28 Neb. 239, 44 N. W. 236, 6 L. R. A. 809, 26 Am. St. Rep. 325. In all cases where baggage is retained in the possession of the passenger, the rule is that the carrier will be liable only for the negligence or misconduct of the servants of the carrier. *Henderson v. Louisville, etc., R. Co.,* (1887) 20 Fed. 430, affirmed in 123 U. S. 61, 8 S. C. R. 60, 31 L. Ed. 92, (railroads); *Clark v. Burns,* (1875) 118 Mass. 275, 19 Am. Rep. 456 (steamboat); *Whitney v. Pullman's Palace Car Co.,* (1887) 143 Mass. 243, 9 N. E. 619 (Pullman day coach). But under a rule peculiar to New York, steamboats are considered floating inns and absolutely liable as insurer. *Adams v. New Jersey Steamboat Co.,* (1896) 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 56 Am. St. Rep. 616. Although not an insurer, the courts have shown a disposition to hold the sleeping car companies to a strict liability for negligence because of the fact that they invite the public to enter their cars for the purpose of sleep and thereby impliedly agree to watch over the persons and property of the passengers. *Lewis v. New York Central Sleeping Car Co.,* (1887) 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135. Two rules have been adopted, one that the carrier must have a careful and continuous watch at all times in order to avoid being negligent. *Hill v. Pullman,* (1911) 188 Fed. 497. The other, that only reasonable watch must be maintained. *Kates v. Pullman Palace Car Co.,* (1894) 95 Ga. 810, 23 S. E. 186. A few courts go to the extent of saying that the mere fact of loss raises a presumption of negligence which the company must rebut by proof of due care. *Robinson v. Southern Ry. Co.,* (1913) 40 App. D. C. 549. *Pullman Palace Car Co. v. Hall,* supra. The rule which the courts seem to be seeking to apply is one of strict liability for negligence, and in determining the question of what is negligence under certain conditions they approach the rule in the principal case.

CONFUSION OF GOODS—EFFECT—REMEDY.—The defendant received hides on a trust receipt, which stipulated that the hides so received should be kept separate, so that they could be reclaimed at any time by the owner. The defendant intentionally or through the want of proper care confused his higher grade skins with the inferior ones of the plaintiff. Part of the goods so confused were sold and part remained with the defendant. Plaintiff now brings action to recover the value of the whole mass. *Held,* that the plaintiff is entitled to all the hides thus mixed, and so is entitled to the money received from their sale. *Peoples Nat. Bank v. Mulholland,* (Mass. 1917) 117 N. E. 46.

If the goods of two or more persons are confused, by their mutual consent, the owners hold the mass as tenants in common. *Low v. Martin,* (1857) 18 Ill. 286. The intentional but innocent confusion of property which is of like value and quality, does not change the ownership, but each has title to his portion. *Ryder v. Hathaway,* (1838) 21 Pick. (Mass.)

298. Even where the mixture is wrongful and fraudulent, if the goods so confused are of equal quality and value, and if the proportion which each owns in the mass is known, each will be entitled to his proportion. *Hesseltine v. Stockwell*, (1849) 30 Me. 237, 50 Am. Dec. 627. But it seems to be the well established rule, that where the true proportions are unknown, and where the confusion was the result of intent to defraud, the injured party may recover the whole mass, or sue in damages for its value. *Beach v. Schmultz*, (1858) 20 Ill. 186; *Jenkins v. Steanka*, (1865) 19 Wis. 139, 88 Am. Dec. 675; *The Idaho*, (1876) 93 U. S. 575, 23 L. Ed. 978. But see discussion in 2 Schouler, Personal Property, Section 47, and foot-note. However, in connection with the above rule it must be remembered that the tendency of the present day courts is to favor a forfeiture only when it is impossible to make a division of the property. *First Nat. Bank of Denver v. Scott*, (1893) 36 Neb. 607, 54 N. W. 987.

In the instant case, where the proportion of the hides which each has in the bulk is known, and the defendant's hides, which are of a superior quality, have raised the value of the whole mass, it seems that the decision is unfair. The defendant, in spite of his wrongful act, ought to have an interest in the mass according to the number of hides he has contributed to it.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—REGULATION OF EMPLOYMENT.—Ch. 547, Laws 1913, Minn., established a minimum wage commission, which commission is empowered to investigate wage conditions and if it is found that less than a living wage is being paid to women or minors, the commission shall establish a legal minimum rate of wages in the occupation where the wages are found to be insufficient. Defendants are members of the commission formed under this act, and plaintiffs seek to enjoin the operation of one of their orders establishing a minimum wage, on the ground that the act violates the fourteenth amendment to the United States constitution by restraining their liberty to contract. *Held*, that the act is a lawful exercise of the police power and is not void as delegating legislative power to a commission. *Williams v. Evans*, (Minn. 1917) 165 N. W. 495.

For a complete discussion of this subject, see articles, Oregon Minimum Wage Cases, by Rome G. Brown, 1 MINNESOTA LAW REVIEW 471, and Constitutional Issue in Minimum-Wage Legislation, by Thomas Reed Powell, 2 MINNESOTA LAW REVIEW 1.

CONSTITUTIONAL LAW—POWER OF LEGISLATURE—PRESUMPTIONS—BURDEN OF PROOF.—The legislature of Illinois passed a statute providing that railroads shall receive and transport grain offered for shipment, and, in case of neglect or refusal to weigh such grain, the sworn statement of the shipper and the sworn statement of the consignee shall be taken as *conclusive* of the amount shipped and received respectively. An action was brought for shortage based on shipment of seven cars of grain, in which action the statute was invoked. *Held*, the legislature cannot declare that the existence of one fact shall *conclusively* establish the existence of an-

other. *Shellabarger Elevator Co. v. Illinois Central R. Co.,* (Ill. 1917) 116 N. E. 170.

The general power of the legislature to prescribe rules of evidence and methods of proof can no longer be doubted under modern authority where the enactment is not in conflict with the constitution or rights guaranteed by it. *Banks v. State,* (1905) 124 Ga. 15 (18), 52 S. E. 74, 2 L. R. A. (N. S.) 1007 and note; *Brinkley v. State,* (1911) 125 Tenn. 371, 143. S. W. 1120. Thus the legislature may determine on whom the burden of proof shall rest and shift the burden as it sees fit. *Gage v. Caraher,* (1888) 125 Ill. 447, 17 N. E. 777.

When an attempt has been made to change the rules of evidence the cases show a sharp cleavage between their holdings on laws declaring that certain facts shall be considered *prima facie* evidence of the fact to be proved, and those declaring certain facts *conclusive* evidence. In the former case, the almost unanimous holding is to the effect that such statutes are constitutional, inasmuch as the burden of proof simply is shifted, leaving the adverse party an opportunity to rebut the presumption. *Marx v. Hanthorn,* (1893) 148 U. S. 172, 13 S. C. R. 508, 37 L. Ed. 415; *Irwin v. Pierro,* (1890) 44 Minn. 490, 47 N. W. 154; *Brinkley v. State,* supra.

Logical connection between the two facts, in civil cases, does not seem necessary; nor need the fact presumed be a probable consequence of the fact proved. See note, 36 Am. St. Rep. 682. However, it would appear that in criminal cases, the fact which is made prima facie evidence of some other fact must be one from which the existence of the latter may reasonably be inferred. *Voght v. State,* (1890) 124 Ind. 358 (361), 24 N. E. 680. Statutes declaring certain facts *conclusive* evidence of others are universally held unconstitutional as depriving the adverse party of due process of law, or, as is said in the principal case, as amounting to an invasion of the power of the judiciary. *Meyer v. Berlandi,* (1888) 39 Minn. 438, 40 N. W. 513, 12 Am. St. Rep. 663, 1 L. R. A. 777; *Vega Steamship Co. v. Consolidated Elevator Co.,* (1899) 75 Minn. 308, 77 N. W. 973, 43 L. R. A. 843, 74 Am. St. Rep. 484 and note. Only two cases have been found where the sworn statement of the adverse party has been attempted to be made *conclusive* evidence, and in both cases the court very properly declared the statute unconstitutional. *Savannah, etc., Ry. Co. v. Geiger,* (1886) 21 Fla. 669, 58 Am. Rep. 697; *Ely v. Thompson,* (1820) 3 A. K. Marsh. (Ky.) 70. From the foregoing it will be seen that the principal case is in accord with the well-settled rule.

CONTRACTS — RESCISSION—MUTUAL MISTAKE OF FACT—REQUISITES. — Plaintiff and defendant entered into a contract whereby the plaintiff engaged the defendant to drive piles for the construction of a pier. When the contract was made both parties believed that the soil was soft and easily penetrable, but after the defendant started work, it was found that the soil consisted of trap rock through which it was difficult to drive piles. The defendant abandoned the contract and the plaintiff brings this action for damages, which he sustained in completing the work, and for the penalty provided by the contract in case of delay. *Held,* that there was not such a mutual mistake of fact as to permit a rescission of the contract.

Cavanah v. Tyson, Weare & Marshall Co. et al., (Mass. 1917) 116 N. E. 818.

An agreement is void, if it was entered into because of a common mistake, which mistake was in respect to the subject matter of the agreement. *Ketchum v. Catlin,* (1849) 21 Vt. 191; *Wheadon v. Olds,* (1838) 20 Wend. (N. Y.) 174. Such an agreement is void because the minds of the parties have never met. *Bedell v. Wilder,* (1892) 65 Vt. 406, 26 Atl. 589, 36 Am. St. Rep. 871. But to invalidate a contract on the ground of mutual mistake, it must be one that goes to the subject matter of the contract. *Hecht v. Batcheller,* (1888) 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708. A contract is valid even if there is a mutual mistake as to a collateral fact which does not affect its essence. *Wheat v. Cross,* (1869) 31 Md. 99, 1 Am. Rep. 28. A mistake, in a contract of sale, does not go to the essence of the contract, if the mistake is in regard to value, quality, or other collateral attributes. All that is necessary is that the thing be in existence, and be the identical thing in kind which is sold. *Hecht v. Batcheller,* supra; *Wood v. Boynton,* (1885) 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610. Ignorance of fact, though connected with the transaction, which is merely incidental and does not affect the very subject matter will not invalidate the contract. *Dambmann v. Shulting,* (1874) 75 N. Y. 55.

The rule in the instant case may be hard as applied to the facts therein presented, but nevertheless it is founded upon good common sense, and tends to give greater stability to business contracts. *Stees v. Leonard,* (1874) 20 Minn. 488. As both parties entered into the contract with their eyes open, it was the duty of the contractor if he wanted protection to provide against the above contingency in the agreement. On considering the principal case from all its angles, and in the light of other decisions, it seems that there is small ground for a court of law to hold the mistake other than a collateral one, and little occasion for equity to relieve the contractor from his blunder.

DEAD BODIES—MENTAL ANGUISH.—One Clement B. Finley took passage from London to New York on the steamship Minneapolis. When about five days from New York Finley died and the defendant, the Atlantic Transport Company, took possession of his body and of his property valued at $750. There was a letter on his person showing that he had a son, the plaintiff, in New York. The body was embalmed and would have kept for a longer period than was necessary to take it to New York, but when the ship was about twenty hours from port the body was cast into the sea. In an action to recover damages for mental suffering, *held,* the plaintiff can recover. He had a legal right to possession of the dead body for burial, and interference with that right is an actionable wrong. Mental suffering being the direct and proximate consequence of this actionable wrong is a subject for compensation. *Finley v. Atlantic Transport Company,* (N. Y. 1917) 115 N. E. 715.

This case is in line with the majority of decisions which allow damages for mental suffering in cases where dead bodies are concerned. *Larson v. Chase,* (1891) 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. In the case of *Larson v. Chase,* supra, Justice Mitchell said,

"But, where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate, and natural result of the wrongful act." This rule is applicable to cases like the instant case but seems to be a little too broad. In general there can be no recovery for mental anguish unless there is an accompanying or resulting bodily injury, *Whitsel v. Watts,* (1916) 98 Kan. 508, 159 Pac. 401, L. R. A. 1917A 708; *Easton v. United Trade School Contracting Co.,* (1916) 173 Cal. 199, 159 Pac. 597, L. R. A. 1917A 394; or some injury to person, property, or reputation, *Southern Express Co. v. Byers,* (1915) 240 U. S. 612, 36 S. C. R. 410, 60 L. Ed. 825. In the instant case, as well as in *Larson v. Chase,* supra, the recovery is not based on the theory of any property right in the dead body but on the right to possession of a dead body for the purpose of preservation and burial belonging to the next of kin. The English courts have recognized the right of possession of a dead body in those next of kin in *The Queen v. Fox,* (1841) 2 Q. B. 246, where a mandamus was issued directing that the body be delivered to the executors named in the will. The doctrine of the instant case is also found in *Darcy v. Presbyterian Hospital,* (1911) 202 N. Y. 259, 95 N. E. 695, Ann. Cas. 1912D 1238. As a general rule mental anguish is a proper element of damages in all tort actions where there has been some physical injury or where the plaintiff's legal rights have been so intentionally invaded as to cause him mental distress, but only in exceptional cases is it an element to be considered in contract actions. *Beaulieu v. Great Northern Railway Co.,* (1907) 103 Minn. 47, 114 N. W. 353, 19 L. R. A. (N. S.) 564, and note. Damages have been allowed however in cases of wilful tort, as for example in assault without physical contact. *Kline v. Kline,* (1902) 158 Ind. 602, 64 N. E. 9, 59 L. R. A. 397. Also in cases affecting the character, reputation, or domestic relations of the party, as for example in an action for breach of contract to marry, or for seduction, recovery is allowed for the injury to the plaintiff's feelings and pride. *Liese v. Meyer,* (1898) 143 Mo. 547, 45 S. W. 282. Recovery in the case of a breach of a contract to marry really is not an exception to the rule which refuses to allow recovery for mental suffering in contract cases because that action has always been recognized as "sui generis." In the case of *Francis v. Western Union Telegraph Co.,* (1894) 58 Minn. 252, 59 N. W. 1078, 49 Am. St. Rep. 507, 25 L. R. A. 406, recovery was not allowed for mental anguish resulting from the negligent delivery of a telegram. In the opinion Justice Mitchell said, "We think we are warranted in asserting that damages for mental suffering resulting from a breach of contract is wholly unknown to and unauthorized by the common law unless 'telegraph' cases are to be made an exception." There are a large number of states which follow the doctrine of *Francis v. Western Union Telegraph Co.,* supra, and allow no recovery for mental suffering in actions against a telegraph company for failure to deliver the telegram promptly. *Chapman v. Western Union Telegraph Co.,* (1892) 88 Ga. 763, 15 S. E. 901, 30 Am. St. Rep. 183, 17 L. R. A. 430. But following the lead of Texas many states allow damages for mental suffering in actions against a telegraph company for failure to properly send and deliver messages intrusted to them. *Wadsworth*

v. Western Union Telegraph Co., (1888) 86 Tenn. 695, 8 S. W. 574, 6 Am. St. Rep. 864; *So Relle v. Western Union Telegraph Co.*, (1881) 55 Tex. 308, 40 Am. Rep. 805. In the concluding opinion in the *So Relle case*, supra, the court said, "Great caution ought to be observed in trial of cases like this; as it will be so easy and natural to confound the corroding grief occasioned by the loss of the parent or other relative with the disappointment and regret occasioned by the fault or neglect of the company; for it is only the latter for which a recovery may be had." In a recent decision by the supreme court of South Carolina recovery was allowed to a passenger against a carrier for offensive and insulting language used by the conductor even though the passenger suffered no physical injury. *Lipman v. Atlantic Coast Line R. Co.*, (So. Car. 1917) 93 S. E. 714. The court bases its decision chiefly on the analogous cases of libel and slander, malicious prosecution, and breach of promise, where recovery for mental suffering may be had though no physical injury is shown.

INJUNCTION—REMEDY AT LAW—REMOVAL OF ENCROACHMENTS—MANDATORY INJUNCTION.—Defendant constructed a foundation wall of stones some of which protruded nine inches into plaintiff's land beneath the surface. Above ground the wall was entirely on the defendant's land. Plaintiff's right and title were settled in an ejectment suit and he files a bill to compel defendant to remove the intruding stones. *Held*, the motion to dismiss the bill will be held over until question of plaintiff's laches is decided. *Hirschberg v. Flusser*, (N. J. 1917) 101 Atl. 191.

It is settled at common law that a landowner may maintain ejectment when his land is encroached upon either above or below the surface, so as to constitute an ouster of possession. *Wachstein v. Christopher*, (1907) 128 Ga. 229, 57 S. E. 511, 11 L. R. A. (N. S.) 1917 (foundation); *Murphy v. Bolger Bros.*, (1888) 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309, (overhanging eaves); but see *Zander v. Val. Blatz Brewing Co.*, (1897) 95 Wis. 162, 70 N. W. 164, holding that where defendant's foundation projected into plaintiff's land beneath the surface and plaintiff extended his own wall and rested it on defendant's foundation, he elected to treat the invasion as a trespass rather than a disseisin and ejectment would not lie.

The weight of authority is that equity will grant a mandatory injunction to compel the removal of an encroaching building or wall. *Kershishian v Johnson*, (1911) 210 Mass. 135, 96 N. E. 56, 36 L. R. A. (N. S.) 402 (foundation wall); *Baron v. Korn*, (1891) 127 N. Y. 224, 27 N. E. 804 (foundation wall); *Pile v. Pedrick*, (1895) 167 Pa. St. 296, 31 Atl. 647, 46 Am. St. Rep. 677 (foundation wall); *Harrington v. McCarthy*, (1897) 169 Mass. 492, 48 N. E. 278 (overhanging eaves); *Baugh v. Bergdell*, (1910) 227 Pa. St. 420, 76 Atl. 207 (wall); *Smoot v. Heyl*, (1910) 34 App. D. C. 480 (bay window); *Mulrein v. Weisbecker*, (1899) 37 App. Div. 545, 56 N. Y. Supp. 240 (wall). The plaintiff has three remedies open to him at law. He may remove the encroachment and sue defendant for expense incurred, seek damages in successive actions in trespass, or sue in ejectment. It is obvious that in the situation presented in the principal case that none of these remedies are entirely efficacious. Hence, equity will by a mandatory injunction compel the defendant to undo his own wrong. See 5 Pom-

eroy, Equity Jurisprudence, 3rd ed., Sec. 507. But equity will not as a general rule grant a mandatory injunction if the removal of the offending object will impose a heavy burden on a defendant who acted in good faith and confer only a slight benefit on the plaintiff. *Hunter v. Carroll,* (1888) 64 N. H. 572, 15 Atl. 17, Ames Cas. on Equity, p. 529; *Lynch v. Union Institution for Savings,* (1893) 159 Mass. 306, 34 N. E. 364, 20 L. R. A. 842; *Coombs v. Lenox Realty Company,* (1913) 111 Me. 178, 88 Atl. 477, 47 L. R. A. (N. S.) 1085. But if defendant has knowledge of the encroachment a mandatory injunction will issue to remove the offending structure though it may impose expense on defendant disproportionate to to the apparent benefit of the plaintiff. *Curtis Manufacturing Co. v. Spencer Wire Co.,* (1909) 203 Mass. 448, 89 N. E. 534, 133 Am. St. Rep. 307. The above cases illustrate the much criticised balance of convenience rule. See 5 Pomeroy, Equity Jurisprudence, 3rd ed., Sec. 508. A mandatory injunction will not issue where plaintiff is guilty of laches. *Starkie v. Richmond,* (1892) 155 Mass. 188, 29 N. E. 770; *Orne v. Fridenberg,* (1891) 143 Pa. St. 487, 22 Atl. 832, 24 Am. St. Rep. 567. Where plaintiff's predecessor in title permitted defendant to build on plaintiff's land, it was held a mere license and did not bar plaintiff's action though no mandatory injunction issued. But equity will allow plaintiff to remove the building at his own expense and enjoin defendant from interfering with the operation. *Hodgkins v. Farrington,* (1889) 150 Mass. 19, 22 N. E. 73, 15 Am. St. Rep. 168, 5 L. R. A. 209. Assuming that plaintiff was not guilty of laches in the principal case a decree granting the injunction asked would work substantial justice, be sound in principle and clearly supported by the weight of authority.

INSANE PERSONS—GUARDIAN AND WARD.—The plaintiff had been appointed conservator for one Anna Meeker. She had a checking account with the defendant bank and the plaintiff deposited money to that account. At the time of her death the account stood as "Frederick Day, conservator for Anna Meeker." The executor of Anna Meeker's estate filed with the defendant a copy of his appointment as executor and the defendant paid him the amount of the money on deposit, without the plaintiff's knowledge or consent. The plaintiff as conservator brings this action against the bank for the money thus paid. *Held,* plaintiff can recover. The guardian has a right to have his accounts settled in probate court before he must pay them over to the executor, and until these proceedings have taken place the conservator is not liable to be sued by either the ward or executor at common law. *Day v. Old Colony Trust Co.,* (Mass. 1917) 117 N. E. 252.

Guardians have a right to have their accounts adjusted and the amounts due them determined in probate court and they cannot be compelled to pay over the fund until the adjustment in probate court. *Green v. Gaskill,* (1900) 175 Mass. 265, 56 N. E. 560. It is the duty of the committee of the estate of a lunatic to take care of the estate of the lunatic for those who succeed in the inheritance. He may rightfully retain possession until ordered by the court to give it up. *Guerard v. Gaillard,* (1867) 15 Rich. Law (S. C.) 22. A guardian assigned a mortgage after his ward became of age and married. The court held that the assignment was valid as the

legal title was in him, and the coming of age of the ward had no effect upon it. *Brewster v. Seegar,* (1899) 173 Mass. 281, 53 N. E. 814. Although a trustee holds the estate only with the power of managing it and for that purpose, yet he is personally bound by the contracts he makes as trustee. *Taylor v. Davis' Administratrix,* (1884) 110 U. S. 330, 4 S. C. R. 147, 28 L. Ed. 163. Trustee hired an attorney who performed services in protecting the estate intrusted to him. Held, the beneficiaries are not personally liable to the attorney because the obligation is a personal one between the trustee and the attorney. *Truesdale v. Philadelphia Trust, etc., Co.,* (1895) 63 Minn. 49, 65 N. W. 133. It has been held that the guardian is personally liable for the loss of funds deposited with the bank for a fixed period on a certificate of deposit without security where the bank's condition was such as to put him on guard. *Corcoran v. Kostrometinoff,* (1908) 164 Fed. 685. But it has been held that the guardian is not liable for the loss of funds through failure of a bank where he has not been negligent in not investing it elsewhere. *In re Grammel,* (1899) 120 Mich. 487, 79 N. W. 706, 6 Detroit Leg. N. 219. To protect himself from loss he must deposit the money in his name as guardian. *O'Conner v. Decker,* (1897) 95 Wis. 202, 70 N. W. 286. In the New York Code of Civil Procedure, Sec. 2344, it is provided that, "Where a person, of whose property a committee has been appointed as prescribed in this title, dies during his incompetency, the power of the committee ceases, and the property of the decedent must be administered and disposed of, as if the committee had not been appointed." Under this code it has been held that the administrator of an incompetent legatee is entitled to receive any property belonging to the incompetent at his death, as the authority of the committee was limited to the incompetent's life. *In re Meyer's Estate,* (1916) 161 N. Y. S. 1111. In *Eisenhauer v. Vaughn,* (Wash. 1917) 163 Pac. 758, the court held that when the insane ward died and an administrator was appointed, the estate passed from the guardian's control to the administrator. This decision was made under the Rem. Code, 1915 Sec. 1762, which provides that the guardian's power ceases on the death of the ward; and the estate descends as if he were of sound mind. But in view of the personal liability of the guardian for debts incurred by him for the ward, the decision in the instant case seems to be just and reasonable.

INSURANCE—EMPLOYER'S LIABILITY INSURANCE—ASSUMPTION OF DEFENSE—PAYMENT OF JUDGMENT BY EMPLOYER.—Insurer in an employer's liability policy assumes the exclusive control of the defense of a suit upon an employee's claim. Judgment was obtained against employer and he sues the insurance company. *Held,* plaintiff could recover although he had not paid the judgment. *Standard Printing Co. v. Fidelity and Deposit Co. of Maryland,* (Minn. 1917) 164 N. W. 1022.

For a discussion of the principles involved in this case see NOTES, p. 216.

INSURANCE—FIDELITY BOND—WARRANTY—RENEWAL.—Bonding concern issued its bond to the Osseo State Bank guaranteeing it for one year against possible pecuniary loss by reason of any fraud of its then assistant cashier, Thompson. Each year thereafter, this bond was continued in

force by a renewal certificate as provided for therein. Thompson had embezzled large sums from the bank. In an action to recover for sums embezzled prior to its last renewal, *Held,* (1) that renewals did not constitute separate bonds, but merely extended the time covered by the original bond. (2) The contract was one of insurance and therefore, a warranty in the application not embodied in the policy was not binding. *Pearson v. United States Fidelity & Guaranty Co.,* (Minn. 1917) 164 N. W. 919.

The rule is generally recognized that a renewal of an insurance policy is a separate and distinct contract for the period of time covered by such renewal. *De Jernette v. Fidelity & Casualty Co.,* (1896) 98 Ky. 558, 33 S. W. 828. *United States Fidelity & Guaranty Co. v. Williams,* (1909) 96 Miss. 10, 49 So. 742. It will be noticed that these cases may be reconciled with the instant case on the ground that it was specifically stated in the renewal policies thereof that such undertaking should cover only acts during its currency, while the Minnesota court followed the well-recognized rule that an ambiguous instrument should be construed most strongly against the maker. For a case of similar construction, see *United States Fidelity & Guaranty Co. v. Shepherds Home Lodge No. 2,* (1915) 163 Ky. 706, 174 S. W. 487.

The almost unanimous weight of modern authority is to the effect that a contract of suretyship, whereby a company for private gain agrees to reimburse an employer for breach of trust by employees, is in its nature an insurance contract, to which insurance rules are applicable. *Geo. A. Hormel & Co. v. American Bonding Co.,* (1910) 112 Minn. 288, 128 N. W. 12, 33 L. R. A. (N. S.) 513; *Standard Salt & Cement Co. v. National Surety Co.* (1916) 134 Minn. 121 (127), 158 N. W. 802, and cases cited; *Mechanics Savings Bank & Trust Co. v. Guarantee Co.,* (1895) 68 Fed. 459. See statement by Judge Lurton in *The Supreme Council Catholic Knights of America v. Fidelity & Casualty Co.,* (1894) 63 Fed. 48. He says in part: "With reference to bonds of this kind, executed upon a consideration, and by a corporation organized to make such bonds for profit, the rule of construction applied to ordinary sureties is not applicable. . . . The rule applicable to fire and life insurance is the rule, by analogy, most applicable to a contract like that in this case."

Minnesota G. S. 1913, Sec. 3292 provides that warranties not embraced within or attached to the policy of insurance are not binding. The Minnesota court, therefore, in construing such a statute as applicable to a fidelity bond, is in harmony with the great weight of modern authority, irrespective of statute.

INTOXICATING LIQUORS—PHOHIBITION — STATUTE — PRIVATE USE.—One Crane was arrested in Idaho charged with having in his possession a bottle of whiskey for his own use and benefit, and not for the purpose of giving away or selling the same to any person, under a Statute (Session Laws of Idaho 1915, c. 11) making it unlawful for a person to have any amount of intoxicating liquor in his possession. Crane sued out a writ of habeas corpus from the state supreme court, on the ground that such a law was unconstitutional, but the writ was quashed and the act held to be valid. On appeal to the United States Supreme Court, the

decision of the State court was upheld. *Crane v. Campbell,* (1917) 38 S. C. R. 98, U. S. Adv. Ops. 1917 p. 95.

For a discussion of the principles involved in this case see 2 MINNESOTA LAW REVIEW, 152.

LIMITATION OF ACTIONS—EFFECT OF BAR OF DEBT ON SECURITY.—Plaintiff Hulet, as assignee of a note and mortgage, brought an action to foreclose the mortgage after an action on the note had been barred by the statute of limitations. The Indiana statute provided that actions upon promissory notes, bills of exchange, and other written contracts for the payment of money must be brought within ten years. It further provided that actions upon contracts other than those for the payment of money, on judgments of courts of record, and for the recovery of the possession of real estate must be brought within twenty years. *Held,* that a mortgage is a mere incident to the debt which it secures and the barring of the debt by the statute of limitations bars the mortgage lien also. *Tennant v. Hulet,* (Ind. App. 1917) 116 N. E. 748.

For a discussion of the principles involved in this case, see NOTES, p. 218.

MANSLAUGHTER—HIGHWAYS—OPERATION OF MOTOR VEHICLES—VALIDITY OF STATUTES.—Through careless and reckless driving the defendant ran over and killed a three-year-old child. The lower court convicted him of manslaughter because his driving was in violation of a statute making it a criminal act to drive motor vehicles "on the public roads or highways at a speed greater than is reasonable or proper. . . . or so as to endanger the property, life, or limb of any person." Defendant appealed. *Held,* that the statute was not unconstitutional because of being indefinite and uncertain in its terms, and the conviction was sustained. *State v. Schaeffer,* (Ohio 1917) 117 N. E. 220.

There can be little doubt but that a statute worded as this is, might be subject to many peculiar decisions, for what is reasonable and proper under certain circumstances, is surely very hard to determine. Many juries would differ on practically the same state of facts. For this reason the Georgia court in *Hayes v. The State,* (1912) 11 Ga. App. 371, held almost exactly the same statute to be "incapable of enforcement" because too "general and indeterminate" in its terms, leaving "the question of criminality dependent upon the idiosyncracies of the individuals who may happen to constitute the court and jury," and thus "null and void." This objection would seem to be of slight importance compared with the benefits obtained, for hardly anyone can swear to a certain definite speed, but an average person can arrive at a decision regarding what was reasonable and proper under the circumstances. Our entire jury system is subject to the idiosyncracies of the men comprising the juries, and thus many peculiar decisions are arrived at. *Schultz v. State,* (1911) 89 Neb. 34, 130 N. W. 972, 33 L. R. A. (N. S.) 403, Ann. Cas. 1912C 495, has been cited as in accord with the instant case, but that statute was attacked as being unreasonable. Therefore the question whether it was void because of being vague and indefinite did not arise, although the court did state that the statute was a very necessary instrument to protect the public. In civil

suits such statutes were held to be definite enough to allow recovery for injury. *Solan & Billings v. Pasche,* (Tex. Civ. App. 1913), 153 S. W. 672; *Strickland v. Whatley,* (1914) 142 Ga. 802. Massachussetts has a very similar statute, Mass. St. 1909, p. 829, the validity of which has not been passed on, but it shows the tendency of modern legislation toward some flexible law, which will apply to all manner of control of an automobile. Our own court in *State v. Frank W. Waterman,* (1910) 112 Minn. 157, 127 N. W. 473, passing on the validity of a statute (G. S. 1913, Sec. 2635) practically like that of Ohio, quickly disposed of the matter by saying that there was no merit in the argument that it was void because of being indefinite. Our statute, however, after making a reasonable and proper speed to be the test, goes on and specifies certain speeds which make it prima facie evidence that the driving is being done in an unreasonable and improper manner.

MASTER AND SERVANT—INJURIES TO SERVANT—WORKMEN'S COMPENSATION ACT—APPLICABILITY—WHERE INJURY SUSTAINED IN ANOTHER STATE. —Plaintiff was injured in North Dakota and claims compensation under the Minnesota Workmen's Compensation Act, his employer being a resident of Minnesota and the contract of employment being made in Minnesota. Although the court recognized the practical difficulties that arise in applying the act to injuries sustained outside the state, *held,* that the Minnesota compensation act is applicable and an award of compensation should be made. *State ex rel. Chambers, et al., v. District Court, Hennepin County,* (Minn. Jan. 11, 1918).

For a discussion of the subject, see 1 MINNESOTA LAW REVIEW 531.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACTS—WHAT IS AN ACCIDENT?—The plaintiff asks recovery under the workmen's compensation act for temporary disability caused by typhoid fever the germs of which are alleged to have been ingested by drinking infected water at the factory. *Held*: typhoid fever caused by drinking infected water is not caused by an accident of the character defined in the law. The workmen's compensation act provides for personal injury caused by accident, and defines the word accident as used therein to mean "an unexpected or unforeseen event, happening suddenly, violently. . . . and producing at the time injury to the physical structure of the body." *State ex rel. Faribault Woolen Mills Co. v. Rice County,* (Minn. 1917) 164 N. W. 810.

Under the workmen's compensation act prior to the amendment which expressly includes occupational diseases, the English courts held that a disease, unless contracted at the time of some physical injury to the body, was not a "personal injury by accident, within the meaning of the English law. *Fenton v. Thorley & Co.* [1903] A. C. 443, *Findlay v. Guardians of Tullamore Union,* (1914) 48 Ir. L. T. 110, 7 B. W. C. C. 973. In *Fenton v. Thorley & Co.,* supra, the court held that a rupture is an injury by accident within the act. The word accident was defined as a mishap or untoward event not expected or designed. In 25 Harv. L. Rev., 328, 343, it is said: "By this construction injury of gradual growth, as such, not the result of some particular piece of work done or condition encountered on a definite occasion, but caused by the cumulative effect of many acts done

or many exposures to conditions prevalent in the work, no one of which can be identified as the cause of the harm, is definitely excluded from compensation." In *Vennen v. New Dells Lumber Co.*, (1915) 161 Wis. 370, 154 N. W. 640, L. R. A. 1916A 273, the court held that typhoid fever contracted through the negligent contamination of the drinking water furnished by the employer is within the act providing for compensation for personal injury accidentally received. Barnes, J., dissenting, said that you cannot call a disease an accident, and that the legislature did not intend to compensate for diseases. This dissenting opinion is upheld in *Findlay v. Guardians of Tullamore Union*, supra, where the court refused recovery for typhoid fever because there was no time and place at which there was an accident which caused the injury to the workman. The result in the principal case seems correct under our statute which seems to have been intended to exclude this class of cases. In *Hurle's Case*, (1914) 217 Mass. 223, 104 N. E. 336, Ann. Cas. 1915C 919 and note, L. R. A. 1916A 279, the court allowed recovery for blindness due to poisonous gas from a furnace about which the plaintiff worked. But the Massachusetts act omits the words "by accident" which occur in the English and Minnesota acts. In *Kutschmar v. Briggs Mfg. Co.*, (Mich. 1917) 163 N. W. 933, the court held that a hernia was not an accidental injury. From this it would seem that Michigan puts an even stricter construction on their act than the Minnesota court does. In *State ex rel. Rau v. Ramsey Co.*, (Minn. 1917) 164 N. W. 916, the court held that sunstroke was an accident; and in *State ex rel. Nelson v. Ramsey Co.*, (Minn. 1917) 164 N. W. 917, and *State ex rel. Virginia & Rainy Lake Co. v. St. Louis Co.*, (Minn. 1917) 164 N. W. 585, that freezing was an accident. At first blush these two Minnesota cases seem inconsistent with the principal case, but, applying the definition of the word "accident" as given in Minn. C. S. 1913 Sec. 8230, it will be seen that freezing and sunstroke happen suddenly and produce injury to the physical structure of the body at some particular time and place, while typhoid fever develops gradually, no physical injury resulting at the time the germs are ingested. The intention of the legislature was to provide recovery for accidents only and the court has to deny recovery for diseases which are not covered by the act.

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT.—A boy in the employment of a firm of builders was ordered to go through the streets of London on a bicycle to fetch some plaster. He came into collision with a motor car and was injured. The House of Lords, reversing the former strict rule of the English courts, *held*, that the accident arose out of the employment. *Dennis v. A. J. White & Company*, [1917] A. C. 479.

For a discussion of the subject, see 2 MINNESOTA LAW REVIEW 154.

MUNICIPAL CORPORATIONS—STREET GRADE—LATERAL SUPPORT.—The city of Seattle lowered the grade of a street one block from the premises of the plaintiff. The grading left a clay bank exposed. The bank gradually disintegrated and slid into the street and continued to recede until the lateral support to plaintiff's premises was removed. *Held*, that if the city left the bank exposed with knowledge or charged with knowledge that dis-

integration would naturally result it was negligent and liable for damages. *Lochore v. Scattle,* (Wash. 1917) 167 Pac. 918.

For a discussion of the principles involved in this case, see NOTES, p. 206.

TAXATION—HIGHWAYS—CREATION OF TAXING DISTRICTS.—The towns of Mount Pleasant and Florence, in the year 1892, agreed to share equally the expense of repairing a bridge wholly within Mount Pleasant. No time limit was set for the expiration of the agreement; but it was acted upon until 1914, when Florence refused to pay the agreed share. *Held*: There was a continuing agreement which neither town could terminate at will. *Town of Mount Pleasant v. Town of Florence,* (Minn. 1917) 165 N. W. 126.

The bridge was part of a highway laid out on the line between both towns, but was built at a point where a detour into Mount Pleasant was necessary because of the nature of the ground. Minn. G. S. 1894 Sec. 1825 provides that the town supervisors shall divide such highways into road districts. Sec. 1826 provides that each district shall belong wholly to the town to which it may be allotted for the purpose of keeping the *road* in repair. The bridge in question was not allotted in portions of the towns, but both were to bear the expense jointly. The court was of the opinion that the case of a bridge was not covered by the statute expressly, but that the power to make an agreement such as this, was necessary to the exercise of the power conferred by the statute. The powers conferred on the town supervisors were administrative, i. e., the erection of road tax districts; and these districts once created, exist by virtue of the statute, not by force of agreement or contract. The court infers that, by necessary implication, the bridge arrangement was authorized by statute. If that be so, it may likewise be looked at as the application of a statutory regulation, rather than the formation of a contract between the parties. This may be a ground for distinction from the case of *State ex rel. St. Paul v. Minnesota Transfer Ry. Co.,* (1900) 80 Minn. 108, 83 N. W. 32, 50 L. R. A. 656. There the city council contracted to keep in repair a viaduct over the defendant's tracks in consideration of the defendant building the viaduct. The contract was held void, for besides containing a surrender by the city of rights held in trust, it was ultra vires as an attempt by contract to bind the city council's successors in office for all time.

BOOK REVIEWS

A TREATISE ON THE LAW OF INHERITANCE TAXATION. By Lafayette B. Gleason and Alexander Otis. Albany: Matthew Bender & Co., 1917. Pp. lviii, 836. Price $7.50.

The newest complete text book on the increasingly important subject of Inheritance Taxation is compiled by two New York attorneys who have exhibited great industry in accumulating references to practically all of the applicable court decisions of importance up to the present time. The general method of analysis of the subject is somewhat new, but is nevertheless logical.

The text differs from the ordinary treatise or law text book in two respects:

First,—the citations are not in the form of foot notes;

Second,—the text is more in the nature of a digest than an encyclopedia or text book.

This plan has the advantage of eliminating the views of the authors including prolonged discussions of the principles of law involved in the rules thus laid down, but it has the disadvantage of making the text disconnected and uninteresting. As a digest or book of ready reference for the busy practitioner, who is already familiar with the principles of Inheritance Taxation as evolved by the courts of the various commonwealths of this Nation, it will be of value. Some of the older text books on the subject, however, will still be required to furnish the principles, and reasonings,—both logical and illogical, on this subject.

The appendix contains valuable information of service to the practicing attorney. There is a brief synopsis of the Inheritance Tax statutes of the 44 states now imposing such taxes, with a tabulation of the table of rates in each state. The book also contains mortality and discount tables with various rules for computing the present value of limited and future estates.

While it is probably true that half of the Inheritance Tax revenue collected in this country is derived from the New York statute, either in that state or in other states where the statute has been almost literally adopted, it is nevertheless apparent from an examination of this volume that the New York authors who wrote it or compiled it, have kept constantly in mind the effort to make it primarily a book for the attorneys of that state, giving the New York procedure with all of the required forms, in much detail. While this does not necessarily detract from the volume, it makes a considerable part of it unimportant to those residing outside of the Empire State.

On the whole the work fills a place not heretofore occupied by any other book on the subject, and it should prove a valuable addition to the rapidly accumulating law in that branch of jurisprudence.

WILLIAM J. STEVENSON.

Minneapolis.

STANDARDS OF AMERICAN LEGISLATION. By Ernest Freund. Chicago: University of Chicago Press. 1917. Pp. xx, 327. Price $1.50, plus postage.

This book is written in the clear and vigorous style characteristic of all of the learned author's work, and makes manifest his extraordinarily broad and accurate knowledge of the history and practice of legislation, but the reader lays it down with a deep sense of disappointment. The author's comments on constitutional law, though rather casual, are decidedly interesting, and the criticisms of leading decisions of federal and state courts, while perhaps not always convincing, are undeniably acute and illuminating; his remarks upon the evolution of certain common law principles and related sociological theories are pertinent and stimulating; but his treatment of what would seem to be his main thesis, "the legal science of legislation" is little more that a philosophically worded elaboration of the obvious. Thus the rather obvious proposition that the several provisions of a statute must be consistent with one another and with the provisions of other statutes relating to the same subject matter our author lays down as one of his "principles in legislation," but expresses it in this formidable manner: "The correlation of distinct and separate provisions makes a system out of a conglomerate of rules, while the correlation of necessarily interdependent provisions is an imperative requirement of logic, the violation of which must nullify the offending statute in whole or in part." It should be added, however, that the author uses this "principle" as a peg upon which to hang some extended and valuable comments upon the principles of statutory construction, his criticism upon the well known Pipe Line Cases (234 U. S. 548) being peculiarly interesting.

The great importance of sound practice in statute drafting in order to secure right legislative mechanics is also rather obvious, perhaps, but the author's comparison of American legislative methods with those prevailing in continental Europe and even in England, puts timely emphasis upon the great need of improving our own haphazard legislative practice. This lesson, unquestionably well taught, justifies the book, but the author signally fails to make a case for introducing into our over-crowded law school curricula the "legal science of legislation," the absence of which he so greatly deplores. As compared with the rich and interesting fields of the common law, legislation would offer a dreary and unprofitable study to the undergraduate student of law.

W. R. VANCE.

University of Minnesota.

BANKRUPTCY ACT OF 1898 with amendments of 1903, 1906, 1910, and 1917 together with General Orders and Official Forms in Bankruptcy with annotations. Collier Edition. Albany: Matthew Bender & Co. 1917. Pp. 1189-1516. Price $1.00.

WAIVER DISTRIBUTED AMONG THE DEPARTMENTS ELECTION, ESTOPPEL, CONTRACT, RELEASE. By John S. Ewart. Cambridge: Harvard University Press. 1917. Pp. xx, 304. Price $2.50.

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FREEDOM OF SPEECH AND OF THE PRESS

AMERICANS should not be greatly surprised that Russian exiles, returning from the United States to receive a Maximalist welcome in their native country, should have reported that American liberty was a fraud and delusion, or that the Maximalists in Petrograd should so fiercely resent the conviction of Alexander Berkman and Emma Goldman for resistance to the Draft Act* that they have given public notice of their intention to hold the American Ambassador as a sort of hostage for these two Bolsheviki, so sadly out of place. The Russian who drank in with his mother's milk the doctrine that liberty necessarily involves opposition to the existing government, and that freedom is exemption from police interference, finding in America that he can no more do what is contrary to the law than he could in Russia under the Czar, naturally reaches the conclusion that the term "the land of the free" is a hollow mockery. Especially is he shocked when he discovers that in spite of the oft heard statement made by the champions of English liberty, and echoed by the courts, that freedom of speech and freedom of the press are the cornerstones of Anglo-Saxon democracy,[1] and in spite of the clear and vigorous language of the first amendment to the constitution of the United States that "Congress shall make no law . . . abridging the freedom of speech, or of the press,"

*See Goldman v. United States, (1918) U. S. Adv. Ops. 1917, p. 215.
[1] See, for example, State v. Pierce, (1916) 163 Wis. 615, 158 N. W. 696.

he is promptly arrested and imprisoned if he counsels, orally or in writing, resistance to the laws of the land. This confusion of mind is by no means lessened when he sees ignorant members of the I. W. W. hauled, fairly in droves, to prison on charges of sedition and encouraging resistance to the law, while at the same time prominent members of Congress and distinguished citizens outside of Congress, with impunity, make heavy charges of incompetence and even of dishonesty against the government and its officers. In the confusion of a swift moving scene in a strange land it is not surprising that the Russian attorney for the unfortunate Russians who had talked not wisely but too much, should, with total unconsciousness of the exquisite humor concealed in the remark, have complained bitterly to the law officers of the federal government that Berkman and Miss Goldman had been denied the immemorial privileges of Englishmen. Undoubtedly it is difficult to determine how to draw the line just at the place where criticism of the government and its measures becomes opposition to the government and resistance to the laws. The purpose of this paper will be to attempt to set forth as clearly as possible just where and how this line is drawn.

In addition to the provision of the federal constitution above quoted,[2] each of the states has incorporated in its constitution a provision of similar import. For example, Article 3 of the Bill of Rights in the constitution of Minnesota provides that:

"The liberty of the press shall forever remain inviolate, and all persons may freely write, speak and publish their sentiments on all subjects, being responsible for the abuse of such right."[3]

[2] The first amendment of the federal constitution in full reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This amendment is expressly a limitation upon the power of Congress, and not upon the states. Justice Harlan dissenting in Patterson v. Colorado, (1907) 205 U. S. 454 (464), 51 L. Ed. 879, 27 S. C. R. 556, 10 Ann. Cas. 689, was of the opinion that the right of free discussion given by the first amendment was one of the attributes of federal citizenship protected against state action by that clause of the fourteenth amendment forbidding any state to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," and also by the clause of the same amendment forbidding the states to deprive any person of his liberty without due process of law. Miller, J., was of different opinion in Butchers' Association v. Crescent City Live Stock Co., (1872) 16 Wall. (U. S.) 36 (74), 21 L. Ed. 394; as was Chief Justice Waite in United States v. Cruikshank, (1875) 92 U. S. 542, 23 L. Ed. 588. See also In re Quarles, (1894) 158 U. S. 532 (535), 39 L. Ed. 1080, 15 S. C. R. 959.

[3] The constitution of Massachusetts, Part 1, Article 16, limits the guar-

In the first place it is to be noted that while the provision of the federal constitution does not contain the statement that persons are responsible for the abuse of the right given, as do most of the state constitutions, yet such a limitation upon the apparently unqualified language of the federal constitution is necessarily implied. That even the most jealously guarded guaranties of the federal constitution, as for instance that of "life, liberty and property," are qualified by other provisions of that instrument and by the requirements of the police power of the several states, is so well known and well settled that it may be stated without argument or citation of authority. If illustration were needed it could be strikingly found in the recent decision of the Supreme Court of the United States holding constitutional the selective draft act, depriving certain citizens of their liberty, often much against their will.[4] If personal liberty can be sacrificed in the interest of public defense, it would be indeed a strange thing if the liberty of the press and of speech were to be so absolute as to permit its exercise in aid of the enemy, or otherwise in antagonism to the public welfare. But the difficult question to be settled is how far may the government go in restricting the freedom of discussion in order to protect the public welfare?

Before attempting to arrive at the answer to this question there are two perfectly simple propositions which must be stated and set aside in order to avoid confusion of thought. The first of these is that these constitutional guaranties protect the citizen only from suffering legal consequences at the hands of the government authorities acting in the alleged enforcement of law. They do not, and cannot, protect the citizen against the social consequences of exercising his legal privilege to say what he pleases. Every citizen of the United States has the right, generally speaking, to bray like an ass if he wishes; but he need not expect the constitution of the United States to protect him against the unpleasant social consequences of being regarded as an ass. The preacher in the pulpit is undoubtedly within his legal rights if he should say that Satan, in the midst of his most diabolical activities, was a Christian gentleman if he chanced to wear a German helmet; but he should not expect the constitution to keep him

anty to liberty of the press. See Commonwealth v. McCann, (1913) 213 Mass. 213, 100 N. E. 355.

[4] Arver v. United States, (1918) 38 S. C. R. 159, U. S. Adv. Ops. 1917, page 193. See also Jacobson v. Massachusetts, (1905) 197 U. S. 11, 49 L. Ed. 643, 25 S. C. R. 358, 3 Ann. Cas. 765.

long in an American pulpit thereafter. The college professor who should say to his class that the moon was made of green cheese, or that the Lusitania was sunk strictly in accordance with international law, or that all forms of government were essentially bad and should be abolished, might well be within his constitutional rights, but ought not to expect long to be within his classroom. So it was a foolish member of a social club who, having been expelled for publishing certain uncomplimentary comments about his fellow members, asked a court to compel his reinstatement on the ground that the constitution permitted him freely to "speak, write and publish" his sentiments on all subjects.[5] The constitution will protect a man against legal punishment for merely foolish talk, but it cannot protect him from the social consequences.

The second elementary proposition is that this provision of the federal constitution, and of the state constitutions as well, does not create the right of freedom of speech and of the press, but merely protects an existing right from abridgment or interference.[6] In view of this fact our problem is, then, reduced to a determination of the scope and extent of the existing right of free publication and free speech at the time of the adoption of the federal constitution. It may be well also, before attempting such determination, to call attention to the fact that this constitutional guaranty is available only to citizens of the United States and does not extend to aliens;[7] and further that it has no necessary application to the rules and regulations of the Post Office department as to exclusion from the mails.[8] A refusal by the government to carry in its mails a book or periodical does not prohibit its publication. Neither does a statute prohibiting political activity on the part of employees and officers of the government deprive them of their right freely to speak and write their opinions.[9] By withdrawing from the government service, as they freely may, they escape the restraint laid upon their political activity; and the government has the right to make reasonable rules

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[5] Barry v. Players, (1911) 130 N. [illegible] Supp. 701.

[6] Cooley, Constitutional Law 299 [illegible] St.

[7] Goldman v. Reyburn, 36 Pa. [illegible] sta[illegible] 581; United States v. Williams, (1904) 194 U. S. 279, 48 L. Ed. 979, [illegible] S. C. R. 719.

[8] Lewis Publishing Co. v. Morgan, (1913) 229 U. S. 288, 57 L. Ed. 1190, 33 S. C. R. 867. See especially Masses Publishing Co. v. Patten, (C. C. A. 1917) 246 Fed. 24, 45 Wash. L. Rep. 706, reviewing the cases.

[9] Duffy v. Cooke, (1913) 239 Pa. St. 427, 86 Atl. 1076, Ann. Cas. 1915A 550.

and regulations governing the conduct of its employees so long as the good of the service is the bona fide purpose of such regulation.

What, then, was the scope and extent of the right of free discussion at common law at the time that the federal constitution was adopted? A distinguished writer on constitutional law gives the following answer:[10]

"We understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted."

Vann, J., in the famous case resulting in the conviction of Johann Most of a seditious publication, gives expression to the same principle in the following vigorous language:[11]

"It [the constitution] places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self preservation."

There is a very general impression, even among lawyers, that the right of free discussion, whether oral or in writing, is one of the fundamental rights of Englishmen; that it is somehow a part of the English constitution. But such is not the case.[12] It is true that English judges have not infrequently spoken of the freedom of speech as a recognized, though restricted, right, and famous statesmen and publicists have, from time to time during the long struggle for English liberty, eulogized the right of free discussion of public events as the palladium of the constitution, and the greatest engine of public safety. Sir James Mackintosh, in the case of Peltier,[13] indicted for seditious libel, said:

"There is one country [England] where man can freely exercise his reason on the most important concerns of society, where he can boldly publish his judgment on the acts of the proudest and most powerful tyrants."

Milton's famous essay, "Areopagitica," is an eloquent argument for the right of free discussion of public events, although

[10] Cooley, Constitutional Lim. 518.
[11] People v. Most, (1902) 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509.
[12] See Dicey, Law of the Constitution, fourth ed., 236.
[13] Rex v. Peltier, (1803) 28 St. Tr. 529.

he is very careful to make it clear that the principles that he contends for so vigorously, have no application to Papists. In the same manner Erskine would pause in the midst of his glowing periods in eulogy of the right of free speech to express his entire approval of the denial of that right to religious heretics.[14] In view of such statements on the bench, at the bar and in Parliament, it is rather surprising that we find no mention of such right in the Petition of Right (1628), or the Bill of Rights (1689), the two great constitutional documents that are the direct forerunners of our own Bill of Rights. In fact until comparatively recent times, the right of public discussion so far from being free, was very narrowly restricted. When Henry VII introduced the printing press into England it seems to have been taken for granted that the press could be used only by license of the King.[15] The granting of such license, which was continued through succeeding reigns, was probably at first intended more as a means of securing a monopoly to the licensee than as a device of censorship, but in the time of Elizabeth the practice of using the license as a means of controlling the character of publications had become well established. During the reign of James I the Star Chamber had taken over the regulation of the press, and, true to its evil genius, had soon developed it into a very effective engine of oppression. Unlicensed publishers were punished by whipping, the pillory and imprisonment.[16] With the fall of the Star Chamber in 1641 Parliament took over the press censorship, but the restraints imposed upon all publications were scarcely less oppressive. After the Revolution of 1688 these regulations gradually fell into disuse, and after the expiration of the last licensing act in 1694 it was never renewed.[17]

But even after the Englishman had become thus free to print, just as he might speak, what he would without previous license, he remained fully liable either in civil action or in criminal prosecution for any wrong committed in the exercise of his freedom. To use the blunt language of Lord Kenyon:[18]

"It [the liberty of the press] is neither more nor less than this, that a man may publish anything which twelve of his countrymen think is not blamable, but that he ought to be punished if he publishes that which is blamable."

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[14] See 70 Cent. Law J. 189.
[15] Paterson, Liberty of Press and Speech 44.
[16] Ibid 77.
[17] Ibid 46.
[18] Rex v. Cuthell, (1799) 27 St. Tr. 641 (675).

To the same effect is Dicey's statement[19] that:

"Freedom of discussion is, then, in England little else than the right to write or say anything which a jury, consisting of twelve shopkeepers, think it expedient should be said or written."

According to common law standards a man is not free to make false statements injuring the reputation of another though made with good intention. There were, however, certain relations in which communication of information was so essential to the public welfare that there arose exceptions to this rule. In some instances public policy so clearly demanded immunity for utterances that the law would not allow them to be drawn into question at all, as for instance, statements made in Parliament or by a judge on the bench. Such statements were said to be absolutely privileged. In other relations where the public interest was less deeply involved, communications were made subject only to a qualified privilege, being actionable only if proved to be malicious as well as false. It was about this doctrine of qualified privilege for discussion of men and measures as applied to charges of seditious libel that the fiercest battles were fought; and it was in these notorious state trials that we find most of the famous statements made about the freedom of speech and of the press, which, it should be noted, were made by barristers and judges in their efforts to define the common law crime of seditious libel.

Closely akin to the crime of seditious libel was that of blasphemy, which consisted in denying any of the tenets of the established religion, or criticising the practices or prelates of the established church. The common law attitude toward religious discussion is well represented by the statement of Hale, J.,[20] "To say that religion is a cheat is to dissolve all those obligations whereby civil societies are preserved." In the time of Elizabeth any criticism whatever of the church was deemed ipso facto an attempt to subvert the government. In the time of the Stuarts the subservient judges pushed this doctrine of blasphemy and sedition so far, in response to orders from their royal masters, that an unfortunate author of a book attacking the stage, which was then under the patronage of the Merry Monarch's queen, was indicted for saying that "dancing was the devil's profession, and fiddlers were the minstrels of the devil." The presiding judge decided that this was a seditious libel of so wicked a

[19] Dicey, Law of the Constitution (fourth ed.) 234.
[20] Reg. v. Taylor, (1687) 1 Ventris 293.

character that it made his blood boil. The unhappy defendant had his ears cut off, was put in the pillory, fined five thousand pounds and imprisoned for life.[21] The prosecutions for sedition and blasphemy in the time of the Stuarts, and the barbarous ferocity of the punishments inflicted,[22] form one of the darkest pages in the history of English law, which one cannot read without the conviction that the bloody Jeffreys justly bears the infamy that attaches to his name.

Another restriction at common law upon freedom of discussion nearly related to the crime of blasphemy was that of making an immoral or obscene publication. This crime, originating in the Ecclesiastical courts, and growing to vigor under the sympathetic ministrations of the Star Chamber, came subsequently to be recognized in Westminster Hall as a common law crime. As late as 1765 Wilkes was indicted and convicted for the publication of his "Essay on Woman," which was deemed so indecent as to be an offense at common law.[23]

At common law no person without license might publish any account of Parliamentary debates. Any person doing so might be punished as guilty of a breach of the privilege of the House. In the eighteenth century, however, newspaper reports became more and more frequent until finally no further attempt was made to prevent their publication, although the Parliamentary order prohibiting such publication has never been rescinded.[24]

The common law did not permit anyone to write or speak anything that would corrupt or interfere with the administration of justice. Therefore any publication imputing misconduct to a judge was an indictable offense. The right of every court to protect itself in the discharge of its functions by contempt proceedings has been long recognized, this power on the part of the courts being coeval with the common law.[25]

It is now necessary to consider briefly the status of the so-called freedom of the press and of speech in the colonies prior

[21] Rex v. Prynne, (1632) 3 St. Tr. 561.

[22] As late as 1656 a certain Quaker, obviously insane, was convicted of blasphemous personation of the Saviour and punished by having his tongue bored with a red hot iron, by having a letter "R" branded upon his forehead, and was whipped, and pilloried. See Paterson, Liberty of Press and Speech 68.

[23] Rex v. Wilkes, (1770) 4 Burr. 2527 (2530), 2 Wils. 151, 4 Bro. P. C. 360.

[24] See Kilbourn v. Thompson, (1880) 103 U. S. 168, 26 L. Ed. 377; Paterson, Liberty of Press and Speech Chap. 6.

[25] See the extended opinion in State v. Shepherd, (1903) 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624.

to the revolution, as throwing light upon the question of what was the right which the first amendment of the constitution of the United States declared should not be abridged.

When the colonists first came to this country in the early part of the seventeenth century they brought with them the then prevailing English views as to restrictions upon the freedom of public discussion, which were in no wise lessened in the severe minds of the Puritans of New England or in the royalist policies of the Cavaliers of Virginia. That stout royalist, Governor Berkeley of Virginia, had no intention of permitting the common people to concern themselves with the affairs of government. We find him, in 1671, thanking God "there are no free schools or printing; and I hope we shall not have these hundred years; for learning has brought disobedience, and heresy, and sects into the world, and printing has divulged them, and libels against the best government. God keep us from both."[26] The prohibition of all printing except by license was in full force in Virginia, Massachusetts and New York, and probably in other colonies as well. In 1662 a statute was passed in Massachusetts appointing two licensors of the press and prohibiting the publication of anything whatever not previously approved by these licensors. The laws of Massachusetts were first published in 1649, and those of Virginia in 1682. The unlicensed publisher of the Virginia laws was arrested and held under bond until the pleasure of the King could be made known. The King promptly forbade the further publication of such laws.[27] In fact the requirement of a previous license for publication persisted in Massachusetts more than a score of years longer than in England, having been abolished only in 1719.[28]

The famous Bill of Rights, prepared by George Mason in 1776, for the Virginia constitution, appears to have been the first constitutional document recognizing the existence of the right of free speech and free press. Others of the new states gave recognition in their constitutions to this right, but when in 1787 the federal constitutional convention met, the proposal, made at different times by Mr. Pinckney, that the new constitution should include a guaranty of liberty of the press, received little attention, and was not included in the constitution as finally submitted

[26] See 2 Watson, Constitution 1400.
[27] 1 Hildreth, History of the United States 561.
[28] 4 Harv. Law Rev. 379.

to the states for ratification.[29] The first amendment, in the form in which it was adopted, as is well known, was drawn up by the first Congress at the behest of the legislatures of the several states. Indeed it is worth noting that when the constitutional convention met, it was still strongly affected with the English idea that it was contrary to public welfare that the debates and proceedings should be communicated to the public; hence the convention sat behind closed doors and all its members were enjoined to hold the proceedings secret. Even after the establishment of the new government, the Senate, for several years, refused to open its doors to the public, or allow publication of its debates.[30]

In the light of this brief survey of the development of the so-called common law right of free speech and of free press, what was in the minds of those in Congress who drafted the first amendment, and of the legislatures of the states when they ratified it in these terms: "Congress shall make no law . . . . abridging the freedom of speech or of the press?" Was the right of a free press thus guaranteed merely exemption from the requirement of license previous to publication with such liability for the publication as existed by common law rule or might be imposed by statute; or was it intended by this provision to protect a right not only to publication without license, but also to immunity from prosecutions of the vexatious and oppressive sort that had so outraged the lovers of freedom both in England and in the colonies during the preceding century?

There can be no question but that the prevailing view of the American courts is in accordance with the former construction. Blackstone,[31] writing some twenty years before the adoption of the constitution, said that freedom of the press "consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. . . . To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion and government." Delolme,[32] writing

[29] 2 Watson, Constitution 1401.
[30] Cooley, Constitutional Lim. 515.
[31] 4 Black. Commentaries 151. In Rex v. St. Asaph, 3 T. R. 428, note a (431), Lord Mansfield said: "The liberty of the press consists in printing without any previous license, subject to the consequence of law."
[32] Delolme, Constitutional History of England 287.

at nearly the same time as the sitting of the federal constitutional convention, took exactly the same view of the common law right. In a recent case[33] the Supreme Court of the United States declared that: "The main purpose of such constitutional provisions is to prevent all such previous restraints as had been practiced by other governments, and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." The court then proceeds to the length of saying, unnecessarily, "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."

The state courts have adopted substantially the same point of view in construing both the special provisions of the state constitutions and the first amendment of the federal constitution. It should be noted, however, that while it appears to be generally assumed that the usual working of the provision as found in the state constitutions, which guarantees to every citizen the right freely to speak, write or publish his sentiments, with responsibility for the abuse of such freedom, merely states expressly what is implied in the briefer form of the federal constitution. Yet there are some cases that find a marked difference in meaning. Thus in a recent Louisiana case,[34] a court enjoined the threatened publication of a false list of petitioners because such publication would not be of defendant's "sentiments," which the constitution gave him an inviolable right to publish, but rather of a mere list of names. The distinction impresses one as being painfully mechanical.

There is not wanting, however, authority[35] for the contention that the intention of those adopting the first amendment was to protect the public not merely against the requirement of previous license, but also against unreasonable and oppressive prosecutions in consequence of publication of statements displeasing to those having control of the machinery of government. There can

[33] Patterson v. Colorado, (1907) 205 U. S. 454 (462), 51 L. Ed. 879, 27 S. C. R. 556, 10 Ann. Cas. 689.

[34] Schwartz v. Edrington, (1913) 133 La. 235, 62 So. 660, Ann. Cas. 1915B 1180. In Empire Theatre Co. v. Cloke, (1917) 53 Mont. 183, 163 Pac. 107, L. R. A. 1917E 383 (386), the court said:

"We still think that this second clause of our provision conveys the idea of liberty, unchecked as to what may be published by anything save penalty, and is therefore so material a departure from the meaning given the national provision that the Federal cases have little, if any, significance."

[35] Cooley, Constitutional Lim. 517. See also cases cited in notes 63-66, infra.

be no doubt that the prosecutions in England, as well as in the colonies, for seditious libel were often highly oppressive to a degree that would not be tolerated in England today, and it seems not unreasonable to infer that the constitution makers had that well known fact in mind, and intended to secure for the citizens of the new Union, not only freedom from press censorship, but also the right freely to discuss public affairs, whether in oral speech or in print, with the same degree of immunity that then existed in England as the result of two centuries of struggle against the claim of the King's divine right to govern. The theory adopted by the courts, that the freedom of the press guaranteed is merely freedom from previous license to print, also illogically ignores the freedom of speech, partner in this guaranty with the liberty of the press. The freedom of speech guaranteed cannot have any relation to previous license, wholly unknown in practice. Surely freedom of speech was intended to mean that a citizen's right to express publicly his opinions concerning public men and public events was to be unrestricted save as he might render himself liable to civil action for slander or criminal prosecution for treason or sedition in accordance with then existing common law rules. It seems strange that in the great mass of the litigation involving the construction of such constitutional guaranties none of the courts seem to have considered the inference here suggested from the association of free speech with the free press, or, indeed, to have given the question of the proper construction of the guaranty that degree of careful consideration which its importance and historical interest deserve and invite. This result no doubt is due, in part, to the fact that the cases involving publication of printed matter are so very much more numerous than those concerning public speech that the judicial mind is apt to confine its attention to the liberty of the press.

From many of the decisions it appears that the requirements of the constitutional guaranty are satisfied if the act of publication is left uncensored and the legislature is free to attach such consequences to the publication as it may see fit. Thus according to this view, it may make criminal a publication that would have been perfectly innocent at common law. One might not at common law be guilty of libeling a man long since dead, yet in a recent case[36] in the state of Washington a man was severely punished for publishing an article tending to bring George Washing-

[36] State v. Haffer, (1916) 94 Wash. 136, 162 Pac. 45, L. R. A. 1917C 610.

ton into public contempt although the court took judicial notice of the fact that the first president was long since dead, with no descendants in the state, and this on the scant ground that though the statute created a liability not known to the common law, yet it was perfectly valid since it did not require any previous license. In the same state a statute making it a misdemeanor to encourage disrespect for the law, not a crime at common law these two hundred years past, was held for the same short reason not to deprive the defendant of his right to publish his sentiments freely.[37] It would seem that such decisions are as much out of harmony with the spirit of the common law rule crystallized in the constitutional form as the statutes in question are unwisely meddlesome.

Those statutes which merely render more definite an existing common law rule, or cure a defect in its application, are not obnoxious to the principle just discussed. Examples of such statutes are those making a false charge of unchastity against a woman slanderous per se,[38] or declaring slander a misdemeanor,[39] as libel always has been. Of course those statutes making seditious utterances punishable as crimes, such as the Federal Espionage Act,[40] or the Minnesota Loyalty Act,[41] are unassailable, although one could wish the courts had upheld them on the ground that such utterances were crimes at common law and therefore never within the meaning of the freedom guaranteed by the constitution, and not solely on the thin ground that no preliminary license requirement was imposed. These are but instances under the general rule, universally accepted, that this constitutional provision affords no protection for acts which at common law were crimes.

Neither is it necessary to resort to the mere no license theory to support that large class of cases holding that statutes prohibiting utterances, publications or exhibitions tending to incite breaches of the peace, cause riots and disorder, to corrupt public morals, endanger public safety, or otherwise affect injuriously the public welfare, do not invade the constitutional right of freedom

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[37] State v. Fox, (1912) 71 Wash. 185, 127 Pac. 1111.

[38] See Newell, Libel and Slander, 3rd ed., 178.

[39] Hyde v. State, (1915) 159 Wis. 651, 150 N. W. 965. So the sale of obscene newspapers may be forbidden. State v. McKee, (1900) 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542.

[40] Act June 15, 1917, Chap. 30, Title I, Sec. 3, sustained in United States v. Pierce, (1917) 245 Fed. 878.

[41] Laws of 1917, Chap. 463, sustained in State v. Holm, (Minn. 1918) 166 N. W. 181.

of speech or of the press. Examples of such statutes declared to be valid are those penalizing utterances or publications tending to encourage the commission of crimes,[42] to prevent or hinder enlistment in the military forces of the United States or of the state,[43] the use of profane language under such circumstances as may disturb the public peace,[44] the publication of false and fraudulent advertisements,[45] or of grossly false reports of judicial proceedings,[46] or forbidding the publishing or sale of newspapers devoted to reports and stories of crime and scandal,[47] or the sending of written or printed communications threatening to accuse the recipient of a criminal action or to attack his reputation or credit.[48] In most instances the publications thus prohibited are crimes, so that the prohibiting statutes are valid under the general rule, but even though they be not crimes at common law, as in the case of fraudulent advertisements, they are removed from the protection of the constitutional guaranty because of the paramount implications incident to all proper exercise of the police power. This principle is strikingly illustrated in a statute passed by the Legislature of Minnesota prohibiting any newspaper from publishing any of the details of a legal execution "beyond a statement of the fact that such a convict was on the day in question duly executed according to law." A newspaper, prosecuted for the violation of this statute, set up in defense its constitutional privilege under the provision of the state constitution that "the liberty of the press shall forever remain inviolate." In sustaining the statute, the court said:[49]

"Appellant argues that there are no constitutional limitations upon the liberty of the press, unless the subject matter be blasphemous, obscene, seditious, or scandalous in its character. This is altogether too restricted a view. The principle is the same, whether the subject matter of the publication is distinctly blasphemous, seditious, or scandalous, or of such character as

[42] People v. Most, (1902) 171 N. Y. 423, 64 N. E. 175, 58 L. R. A. 509.

[43] United States v. Pierce, (1917) 245 Fed. 878; State v. Holm, (Minn. 1918) 166 N. W. 181.

[44] State v. Warren, (1893) 113 N. C. 683, 18 S. E. 498.

[45] People v. Apfelbaum, (1911) 251 Ill. 18, 95 N. E. 995; State v. Blair, (1894) 92 Iowa 28, 60 N. W. 496.

[46] State ex rel. Haskell v. Foulds, (1895) 17 Mont. 140, 42 Pac. 285.

[47] State v. McKee, (1900) 73 Conn. 18, 46 Atl. 409, 84 Am. St. Rep. 124, 49 L. R. A. 542; State v. Van Wyl, (1896) 136 Mo. 227, 37 S. W. 938, 58 Am. St. Rep. 627.

[48] State v. McCabe, (1896) 135 Mo. 450, 37 S. W. 123, 58 Am. St. Rep. 589, 34 L. R. A. 127.

[49] State v. Pioneer Press Co., (1907) 100 Minn. 193, 110 N. W. 869, 117 Am. St. Rep. 684, 9 L. R. A. (N. S.) 480, 10 Ann. Cas. 351.

naturally tends to excite the public mind and thus indirectly affect the public good."

The universally recognized rule that the liberty of the press guaranteed by the constitution does not affect the power of the courts to punish for contempts, a power inherent in the courts and coeval with the common law,[50] or afford any immunity for libel or slander,[51] may also be amply supported as an existing common law principle embodied by implication in the constitutional provision and qualifying the right thereby guaranteed.

It is necessary to admit, however, that the courts sustain these statutes and enforce these liabilities for the most part either on the ground that since no previous license is required, the liberty of publication is not violated, or on the general theory that it would be "a libel on the Bill of Rights which guarantees free speech to assert that it was intended to protect any one in such despicable practices."[52]

Certain rather surprising results have followed the application of the rule that the guaranty of free publication absolutely forbids any previous restraint upon publication. It has been held broadly on this ground that no court may enjoin an intended publication of any kind, however serious or irreparable may be the threatened damage. "The purpose of this provision of the constitution was the abolishment of censorship, and for courts to act as censors is directly a violation of that purpose." This statement was made as the reason why the California supreme court annulled an order of the superior court enjoining the advertisement and production of a play, which, the complainant alleged, set forth in an unfair and prejudicial manner the facts relating to an alleged murder for which complainant was then on trial for his life.[53] The court admitted that such theatrical representation would interfere with the administration of justice, and prevent a fair trial, but it thought this wrong-doer absolutely protected by the constitution. It may be added that the English courts have never hesitated to enjoin a publication tending to interfere with any kind of judicial proceedings.[54] The decision seems the more unfortunate

[50] State v. Shepherd, (1903) 177 Mo. 205, 76 S. W. 79, 99 Am. St. Rep. 624; In re Hayes, (1916) 72 Fla. 558, 73 So. 762, L. R. A. 1917D 192.

[51] Cooley, Constitutional Law 302.

[52] State v. McCabe, (1896) 135 Mo. 450, 37 S. W. 123, 58 Am. St. Rep. 589, 34 L. R. A. 127; United States v. Pierce, (1917) 245 Fed. 878.

[53] Dailey v. Superior Court, (1896) 112 Cal. 94, 44 Pac. 438, 53 Am. St. Rep. 160, 32 L. R. A. 273.

[54] See Matthews v. Smith, (1844) 3 Hare 331; Kitcat v. Sharp, (1882) 52 L. J. Ch. 134, 48 L. T. 64; Odgers, Libel and Slander, 5th ed., 539.

in view of the common practice of requiring licenses of all theatres, and the recent decision of the Supreme Court of the United States that moving picture productions are not within the purview of this provision, and therefore fully subject to censorship.[55] Some of the courts have based their refusal to enjoin a libel on the ground that the constitution prohibits interference with a libelous publication.[56] As such action finds ample support in the settled rule of equity that no injunction will issue when the law provides an adequate remedy for the threatened injury, it is to be regretted that the constitutional provision was needlessly lugged in.[57]

For a like reason the Nebraska supreme court refused to enjoin publication of a false statement that the complainant would not be a candidate for a public office which he sought. The court was of opinion that "The exercise of censorship by a court of equity through the writ of injunction is no less objectionable than the exercise of that function by other departments of the government."[58]

The same rigid theory that no previous restraint can be put upon a publication of any kind has been held to render a court powerless to enjoin a boycott, which necessarily involves as its most important feature publication of the strikers' complaints, demands and threats.[59] The Montana supreme court, in refusing to enjoin a boycott, stated that it was "unable to conceive how anyone can possess the right to publish what he pleases, subject only to penalty for abuse, and at the same time be prevented by any court from doing so."[60]

The Supreme Court of the United States, however, has escaped this dilemma by holding, in the celebrated Gompers' contempt

[55] Mutual Film Corp. v. Ohio Industrial Commission, (1915) 236 U. S. 230, 35 S. C. R. 387, 59 L. Ed. 552, Ann. Cas. 1916C 296. See also Commonwealth v. McGann, (1913) 213 Mass. 213, 100 N. E. 355.

[56] Brandreth v. Lance, (1839) 8 Paige Ch. (N. Y.) 24, 24 Am. Dec. 368; Life Ass'n v. Boogher, (1876) 3 Mo. App. 173.

[57] By statute libels may now be enjoined in England. Odgers, Libel and Slander, 5th ed., 426, 428.

[58] Howell v. Bee Pub. Co., (1916) 100 Neb. 39, 158 N. W. 358, L. R. A. 1917A 160.

[59] "The sovereign power has forbidden any instrumentality of the government it has instituted to limit or restrain the right, except by fear of the penalty, civil or criminal, which may wait on abuse. The general assembly can pass no law abridging the freedom of speech or the press. It can only punish the licentious abuse of that freedom." Marx, etc., Clothing Co. v. Watson, (1902) 168 Mo. 133, 67 S. W. 391, 90 Am. St. Rep. 440, 56 L. R. A. 951.

[60] Empire Theater Co. v. Cloke, (1917) 53 Mont. 183, 163 Pac. 107, L. R. A. 1917E 383.

case[61] that freedom of publication was not involved since the publication of the unlawful communications and orders was but an incident of the unlawful conspiracy that was enjoined. In Texas it has been held, seemingly without serious effort on the part of the court, that the defendant in a suit for alienation of a wife's affections may be enjoined from speaking or writing to the wayward wife, in spite of the constitutional guaranty of free speech.[62]

It is respectfully suggested that these injunction cases well illustrate the unfortunate consequences of the construction that liberty of the press means absolute absence of previous restraint of any kind upon publications of any kind. It would seem more reasonable, and far more practicable, to say that the constitutional provision in question prohibits any other previous restraints than those recognized and accepted at the time the constitution was adopted, thus leaving the courts free to exercise their equity powers in accordance with settled principles of justice.

The theory of construction which seems to the writer to rest upon sound principle is that the constitutional guaranty in question was intended not only to abolish forever previous censorship of publications by the government, but also to safeguard the citizen from any larger liability for his uncensored publication, or for his public utterance, than was imposed by the rules of the common law as accepted at the time of the making of the federal constitution. It would necessarily follow from the acceptance of this theory that a statute imposing new and distinct restrictions, not recognized by the common law as known by the makers of the constitution, would be void. This theory finds not a little judicial support, though it is not so articulate as one could wish. Justice Harlan, in the case of *Patterson v. Colorado*,[63] dissenting with his usual vigor, said:

"It [the majority opinion] yet proceeds to say that the main purpose of such constitutional provisions was to prevent all such 'previous restraints' upon publications as had been practised by other governments, but not to prevent the subsequent punishment of such as may be deemed contrary to the public welfare. I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public requires that to be done. The

[61] Gompers v. Bucks Stove & Range Co., (1911) 221 U. S. 418, 31 S. C. R. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

[62] Ex parte Warfield, (1899) 40 Tex. Cr. 413, 50 S. W. 933, 76 Am. St. Rep. 724.

[63] (1907) 205 U. S. 454 (464), 51 L. Ed. 879, 27 S. C. R. 556, 10 Ann. Cas. 689.

public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any state, since the adoption of the 14th amendment, can, by legislative enactments or by judicial action, impair or abridge them."

So, in the often cited case of *Cowan v. Fairbrother*,[64] the court said:

"In its broadest sense, 'freedom of the press' includes not only exemption from censorship, but security against laws enacted by the legislative department of the government, or measures resorted to by either of the other branches for the purpose of stifling just criticism or muzzling public opinion."

Cases holding unconstitutional the so-called "black-listing" statutes, which require an employer discharging an employee to give him a written statement showing the true reason for his discharge, decide in effect that a statute imposing upon the exercise of freedom of speech a penalty unrecognized by common law standards violates the constitutional provision, though it has no relation to any previous restraints on communication.[65] The same thing may be said of those cases which hold void statutes forbidding and penalizing the nomination, endorsement or recommendation of a candidate for office by a convention or political party, making illegal the publication of any report as to fitness or qualifications of candidates for public office unless accompanied by certain information as to sources.[66] These penalties imposed for publication of statements wholly lawful in accordance with common law standards, abridge the liberty of the press.

We are now ready, in conclusion, to apply the principles worked out to the question, so important in times of national excitement, like the present, as to how far the government can go in suppressing utterances deemed to be injurious to the public safety and welfare, disregarding, for the purpose of this discussion, Professor Fletcher's forceful contention[67] that all constitutional guaranties must yield in time of war to the paramount war power given to Congress and to the President by the consti-

[64] (1896) 118 N. C. 406, 24 S. E. 212, 54 Am. St. Rep. 733, 32 L. R. A. 829.

[65] St. Louis, etc., Ry. Co. v. Griffin, (1916) 106 Tex. 477, 121 S. W. 703, L. R. A. 1917B 1108; Wallace v. Georgia, etc., Ry. Co., (1894) 94 Ga. 732, 22 S. E. 579. Such statutes have been held valid as a proper exercise of police power. See Cheek v. Prudential Ins. Co., (Mo. 1917) 192 S. W. 387.

[66] Ex parte Harrison, (1908) 212 Mo. 88, 110 S. W. 709, 126 Am. St. Rep. 557, 16 L. R. A. (N. S.) 950, 15 Ann. Cas. 1.

[67] 2 MINNESOTA LAW REVIEW 110.

tution, as to which we may safely say that the courts will not have recourse to it except as a last resort.

According to the theory that the guaranty of free speech and free press was intended only to banish all previous restraint, it is clear that Congress or the state legislature can declare any sort of utterance which it deems hurtful to the public welfare to be seditious and punishable so long as it imposes no censorship. It could thus penalize not only such statements as were recognized as seditious at common law, but could also make it a crime to speak or write of the president, the Congress or the courts in such terms of criticism as might not be libelous under common law rules, and yet tend to bring the government and its officers and agencies into popular disesteem. A citizen would be perfectly free to publish what he chose and then take such punishment as might be meted out to him, just as he did in the time of George I. It was on this theory that the infamous sedition laws of 1798 were passed, to be used by the then dominant Federalist party largely for the purpose of oppressing and destroying their political opponents. The constitutionality of this law, vigorously denied by the anti-Federalist party, never came to be passed on by the Supreme Court, then in its trembling infancy, but its unpopularity was so great that the party responsible for it was destroyed. The celebrated Kentucky Resolutions declared the law void as contrary to the constitution, and Jefferson, upon coming to the Presidency in 1801, ordered all prosecutions under it dismissed on the express ground that it was unconstitutional.

According to the second theory of construction, Congress cannot, without unlawfully abridging the freedom of the press, pass any law making utterances punishable as seditious unless such utterances would be regarded as seditious and criminal under the rules of the common law as recognized and accepted in 1787. We may state the rule more concisely thus: whatever utterance was punishable at common law in the colonies as a seditious libel immediately before the constitution was adopted could be made punishable by act of Congress immediately after its adoption in spite of the first amendment, but further Congress was prohibited from going. It will be kept in mind that there can be no common law libel against the government of the United States, since crimes cognizable by the federal courts are purely statutory.[68]

[68] Cooley, Constitutional Law 304; United States v. Hudson, (1812) 7 Cranch (U. S.) 32, 3 L. Ed. 259.

There can be no doubt that in early times any censuring comment upon the Sovereign, either house of Parliament, or upon the constitution and laws of England, was indictable. Thus in 1629 a merchant was tried before the Star Chamber for saying that a merchant was more "screwed and wrung" in England than in Turkey, found guilty of sedition, since his utterance tended to cast dishonor upon the King's Government, and severely punished.[69] In other cases of the same time even more trivial statements were made the occasion of inflicting savage penalties, but these tyrannous prosecutions provoked such fierce resentment that prosecution for libel against the government never resumed its violent form after the English Revolution. By the time of the American Revolution this terrible agency of oppression had been so modified as to assume a character thus described by a leading authority on English constitutional law:[70]

"The essence of seditious libel may be said to be its immediate tendency to stir up general discontent to the pitch of illegal courses, that is to say, to induce people to resort to illegal methods other than those provided by the Constitution, in order to redress the evils which press upon their minds. If laws are unjust, the legal method is to petition Parliament to amend them. If a minister is obnoxious, the legal method is to petition the Crown to remove him, and failing that to dismiss at the next opportunity those members of Parliament who support him. Whenever a writing is so framed as to urge strongly the people, and especially the ignorant and turbulent portion of the people, to take some shorter and illegal method, not at a future time, but at once, of attaining the end in view, then it may be said to be a seditious libel."

The same author also defined seditious libel as "any words which tend to incite people immediately to take other than legal courses to alter what the Government has in charge."

As Cooley says,[71] it is doubtful whether the common law rule as to seditious libel ever became a part of the common law of the American states, so unsuited is it to American political conditions. Certainly there could be no common law seditious libel upon the Government of the United States, and the founders of that government evidently had no intention that it should ever be set up by statute in its one-time repressive form. But it is inconceivable that they intended to deprive the government of powers to pre-

[69] Rex v. Chambers, (1629) 3 St. Tr. 373.
[70] Paterson, Liberty of Press and Speech 82.
[71] Constitutional Limitations 526.

serve itself by making seditious utterances criminal offenses. The reasonable inference is that they intended strictly to limit the new government's statutory powers to penalize utterances as seditious, to those which were seditious under the then accepted common law rule, and that any statutory extension of the definition of the crime was forbidden as an abridgment of the right of free discussion of public affairs, everywhere recognized as absolutely essential to the maintenance of a free government. Therefore we conclude that Congress has power to punish as seditious all utterances, whether spoken or written which advise or tend to cause disobedience to the law, or resistance to its officers, or which tend to subvert the government by inducing or encouraging attempts to change or hinder governmental actions or policies by any other methods than those sanctioned by law, or tend to incite riot and disorder or to cause disturbances of the public peace. On the other hand, Congress has no power to abridge the right freely to discuss all public measures, to expose their defects and urge their alteration or repeal by legal methods, to criticise the constitution and the laws and advocate their amendment, and to comment, however severely if only it be fairly, upon the conduct of the officers of the government. Such adverse comment, so long as it does not tend to excite resistance to the law or breach of the peace, though it may be intemperate and unreasonable, and possibly vexatious and even harmful, is not seditious.[72] Fortunately the vagueness of every statement of what constitutes sedition does not cause so much trouble in the trial of the cause as in the wording of the statute, since if the statute be valid and the

[72] Ray, J., in the recent case of United States v. Pierce, (1917) 245 Fed. 878 (888), gives this excellent summary statement of what constitutes sedition:

"Citizens have the right to criticize the existing laws, point out their defects, injustice, and unwisdom, and advocate their amendment or repeal; but they have no constitutional right to counsel, advise, encourage, and solicit resistance to the execution of or refusal to obey them. A political party and its individual members may advocate the repeal of existing laws, their amendment and improvement, and point out defects, and a political party may be formed for this very purpose. However, a so-called political party may not be formed to resist the execution of existing laws claimed to be unwise, unpatriotic, and oppressive, and its members permitted to encourage and advocate resistance to their due execution because of their membership therein. The willful resistance to the execution of a valid law may be made a crime, as may the willful obstruction of its enforcement. Any and all resistance and any and all obstruction to the operation or enforcement of a law may be declared an offense. It is the duty of all persons to obey the law and in lawful ways when called upon by due authority to aid in its enforcement. If this is not true, no government can survive."

indictment sufficient, the issue as to whether the utterances complained of are seditious or not will be determined by the jury according as they think the defendant blamable or not. Thus a sedition law, supported by public sentiment, will be enforceable, while one violating the public sense of justice and freedom will register its unfitness in verdicts of acquittal.

W. R. VANCE.

UNIVERSITY OF MINNESOTA.

WILLS OF SOLDIERS AND SEAMEN

THE right of soldiers to make wills, independent of the formalities required of other persons, was first given by Julius Caesar, after he had acquired both civil and military authority at Rome. Caesar gave this privilege as a temporary grant of favor to his soldiers, but it was adopted and confirmed by his successors and extended by them to the naval service, so that by the time of Trajan it had become a well settled principle of Roman law.[1] The privilege when first granted seems to have been very general, but from time to time limitations and restrictions were placed thereon. The extent of the right in the Justinian law is set out in the Institutes as follows:[2]

"The necessity for the observance of these formalities in the construction of testaments, has been dispensed with by the imperial constitutions, in favor of military persons, on account of their excessive unskilfulness in such matters. For, although they neither employ the legal number of witnesses, nor observe any other requisite solemnity, yet their testament is valid, but only if made while they are on actual service, a proviso introduced by our constitution with good reason. Thus in whatever manner the wishes of a military person are expressed, whether in writing or not, the testament prevails by the mere force of his intention. But during the times when they are not on actual service, and live at their own homes, or elsewhere, they are not permitted to claim this privilege."

This principle of the Roman law of allowing soldiers and seamen to make informal wills has been very generally adopted and has become the law of most civilized nations.[3]

The general policy of the common law of permitting the disposition of personal property by nuncupative will was derived from the civil law at a very early date. By this is not meant that the policy was borrowed from the civil law of military testaments, but from the general principle of that law allowing any person to make a valid oral will in the presence of witnesses.[4] The most

[1] Dig. xxix. 1, 1; xxxvii. 12, 1; Ex parte Thompson, (1856) 4 Brad. (N. Y.) 154; Drummond v. Parish, (1843) 3 Curt. Eccl. Rep. 522.

[2] Inst. lib. 2, tit. 11; Sandars' Institutes, p. 244.

[3] Ex parte Thompson, (1856) 4 Brad. (N. Y.) 154; Drummond v. Parish, (1843) 3 Curt. Eccl. Rep. 522. See also 4 B. R. C. 895 and note.

[4] Prince v. Hazelton, (1822) 20 Johns. (N. Y.) 502, 11 Am. Dec. 307, citing Institutes of Justinian lib. 2, tit. 10, sec. 14.

obvious reason for such in the common law was the widespread illiteracy of the English people. It seems very doubtful if in these early days special privileges were granted to soldiers and seaman as to making wills, for the simple reason that in the existing state of the country, they were unnecessary. Any form of expression, whether made orally to witnesses, in response to questions, by dictation to another, or by an unsigned writing, seemed to have been sufficient so long as the testator's intent was manifest.[5]

With the advance of learning, particularly with the wider diffusion of the art of reading and writing, the reason for this general policy of nuncupation ceased. Oral wills, therefore, gradually fell into disfavor, because of the opportunities for fraud, mistake and consequent injustice attendant upon their publication. The courts, to lessen these evils, attempted to limit the right of making informal wills by requiring proof of necessity. The better opinion indicates that by the time of James I. such wills were invalid unless made in last sickness.[6] It seems very probable that it was while this change was taking place that privileged testaments were allowed to soldiers and seamen, so as to exempt them from the general limitations placed upon nuncupations. How much was borrowed by the ecclesiastical courts at this time, from the civil law of military testaments, is not quite clear. There is good authority, however, for saying that during this period soldiers in actual service were given the privilege of making informal wills independent of any showing of necessity required of other persons.[7] The Statute of Frauds, which came to the assistance of the courts by placing many limitations on the right of nuncupation, bears out this view, in an exception to that act as follows:[8]

"That notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages and personal estate, as he or they might have done before the making of this act."

Whether Parliament borrowed this exception to the statute from the common law as they found it stated in Swinbourne, or

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[5] Hubbard v. Hubbard, (1853) 8 N.Y. 198; Leathers v. Greenacre, (1866) 53 Me. 561; Ex parte Thompson, (1856) 4 Brad. (N.Y.) 154.

[6] Ex parte Thompson, (1856) 4 Brad. (N.Y.) 154; Prince v. Hazelton, (1822) 20 Johns. (N.Y.) 502, 11 Am. Dec. 307.

[7] Drummond v. Parish, (1843) 3 Curt. Eccl. Rep. 522, citing Swinbourne on Wills.

[8] Statute 29 Charles II, c. 3, sec. xxiii.

directly from the Institutes of Justinian, is not a question of very great importance, for all the authorities agree that it is no more than a re-enactment of the civil law.[9]

By the Wills Act[10] nuncupative wills were abolished in England, but the exception in favor of soldiers and seamen was preserved in almost the identical words of the Statute of Frauds.[11]

Most of the American states, whether they have followed the Statute of Frauds and allowed nuncupative wills generally, but under certain limitations, or have followed the Wills Act, and abolished them generally, have retained the exception in favor of soldiers and seamen. In most of such states soldiers and seamen are allowed to make wills of personalty, "as before," "without regard to this title," or "as at common law." In a few of such states they must be in extremis before the privilege is allowed. In Louisiana the common law has not been followed, but soldiers and seamen are privileged to make informal wills under an enactment similar to the French Civil Code. In practically all other states, that is those not granting the special privilege, nuncupative wills may be made, under certain restrictions, by any competent person.[12]

Thus it is clear that the law as to wills of soldiers in actual service and seamen at sea, in England and a majority of the United States, is left untouched by statute and is to be determined by the rules of the common law as borrowed from the law of Rome.[13] The underlying reason for the preservation of this privilege is well stated in a New York case:[14]

"The imminent dangers, the diseases, disasters, and sudden death, which constantly beset soldiers and sailors; the utter inability, oftentimes, to find the time or the means to make a deliberate and written testamentary disposition of their effects, seem, at all times, to have made them a proper exception to the operation of a rule, which the wisdom of later times has found it expedient, if not absolutely obligatory, to apply to all others."

In most of the cases where the courts have been called upon to determine the validity of the will of a soldier or seaman, the

[9] Hubbard v. Hubbard, (1853) 8 N. Y. 198; Drummond v. Parish, (1843) 3 Curt. Eccl. Rep. 522.

[10] Statute 7 Wm. IV & 1 Vict. c. 26, sec. xi.

[11] See note 8, supra.

[12] 1 Stimson, American Statute Law, Art. 270.

[13] Hubbard v. Hubbard, (1853) 8 N. Y. 198; Leathers v. Greenacre, (1866) 53 Me. 561.

[14] Hubbard v. Hubbard, (1851) 12 Barb. (N. Y.) 148 (155), affirmed in 8 N. Y. 198.

problem has generally been, to decide who, within the meaning of the statute, constitute the privileged classes.

The term "soldier," as used in the statutes, has been held to include any person in military service of any rank from private to general,[15] and the fact that the person is a minor makes no difference.[16]

The term "mariner or seaman" had been held to apply to all persons in the maritime service, from a common seaman to an admiral or captain, and to include not only those in government service, but merchant seamen as well.[17] There is some conflict, however, as to whether or not, one, who although a seaman and at sea, must be in actual service as such, to be entitled to make a seaman's will. In a Rhode Island case, where the testator, although a mariner by profession, was at the time of making his will a passenger, the court said:[18] "The meaning of these words is a seaman employed as such at sea."

On the contrary, in an English case it was held that a naval officer was a seaman within the meaning of the Wills Act, although at the time of making his will he was a passenger on the vessel.[19]

The courts are not entirely agreed as to the meaning of the phrase "actual military service." This question was raised for the first time in the ecclesiastical court, in the case of *Drummond v. Parish.* In this case Sir Herbert Jenner Fust, in an elaborate and exhaustive opinion, shows that the privilege of nuncupation as first given to the Roman soldiers was without any qualifications, but that by the time of Justinian it was limited to soldiers "cum in expeditionibus occupati sunt," which is translated as "while engaged in an expedition." The court then points out that all of the authorities have used the term "in expeditione" translated as "on an expedition" as being synonymous with the phrase "actual military service," and thus he concludes:[20]

"Being of the opinion from the result of the investigation of the authorities, that the principle of the exemption, contained in the 11th section of the [Wills] Act, was adopted from the Roman

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[15] Woerner, American Law of Administration, Sec. 84 and cases cited.
[16] Goods of Hiscock, [1901] P. 78, 84 L. T. N. S. 61, 70 L. J. P. N. S. 22, 17 T. L. R. 110.
[17] Ex parte Thompson, (1856) 4 Brad. (N. Y.) 154.
[18] Warren v. Harding, (1852) 2 R. I. 133 (138).
[19] Goods of Saunders, (1865) L. R. 1 P. & D. 16, 35 L. J. P. N. S. 26, 13 L. T. N. S. 411, 14 W. R. 148, 11 Jur. N. S. 1027.
[20] Drummond v. Parish, (1843) 3 Curt. Eccl. Rep. 522 (542).

law: I think it was adopted with the limitations to which I have adverted, and that, by the insertion of the words 'actual military service,' the privilege, as respects the British soldier, is confined to those who are 'on an expedition.' "

This decision, even if correct, does not settle the question of interpretation, but merely shifts the burden on the courts to determine in each case, what constitutes "an expedition."

The American courts, where the question has come before them in cases arising out of the Civil War, have adopted this construction of the ecclesiastical courts. In the case of *Gould v. Safford,* decided in 1866, the supreme court of Vermont, in referring to *Drummond v. Parish,* said:[21]

"We are entirely satisfied with this interpretation of the statute, but what shall be considered an expedition is, in some measure a question of fact, depending upon the circumstances of the particular case."

The court in that case held that the testator was on an expedition, and therefore in actual military service, when the body of troops, of which his regiment was a part, was moving to repel an invasion of Maryland, although the testator himself was seriously ill at the time in a field hospital.

The question was before the Vermont court the same year in the case of *Van Deuzer v. Gordon.*[22] In that case the testator had enlisted, been mustered into service and was stationed at a training camp in Massachusetts, expecting to go to the front as soon as his regiment was complete. While at this training camp he made an informal will. Two months later his regiment was ordered to North Carolina where it engaged in actual military operations for some months. While in North Carolina the testator wrote a letter explaining and confirming his informal will. The court was of opinion that while the testator was stationed at the training camp in Massachusetts he was not privileged to make a soldier's will and explained its view, in part, as follows:[23]

"The term service in its restricted sense is the exercise of military functions in the enemy's country in the time of war, or the exercise of military functions in the soldier's own state or country in time of insurrection or invasion, and in this sense the words of the statute, 'actual military service' should be understood."

In explaining its view that the testator was in actual military service while in North Carolina, the court said:[24]

[21] Gould v. Safford, (1866) 39 Vt. 498 (505).
[22] (1866) 39 Vt. 111.
[23] Ibid., p. 118.
[24] Ibid., p. 119.

"Nor is it essential to the validity of a soldier's will that it should be made or executed in the face of the enemy, or while the army is preparing for an immediate engagement, for, at such a time, from the very nature of the circumstances, the engagement must be delayed to give opportunity for soldiers to make their wills, if they desire to make them, or they must be deprived of the conditions of the statute. When a soldier is in the enemy's country, whether in camp, in campaign or in battle, such service is actual military service within the letter and spirit of the statute."

In a Maine case, also decided in 1866, and upon a state of facts very similar to those in the case last cited, the supreme court of that state held that the phrases "engaged in an expedition" and "in actual service" were synonymous. It was said in substance, that if the testator had made his will after being mustered into the service, but while he remained in a training camp in a loyal state not exposed to the incursions of the enemy, and before he had actually crossed over into the enemy's territory and under military orders had begun to move against the foe, that such will would not be entitled to probate as the will of a soldier. But since the testator was actually in the enemy's country, although at the time of making the alleged will was encamped in winter quarters, he was in "actual military service" or "engaged in an expedition," within the meaning of the Maine statute.[25]

In an Indiana case, decided in 1874, the supreme court of that state cited with approval the interpretation of the term "actual military service" as laid down in the Maine and Vermont cases. The testator in that case was denied the privilege of making a soldier's will, although he had responded to a call for volunteers to repel an invasion of the state by Confederate troops and was on the verge of leaving for the front when the alleged will was made, the court holding that since he had not yet been formally mustered into service he was not "a soldier" nor "in actual service" within the meaning of the statute.[26]

Thus it appears that the American courts, when they have been called upon to interpret the phrase, "actual military service," within the meaning of their respective statutes, have accepted the explanation of the ecclesiastical courts that this phrase is synonymous with "engaged in an expedition," and have proceeded to define the meaning of this latter expression, without once reverting to the civil law to determine for themselvs the true

[25] Leathers v. Greenacre, (1866) 53 Me. 561.
[26] Pierce v. Pierce, (1874) 46 Ind. 86.

significance in that law of the original Latin phrase, "in expeditione." The result of the decisions in this country have very naturally been to limit the privilege of making soldier's wills to those, who, in time of war out of the country, are actually in the enemy's territory with the fighting forces, or those who, in time of a war of invasion are in the invaded section resisting the incursions of the enemy.

A decidedly more liberal interpretation of the phrase "actual military service" is observable in the later English cases, particularly in those arising out of the Boer War. As early as 1865 it was held that an officer, in command of a detachment about to march from a point in Africa against a native tribe, was entitled to make a soldier's will, even before he left the English settlement.[27]

In the *Goods of Hiscock*,[28] decided in 1901, it was held that where a volunteer had gone into barracks during the Boer War, as a first step towards joining the field forces, he was in actual service. It was there said that the test whether a soldier is "in actual military service" for the purpose of the Wills Act, is whether or not he has, under an order for mobilization, taken some step, however small, towards joining the forces in the field. In explanation of this view the court said:[29]

"The step may be a small one, both as regards place and time. In case of invasion or civil war—both circumstances which were more present to the minds of the persons who framed the laws of this country in the time of Charles II, than they are to the legislators of our own time—the step might be merely that a man was taken from his home to man the walls of defences of his own native town. In the case of invasion, I should imagine, for instance, that a man living at Dover, and who was called upon to go into the fortifications at Dover and to assist in the defense, would have been within the meaning of the term 'in expeditione' or 'actual military service,' although the movement made or step taken by him would be small both in point of time and locality or distance."

The same judge, a year later in the case of *Gattwood v. Knee*, in deciding that a soldier in barracks in India was "in actual mili-

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[27] Thorne's Goods, (1865) 4 Swab. & Tr. 36, 34 L. J. P. N. S. 131, 11 Jur. N. S. 569, 12 L. T. N. S. 639.

[28] Hiscock's Goods, [1901] P. 78, 84 L. T. N. S. 61, 70 L. J. N. S. 22, 17 T. L. R. 110.

[29] Ibid., p. 83.

tary service," after the order for mobilization for the Boer War had been given, said:[30]

"Then comes the question, Is it a soldier's will within the meaning of the wills act? Upon the whole, I am of the opinion that it is. In so holding I am perhaps going a step further than in my recent decision,—In the *Goods of Hiscock,*—but I have no doubt myself that mobilization, giving to that word the effect which I understand it to carry, may fairly be taken as a commencement of that which in the Roman law was expressed by the words, in expeditione. These words meant something more than the English words, 'on an expedition,' because it is quite clear that when a force begins in a sense to engage in or to enter upon active service, it would be said to be in expeditione. I thought, when deciding the case cited, and still think, that it is a fair test to ask whether or not the person whose testamentary dispositions are in question has done anything; but I am of the opinion that if the order for mobilization has been received, although the man himself may have done nothing under it, yet that so alters his position as practically to place him in expeditione. Such an order goes beyond a mere warning. I do not think that a mere warning for active service would be sufficient; but when a force is mobilized I understand this to be that it is placed under military orders with a view to some step being taken forthwith for active service."

Following the test laid down in the *Goods of Hiscock* and its further extension in *Gattwood v. Knee,* the English courts have in cases arising out of the Boer War, held that soldiers were in "actual military service" in the following situations: a sergeant stationed at Woolwich, under orders to report to a regiment about to sail to South Africa in anticipation of the war;[31] in barracks on the day of sailing for South Africa after the war had started;[32] on a vessel sailing for Africa during the war.[33]

Once it is made clear that a testator is actually engaged in an expedition, whether that term is given the meaning fixed by the ecclesiastical and American courts, or the more liberal view of the modern English cases, the privilege exists until the expedition is at an end. In a recent case it was held, that an officer who at the conclusion of a military campaign against a native tribe on the frontier of India, remained as a member of the mili-

[30] Gattward v. Knee, [1902] P. 99, 86 L. T. N. S. 119, 18 T. L. R. 163, 71 L. J. P. N. S. 34, 4 B. R. C. 895.

[31] Gordon's Goods, (1905) 21 T. L. R. 653.

[32] Stopford v. Stopford, (1903) 19 T. L. R. 185. Contra, Bowles v. Jackson, (1854) 1 Spinks Eccl. & Adm. 294.

[33] Cory's Goods, (1901) 84 L. T. N. S. 270; May v. May, [1902] p. 99 (103), 86 L. T. N. S. 119, 71 L. J. P. N. S. 34, 18 T. L. R. 184.

tary escort of a party engaged in the delimitation of the frontier, was engaged in actual service and entitled to make a soldier's will.[34] But a soldier home on a furlough is not entitled to the privilege.[35]

The right of a mariner or seaman to make an informal will under the statute is made to depend upon the further condition of being "at sea." The courts have generally construed these words with considerable liberality. In a New York case,[36] however, the court followed the old English rule for determining navagability and held that the commandant of a gunboat operating on the Mississippi river, above the ebb and flow of the tide, was not "at sea" within the meaning of the statute of that state, and consequently not entitled to make a seaman's will. This case has met with justly deserved criticism. In Gardner on Wills, it is said:[37]

"A vessel may certainly be said to be at sea when she is on her way to her destination, regardless of whether or not there is a daily variation in the depth of the waters which she is traversing. If so, a seaman on board can make a valid nuncupative will. To hold to the ancient doctrine is to hold that a sailor on the Great Lakes cannot, when overtaken by sudden danger, make an oral will, although the reasons for sustaining a will thus made are as strong in his case as in that of his fellow on the Atlantic. If this doctrine applies, it follows that a seaman on a vessel bound from Montreal to Liverpool can make a nuncupative will when the ship has reached Three Rivers, where the influence of the tide is felt, but cannot do so between that point and Montreal,—a palpable absurdity."

Most courts would probably agree that a vessel may be considered "at sea" when she has left her wharf and is on her way to her destination, regardless of whether or not she is traversing tidal or non-tidal waters, even though she be detained in a river, harbor, or arm of the sea.[38] Some courts have gone farther and said that a sailor or mariner is "at sea" before his vessel leaves

[34] In re Limond, [1915] 2 Ch. 240, 84 L. J. Ch. 833, Ann Cas. 1916A 479.

[35] In re Smith's Will, (1865) 6 Phila. 104, 22 Leg. Int. 68.

A nurse, employed under contract by the War Office on hospital ships, after receiving orders to re-embark for duty, and before re-embarking, wrote a letter to her niece disposing of her personal property. It was held valid as a soldier's will. Estate of Stanley, [1916] P. 192, 114 L. T. 1182, 32 T. L. R. 643.

[36] Gwin's Will, (1865) 1 Tucker (N. Y.) 44.

[37] Gardner, Wills 63.

[38] Warren v. Harding, (1852) 2 R. I. 133; Patterson's Goods, (1898) 79 L. T. N. S. 123; Milligan's Goods, (1849) 2 Rob. Eccl. Rep. 108; Hubbard v. Hubbard, (1853) 8 N. Y. 198; Austen's Goods, (1853) 2 Rob. Eccl. Rep. 611.

the wharf.[39] And in one instance a mariner on board a naval vessel was held to be within the statute, although his vessel was at the time lying in port with no immediate intention of sailing.[40]

In one case it was said: "A mariner on shore has no rights in making a will of his personalty superior to those of any other person.[41] In the light of other decisions this statement needs some qualification. It is very apparent that the legislators did not intend to grant the privilege of nuncupation to all seamen under all conditions or circumstances, but only while "at sea," and it has accordingly been held that the privilege cannot be exercised on shore, although the testator may be contemplating an immediate voyage,[42] but it has been held that a voyage once begun, a seaman in continuous service, may make an oral will while ashore at an intermediate port.[43]

In those jurisdictions where soldiers and seamen are, by express reservation in the statutes, allowed the privilege of nuncupation, it has generally been held that the members of the privileged class do not have to be in extremis to make a valid oral will.[44] In a recent case it was said:[45]

"The fear of death which was supplied by sickness in case of those who made oral wills at home was sufficiently furnished, in the case of sailors or soldiers, by the perils of the sea or the presence of the enemy."

The statutes of Montana, North Dakota, and Oklahoma,[46] however, provide that:

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[39] Ex parte Thompson, (1856) 4 Brad. (N. Y.) 154; Rae's Goods, (1891) Ir. L. R. 27 Eq. 116.

[40] M'Murdo's Goods, (1868) L. R. 1 P. & D. 540, 37 L. J. P. N. S. 14, 17 L. T. N. S. 393, 16 W. R. 283.

[41] Gwin's Will, (1865) 1 Tucker (N. Y.) 44.

[42] Goods of Henry Corby, (1854) 1 Spinks Eccl. & Adm. 292.

A woman for several years employed by the Cunard Company as a typist on one or other of its steamships, who made her nuncupative will while at her lodgings in Liverpool, in contemplation of sailing on the Lusitania on the voyage during which the ship was sunk, was held to be a "mariner or seaman;" she was also held to have been "at sea" within the meaning of the Wills Act, at the time of making her will. Goods of Sarah Hale, [1915] 2 I. R. 362.

[43] Parker's Goods, (1859) 2 Swab. & Tr. 375, 28 L. J. P. N. S. 91, 5 Jur. N. S. 553; Lay's Goods, (1840) 2 Curt. Eccl. Rep. 375.

[44] Leathers v. Greenacre, (1866) 53 Me. 561; Van Deuzer v. Gordon, (1866) 39 Vt. 111; Ex parte Thompson, (1856) 4 Brad. (N. Y.) 154; In re O'Connor's Will, (1909) 65 Misc. Rep. 403, 121 N. Y. Supp. 903; Botsford v. Krake, (1866) 1 Abb. Pr. N. S. (N. Y.) 112.

[45] In re O'Connor's Will, (1909) 65 Misc. Rep. 403, 121 N. Y. Supp. 903.

[46] N. D. Compiled Laws 1913 Sec. 5645; Okla. Rev. Laws 1910 Sec. 8343; Ray v. Wiley, (1902) 11 Okla. 720, 69 Pac. 809; Mont. Rev. Codes 1907 Sec. 4738.

The Minnesota statute (Minn. G. S. 1913) provides:

"The decedent must at the time have been in actual military service in the field, doing duty on shipboard at sea, and in either case in actual contemplation, fear or peril of death, or the decedent must have been at the time in expectation of immediate death from an injury received the same day."

In other states where soldiers are not specially privileged, but where nuncupative wills are allowed, it is held by the weight of authority that the testator must be in extremis to make a valid oral will.[47]

By the words of the statutes only personal property may be bequeathed by the will of a soldier or sailor, and this is the rule generally prevailing as to all nuncupative wills.[48]

It was provided by the Justinian law that if a soldier made a will while in actual service such a will would hold good for one year after he left the service.[49] This rule seems not to have been enforced in England and the United States. It was recently held in a New York case that a will of a seaman remained effective, although the testator recovered from the illness prompting making of the will and died on shore.[50] In England it has been held that a will make by the testator in actual military service remained effective although the testator had returned to England and lived there for several years before his death.[51]

The form of expression of the testamentary disposition of a soldier or sailor has never been considered very material. Justinian said:[52]

Sec. 7252. "Nuncupative wills shall not be valid unless made by a soldier in actual service or by a mariner at sea, and then only as to personal estate."

Sec. 7282. "Nuncupative wills, at any time within six months after the testamentary words are spoken by the decedent, may be admitted to probate on petition and notice, as provided for in case of other wills. The petition shall allege that the testamentary words, or the substance thereof, were reduced to writing within thirty days after they were spoken, which writing shall accompany the petition. No such will shall be admitted to probate except upon the evidence of at least two credible and disinterested witnesses."

The Wisconsin Statute 1915 Secs. 2292 and 2293 regarding nuncupative wills contain the following proviso:

"Nothing herein contained shall prevent any soldier being in actual service nor any mariner being on shipboard from disposing of his wages and other personal estate by a nuncupative will."

[47] Prince v. Hazelton, (1822) 20 Johns. (N. Y.) 502, 11 Am. Dec. 307; see also 40 Cyc. 1134.

[48] Pierce v. Pierce, (1874) 46 Ind. 86; see also L. R. A. 1916E 1132 note.

[49] Institutes, lib. 2, tit. 11, sec. 3.

[50] In re O'Connor's Will, (1909) 65 Misc. Rep. 403, 121 N. Y. Supp. 903.

[51] In Goods of Leese, (1852) 17 Jur. 216.

[52] Institutes, lib. 2, tit. 11.

"Thus in whatever manner the wishes of a military person are expressed, whether in writing or not, the testament prevails by the mere force of his intention."

Blackstone is authority for the statement that under the civil law if a soldier wrote anything in blood on his shield or in the dust of the battle field with his sword, it was a good military testament, but he adds that the common law is not so liberal.[53] Swinbourne says, however, that:[54]

"As for any precise form of words, none is required, neither is it material whether the testator speak properly or improperly, so that his meaning appears."

This statement, though made three hundred years ago, seems to be the law today. All that the courts require, is that there be proof of the testator's wishes, however they may have been expressed, and proof of testamentary intent at the time of the declaration. It has accordingly been held that a seaman's will is good though made orally,[55] and in response to interrogatories.[56] And that an expression of testamentary desire and intent of a soldier or seaman contained in a written statement,[57] or letter,[58] may constitute a valid will, even though a large portion of such letter is not testamentary,[59] or the writer therein expresses an intention of making a formal will.[60] In one case, on the authority of the civil law, it was held that a document not effective as a soldier's will because not made in actual service, became such where it was recognized and confirmed by the testator in a letter written by him while in actual service.[61] In a recent English case, a declaration made by a soldier in actual service at the instance of the military authorities, to the effect that, "in the event of my death in South Africa, I desire all of my effects to be credited to my sister," naming her, was held entitled to probate as a will.[62]

In the construction of the wills of soldiers and sailors, although a few cases have arisen, most of which concern expressions of the

[53] 1 Blackstone, Commentaries 417.

[54] 2 Swinbourne, Wills 643.

[55] Ex parte Thompson, (1856) 4 Brad. (N. Y.) 154; In re O'Connor's Will, (1909) 65 Misc. Rep. 403, 121 N. Y. Supp. 903.

[56] Hubbard v. Hubbard, (1853) 8 N. Y. 198.

[57] In re Limond, [1915] 2 Ch. 240, 84 L. J. Ch. 833, Ann. Cas. 1916A 479.

[58] Leathers v. Greenacre, (1866) 53 Me. 561; Gould v. Safford, (1866) 39 Vt. 498; Gattward v. Knee, [1902] p. 99, 86 L. T. N. S. 119, 18 T. L. R. 163, 71 L. J. P. N. S. 34, 4 B. R. C. 895; Anderson v. Pryor, (1848) 10 Sm. & M. (Miss.) 620.

[59] Parker's Goods, (1859) 2 Swab. & Tr. 375, 28 L. J. P. N. S. 91, 5 Jur. N. S. 553; Rea's Goods, (1891) Ir. L. R. 27 Eq. 116.

[60] May v. May, [1902] P. 99 (103), 86 L. T. N. S. 119, 71 L. J. P. N. S. 34, 18 T. L. R. 184; Herbert v. Herbert, (1855) Deane & Sw. Eccl. Rep. 10.

[61] Van Deuzer v. Gordon, (1866) 39 Vt. 111.

[62] Scott's Goods, [1903] P. 243, 73 L. J. P. N. S. 17, 89 L. T. N. S. 588.

testator relating to approaching death, yet there appears to be no principle that is not pertinent to the construction of ordinary wills.[63]

Although the policy of permitting soldiers to make informal wills originated in the civil law nearly two thousand years ago and has by direct or indirect influence of that law become a fixed principle in most civilized countries, there has never been a time in the world's history when so many men were entitled to the privilege as now. In the United States very few cases upon this subject have reached the higher courts. But with a proposed army for the present war to be numbered by millions, it seems very likely that many soldiers will exercise their privilege of nuncupation and that some litigation will follow.

As the law now stands there is really but one question on this subject about which the courts are not agreed. That question can be generally put as follows: At what stage in the career of an American soldier, from the time he is called from private life until he stands in the front line trenches on the battlefields of Europe can it be said that he is in actual military service, within the meaning of the English and American statutes? By the rule of the American decisions it is not till he is "in the enemy's country, performing military service, whether in camp, campaign or battle." If our courts attempt to follow this rule in the future they are sure to meet with much difficulty in applying it to the conditions of modern warfare, and to a war like the present. Many questions suggest themselves, for example, what is the "enemy's country?" If the battlefields of Europe, then what of the American soldier who crosses a sea infested with enemy submarines? If the sea is the "enemy's country" where on the sea can a soldier make a valid oral will? The rule laid down by the recent English cases that actual military service is begun when the order for mobilization has been given, that is, when the soldier is "placed under military orders with a view to some step being taken forthwith for active service," is one which seems founded on best reason, easiest of application, and most likely under all circumstances to do justice.

W. L. SUMMERS.

UNIVERSITY OF FLORIDA.

[63] Gattward v. Knee, [1902] P. 99, 71 L. J. P. N. S. 34, 86 L. T. N. S. 119, 18 T. L. R. 163, 4 B. R. C. 895; In Goods of Spratt, [1897] P. 28, 66 L. J. P. N. S. 25, 75 L. T. N. S. 518, 45 W. R. 159; Goods of Robinson, (1870) L. R. 2 P. & D. 171, 40 L. J. P. N. S. 16, 23 L. T. N. S. 397, 19 W. R. 135; Scott's Goods, [1903] P. 243, 73 L. J. P. N. S. 17, 89 L. T. N. S. 588.

GROSS AND NET INHERITANCE TAX VALUES

THE states have the absolute right to declare what disposition shall be made of the property of deceased persons. A sovereign state may escheat all of the property of a decedent subject to his debts.

The privilege of taking property by will or inheritance is not a natural right. Wisconsin is the only state which has questioned this doctrine.[1]

States granting succession privileges may tax the same. A legacy becomes the property of the beneficiary only after it has suffered a diminution to the amount of the tax.[2] The payment of the tax is a condition imposed. Upon complying with such condition, the state assents to the transfer.

While the state has the paramount right to regulate successions, the Federal government may, if it does not interfere with the exercised rights of the state, exact an inheritance tax from the beneficiaries.[3]

The tax is on the transfer and not upon the property but the full and true value in money of the property passing[4] is the measure by which the tax is computed. In Minnesota, the taxes imposed take effect upon the death of the person from whom the transfer is made.[5] The value as of the date of death governs and the same is not affected by subsequent appreciation or depreciation.[6]

The difficulty, if any, in ascertaining the full and true value in money is occasioned by the character of the property involved. As to real estate, the assessor's full and true value for ordinary taxation purposes is not controlling.[7] The rules employed in courts of general jurisdiction to ascertain land values govern. If the land is encumbered, the amount of mortgage or other liens

[1] Nunnemacher v. State, (1906) 129 Wis. 190, 108 N. W. 627, 9 L. R. A. (N.S.) 121.

[2] United States v. Perkins, (1896) 163 U. S. 625, 41 L. Ed. 287, 16 S. C. R. 1073.

[3] Knowlton v. Moore, (1900) 178 U. S. 41, 44 L. Ed. 969, 20 S. C. R. 747.

[4] Minn. G. S. 1913 Sec. 2272.

[5] Minn. G. S. 1913 Sec. 2273.

[6] Matter of Penfold, (1915) 216 N. Y. 163, 110 N. E. 497, Ann. Cas. 1916A 783 and note.

[7] In re Estate of McGhee v. State, (1898) 105 Iowa 9, 74 N. W. 695.

should be deducted in arriving at the value of the decedent's interest therein.

Bonds listed on exchanges fix their own value to be the quoted sale price plus accrued interest. If such securities are not listed, then the value of the security given, the term of the bond and the rate of interest, together with the prescribed time for payment thereof, furnish the data from which is calculated the value as of any given date. The value of listed stocks is ordinarily determined by the record of sales on the stock exchange. If, however, an estate holds large blocks of stock, which, if all offered for sale at once, might depress the market, then it is proper to take the average price for a reasonable period.

In *Walker v. People*,[8] the court said:

"'Fair market value' has never been construed to mean the selling price of property at a forced or involuntary sale. In Peoria Gaslight Co. v. Peoria Terminal Railway Co. 146 Ill. 372, it was said (p. 377): 'The theory, upon which evidence of sales of other similar property in the neighborhood at about the same time is held to be admissible, is that it tends to show the fair market value of the property sought to be condemned. . . . But it seems very clear that, to have that tendency, they must have been made under circumstances where they are not compulsory, and where the vendor is not compelled to sell at all events, but is at liberty to invite competition among those desiring to become purchasers.'"

"The very fact, that the market would be depressed by forcing large blocks of stock upon it, and forcing such large blocks of stock to sale, indicates that such a sale is not a proper test of the fair cash value of the stock."

. . .

"The quotations of the stock exchange may be temporarily uncertain and untrustworthy, if the sales thereon are suddenly affected for speculative purposes, or by the forcing upon the market and to sale of large blocks of stock in an extraordinary manner with no explanation of such action, and where the purpose of it is left to the conjecture of those dealing in the stocks; but such quotations may be a fair and safe guide where they are taken for a reasonable period of sales made in the usual and ordinary course of business."

In the *Estate of Jay Gould, deceased*,[9] the court said:

"It is claimed, however, that the rule should be so construed that, when the value of large blocks of stock is involved, only the

[8] (1901) 192 Ill. 106 (110) (112), 61 N. E. 489.

[9] (1897) 19 App. Div. 352, 46 N. Y. Supp. 506, modified 156 N. Y. 423, 51 N. E. 287.

purchase and sale in markets of correspondingly large blocks of stock should be considered, upon the theory that such large blocks would necessarily sell at lower rates than small quantities of stock sold separately, and that throwing large blocks of stock upon the market all at once would have a tendency to produce a break in the market, and perhaps a total inability to get more. . . . . Under the construction contended for, the securities involved in this proceeding might have been shown to be of little or no value, by considering that forcing them upon the market in large blocks at one time would break the market, and make them practically unsalable at all."

In *People v. Coleman*,[10] it was said:

"So the market value of the shares of capital stock may sometimes be above and sometimes below the actual value. Such value may be greatly enhanced or depressed for speculative purposes without any change in the actual value. But the market value of any stock which is listed at the stock exchange in New York, and largely dealt in from day to day for a series of months will usually furnish the best measure of value for all purposes. The competition of sellers and buyers, most of them careful and vigilant to take account of everything affecting value of stock in which they deal, and each mindful of his own interests, and seeking for some personal gain and advantage, will almost universally, if time sufficient be taken, furnish the true measure of the actual value of stock."

In appraising the value of unlisted stocks, great difficulty is often experienced. Such stocks may be in a corporation which owns a large amount of property and has numerous stockholders or it may be in a corporation, the stock of which is closely held, or it may be in a family holding company.

In Re Chappell's Estate[11] presents a case where the decedent owned 3,219 shares of stock in the National Casket Company. There were 4,350 shares of the par value of $100 each issued and outstanding. The company paid a 5% dividend and the book value of the stock was $140 per share. In this case the court said:

"The true rule for appraising property of this kind is its actual market value. The fact that there was not a ready market for a large amount of the stock has a direct bearing. The amount of the stock, the market for it, and whether a large block could be sold are elements to be considered in fixing its value."

In *State v. Pabst*,[12] Mr. Justice Siebecker said:

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[10] (1887) 107 N. Y. 541 (544), 14 N. E. 431.
[11] (1912) 136 N. Y. Supp. 271.
[12] (1909) 139 Wis. 561 (594), 121 N. W. 351.

"On the various occasions when he secured stock for the corporation or when there were dealings between members of the family, the decedent had dealt with this stock on the basis of its book value. The transfers shown were apparently made in reliance on the book value. The evidence adduced showed the dividends declared and paid for the years from 1896 to 1904, inclusive, and the value of the corporation's assets from 1896 to 1906, inclusive, exclusive of the good will of the business. . . . The facts and circumstances regarding the business of the corporation and its properties, the progress, growth, and general financial results, furnish a basis for valuation."

In *Re Brandreth's Estate,*[13] the value of shares of stock in the Porous Plaster Company was brought before the court. The business of the company was that of compounding or manufacturing pills and plasters under three secret recipes. The corporation for more than 17 years earned and paid from 48 to 60 per cent. In this case, the court said:

"It goes without saying that property of this kind is not susceptible of a market value, and its value cannot be determined by ordinary expert testimony. . . . While the earning power of a corporation is not proof of the value of its property, nevertheless it is competent evidence of value, and is a feature to be considered in determining the valuation to be placed upon the stock for the purposes of taxation. . . . Where it is impossible to ascertain a market value of the stock of a corporation by reason of the fact that there is none, the state does not thereby lose the tax upon the transfer. Under such circumstances, the actual value will be presumed to be the market value until the contrary is shown. . . .

In *Re Smith's Estate,*[14] the decedent owned stock in a newly organized industrial corporation which had paid an 8% dividend in the first year of its operation. About the time of decedent's death, an officer of the company sold stock of the par value of $100,000 for $50,000, which amount he considered was a fair value. In this case, the court held that in the absence of evidence other than the amount of the first dividend paid, the sale price was controlling.

Often in arriving at the value of unlisted stocks good will is an important factor. It may be a very valuable asset but no hard and fast rule could be laid down whereby the value of the same may be ascertained. One of the most recent cases involving the value of good will is *In Re Moore's Estate,*[15] wherein was con-

[13] (1899) 28 Misc. Rep. 468, 59 N. Y. Supp. 1092 (1096), (reversed but upon different grounds 58 App. Div. 575, 69 N. Y. Supp. 142.)
[14] (1902) 71 App. Div. 602, 76 N. Y. Supp. 185.
[15] (1916) 97 Misc. Rep. 238 (240), 161 N. Y. Supp. 142.

sidered the value of good will in "Tiffany & Company." Judge Fowler, writing the opinion said:

"The appraiser ascertained the value of the good will by deducting interest at the rate of six per cent per annum on the capital employed by the company in its business from the average annual net profits in its business from the average annual net profits of the business and multiplying the difference by ten. This gave the value of the good will as $1,507,922.40. No exception was taken to the amount which the appraiser adopted as the average annual net profits, but it is contended that the value of the good will should be ascertained by multiplying the average net profits by three or five instead of ten, the latter being the figure used by the appraiser.

"The cases in this country are not uniform in regard to the number of years' purchase by which the average annual net profits may be multiplied for the purpose of determining the value of the good will. Most of the American cases adopt a period ranging from two to six years, the number being dependent upon the nature of the business, the length of time during which it has been established at a particular place and the extent to which it is known to the public. Tiffany & Company has an enviable international reputation as a craftsman and tradesman; it has been established in New York city for more than sixty years. If six years' purchase of the average annual net profits was considered not an unreasonable value of the good will in a case where the question of good will related to the name under which a number of candy stores were conducted (Von Au v. Magenheimer, 126 App. Div. 257) it would seem that the good will of a company having the prominence, the permanency and the established reputation of Tiffany & Company should be worth at least ten years' purchase of the annual net profits."

In *Re Keahon's Estate*[16] it was held that to determine the value of the good will of a business for the purpose of a transfer tax the net earnings of a single year should be multiplied by a certain number of years; the number depending upon the nature of the business.

Generally the rule is that the value of unlisted stocks is ascertained by consideration of the book value, earnings and good will. In some instances, it may be necessary to reduce the book value on account of the depreciation. Such usually occurs in connection with bills and accounts receivable, and merchandise which is of a character where the fashions are fickle.

The rule governing the valuation of closely held stock also determines the value of co-partnership interests. Often it is

[16] (1908) 60 Misc. Rep. 508, 113 N. Y. Supp. 926.

provided by agreement that the surviving partner or partners may purchase the decedent's interest in the business for an amount much less than its full and true value. Such agreements do not, however, fix the value for inheritance tax purposes. The state is entitled to a tax upon the full and true value in money on the property passing.[17] In such cases, a portion of the property may be taxable as a gift made to take effect in possession or enjoyment at death.[18]

The appraisal of countless other items forming a part of decedent's estate requires the adoption of such method as will best establish the full and true value. In many instances expert tax testimony alone controls. The value of diamonds, jewelry and paintings can be determined in no other way.

With the value of a decedent's estate established, the next inquiry is as to the amount of the net estate for distribution; or, in other words, what are the properly allowable deductions before computing the tax? The widow's maintenance, consisting of a reasonable amount paid during the time necessary to probate the estate, and her selection of personal property, as provided for by statute, are treated as deductions. They are not in fact such. They constitute no part of a decedent's estate but are an encumbrance thereon.[19] They are not even subject to debts or administration expenses.

Claims filed and properly allowed by the probate court are deductible, but in this connection it should be kept in attention as to what constitute claims which may be allowed against an estate in the probate court. Under the Minnesota statute, the court has defined the same to be a demand of a pecuniary nature which could have been enforced against the decedent in his lifetime.[20]

Expenses of last sickness and burial constitute deductible items, if reasonable in amount. A suitable monument or tombstone consonant with the value of decedent's estate is properly classed as a funeral expense. It matters not whether decedent died intestate or left a will in which no provision was made for a

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[17] In re Cory's Estate, (N. Y. 1917) 164 N. Y. Supp. 956.

[18] Comptroller of New York v. Orvis et al., (N. Y. 1917) 166 N. Y. Supp. 126.

[19] State ex rel. Pettit v. Probate Court of Hennepin County et al., (Minn. 1917) 163 N. W. 285.

[20] Knutsen v. Krook, (1910) 111 Minn. 352, 127 N. W. 11.

monument.[21] A note to the Lester case[22] contains many interesting illustrations of the amounts allowed for tombstones. In *Taylor's Estate*,[23] the court held that it was unreasonable to erect to a deceased person a monument of such a character as to provoke comment on the contrast between the lavishness of the monument and the simplicity of the habits and antecedents of the deceased.

Taxes and assessments, if they became a lien or in effect a debt prior to the date of death, even if not payable, are allowable as deductions;[24] but inheritance taxes imposed by other states are not allowed as deductions.[25]

New York State has refused to allow as a deduction the federal inheritance tax.[26] The Minnesota supreme court recently[27] held that such tax was a proper deduction, not upon the ground that the federal government has paramount right to regulate successions but because Minnesota under its statute has expressed an intention to allow such deduction.

Expenses of administration, including appraisers' fees, executor's or administrator's fees, attorneys' fees, and the ordinary miscellaneous items are, if reasonable in amount, allowable as deductions. In *State v. Probate Court*,[28] Mr. Justice Brown (now Chief Justice) said:

"The expenses of administration are imposed as a matter of law, and are caused by the use of the legal machinery provided by the state to wind up the affairs of deceased persons, and cannot ordinarily be avoided; hence it is just that they should be deducted from the valuation of the estate."

In this case it is also clearly pointed out that it is not proper to allow as a deduction compensation earned, not in the administration of the estate, but in the management thereof for the benefit of the legatees and devisees.

ST. PAUL, MINNESOTA. EGBERT S. OAKLEY.*
*Assistant Attorney General.

[21] State ex rel. Smith, Atty. Gen., v. Probate Court of St. Louis County et al., (Minn. 1917) 164 N. W. 365.

[22] (1915) 169 Iowa 15, 150 N. W. 1033, Ann. Cas. 1917B 255 (263).

[23] (1894) 3 Pa. Dist. 691.

[24] In re Liss' Estate, (1902) 39 Misc. Rep. 123, 78 N. Y. Supp. 969; Matter of Babcock, (1889) 115 N. Y. 450, 22 N. E. 263.

[25] Matter of Penfold, (1915) 216 N. Y. 163 (171), 110 N. E. 497, Ann. Cas. 1916A 783.

[26] In re Bierstadt, (N. Y. 1917) 166 N. Y. Supp. 168; In re Sherman, (N. Y. 1917) 166 N. Y. Supp. 19, affirmed in December, 1917, by Court of Appeals.

[27] State ex rel. Smith v. Probate Court of Hennepin County et al., (Minn. 1918) 166 N. W. 125.

[28] (1907) 101 Minn. 485 (487), 112 N. W. 878.

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PUBLIC OFFICER'S LIABILITY FOR PRINCIPAL AND INTEREST OF FUNDS.—In the absence of specific statutes defining the liability of a treasurer for public funds in his control, there has been considerable conflict among the several jurisdictions as to who is entitled to the interest. As a general rule a custodian of public funds is held to be an insurer of them on the grounds of public policy which requires that every depositary of public moneys be held to a strict accountability.[1] The liability of public officers at the common law for funds deposited with them was substantially that of a bailee for hire and they were not liable for the

*Resigned to enter military service.

[1] United States v. Prescott, (1845) 3 How. (U. S.) 578, 11 L. Ed. 734.

loss of funds if it occurred without their fault.[2] But the majority today hold that there is an absolute liability on the grounds of public policy, and upon the statutory provisions and the conditions of the official bonds.[3] The case of *United States v. Thomas*[4] made a qualification to this absolute liability and excused the officer for the loss of money due to an act of God or the public enemy.

On account of the absolute liability of the custodian of public money some courts have seen fit to hold that the custodian becomes the owner of the funds, and that all that he has to do is to account for the amount he receives; allowing him to keep the interest which may have accrued on the funds he has deposited.[5] In *State v. Walsen*[6] the court held that on account of the absolute liability of the state treasurer to account for the state funds he cannot be compelled to account for the interest he receives on them, although to make profit out of them was a felony. The argument that the treasurer becomes the owner of the funds on account of his absolute liability seems to be a complete non sequitur. A common carrier is absolutely liable for goods entrusted to its care yet no one would argue that the carrier becomes the owner of the goods and that the relation of debtor exists.[7] *Thompson v. Oklahoma*[8] in holding that the title to the funds remained in the state said that to hold that the title vests in the treasurer would open the door for fraud and corruption for those who wish to take advantage of that fact. There would be temptation to speculate and loan on high rates of interest on poor securities, and the funds could be garnished to pay the private debts of the treasurer. The court in *Eshelby v. Board of Education*[9] said:

"But it does not necessarily follow that funds coming into the hands of the treasurer are his, nor that upon the receipt of money

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[2] Northern Pacific Ry. Co. v. Owens, (1902) 86 Minn. 188, 90 N. W. 371, 57 L. R. A. 634, 91 Am. St. Rep. 336.

[3] Commonwealth v. Godshaw, (1891) 92 Ky. 435, 17 S. W. 737, 13 Ky. Law Rep. 572; Shelton v. State, (1876) 53 Ind. 331, 21 Am. Rep. 197; Northern Pacific Ry. Co. v. Owens, (1902) 86 Minn. 188, 90 N. W. 371, 57 L. R. A. 634, 91 Am. St. Rep. 336.

[4] (1872) 15 Wall. (U. S.) 337, 21 L. Ed. 89.

[5] Shelton v. State, (1876) 53 Ind. 331, 21 Am. Rep. 197; and see Commonwealth v. Godshaw, (1891) 92 Ky. 435, 17 S. W. 737, 13 Ky. Law Rep. 572.

[6] (1892) 17 Col. 170, 28 Pac. 1119, 15 L. R. A. 456.

[7] State v. Schamber, (S. D. 1917) 165 N. W. 241.

[8] (1900) 10 Okl. 409, 62 Pac. 355.

[9] (1902) 66 Ohio St. 71, 63 N. E. 586.

in his official capacity the relation of debtor and creditor is established between him and the district. To the contrary it is quite clear that instead of being the creditor of the district he is its treasurer—the custodian of its funds—and that he acquires custody of the funds without acquiring title to them."

Another line of cases holds that when the loaning of the funds is made a felony by law, the interest on the funds does not come into the hands of the treasurer by virtue of his office, and neither the treasurer nor the sureties are liable for it.[10] The sureties attempt to escape liability on the ground that the act is done colore officii. But as the court in *People v. Treadway*[11] said:

"If such an officer is to be regarded as acting unofficially whenever he violates his duty, it is not easy to see what object there can be in requiring official bonds. They are not meant to be mere formalities. . . . Their object is to obtain indemnity against the use of an official position for wrong purposes, and that which is done under color of office, and which would obtain no credit except from its appearing to be a regular official act, is within the protection of the bond, and must be made good by those who signed it."

The better view seems to be that even though the treasurer commits a crime in lending the money and accepting interest on the funds, yet he is estopped from saying he had no authority to accept such interest, and will not be permitted to take advantage of his wrong and reap the benefits thereof.[12]

The strongest view seems to be that of the *McFetridge case*[13] which holds that the treasurer can be absolutely liable for all the funds and still be liable for the interest he collects on them. The court says that the legislature could never have intended to divest the state of the title to the funds and the consequent control over those funds which results from ownership thereof. Practically the same rule was laid down in *United States v. Mosby*[14] where the consul was held liable for interest on the public funds in respect of which he was a trustee. The court said that he was not required to put the funds out at interest but having done so the accretion belongs to the government. The treasurer is only a debtor in the sense that he owes an obligation to pay over the money received to the state.[15]

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[10] Renfroe v. Colquitt, (1885) 74 Ga. 618; State v. Walsen, (1892) 17 Col. 170, 28 Pac. 1119, 15 L. R. A. 456.

[11] (1869) 17 Mich. 480.

[12] Thompson v. Oklahoma, (1900) 10 Okl. 409, 62 Pac. 355.

[13] (1893) 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223.

[14] (1890) 133 U. S. 273 (286), 33 L. Ed. 625, 10 S. C. R. 327, (332).

[15] County of Lake v. Westerfield, (1916) 273 Ill. 124, 112 N. E. 308.

The recent case of *State v. Schamber*[16] is in accord with the *McFetridge* and *Mosby cases* and seems to be in line with the most logical decisions. The court held that the title to the funds remained in the state (so interpreting their statutes), and that there is nothing which renders it unlawful for the treasurer to deposit the funds on interest. The interest becomes an increment of the state owned funds and is part of the public funds. As the court in *Richmond Co. v. Wandel*[17] said:

"The notion that a public officer may keep back interest which he has received upon a deposit of public moneys, as a perquisite of office, is an affront to law and morals, for if done with evil intent, it is nothing less than embezzlement."

STOCK DIVIDENDS AS CAPITAL OR INCOME.—This question presents itself in two aspects, (1) when the question arises between a life tenant and a remainderman, (2) under the income tax law.

(1) *As between Life Tenant and Remainderman.* There is much conflict as whether, under the terms of a trust, to pay the net income of the trust fund to A during his life, and at his death to convey the corpus to B, a stock dividend is capital or income. It was decided in Massachusetts in *Minot v. Paine*[1] to be capital. The dividends represented expenditures for improvements on the railroad issuing the stock, which were made out of net earnings, but this latter fact was not regarded as material because the net earnings of a corporation remain the property of the corporation as fully as its other property until the directors declare a dividend. A shareholder has not title to them. The directors have the power to distribute them among the shareholders or to use them to improve equipment or for other corporate purposes. The stockholder has no right to interfere except in case of an abuse of their power. If the earnings were not distributed as dividend, either cash or stock, but had been expended in improvements, such improvements would be added to the capital and would pass to the remainderman. The existing shares of stock would be enhanced in value by such improvements. If the directors thought fit to issue to the stockholders new stock representing such increased value, the stockholders after such issue would

[16] (S. D. 1917) 165 N. W. 241.
[17] (1872) 6 Lans. (N. Y.) 33.
[1] (1868) 99 Mass. 101, 96 Am. Dec. 705.

be no richer and the corporation no poorer than before.[2] On this reasoning a cash dividend is income, a stock dividend capital. Emphasis is laid on the discretionary power of the directors of a corporation[3] to distribute its net inome among the stockholders or to invest it as capital, and if so invested to allow its value to be represented by the new stock or by the old.

The same view was taken by the federal Supreme Court in *Gibbons v. Mahon,*[4] emphasizing the discretionary power of the directors to distribute the net earnings of any given year in cash, or to reserve part of them to make up for a possible lack of earnings in future years, or to invest them in permanent improvements. Whether reserved or invested they remain capital and are represented equally by the existing shares or by the new shares. *In Towne v. Eisner*[5] the court reaffirms the doctrine of *Gibbons v. Mahon,* applying it to the federal income tax of October 3, 1913.

In England the House of Lords has stated the general principle to be that when a company has the power either of distributing its profits as dividend, or of converting them into capital, and validly exercises this power, such exercise of the power is binding on all persons interested under the testator or settlor, in the shares, "and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholders as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital."[6] This test, while attaching great importance to the action of the directors, leaves the question still open in every case, whether the directors intended to distribute the company's accumulated profits as dividends or to convert them into capital.[7]

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[2] Logan County v. United States, (1898) 169 U. S. 255, 42 L. Ed. 737, 18 S. C. R. 361.

[3] See elaborate discussion, Williams v. Western Union Tel. Co., (1883) 93 N. Y. 162. This case also shows clearly that a "stock dividend does not distribute property, but simply dilutes the shares as they existed before."

[4] (1890) 136 U. S. 549, 10 S. C. R. 1057, 34 L. Ed. 525.

[5] (1918) 38 S. C. R. 158, 50 Chicago Leg. News, 203.

[6] Bouch v. Sproule, (1887) L. R. 12 App. Cas. 385, approving Barton's Trust, (1868) L. R. 5 Eq. 238. See this case analyzed and distinguished, Knowles v. Ballarat Trustees, etc., Co., (1916) 22 Com. L. R. (Australia) 212; and In re Thomas, [1916] 1 Ch. 383.

[7] Sproule v. Bouch, (1885) L. R. 29 Ch. 635, reversed by the House of Lords on the question of fact as to whether the particular distribution was appropriated to the tenant for life as income or to the remainderman as capital, but not as to the test.

A trustee receiving stock dividends and required to pay them to the life tenant, or keep them for the remainderman, cannot rely on any definite rule, but must determine as best he may whether the directors intended the distribution to be "as capital" or as profits.

The earlier cases in New York seemed to take the same position as Massachusetts. In *Kernochan's Case*[8] the court points out that earnings of a corporation do not become income nor profits of the stockholder until ascertained and declared by the directors and allotted to the shareholder; hence the court cannot go back of the action of the directors to discover the period during which the earnings were made. The question arose again in New York in 1913 in the case of *Re Osborne*.[9] The trust fund consisted of 3000 shares of Singer Manufacturing Company. The corporation having a capital stock of $30,000,000, and accumulated surplus of over $50,000,000, declared a stock dividend of $30,000,000 which was distributed among the existing stockholders, the balance of the surplus being retained as working capital. The court reviewing the earlier New York cases showed that in some of them dividends, whether in cash or in stock, were regarded as gains, profits, and income, and that the creator of the trust must have intended them to go to the life tenant, only the original investment belonging to the remainderman; in some, the courts refused to make any distinction between cash and stock dividends as such; in some, a distinction was drawn between increases due to enhanced market value of the capital stock and those due to accumulated earnings; in some cases the courts went into an inquiry as to the period during which the earnings were made, giving the life tenant the benefit of accumulations made after the death of the testator but not before. In the *Osborne Case* the court calls attention to the fact that it is the capital of the trust fund as well as the capital of the corporation that must be kept intact. The court cited the instance of a well-known bank with a capital of $500,000 and a very large surplus, which declared a dividend of $9,500,000 and increased its stock to $10,000,000 allowing its stockholders the option of taking the dividend in cash or of subscribing for the increase and paying for it with the dividend thus declared. In such a case, it is very difficult to see any difference between a dividend in cash

[8] (1887) 104 N. Y. 618, 11 N. E. 149.
[9] (1913) 209 N. Y. 450, 103 N. E. 723, 823, 50 L. R. A. (N.S.) 510, Ann. Cas. 1915A, 298.

and one in stock. The court reached the conclusion that it is impossible arbitrarily to declare that a dividend if in cash is income and if in stock is corpus, but that the question must be determined by other considerations. Ordinary cash dividends are income as a matter of course; an extraordinary cash dividend or a stock dividend may represent profits earned or accumulated before the life tenancy began, and in that case the remainderman should receive it. If earned after the life tenancy began it should go to the life tenant.[10]

This rule takes from the directors the arbitrary power to give a dividend the character of a distribution of capital or of profits by the mere form in which the distribution is made,[11] and enables the court to decide each case upon its special facts. It gives more weight to the question whether the dividend is ordinary or extraordinary, rather than whether it takes the form of cash or stock. Ordinary dividends usually represent current earnings; extraordinary dividends dispose of an accumulated surplus which prior to the distribution was represented by the outstanding stock. The court therefore laid down two rules:

"(1) Ordinary dividends, regardless of the time when the surplus out of which they are payable was accumulated, should be paid to the life beneficiary of the trust. (2) Extraordinary dividends, payable from the accumulated earnings of the company, whether payable from cash or stock, belong to the life beneficiary, unless they entrench in whole or in part upon the capital of the trust fund as received from the trust testator or maker of the trust or invested in the stock, in which case such extraordinary dividends should be returned to the trust fund, or apportioned between the trust fund and the life beneficiary in such a way as to preserve the integrity of the trust fund."[12]

As to the second of these rules, it seems to ignore the discretionary power of the directors to determine what part of the gains of the corporation shall be distributed as profits and what part shall be added to capital. Also it seems to be limited to cases of extraordinary dividends payable from accumulated earnings, unless by "earnings" it means to disregard the difference between "income" and "increase." But "income" and "increase" are not necessarily the same thing. *Lynch v. Turrish*[13] is an example of a corporation whose stock doubled in ten years through the rise in value of land which

[10] 2 Cook, Corporations, 6th ed., Sec. 552.
[11] Thompson, Corporations, 2nd ed., Sec. 5414.
[12] See note 9 supra.
[13] Lynch v. Turrish, (1916) 236 Fed. 653.

constituted its sole asset. It earned nothing because its only business was holding title to the land. Suppose the owner of stock had created a trust at a time when the value of the land, and consequently of the stock, had increased 25 per cent: would the subsequent increase of 75 per cent be deemed corpus or income? It seems fairly clear that it would be corpus, and could not go to one entitled only to income, unless the language of the will compelled such a result. But the enhanced value of stock may be due in part to rise in value of the corporation's assets and in part to undivided net earnings. A dividend, cash or stock, might be declared out of the company's net gains. The problem is how to distribute it as between life tenant and remainderman. It was held in *Spooner v. Phillips*[14] that a stock dividend representing a mere increase in the value of assets should not be treated as "income."

In Iowa a question arose in the case of *Lauman v. Foster*[15] as to profit derived by trustees by exercising the option to subscribe for an increase of stock of a corporation in whose stock assets of the estate are invested; and it was held not to be net income going to the life tenant especially where the increase of the capital diminishes the value of the original shares. In *Kalbach v. Clark*[16] the Iowa court refused to distinguish between cash and stock dividends, treating them all as a part of income which, when declared, go to the life tenant and not to the remainderman, because not a part of the corpus of the property but part of the income derived from the use and management thereof; but further held that if the "so-called stock dividends represent the corporate capital,—that is, represent nothing but the natural growth or increase in the value of the permanent property, so that there is merely a change in the form of ownership,—such stock should go to the remainderman; for in such cases the dividend is a dividend of capital, representing simply an increase in the value of the physical property, good will, or other thing of tangible value." The privilege of subscribing for new stock is a mere incident to the ownership of the existing stock, and if sold at a premium does not necessarily make the premium income. It is an enhancement in the value of the original stock, but not income therefrom.

[14] Spooner v. Phillips, (1892) 62 Conn. 62, 24 Atl. 524, 16 L. R. A. 461.

[15] (1912) 157 Iowa 275, 135 N. W. 14, 50 L. R. A. (N.S.) 531.

[16] (1907) 135 Iowa 215, 110 N. W. 599, 12 L. R. A. (N.S.) 801, 12 Ann. Cas. 647.

The rule of apportionment, giving to the remainderman the accumulations existing at the creation of the trust and to the life tenants the dividends, whether cash or stock, derived from accumulations made since that time, has received such frequent and emphatic illustrations in Pennsylvania that it is sometimes called the Pennsylvania rule.[17] Mr. Cook says: "This rule, inasmuch as it obtains in nearly every state in the union, may well be called the American rule."[18]

The foregoing survey shows that the cases are in irreconcilable conflict as to whether stock dividends are to be regarded as income or capital as between life tenant and remainderman, and as to the grounds upon which the definition of income is to be made. The rule of apportionment unquestionably is in line with the present tendency of the courts. The Massachusetts rule treats the action of the directors as conclusive, paying no attention to the source of the fund from which the distribution is made nor whether a portion of it was in existence at the time of the creation of the trust.[19]

(2) *Stock Dividends as Taxable Income.* Here the Massachusetts court refuses to follow its own rule. In *Trefry v. Putnam*[20] it was required to interpret the constitutional amendment authorizing a tax on "income," and the statute passed in pursuance thereof. Stock dividends were declared out of an accumulation of earnings which before the statute had been invested in permanent additions to the plant of the corporation. The court holds that the pertinent question is not how these dividends would be divided as between life tenant and remainderman, but what is the intention of the legislature. The statute declared that

[17] Earp's Appeal, (1857) 28 Pa. St. 368; Eisner's Appeal, (1896) 175 Pa. St. 143, 34 Atl. 577; Stokes' Appeal, (1913) 240 Pa. St. 277, 87 Atl. 971.

[18] 2 Cook, Corporations, 6th ed., Sec. 554. Minnesota follows this rule: Goodwin v. McGaughey, (1909) 108 Minn. 248, 122 N. W. 6; Wisconsin (apparently): Miller v. Payne, (1912) 150 Wis. 354, 136 N. W. 811; Delaware: Bryan v. Aiken, (1913) 10 Del. Ch. 447, 86 Atl. 674, 45 L. R. A. (N.S.) 477; New Jersey: Van Doren v. Olden, (1868) 4 C. E. Green 176; Ashurst v. Field, (1875) 11 C. E. Green 1; Van Blarcom v. Dager, (1879) 4 Stew. Eq. 783; New Hampshire: Lord v. Brookes, (1872) 52 N. H. 72; Pierce v. Burroughs, (1878) 58 N. H. 302. Kentucky, while rejecting the rule of apportionment, rejects also the English rule, but professes to follow Pennsylvania: Hite v. Hite, (1892) 93 Ky. 257, 20 S. W. 778, 19 L. R. A. 173, 40 Am. St. Rep. 189.

[19] See note, 50 L. R. A. (N.S.) 510; article, Rights of Life Tenants and Remaindermen in Corporate Distributions by Alexander Smith, 21 Yale Law Journal 181; see also, 26 Harv. L. Rev. 77.

[20] (Mass. 1917) 116 N. E. 904.

"dividends on shares in all corporations and joint stock companies . . . ." should be subject to taxation; "no distribution of capital, whether in liquidation or otherwise, shall be taxable as income under this section; but accumulated profits shall not be regarded as capital under this provision." Accumulations prior to 1916, not having been divided, had added to the value of the assets; but the act of the corporation distributing certificates representing this increment gave to the stockholder something of value which he did not before possess; it was a distribution of "accumulated profits" within the meaning of the statute. The difficulty with this position is that after the distribution the pre-existing stock was diminished in value; the stock had been diluted, without any increase in value of the capital. It is hard to resist the conclusion that its issuance was a distribution of capital, which was not taxable by the terms of the statute. If before the distribution the existing stock represented it, it is difficult to see how the stockholder was made richer by the distribution.

The same position was taken, under the federal Income Tax Law, by the federal district court in *Towne v. Eisner*.[21] It was held that stock dividends are taxable income, since, even though not technically dividends, they represent "gains, profits, and income." The court did not regard the decision of the Supreme Court in *Gibbons v. Mahon*[22] as applicable to such a case, and so did not feel bound to go into the question discussed in the first part of this note; nor did the court think it necessary to determine the question as between ordinary and extraordinary dividends, but intimated a strong disposition in favor of the rule of apportionment in regard to the latter as between life tenant and remainderman. But considered as "gains, profits, and income of the stockholder," the earnings have now become permanently added to the capital of the corporation, and can never be legally divided, withdrawn, or dissipated, and being now represented in the hands of the stockholder by certificates are as much an addition to his income as if distributed to him in cash. This decision was reversed[23] by the Supreme Court in January, 1918, the Court declaring emphatically that after the distribution the corporation was no poorer and the stockholder no richer than they were before.

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[21] (1917) 242 Fed. 702.

[22] (1890) 136 U. S. 549, 34 L. Ed. 525, 10 S. C. R. 1057.

[23] Towne v. Eisner, (1918) 38 S. C. R. 158, 50 Chic. Legal News 203.

In principle, a stock dividend which merely distributes to the stockholders the enhanced value of the corporate property which has been gradually increasing in value during a series of years, should not be deemed "income" of the year in which it is received by the stockholder. While the corporation holds the legal title to the property, it does so for its stockholders who are the beneficial owners. Accordingly, where between 1903 and 1913 the property of the corporation doubled in value, doubling thereby the value of the stock, a sale of the stock in 1913 for cash does not make the entire profit realized by the stockholder taxable income for the year 1913. A sale of the entire property of the corporation in 1913, and a distribution of the proceeds among the stockholders, has precisely the same effect.[24] This is a cash dividend which ends the corporate existence. Such a case illustrates sharply the difference between an ordinary and an extraordinary cash dividend, and supports the theory of such cases as *Re Osborne*.[25]

It seems to be the better rule that the increment in the value of stock by the increase in the value of the property represented by it, or by the accumulation of earnings, prior to the taxing year, cannot be regarded as income of that year, whether the stock be sold and the profit realized in cash during the year,[26] or the increment be distributed in the form of stock or cash dividends. How far the principles discussed have been disregarded in the federal Act of 1916 as amended in 1917 may be seen in the extract printed in the foot-note.[27] The Act seems to distinguish between a stock

[24] Lynch v. Turrish, (C. C. A. 1916) 236 Fed. 653.

[25] See Note 9, supra.

[26] State v. Nygaard, (1916) 163 Wis. 307, 158 N. W. 87.

[27] The 1917 Federal Income Tax Amendment (Oct. 3, 1917, Chap. 63, Sec. 1211) contains the following provision:

[a] Dividend defined.

"The term 'dividends' as used in this title shall be held to mean any distribution made or ordered to be made by a corporation, joint stock-company, association, or insurance company, out of its earnings or profits accrued since March first, nineteen hundred and thirteen, and payable to its shareholders, whether in cash or in stock of the corporation, joint-stock company, association, or insurance company, which stock dividend shall be considered income, to the amount of the earnings or profits so distributed."

[b] Distributions to shareholders, etc., deemed to have been made from most recently accumulated undivided profits or surplus, and counted as part of annual income of distributee.

"Any distribution made to the shareholders or members of a corporation, joint-stock company, or association, or insurance company, in the year nineteen hundred and seventeen, or subsequent tax years, shall be deemed to have been made from the most recently accumulated undivided profits or surplus, and shall constitute a part of the

dividend declared out of accumulated earnings, and one representing a mere enhancement in value of corporate assets, deeming the former income of the corporation and of the stockholder as of the year in which the distribution is made. As to the latter, the *Towne Case*[28] seems to imply that a stock dividend is capital, and not income, although the dividend in that case was declared out of earnings. The Act as amended, nullifies the decision on the precise point involved.

WRONGFUL DEATH AND SURVIVAL ACTS—TWO CAUSES OF ACTION OR ONE.—Causing death, in itself gives rise to no civil liability under the common law. Among the assets that go to make up the estate, the deceased leaves his personal representatives no cause of action for the death. If his executor sues on contract, though he may recover the damages to the estate accruing after the breach and before death,[1] yet if the breach results in purely personal injury and death, the executor, being privy neither in law nor in fact, cannot recover.[2] If this action is based in tort, the axiom "actio personalis moritur cum persona" applies as well.[3] Where the rights of a third person, such as surviving spouse or next of kin, are concerned, the English court has included death as an element of contract damages, allowing one of the contracting parties to recover from the other for the death of the plaintiff's wife which was caused by the defendant's breach of warranty.[4]

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annual income of the distributee for the year in which received, and shall be taxed to the distributee at the rates prescribed by law for the years in which such profits or surplus were accumulated by the corporation, joint-stock company, association, or insurance company, but nothing herein shall be construed as taxing any earnings or profits accrued prior to March first, nineteen hundred and thirteen, but such earnings or profits may be distributed in stock dividends or otherwise, exempt from the tax, after the distribution of earnings and profits accrued since March first, nineteen hundred and thirteen, has been made. This subdivision shall not apply to any distribution made prior to August sixth, nineteen hundred and seventeen, out of earnings of profits accrued prior to March first, nineteen hundred and thirteen." U. S. Comp. Laws Suppl. 1917. Sec. 6336Z.

[28] Towne v. Eisner, (1918) 38 S. C. R. 158, 50 Chicago Leg. News 203, U. S. Adv. Ops. 1917 page 183.

[1] Bradshaw v. Lancashire, etc., Ry. Co., (1875) L. R. 10 C. P. 189, 44 L. J. C. P. 148; Leggott v. Great Northern Ry. Co., (1876) L. R. 1 Q. B. D. 599, 45 L. J. Q. B. 557, 35 L. T. (N.S.) 334, 24 Wkly. R. 784.

[2] See Vittum v. Gilman, (1871) 48 N. H. 416; Jenkins v. French, (1883) 58 N. H. 532. But see also The City of Brussels, (1873) 6 Ben. (U.S.D.C.) 370, Fed. Cas. No. 2745.

[3] Crowley v. Panama R. Co., (1859) 30 Barb. (N.Y.) 99.

[4] Jackson v. Watson & Sons, [1909] 2 K. B. 193.

But if the claim of the surviving spouse or next of kin is based in tort, as where he complains of loss of services, it is long settled that "the death of a human being could not be complained of as an injury."[5] There have been theories, that the tort dies with the person, that the private wrong was lost in the felony, that policy forbade fixing a value for life; but no entirely satisfactory reason has been given for the rule.[6]

Such was the harsh and unjust rule of the common law. To bar the cause of action which the deceased had, works no hardship, it deprives no one of anything more than a mere expectancy; on the other hand, there is a manifest injustice where a dependent family is deprived of support without a remedy. Recognizing this defect in the common law, in 1846 "Lord Campbell's Act" entitled "an act for compensating the families of persons killed by accidents" was passed in England; and similar statutes have been enacted in some form or other in all the states of this country. Though the statutes differ widely, most of them have certain common features. In general they allow the personal representative of the deceased to recover, for the benefit of the surviving spouse or next of kin, damages proportionate to the injuries resulting to these beneficiaries from the death. Under Lord Campbell's Act the action lies "Whensoever death of a person is caused by wrongful act, neglect, or default, . . . such as would (if death had not ensued) have entitled the party injured to maintain an action."[7] The English[8] and many American courts[9] take the view that the statute creates a new cause of action. The injury of the deceased and his resulting death is necessary but incidental; the basis of the action is the beneficiary's right in the life of the deceased and the invasion of that right. It is true that the statutes generally class among the beneficiaries, persons who could not technically recover for loss of services, yet by statute or decision the damages are usually measured by the actual pecuniary loss to the beneficiary.[10] Damages measured by loss to

[5] Lord Ellenborough in Baker v. Bolton, (1808) 1 Campb. 493.

[6] Tiffany, Death by Wrongful Act, 2nd ed., Sec. 12.

[7] 9 and 10 Vict. Chap. 93.

[8] British Electric R. Co. v. Gentile, [1914] App. Cas. 1034, 83 L. J. P. C. (N. S.) 353, 111 L. T. (N. S.) 682, 30 Times L. R. 594.

[9] See cases collected in note 26, post; also, Pittsburgh, etc., R. Co. v. Hosea, (1899) 152 Ind. 412, 53 N. E. 419; Stewart v. United Elec., etc., Co., (1906) 104 Md. 332, 65 Atl. 49, 8 L. R. A. (N.S.) 384, 118 Am. St. Rep. 31; Williams v. Alabama, etc., R. Co., (1909) 158 Ala. 396, 48 So. 485, 17 Ann. Cas. 516.

[10] Lord Campbell's Act, 9 and 10 Vict. Chap. 93, awards damages "proportioned to the injury resulting from such death to the parties

the person for whose benefit the action is brought are consistent only with an independent and distinct right in that person. Mitchell, J., in one of the first opinions on the Minnesota statute says:[11]

"The theory of the statute is that they [widow and next of kin] have a pecuniary interest in the life of the deceased, and its object is to compensate them for their loss caused by his death. As their pecuniary loss is the sole measure of damages, so the satisfaction of that loss is the sole purpose for which the right of action is given. . . . The distinction must be kept in mind between such statutes [similar to Lord Campbell's Act] and those which simply provide that a cause of action, for the benefit of his estate, shall survive the death of the person entitled to the same. Under our statute, the damages which may be recovered are designed as a compensation or indemnity to certain persons, and not to the general estate, and therefore the fact that there are persons entitled to this indemnity, must be both alleged and proved in order to warrant a recovery.[12]

This cause of action, distinct from the assets of the estate and for the benefit of certain named persons, is vested in the personal representative by the statute of the locus delicti. His position with regard to the action is not that of administrator of the assets of the estate but rather that of trustee for named beneficiaries; and for that reason he may prosecute an action in a foreign court without taking letters of administration in the foreign jurisdiction.[13]

In almost a score of the states general survival statutes have been enacted providing for the survival in the hands of the per-

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respectively for whom and for whose benefit such action shall be brought."

The same measure of damages has been laid down by decision in Pennsylvania Ry. Co. v. Zebe, (1858) 33 Pa. 318; Kerling v. Van Dusen Co., (1910) 109 Minn. 481, 124 N. W. 235, 372.

The Minnesota statute gives no measure of damages, but sets the maximum amount at $7,500, G. S. 1913 Sec. 8175.

[11] Minn. G. S. 1913 Sec. 8175.

[12] Schwartz v. Judd, (1881) 28 Minn. 371, 10 N. W. 208; Vander Wegen v. Great Northern Ry. Co., (1911) 114 Minn. 118, 130 N. W. 70.

[13] See Connor v. New York, etc., R. Co., (1908) 28 R. I. 560, 68 Atl. 481; Brown v. Chicago, etc., Ry. Co., (1915) 129 Minn. 347, 152 N. W. 729. But see Richards v. Riverside Iron Works, (1904) 56 W. Va. 510, 49 S. E. 437. In West Virginia it is not necessary to allege in the complaint the existence of beneficiaries. Madden's Adm'r v. Chesapeake, etc., Ry. Co., (1886) 28 W. Va. 610, 57 Am. Rep. 695. See 23 H. L. R. 554.

The United States courts allow the administrator of the forum to sue. Dennick v. Railroad Co., (1880) 103 U. S. 11, 26 L. Ed. 439. The federal courts do not consider the substantive law, but regard the question as merely a procedural one. Williams v. Camden Interstate Ry. Co., (1904) 138 Fed. Rep. 571, affirmed in 140 Fed. 985, 72 C. C. A. 680.

sonal representative of causes of action for personal injuries.[14] The purpose of these statutes was to abolish the maxim "actio personalis moritur cum persona" where it deprived the estate of the decedent of damages already accrued in his favor. The wrongful death act had done very much the same thing for those entitled to recover under it; and the courts have had to consider the two statutes together because of that common feature. Some courts recognize the distinction between the separate rights invaded and allow the representative to prosecute both causes of action.[15] The view has also obtained that unless a recovery under one statute should bar recovery under the other, the defendant would suffer twice for his wrong.[16] In other jurisdictions recovery under the wrongful death act is allowed only where death was instantaneous;[17] if the decedent lingered, recovery under the survival statute alone is possible. A still different limitation placed on these acts is that the survival statutes apply to such personal injuries only as do not result in death; where death results from the injuries the wrongful death statute applies.[18] The holdings of these courts are not inconsistent with, nor do they deny as a rule, the existence of separate and distinct causes of action; they rest rather on "reading into" the statutes certain limitations in their application which are considered implied.

But the existence side by side of the general survival and wrongful death statute, together with an ill-conceived idea that two liabilities are incurred by a single wrong, have led some courts to the conclusion that the two statutes simply provide different remedies for the same wrong,[19] and, hence, the exercise of one remedy should settle all liability. Since it is considered that the grounds for recovery are the same that the deceased had at his death, a former recovery or release by the deceased is a bar.[20]

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[14] There is no general survival act in Minnesota. See G. S. 1913 Sec. 8174.

[15] See note 26, post.

[16] Chesapeake, etc., Ry. Co. v. Banks' Adm'r, (1911) 142 Ky. 746, 135 S. W. 285.

[17] Sawyer v. Perry, (1895) 88 Me. 42, 33 Atl. 660; Dolson v. Lake Shore, etc., Ry. Co., (1901) 128 Mich. 444, 87 N. W. 629.

[18] Holton v. Daly, (1882) 106 Ill. 131; McCarthy v. Chicago, etc., Ry. Co., (1877) 18 Kan. 46, 26 Am. Rep. 742; Lubrano v. Atlantic Mills, (1895) 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797.

[19] See Connors v. Burlington, etc., Ry. Co., (1887) 71 Ia. 490, 32 N. W. 465, 60 Am. Rep. 814; Mobile, etc., Ry. Co. v. Hicks, (1907) 91 Miss. 273, 46 So. 360, 124 Am. St. Rep. 679.

[20] Recovery by decedent as bar: Dougherty v. New Orleans Ry. & Light Co., (1913) 133 La. 993, 63 So. 493. But see Clare v. New York, etc., Ry. Co., (1898) 172 Mass. 211, 51 N. E. 1083. Release by

And the language of Lord Campbell's act is pointed to in order to bear out the proposition that the wrong to the deceased is the real basis. The act provides for recovery for a wrongful act "such as would (if death had not ensued) have entitled the party injured to maintain the action.[21] The explanation offered by some courts is that the right of the deceased to sue at the time of his death is a statutory condition to the right of the beneficiaries.[22] Another argument why the death act deals with only the cause of action the deceased had at his death is that the act allows recovery "notwithstanding the death of the person injured." But it may be said that this was intended to remove the bar imposed by death to an action for subsequent loss of services.[23] The courts which say that the grounds of the plaintiff suing under the wrongful death act are those the decedent had at his death, make out damages as a loss to the estate.[24] But, it is to be noted that only such loss as the beneficiary shows is recoverable in the action.[25]

From the foregoing discussion it will be seen that the chief controversy concerns the question whether, under such statutes, there are two causes of action, (1) in favor of the administrator of the deceased for the enforcement of the decedent's personal claim for the injury sustained by him prior to his death, and (2) in favor of the spouse and next of kin through the administrator as statutory trustee; or only one cause of action, viz.: the second above mentioned.[26] According to the former theory, the first

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decedent as bar: Southern Bell Tel., etc., Co. v. Cassin, (1900) 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694. Contra: Rowe v. Richards, (1915) 35 S. D. 201, 151 N. W. 1001, L. R. A. 1915E 1075.

[21] 9 and 10 Vict. Chap. 93.

[22] State to use of Melitch v. United Rys., etc., Co., (1913) 121 Md. 457, 88 Atl. 229, L. R. A. 1915E 1163.

[23] Baker v. Bolton, (1808) 1 Campb. 493.

[24] Donaldson v. Mississippi, etc., Ry. Co., (1865) 18 Ia. 280, 87 Am. Dec. 391; Carlson v. Oregon, etc., Ry. Co., (1892) 21 Ore. 450, 28 Pac. 497.

[25] See note 10, supra.

[26] Among the states recognizing two causes of action under wrongful death and survival statutes are:

Ohio: Mahoning Valley R. Co. v. Van Alstine, (1908) 77 Oh. St. 395, 83 N. E. 601, 14 L. R. A. (N.S.) 893.

Massachusetts: Bowes v. Boston, (1892) 155 Mass. 344, 29 N. E. 633, 15 L. R. A. 365; Clare v. New York, etc., R. Co., (1898) 172 Mass. 211, 51 N. E. 1083.

Wisconsin: Brown v. Chicago, etc., R. Co., (1898) 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

Mississippi: Vicksburg & M. R. Co. v. Phillips, (1887) 64 Miss. 693, 2 So. 537.

Oregon: Putnam v. So. Pac. Co., (1891) 21 Ore. 230, 27 Pac. 1033.

Arkansas: Davis v. St. Louis, etc., R. Co., (1890) 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283.

cause of action depends on the survivorship of the claim which existed in favor of the injured person in his lifetime, includes his personal pain and suffering, and is for the benefit of his estate; the second is newly created by the statute, comes into existence only upon the death of the injured person, and affords compensation for the pecuniary loss sustained by the relatives through his death, exclusive of any pain suffered or other injury sustained by him. *Brown v. Chicago & Northwestern R. Co.*[27] is a good example of this view. According to the latter theory, there is but one cause of action, that in favor of the relatives, the injured person's claim dying with him. *Lubrano v. Atlantic Mills*[28] illustrates this view. This theory seems to proceed from an erroneous notion of the nature of a cause of action. A cause of action is not the wrongful act or omission from which injuries result; otherwise the negligent collision of a locomotive with a carriage in which two persons are riding, injuring both, would give rise to

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Arizona: Southern Pac. Co. v. Wilson, (1906) 10 Ariz. 162, 85 Pac. 401.

South Dakota: Belding v. Black Hills, etc., R. Co., (1892) 3 S. D. 369, 53 N. W. 750.

Washington: Hedric v. Ilwaco R. & Nav. Co., (1892) 4 Wash. 400, 30 Pac. 714.

Michigan: Hurst v. Detroit City R. Co., (1891) 84 Mich. 539, 48 N. W. 44.

In Illinois the cause of action created by the wrongful death act is entirely distinct from that previously existing in favor of the injured person. The statute was not intended to permit the widow and next of kin to recover for the pain and suffering of the deceased, but solely to compensate them for their pecuniary loss sustained by reason of his death. Under the Illinois survival statute, on the other hand, it is held that the action in favor of the deceased survives only when he died from some cause other than the injury. Ohnesorge v. Chicago City R. Co., (1913) 259 Ill., 424, 10 N. E. 819.

States recognizing only one cause of action are:

New York: Littlewood v. New York, (1882) 89 N. Y. 24, 42 Am. Rep. 271.

Vermont: Legg v. Britton, (1892) 64 Vt. 652, 24 Atl. 1016.

Rhode Island: Lubrano v. Atlantic Mills, (1895) 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797.

Pennsylvania: Hill v. Penna. R. Co., (1896) 178 Pa. 223, 35 Atl. 997, 35 L. R. A. 196, 56 Am. St. Rep. 754

Kansas: Martin v. Missouri Pac. R. Co., (1897) 58 Kan. 475, 49 Pac. 605.

In England it seems to be settled that Lord Campbell's Act creates a new cause of action in favor of the widow, etc., the administrator being merely their trustee, distinct from that in favor of the deceased. The administrator suing in one capacity is not estopped by judgment rendered in suit by him in the other capacity. Leggott v. Great Nor. R. Co., (1876) L. R. 1 Q. B. Div. 599, 45 L. J. Q. B. 557, 35 L. T. (N.S.) 334, 24 Wkly. R. 784; Robinson v. Canadian Pac. R. Co., [1892] A. C. 481.

[27] (1899) 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

[28] (1895) 19 R. I. 129, 32 Atl. 205, 34 L. R. A. 797.

but one cause of action; nor is it the resulting injuries. It is rather the primary right, the invasion thereof, and the resulting injury. In the case of a single individual dying as the result of such accident, the conclusion seems irresistible that the statute has created a new cause of action for the benefit of the relatives, which is totally distinct from that which belonged to the decedent, and which latter may, or may not, survive.

In Minnesota, apparently, it does not survive. In many states the wrongful death statute is separate from and independent of the survival act, and often the two were enacted at different times, —sometimes the one first, and sometimes the other. But in Minnesota there is no general survival act. On the contrary, Sec. 8174 declares that "a cause of action arising out of an injury to the person dies with the person of either party, except as provided in Sec. 8175." Section 8175, after creating a cause of action in favor of the spouse and next of kin, provides for the survival of an action actually begun by the injured person in his lifetime. Obviously this refers to his cause of action alone, but instead of the sum recovered becoming a part of his estate, it is to be for the benefit of the spouse and next of kin, and is "for recovery of the same damages" as if the action originally had been begun in their behalf. In other words, the decedent's cause of action dies with him, but if he begins a suit and dies, it may be converted into an entirely different action, to recover entirely different damages in favor of different persons. Instead of a recovery for the pain and suffering of the deceased, it is a recovery for the pecuniary loss suffered by the relatives. Had he lived there would have been no limit to the amount of the recovery; but the recovery in the revived action is limited to $7,500. Clearly the cause of action in favor of the deceased does not survive, even when he died while his own action was pending. Nothing but the shell survives.

In the somewhat novel recent case of *Keiper v. Anderson*,[29] the Minnesota court overruled a demurrer to a complaint alleging a cause of action declared in the majority opinion to be founded on contract, rather than tort. The defendant had leased a store to the deceased and had contracted to keep it heated. He failed to heat the place properly, and the tenant became sick and died. The action was by the widow who sued as administratrix. The court holds that the action is founded on contract, because proof

[29] (Minn. 1917) 165 N. W. 237.

of the contract was necessary to create any cause of action, notwithstanding the allegations of negligence. The opinion notes, without deciding, the controversy as to whether there are two causes of action or one, but appears to hold distinctly that the liability in this case is that created by the "wrongful death" statute, and not that which belonged to Keiper independently of the statute. The sole point really debated in the majority opinion is whether the wrongful death statute applies only to tort actions or covers contract action as well. Yet Brown, C. J., dissenting, says:

"The sole question presented, stated in a word, is whether the next of kin of a deceased person may maintain an action in tort under the death by wrongful act statute for an act, alleged to have caused his death, which as to decedent amounted to nothing more than a breach of contract."

On this question he takes the negative. It seems, therefore, that the majority and minority are debating different questions. The position of the minority is that (assuming the action to be framed in tort) where a contractor agrees to do something and does it negligently, or where the contract creates a relation out of which the law imposes a duty independent of that expressly contracted for, the injured party has the election to sue in tort or for a breach of the contract; but where he is merely guilty of nonfeasance, the exclusive remedy is for breach of the contract, and that this is a case of mere nonfeasance. The position of the majority is that the action is framed in contract. Justice Brown, in discussing the nature of plaintiff's case, says:

"While a new action is given by the statute, one that did not exist prior to its enactment, it is founded wholly upon a right possessed by decedent, namely, a right of action in tort, and not in contract. That right, and only that right, passes by the statute to the next of kin."

It is submitted that plaintiff's cause of action may be either a wholly new one, given by the statute, or it may be the one possessed by the decedent independent of statute, but it cannot be both. They are totally distinct. The one is for the pain, suffering, etc., of Keiper during his life, the other is the pecuniary loss sustained by his relatives, due to the deprival of his earnings. Keiper's cause of action died with him, no action having been brought in his lifetime. Whether the widow and next of kin have a cause of action depends upon whether the death statute applies to cases

where the death resulted from breach of contract as well as from pure tort. The court holds that it does.

In states, like Wisconsin, Michigan, and Illinois, having a general survival statute and whose courts recognize two causes of action which may be prosecuted simultaneously, the courts must have considerable difficulty in confining juries to the proper measure of damages. In Minnesota it is a question whether juries can be prevented from blending damages for pain and suffering with compensation for loss of earning capacity, to which alone the beneficiaries are entitled.

RECENT CASES

ADOPTION—ADOPTED CHILD—REMAINDERS—TRUST DEEDS.—Blume deeded real estate to Frank Wilder, trustee, for the use of William Wilder for life, then to Minnie Wilder, wife of William, for life, and upon her death in fee to the child or children of William. After divorcing Minnie Wilder, William Wilder adopted a child. The Maine statute provided that as to an adopted child, for "all rights of inheritance, obedience, and maintenance he becomes to all intents and purposes the child of his adopters the same as if born to them in lawful wedlock." After the death of William Wilder it was *held* that the adopted child was not a child within the meaning of the trust deed. *Wilder v. Wilder et al.*, (Me. 1917) 102 Atl. 110.

It seems that practically all of the cases defining the right of an adopted child to acquire property as the *child* of the adoptive parent have arisen in the interpretation of wills. Some states have statutes prescribing that a gift over to a *child* shall not go to an adopted child. *Matter of Leask*, (1910) 197 N. Y. 193, 90 N. E. 652, 134 Am. St. Rep. 866, 18 Ann. Cas. 516, 27 L. R. A. (N.S.) 1158 and note. But even where no such statute prevails the majority of the courts deny the adopted child the right to take the estate as the *child* of the adoptive parent in a gift over; and it makes no difference in the result whether the child was adopted during the lifetime of the testator or subsequently. *Schafer v. Eneu*, (1867) 54 Pa. 304; *Woodcock's Appeal*, (1907) 103 Me. 214, 68 Atl. 821, 125 Am. St. Rep. 291. It has been said that the adopted child can inherit *from* but not *through* the adoptive parent. *Van Derlyn v. Mack*, (1904) 137 Mich. 146, 100 N. W. 278, 66 L. R. A. 437, 109 Am. St. Rep. 669, and note at p. 674; *Hockaday v. Lynn*, (1906) 200 Mo. 456, 98 S. W. 585, 8 L. R. A. (N.S.) 117 and note. A different result was reached in *Bray v. Miles*, (1899) 23 Ind. App. 432, 55 N. E. 510. In that case the father of an adoptive parent made a devise to his sons and daughters or to their children in case they should predecease testator and the adopted child was held entitled to the estate. That case is typical of the minority and contra to the instant case in which the intention of the testator was held to be the determining factor. The Maine court in the instant case seems in accord with the majority view which puts a strict interpretation on the adoption statute, as one in dero-

gation of common law. The Indiana court, however, though clearly in the minority seems to adopt a more liberal construction of the statute which favors the adopted child.

ADOPTION—RIGHT OF INHERITANCE—SECOND ADOPTION.—A minor child was adopted by Cyrus Klapp and wife. After the death of Mrs. Klapp the child was adopted by Pulsipher, Cyrus Klapp consenting to the second adoption. After the death of Klapp it was *held,* that the second adoption revoked all rights of inheritance from the first adoptive parent. *In re Klapp's Estate,* (Mich. 1917) 164 N. W. 381.

In Minnesota, as in most states, the right of an adopted child to inherit from his foster parents is conferred by statute. Minn. G. S. Sec. 7156. The courts are firm in enforcing this right. It has been held that where a testator makes a will and subsequently adopts a child the adoption revokes the will and the adopted child acquires the same interest as if he had been born to the adoptive parents. *Hilpire v. Claude,* (1899) 109 Iowa 159, 80 N. W. 332, 46 L. R. A. 171, 77 Am. St. Rep. 524; *Glascott v. Bragg,* (1901) 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258; *Flannigan v. Howard,* (1902) 200 Ill. 396, 65 N. E. 782, 59 L. R. A. 664, 93 Am. St. Rep. 201. And where the foster father, prior to the adoption, had taken out insurance for the benefit of his wife, or in case of her death for the benefit of her children, it was held that the adopted child should share in the proceeds of such policies. *Von Beck v. Thomsen,* (1899) 44 App. Div. 373, 60 N. Y. Supp. 1094, 7 N. Y. Ann. Cas. 33, affirmed 167 N. Y. 601, 60 N. E. 1121. As stated in the principal case, it is clearly settled that the child may inherit from his natural parents as well as from the adoptive parents, unless otherwise provided by statute. *Burns v. Burns,* (1904) 132 Fed. 485, affirmed in 137 Fed. 781, 70 C. C. A. 357; *Clarkson v. Hatton,* (1898) 143 Mo. 47, 44 S. W. 761, 39 L. R. A. 748, 65 Am. St. Rep. 635. And so, also, it has been held that he may inherit from his grandparents by blood. *Estate of Darling,* (1916) 173 Cal. 221, 159 Pac. 606. There are at least two cases which, contrary to the principal case, permit the adopted child to inherit from the first adoptive parent as well as the second. *Russell v. Russell,* (1892) 14 Ky. Law Rep. 236; *Patterson v. Browning,* (1896) 146 Ind. 160, 44 N. E. 993. They are distinguished from the present case only by the fact that in each of them the first adoptive parent was dead at the time of the second adoption. In the instant case the decision seems to rest chiefly on the theory that the inheritance right of the first adoption rested on the contract of adoption; and that when Cyrus Klapp consented to the second adoption the whole contract, so-called, was revoked, including the inheritance rights. If adoption is a contract the decision is to be approved. But as stated in *Jordan v. Abney,* (1904) 97 Tex. 296, 78 S. W. 486, the right of inheritance from adoption "arises by operation of law, from the acts of the parties made in compliance with the statute and does not depend on or arise from contract."

CARRIERS—PRIVATE AND COMMON—TAXICABS—INSURANCE.—Plaintiff and his fellow passenger, at a public taxicab station, engaged a taxicab to be used by them exclusively notwithstanding there were additional seats. Plaintiff carried accident insurance with defendant company which pro-

vided for double indemnity in case accidental injuries were sustained while the insured was "in a public conveyance provided by a common carrier for passenger service." Plaintiff was injured during the trip in the taxicab. *Held*, the taxicab company was not a common carrier. *Anderson v. Fidelity & Casualty Co. of New York.*, (1917) 166 N. Y. Supp. 640.

Where there is a "holding out" on the part of the carrier to receive all passengers at a certain price, such carrier is a common carrier. Bouvier L. D. 561 and cases cited. It is settled that where a taxicab company maintains stands or offices to receive passengers, there is a sufficient "holding out" to constitute the taxicab company a common carrier. *Van Hoeffen v. Columbia Taxicab Co.*, (1913) 179 Mo. App. 591, 162 S. W. 694; *Donnelly v. Philadelphia, etc., Ry. Co.*, (1913) 53 Pa. Super. 78. In the instant case the taxicab company is held in respect to plaintiff to be a private carrier because it might refuse to accept other passengers in the taxicab engaged by plaintiff even though some of the seats in the vehicle remained vacant. To support the decision that such right of refusal marks the taxicab company as a private carrier, the court asserts the rule, "The distinction between a . . . common carrier . . . and a . . . . private carrier is that it is the duty of the former to receive all who apply for passage, so long as there is room . . . while such duty does not rest upon the latter." Such a test cannot be regarded as conclusive. In *Van Hoeffen v. Columbia Taxicab Co.*, supra, and in *Donnelly v. Philadelphia, etc., Ry. Co.*, supra, there were vacant seats and the right of refusal, notwithstanding which the taxicabs were held to be common carriers. The Supreme Court of the United States has lent its weight to the view that limitation of service by the right of refusal is immaterial. In *Terminal Taxicab Co. v. Kutz*, (1916) 241 U. S. 252, 36 S. C. R. 583, 60 L. Ed. 984, the court says, "We do not perceive that this limitation removes the public character of the service, or takes it out of the definition of the act. No carrier serves all the public." The instant case is contra to a strong current of authority and is, in reason, inconsistent with the public character of the service rendered by the taxicab.

CARRIERS—LOSS OF GOODS—DELIVERY—TERMINATION OF LIABILITY. — The plaintiff, according to the court's interpretation of the facts, shipped goods over three connecting railroads to Philadelphia. The goods were consigned to the shipper, who refused to take them at Philadelphia, claiming that they should have been delivered at St. Louis. The final carrier stored the goods in a public warehouse and they were sold for charges against them. The shipper, relying on the Carmack Amendment sued the initial carrier for the conversion of them. *Held*: The initial carrier is not liable under U. S. Comp. St. 1916 Sec. 8604a after the final carrier has become a warehouseman. *Adams Seed Co. v. Chicago, etc., R. Co.*, (Iowa 1917) 165 N. W. 367.

The Carmack Amendment makes the initial carrier liable on the bill of lading for damage to the property which occurs while in the hands of any common carrier, railroad, or transportation company over whose lines the shipment is made. The Supreme Court in upholding the constitutionality of the act in *Atlantic Coast Line R. Co. v. Riverside Mills*, (1911), 219 U. S. 186, 31 S. C. R. 164, 31 L. R. A. (N.S.) 7 sets forth the reasons

of policy for its enactment. The public was obliged to accept contracts by which each of the carriers limited its liability to its own lines; and when injury to the goods occurred, because the facts were almost inaccessible to the individual shipper and so much within the special knowledge of the carrier, the owner of the goods was used as a shuttlecock by the several roads. The policy is the same as that underlying the rule of absolute liability laid down by Lord Holt in *Coggs v. Bernard,* (1703) 2 Ld. Raym. 909, and applied by Lord Mansfield in *Forward v. Pittard,* (1785) 1 Term, R. 27; i.e., protection from collusion. Thus considered the statute was but an extension of the common law principle. But the decisions are in accord that the initial carrier shall not be liable under the act after the final carrier has become a warehouseman. *Hogan Milling Co. v. Union Pacific R. Co.,* (1914) 91 Kan. 783, 139 Pac. 397; *Louisville, etc., R. Co. v. Brewer,* (1913) 183 Ala. 172, 62 So. 698; *Norfolk, etc., Ry. Co. v. Stuart's Draft Milling Co.,* (1909) 109 Va. 184, 63 S. E. 415. The distinction is a proper one; the contract of carriage is completely performed, and the difficulty of following the carrier is ended. Since the owner can hold the final carrier definitely from that time, there is no reason for holding the initial one. Where the last carrier has not performed his whole duty as common carrier, the initial carrier still retains responsibility. Thus, where the consignee refuses to accept the goods, there is the duty on the carrier to notify the shipper. Until the shipper has received due notice, the first carrier is still liable. *Nashville, etc., R. Co. v. Dreyfus-Weil Co.,* (1912) 150 Ky. 333, 150 S. W. 321.

DEATH—WRONGFUL ACT—BREACH OF COVENANT OF LEASE.—The defendant leased a store to Edward Keiper, covenanting to properly heat the building. The covenant was broken with the result that the lessee died of a malady contracted in the cold store. His administratrix sued under the wrongful death statute, naming herself as widow and claiming to recover for the "negligence" of the defendant in failing to heat the building and thus wrongfully causing the death of her husband. On an appeal from an order overruling a demurrer, the court, though it did not hold that there was no allegation of negligence, said that the action was based on the contract and that the action provided by the wrongful death statute is the same as the one the injured person had at the time of his death. *Keiper v. Anderson,* (Minn. 1917) 165 N. W. 237.

For discussion of principles involved see NOTES, p. 292.

EXTRADITION—FUGITIVE FROM JUSTICE.—Having been arrested in the state of Texas for an offense there committed, the petitioner, with the consent of the Texas authorities, was taken on process under extradition to California, to answer a charge of having committed a crime in that state. This charge was subsequently dismissed, whereupon the governor of Texas made requisition upon the governor of California to have the petitioner returned. *Held,* that the petitioner could not be returned. *In re Whittington,* (Cal. 1917) 167 Pac. 404.

The American cases are unanimous in holding that a person cannot be a fugitive from justice unless he was in the demanding state when the

crime was committed. *Hyatt v. People, etc., ex rel. Corkran*, (1903) 188 U. S. 691, 47 L. Ed. 657, 23 S. C. R. 456, 12 Am. Crim. Rep. 311, affirming 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 774, 92 Am. St. Rep. 706. So the courts necessarily hold that the mere constructive presence of the accused in the demanding state does not make him a fugitive from justice. *In re Mohr*, (1883) 73 Ala. 503, 49 Am. Rep. 63; *State v. Hall*, (1894) 115 N. C. 811, 20 S. E. 729, 28 L. R. A. 289 and note. However, if the accused was in the demanding state at the time the crime was committed, the weight of authority is clearly to the effect that the reason or motive for his having left is immaterial. *Appleyard v. Massachusetts*, (1906) 203 U. S. 222, 51 L. Ed. 161, 27 S. C. R. 122, 7 Ann. Cas. 1073; *State v. Richter*, (1887) 37 Minn. 436, 35 N. W. 9. But there are decisions to the effect that a person is not a fugitive if he leaves the state at the request of the party who demanded his surrender. *Ex parte Tod*, (1900) 12 S. D. 386, 81 N. W. 637, 76 Am. St. Rep. 616, 47 L. R. A. 566. See 2 Moore, Extradition and Interstate Rendition, Sec. 569. But when a fugitive has been extradited into a state, that fact is not sufficient to prevent an extradition of the prisoner to a third state, which he left of his own free will. *Innes v. Tobin*, (1916) 240 U. S. 127, 60 L. Ed. 562, 36 S. C. R. 290; *Hackney v. Welsh*, (1886) 107 Ind. 253, 8 N. E. 141, 57 Am. Rep. 101; *People v. Sennott*, (1879) 20 Alb. L. J. 230. There is conflict on this point. See note in 28 L. R. A. 289 and Dr. Spear's note in 20 Alb. L. J. 425.

Upon analysis of the above cited cases, one finds the underlying principle that the accused not having left the demanding state voluntarily and of his own free will would not be a fugitive from justice.

The Supreme Court of the United States has held in *Biddinger v. Commissioner of Police*, (1917) U. S. Adv. Ops. 1917, p. 20, 245 U. S. 128, that the fact that the prosecution is barred by the Statute of Limitations of the demanding state cannot be shown in habeas corpus proceedings; the Court stating that "when the extradition papers required by the statute are in proper form the only evidence sanctioned by this Court as admissible on such a hearing is such as tends to prove that the accused was not in the demanding state at the time the crime is alleged to have been committed." Under this rule, the instant case seems to have been wrongly decided.

HOSPITALS—PROPERTY OF PATIENT—LIABILITY.—Plaintiff engaged accommodations for an operation at a private hospital carried on for gain, and also contracted for nursing during that period. While plaintiff was under the influence of ether one of the nurses stole a ring from her finger. *Held*, that the hospital is not liable in tort for negligence but is liable under its contract with the plaintiff for accommodations. *Vannah v. Hart Private Hospital*, (Mass. 1917) 117 N. E. 328.

It is well settled that a private hospital carried on for gain must respond in damages for failure to exercise that degree of care which the mental or physical condition of the patient may require under the circumstances. *Wetzel v. Omaha Maternity and General Hospital Assn.*, (1914) 96 Neb. 636, 148 N. W. 582, Ann. Cas. 1915B 1224 and note; *Richardson v. Dumas*, (1914) 106 Miss. 664, 64 So. 459; *Hogan v. Hospital*

Company, (1908) 63 W. Va. 84, 59 S. E. 943. See also note in L. R. A. 1915D 334. The above cases, however, involve the question of caring for a patient with regard to his particular illness only. But does the hospital owe a patient any protection against robbery in the absence of a special agreement to that effect? The instant case absolves the hospital from any tort liability, but imposes a contract liability and holds the case analogous to that of the innkeeper and common carrier. The duty of a carrier, however, is not merely a contract duty, but one imposed by law and growing out of the relationship of carrier and passenger independently of contract. *Nevin v. Pullman Palace Car Company*, (1883) 106 Ill. 222, 46 Am. Rep. 688; *Kansas City, etc., R. Co. v. Becker*, (1899) 67 Ark. 1, 53 S. W. 406, 46 L. R. A. 814, 77 Am. St. Rep. 78. Though the result in the instant case is no doubt satisfactory, it is somewhat difficult to understand on what theory the hospital's liability in tort for negligence is denied but recovery is allowed in contract, especially since the decision is based entirely on the analogy to an innkeeper or common carrier.

INJUNCTION—UNFAIR COMPETITION—INDUCING EMPLOYEE TO DISCLOSE INFORMATION—PROPERTY RIGHT IN NEWS.—Defendant was plaintiff's competitor in the gathering and dissemination of news. It induced plaintiff's employee to disclose to it news items coming in over plaintiff's wires and intended for the exclusive use of plaintiff's customers. *Held*, defendant's acts were a wrongful interference with plaintiff's property rights, in the nature of unfair competition, and would be enjoined. *Associated Press v. International News Service*, (1917) 245 Fed. 244.

Prevention of fraud is one of the great heads of equity jurisdiction, and unfair competition is a fraud on the injured party as well as on the public. *Knott v. Morgan*, (1836) 2 Keen 213. Common illustrations of this sort of commercial piracy are the simulation cases, where the defendant "dresses up" his goods to resemble those of the plaintiff, thereby deceiving the public into buying the defendant's goods, when it thinks it is buying the plaintiff's. The authorities holding that such conduct will be enjoined are legion. *N. K. Fairbanks Co. v. R. W. Bell Mfg. Co.*, (1896) 77 Fed. 869, 23 C. C. A. 554; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.*, (1897) 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; *Rickard v. Caton College Co.*, (1903) 88 Minn. 242, 92 N. W. 958; *O. & W. Thum Co. v. Dickinson*, (1917) 245 Fed. 609; *Shredded Wheat Co. v. Humphrey Cornell Co.*, (1917) 245 Fed. 508.

Another type of unfair competition is the wrongful disclosure of a trade secret. Equity will enjoin such disclosure by an employee. *Peabody v. Norfolk*, (1868) 98 Mass. 452, 96 Am. Dec. 664. The duty of such person not to disclose may rest on a negative covenant in his contract of employment, which equity will enforce. But this is not necessary. In the absence of such covenant, a contract not to disclose will be implied from the relation of trust and confidence he has to his employer. *Empire Steam Laundry v. Lozier*, (1913) 165 Cal. 95, 130 Pac. 1180, 44 L. R. A. (N.S.) 1159; *Vulcan Detinning Co. v. American Can Co.*, (1907) 72 N. J. Eq. 387, 67 Atl. 39, 12 L. R. A. (N.S.) 332; 1 High, Injunctions, 3rd ed. Sec. 19.

Closely akin to the above situation are the secession cases, where an employee learning valuable business secrets and methods leaves his em-

ployer and sets up in business for himself, using this knowledge in direct competition with his former employer. That equity will go far to restrain such conduct is clear. *Du Pont de Nemours Powder Co. v. Masland*, (1917) 244 U. S. 100, 61 L. Ed. 1016, 37 S. C. R. 575. Thus where a laundry driver copied lists of his employer's customers and used them to aid a rival in business, it was held that he would be restrained. *Empire Steam Laundry v. Lozier*, supra. Similar conduct by a former employee was enjoined in *Grand Union Tea Co. v. Dodds*, (1910) 164 Mich. 50, 128 N. W. 1090, 31 L. R. A. (N.S.) 260, and in *Eureka Laundry Co. v. Long*, (1911) 146 Wis. 205, 131 N. W. 412, 35 L. R. A. (N.S.) 119. An interesting situation arose in *Davis v. Hamlin*, (1883) 108 Ill. 39, 48 Am. Rep. 541. There defendant was the employee of the plaintiff, who held the lease on a certain theater. Knowing the profits of the business and that the lease would soon expire, he offered the owner a larger rental than the plaintiff was paying. It was decreed that he held the lease in trust for his employer.

In *Chamber of Commerce v. Wells*, (1907) 100 Minn. 205, 111 N. W. 157, the defendant, owing no fiduciary duty to plaintiff, surreptitiously obtained plaintiff's market reports and used them as his own. The court in enjoining this conduct recognized plaintiff's property right in the quotations. This case is strikingly similar to the instant case where the court went to considerable trouble to work out a property right in "news," but also laid stress on the unconscionable conduct of the defendant and enjoined it as unfair competition.

MONOPOLIES—RESTRAINING VIOLATION OF SHERMAN ANTI-TRUST ACT—RIGHT OF PRIVATE PARTY TO MAINTAIN SUIT.—Plaintiff sought an injunction against the defendants who were conspiring to refuse to work upon non-union made goods and to prevent by concerted action the use of such material manufactured in other states. The action was brought under the Sherman Anti-Trust Act of July 2, 1890, 26 Stat. at L. 209, Chap. 647, 8 U. S. Comp. Stat. 1916 Sec. 8820. *Held*, that an act, although a violation of the provisions of that law, could not be enjoined at the instance of a private party, although he may have suffered special damage therefrom, the remedy by injunction being available only to the government. *Paine Lumber Co. v. Neal*, (1917) 244 U. S. 459, 37 S. C. R. 718, 61 L. Ed. 1256.

The general opinion of the federal courts since the enactment of the Sherman Act has been that that statute was of such a drastic penal character that only the government had the right to injunctive relief under it, the private individual being left to his remedy at law for triple damages for injuries suffered through violation of its provisions. *Pidcock v. Harrington*, (1894) 64 Fed. 821; *National Fireproofing Co. v. Mason Builders' Association*, (1909) 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N.S.) 148 and note, page 152; *Southern Indiana Express Co. v. United States Express Co.*, (1898) 88 Fed. 659, affirmed in 92 Fed. 1022, 35 C. C. A. 172. Some of the state acts against unlawful combinations have specifically granted the right to injunctive relief to private parties. *Currier v. Concord R. Corp.*, (1869) 48 N. H. 321. But where the state statute follows the federal act it is held that the right to injunction is only in the govern-

ment. *Albers Commission Co. v. Spencer*, (1907) 205 Mo. 105, 103 S. W. 523, 11 L. R. A. (N. S.) 1003. Likewise, the invalidity of plaintiff corporation because of violation of the Sherman Act is not a good defense to an action for goods sold and delivered. *Wilder Manufacturing Co. v. Corn Products Refining Co.*, (1915) 236 U. S. 165, 35 S. C. R. 398, 59 L. Ed. 520, Ann. Cas. 1916A 118. The court seems to hold in the principal case that the action in equity for injunction, which complainants were entitled to before the Sherman Act, was taken away by that act. Granting that the Sherman Act created a new criminal right of action in the government, the right in the individual to save himself and his property from irremediable damage through acts constituting a violation of that statute should still exist. *Blindell v. Hagen*, (1893) 54 Fed. 40, affirmed in 56 Fed. 696, 6 C. C. A. 86, 13 U. S. App. 354. Although the facts did not establish a right exclusive of the statute, the court recognized that the equity right still existed, in *Gulf, etc., Ry. Co. v. Miami Steamship Co.*, (1898) 86 Fed. 407, 30 C. C. A. 142. The doubt has been cleared up by the Clayton Act of October 15, 1914, Chap. 323, Sec. 16, 38 Stat. at L. 730, 737, 8 U. S. Comp. Stat. 1916, Secs. 8835a, 8835o, which gives a right to injunction by a private individual who has suffered special damage through a violation of the Anti-Trust Acts. *Venner v. New York Central & Hartford R. Co.*, (1917) 177 App. Div. 296, 164 N. Y. Supp. 626. This act was in force at the time of the decision of the principal case by the Supreme Court, and it is not plain why it was not considered binding, inasmuch as the relief sought would operate only in future and not retrospectively.

MUNICIPAL CORPORATIONS—CONFLICT BETWEEN COMMON LAW AND ADMIRALTY LAW AS TO THE LIABILITY OF MUNICIPAL CORPORATIONS FOR MARITIME TORT.—A fire-boat belonging to the fire department of the city of Chicago, while engaged in putting out an elevator fire, negligently sank a vessel which was tied up at a dock for the winter. Suit was brought against the city of Chicago in admiralty, for the tort, and damages were recovered. *City of Chicago v. White Transportation Co.*, (C. C. A. 1917) 243 Fed. 358.

Such a result is in direct conflict with the common law of practically all jurisdictions in this country, which hold that a city fire department is engaged in a governmental function, and hence the city is not liable. *Miller v. City of Minneapolis*, (1898) 75 Minn. 131, 77 N. W. 788; *Hillstrom v. City of St. Paul*, (1916) 134 Minn. 451, 159 N. W. 1076, L. R. A. 1917B 548 and note. The common law test as to when a municipality is liable for torts is whether or not the city or department is engaged in the performance of public or governmental functions or duties. 20 Am. & Eng. Ency. of Law 1193. *Gullikson v. McDonald*, (1895) 62 Minn. 278, 64 N. W. 812; *Opocensky v. South Omaha*, (Neb. 1917) 163 N. W. 325, L. R. A. 1917E 1170. The distinction is between governmental and corporate functions. Courts recognize this difference, but differ as to what constitutes such functions. *Barnes v. District of Columbia*, (1875) 91 U. S. 540, 23 L. Ed. 440; *Evanston v. Gunn*, (1878) 99 U. S. 660, 25 L. Ed. 306; *Kobs v. Minneapolis*, (1875) 22 Minn. 159. The doctrine of respondeat superior does not apply to the servants of a municipality en-

gaged in a governmental function, as distinguished from municipal or corporate duties. *Bryant v. City of St. Paul,* (1885) 33 Minn. 289, 23 N. W. 220, 53 Am. Rep. 31, (Duties of Board of Health contrasted with duty to maintain safe streets). Various reasons are given for this rule of law as to liability of municipal corporations. The main reason seems to be that the corporation is exercising a portion of the sovereign power of the state (Id.). Some courts base it upon public policy, arguing that a contrary rule would cause endless trouble and litigation, and also cause a municipality to hesitate taking over or performing necessary functions. *Ogg v. Lansing,* (1872) 35 Iowa 495, 14 Am. Rep. 499. Modern text writers do not very clearly show the real history of the rule, merely giving the general rule, with a statement that public policy is back of it. Cooley, Municipal Corporations 376; 3 Abbott, Municipal Corporations 953; 2 Dillon, Municipal Corporations, 4th ed. Secs. 975, 976. It is an application of the fundamental conception that a sovereign cannot be sued in his own courts without his consent. *Chisholm v. Georgia,* (1793) 2 Dall. (U.S.) 419, 1 L. Ed. 440. But it must be so stated as to harmonize with the rule that a municipality, as a corporation, may be sued to enforce its contracts and its tort obligations which do not grow out of the delegated exercise of the sovereignty of the state.

In admiralty a different rule seems to prevail. While a claim for damages against a ship belonging to the United States, for injuries caused by it in a collision, cannot be enforced by direct proceedings, yet when the government initiates proceedings which put the offending ship within the jurisdiction of an admiralty court, private parties may assert and enforce their claims against the ship, or against the fund created by the condemnation and sale of the ship. The government in such a case impliedly consents to the jurisdiction. *The Siren,* (1869) 7 Wall. (U. S.) 152, 19 L. Ed. 129. The court, having taken jurisdiction at the instance of the United States, exercises it to adjudicate all claims respecting the rem growing out of maritime tort, etc. 1 Kent, Commentaries 354. But while the United States Supreme Court recognizes the immunity of the federal government from suits instituted by private persons, and admits the non-liability of a municipality at common law for collision by a fire-boat belonging to a city, it upholds the jurisdiction of admiralty in such a case. *Workman v. New York City,* (1900) 179 U. S. 552, 21 S. C. R. 212, 45 L. Ed. 314, holding the city liable in personam under the rule of respondeat superior. In that case the court seems largely to rely upon the decision in *The Siren,* notwithstanding that was (a) a libel in rem, and (b) a case in which the government waived its immunity by invoking the jurisdiction. The four dissenting justices denied the authority of that decision as supporting a judgment in personam against a municipality which had never consented to be sued. Prior to the *Workman Case,* it had been decided by Chief Justice Waite in *The Fidelity,* (1878) 9 Ben. (U. S. D. C.) 333, (1879) 16 Blatch. (U.S.D.C.) 569, that a libel in rem could not be sustained in admiralty against a steam-tug owned by the city of New York and used exclusively by the commissioners of charities and correction in the performance of their duties. He declared that the exemption of public vessels from suits in admiralty arose not out of a want of power to sue the public owner, but out of a want of liability on the part of the vessel. If so, it is plainly

immaterial whether the proceeding be in rem or in personam. In *Thompson Navigation Co. v. Chicago,* (1897) 79 Fed. 984, Grosscup, J., held the city liable in personam in admiralty, but not in rem, professing to follow the *Fidelity Case* in denying liability in rem, but refusing to follow it in respect to personal liability. He attributed the city's liability solely to the fact of its ownership of the offending vessel, and not to the rule of respondeat superior, whereas the Supreme Court, in the *Workman Case,* places it squarely upon the doctrine of respondeat superior (179 U. S. 552, 565). The circuit court of appeals in the instant case applies the doctrine of the *Workman Case,* without reviewing the reasoning upon which it was based. According to Grosscup, J., while the city is liable because of its ownership of the offending ship, regardless of the relation of master and servant, the vessel which is the basis of the court's jurisdiction cannot be held. This proposition is plainly untenable. According to a bare majority of the Supreme Court, the sovereignty which protects the city in the state court in every form of action, and in the federal court if the proceeding be in rem, is no protection if the action be in personam in admiralty, although a vessel owned by the United States would be immune under the same circumstances. Why admiralty should assert the right to override a settled rule of the common law in this instance does not very clearly appear. The impolicy of permitting the vessel itself to be seized is obvious. For tort liability in admiralty of a Deleware county, see *The Alex Y. Hanna,* (1917) 246 Fed. 157.

RESTRAINT OF TRADE—LIMITATION AS TO TERRITORY.—The defendant entered into a contract with the plaintiff by which he agreed to devote all his time for five years to the plaintiff's business and not to enter into the business himself or into the employ of anyone using the forms and plans of the plaintiff in competition with the plaintiff. *Held,* that it being possible to ascertain whether another business of the same type would be in competition with him, the contract was limited as to territory and valid. *Cropper et al. v. Davis,* (1917) 243 Fed. 310.

The law has undergone a great change in regard to contracts in restraint of trade. The earlier English and American cases held contracts in general restraint void. *Case of the Tailors of Ipswich,* (1615) 11 Coke 53; *Calahan v. Donnolly,* (1872) 45 Cal. 152, 13 Am. Rep. 172 and note. So restraint not limited as to space has been declared void. *Ward v. Byrne,* (1839) 5 M. & W. 547; *Wilcy v. Baumgartner et al.,* (1884) 97 Ind. 66, 49 Am. Rep. 427. A restraint limited in time and place, however, was held valid at an early date. *Mitchell v. Reynolds,* (1711) 1 P. Wms. 181. The test of partial and general restraint was slightly modified by the House of Lords in the case of *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Company,* [1894] App. Cas. 535, where a covenant in general restraint of trade was held valid and enforceable, because a reasonable restraint with reference to the circumstances of that particular case. The weight of authority in American jurisdictions seems to be in accord with that rule. *Diamond Match Company v. Roeber,* (1887) 106 N. Y. 473, 13 N. E. 419; *Carter v. Alling,* (1890) 43 Fed. 208; *Hall Manufacturing Company v. Western Steel & Iron Works,* (1915) 227 Fed. 588, 142 C. C. A. 220, L. R. A. 1916C 620.

The instant case may be said to contain a spatial restriction in the words "in competition therewith." *Hubbard v. Miller,* (1873) 27 Mich. 15, 15 Am. Rep. 153, holds that, if no territorial limits were introduced into the agreement, the restriction should be construed to go as far as the trade of the covenantee might extend. *Knapp v. Jarvis Adams Company,* (1905) 135 Fed. 1008, 70 C. C. A. 536, holds that under similar circumstances, the restraint might extend to the limits wherein plaintiff's trade would be likely to go. In *Moore & Handley Hardware Company v. Towers Hardware Company,* (1889) 87 Ala. 206, 6 So. 41, 13 Am. St. Rep. 23, there was an agreement that one of the parties was not to handle any more plow blades or plow shares—no restriction being put on time or space. The parties had been dealing in competition with each other and the court held that the restraint should be construed as applying to the territory wherein the competition existed. In the instant case the territorial restriction is co-extensive with the bounds within which plaintiff's business is carried on, of the extent of which the defendant is presumed, by implication, to have knowledge and notice.

BOOK REVIEWS

THE RULE-MAKING AUTHORITY OF THE ENGLISH SUPREME COURT. Samuel Rosenbaum. Boston: The Boston Book Company. 1917. Pp. xiv, 321. Price, $3.50.

Mr. Rosenbaum here presents as Volume IV of the University of Pennsylvania Law School Series the results of his two years' study of English civil procedure. The material first appeared in the form of articles in English and American legal periodicals. Taking the Judicature Acts as an historical basis, the author gives a clear and thorough account of modern English procedure, with especial reference to the rule-making functions of Bench and Bar. Rules of practice are shown in process of adoption and alteration; the composition and function of the several rule-making bodies are clearly explained. The last chapter is devoted to a comparative survey of rule-making and practice throughout the British Empire. The thoroughness of the author's investigation and the accuracy of his statements are attested by T. Willes Chitty, a Master of the Supreme Court of Judicature, in his preface to the book.

The administration of justice in American courts is the subject of no little adverse criticism. Critics and reformers are not wholly agreed either upon the nature of the difficulty or its remedy; but there is a growing conviction that judges and practicing lawyers should more largely control the making of rules of procedure. In most of our states legislatures now prescribe the details of practice. They meet infrequently and only at stated intervals and are occupied with many questions. Their members are chosen without reference to any special fitness for this particular task. The arguments in favor of judicial control of civil procedure, as more efficient and flexible than legislative control, have recently been presented in this REVIEW by Major Morgan in his clear and forceful article, "Judicial Regulation of Court Procedure."[1]

[1] MINNESOTA LAW REVIEW 81.

This book furnishes valuable material for every lawyer interested in the betterment of civil procedure and is an excellent basis for comparison between the English system and the typical American system of rule-making.

WILBUR H. CHERRY.

MINNEAPOLIS.

HANDBOOK OF THE LAW OF TORTS. By H. Gerald Chapin. St. Paul: West Publishing Company. 1917. Pp. xiv, 695. Price $3.75.

Although denominated a "handbook" merely, Professor Chapin's new volume contains a surprisingly large amount of valuable material on the varied subject matter of Tort law. The book is divided into two parts, the first dealing with general principles, the second with specific torts. In each the author has made his production much more than a collection of head-notes. Topics are carefully analyzed and discussed as fully as the nature of the book permits. Cases are not only freely cited but intelligently criticized, especially in the footnotes, which are hardly less important than the text. Occasionally the brevity made necessary by treating so large a subject matter in small compass necessarily necessitates over-conciseness as, for instance, in Deceit (398): "So representations of value are generally deemed mere expressions of opinion." References to other well known texts and legal periodicals frequently appear, however, where the author's own discussion is limited. Here and there, too, is found a section which is not up to the general standard in clearness; instance, Statutory Torts (pp. 32-40), a topic which Dean Thayer's masterful discussion has greatly clarified. The general impression conveyed by Chapin on Torts is that of a well written and useful piece of work.

HERBERT F. GOODRICH.

University of Iowa.

THE LAW AND PRACTICE IN BANKRUPTCY. By Wm. Miller Collier, Eleventh Edition by Frank C. Gilbert, Albany: Matthew Bender & Company. 1917. Price $12.00 in buckram.

Every edition of Collier on Bankruptcy has been based on the proposition that all bankruptcy law is statutory, and that what attorneys and courts desire to know is what Congress meant when it used the language that it did in the Bankruptcy Act of 1898 and the amendments thereto. To endeavor to furnish that information, each section of the act is discussed in its numerical order, and the decisions of the courts construing that section cited in the foot notes.

After the publication of the tenth edition on June 1st, 1914, Congress enacted three amendments to the Bankruptcy Act, one of a minor character affecting debts dischargeable in bankruptcy, and two very important amendments affecting appellate procedure in bankruptcy cases. During that period, over two thousand cases were decided by state and federal courts disposing of several controverted questions. In view of these material additions to, or alterations in the bankruptcy law, the author says that he felt the necessity for a revised edition.

The method of presentation employed in previous editions has been followed in this one. For example, the author first takes up the first

section of the Act containing the definition of terms used in the Act as Congress defined them, and where questions have arisen as to just what Congress meant in the use of the terms, cites the cases construing said phrases, quotes from said cases and summarizes all in his own language. The same method is then employed with reference to Section 2, and so on through the 72 sections of the Act. References are made to the American Bankruptcy Reports, Federal Reporter, United States Reports and State Court Reports, containing the decisions.

Too much can not be said in favor of this method of presentation as compared with the topical method. An attorney can usually find a section of the Act covering the particular question in controversy, because Congress had the benefit of the previous United States Bankruptcy Acts of 1800, 1841 and 1867 and also the English Acts of 1883 and 1890, when the present law was enacted, and made the Act very comprehensive.

The difficulty usually arises in applying the language of that section of the Act to the particular facts under consideration. To refer to a text book using the topical method of presentation requires first a careful analysis of the subject and then a search through an author's index to see whether one's analysis corresponds with that made by the author. When one can refer to the section in question immediately, and find a complete summary of the decisions construing that section, much time is saved.

After discussing all sections of the Act in this manner, the author presents and discusses in the same manner each one of the 38 General Orders in bankruptcy adopted by the Supreme Court of the United States at the October term in 1898. These orders have the same force as the Act itself except where they conflict with the act and are designed to explain, amplify and apply the provisions of the Act.

Following the orders, the author furnishes the 63 official forms issued by the United States Supreme Court for use in bankruptcy proceedings and adds 198 supplementary unofficial forms prepared by or for the author covering practically every conceivable situation. Where decisions have made official forms of no value, as has happened with reference to some of them, the forms are given and reference made to the decisions.

Inasmuch as proceedings in equity instituted for the purpose of carrying into effect the provisions of the Act, or of enforcing the rights and remedies given by it are governed by the rules in equity prescribed by the United States Supreme Court those rules are next quoted in full. Then follows the full text of the Bankruptcy Acts of 1898, 1867, 1841 and 1800.

It is a well known fact that very few men realize in time that they are insolvent. Each believes that by making some fortunate turn, he will be able to weather the impending disaster. He makes turn after turn and if unsuccessful, finds his affairs either voluntarily or involuntarily in the hands of the bankruptcy court. More complicated situations can hardly be imagined than those that confront the court, at that time. Any treatise that will assist both courts and attorneys in solving those difficulties, as this work does, is well worth having on one's book shelves.

CLARK R. FLETCHER.

Minneapolis.

MINNESOTA LAW REVIEW

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TITLE TO THE SOIL UNDER PUBLIC WATERS—A QUESTION OF FACT

IN *State v. Korrer*[1] the supreme court of Minnesota decided that the owners of land bordering on public waters have no right to take iron ore from the bed below low-water mark and for that purpose to fill in the bed of the lake; and, on the other hand, that the state had no right to recover the value of the ore mined under a stipulation of the parties, and order of court, that the state should be paid for it if the riparian owners were not entitled to it.

The riparian owner is denied the right to remove the minerals in the bed on two grounds: (1) "the state owns the soil under public waters in a sovereign, not a proprietary, capacity, and the shore owner does not;" (2) "the state has the power to preserve the integrity of its public lakes and rivers, and riparian rights do not include the right to fill and destroy the bed. . . . for the purpose of taking ore therefrom, against the protest of the state."[2] The state is denied recovery for the minerals taken because "the state owns the bed. . . . 'not, however, in the sense of ordinary, absolute proprietorship, with the right of alienation, but in its sovereign governmental capacity, for common public use, and in trust for the people of the state for the public purposes for which they are adapted.' "[3]

[1] (1914) 127 Minn. 60, 148 N. W. 617.
[2] Ibid., at 73.
[3] Ibid., at 70

There is great difference between the two reasons first given. Ownership is a collective name for rights in a thing, indefinite, but exhaustive. It may be qualified by, or subject to, rights in others, such as easements or profits a prendre, but would still connote all residuary rights not included in the special right.[4] If the state owns the bed, and whether absolutely or in trust for the public is here immaterial, the riparian is necessarily excluded from any right therein peculiar to him, except such as he may have by some special right; and the first part of the decision is that the riparian has no profit a prendre of minerals in the state's land. The second reason, however, does not necessarily import ownership in the state, but only a quasi-easement which the state holds for the public, with power to conserve it for the public use. This would leave the riparian the owner of the bed, subject only to the public right. And as the public right does not include minerals, the riparian would own the minerals, but must not destroy the public right in getting at them. The reason for denying recovery to the state under the stipulation is ambiguous and may correspond to either of the above. It may mean that the state is owner of the bed, but without power to alien any interest in it, or that the state has merely a special interest measured by the public right, and that the general ownership is in the riparian; that the state's right is proprietary in extent, though not in power, or not proprietary in either respect. This dual reasoning reflects the state of the Minnesota decisions.[5]

For most purposes it makes no difference whether the ownership is in the state or in the riparian. So far as the public right goes it is paramount, and either the state or the riparian holds subject to it. So if the public right were exhaustive of all possible uses of the soil, the inquiry who has the dry legal title would be of only academic interest. But there are uses of the soil not included within the jus publicum, the right which the public enjoy directly as individuals. The taking of minerals is one of these, and it becomes important to determine whether these residuary rights, the jus privatum, are in the corporate state, as distinguished from the public, or in the riparian,—which of the two is the general owner.

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[4] Austin, Jurisprudence Secs. 515, 1054.

[5] "It seems to me that the supreme court of Minnesota, has, in effect and for all practical purposes, finally adopted the common law rule . . . that of a qualified fee ownership in the riparian owner of the bed of the stream to the middle thread thereof." Per Judge Morris in Hobart v. Hall, (1909) 174 Fed. 433.

If the corporate state is the owner, other questions arise. It is conceivable that a right like that to minerals may be enjoyed without any impairment of the value or use of the public waters for other purposes, as by dredging, or that it cannot be enjoyed without impairing or destroying the public waters, as by draining. May the state alien the beds of the public waters to be enjoyed in either manner?

It is intended to discuss—

(1) Does the state own the beds of its public waters, or is the title in the riparian?

(2) If the state owns the beds, may it use or alien them, subject to public and riparian special rights?

(3) May the state use or alien the beds for any purpose impairing or destroying the public and riparian special rights?

Waters are public which are tidal or which are navigable in fact. What waters are included under navigable in fact is itself a difficult question, into which we shall not enter here.[6]

In England the crown has prima facie title to the beds of tidal waters, but the beds of public fresh waters are prima facie in the riparians. As the American cases usually refer to the English rule, either to follow it or to distinguish it, a consideration of the origin and meaning of that rule is necessary.

It has been pointed out that the distinction between tidal and fresh waters, in respect to ownership of the beds, did not exist in the earlier English law. Mr. Moore[7] has thrown by his valuable treatise a flood of light into this obscure corner of the law. He has shown that prior to the time of Elizabeth, where the upland was in possession of a subject the crown asserted no title to the foreshore of tidal waters, now included within the prima facie title of the crown, though there had been much litigation between crown and subject wherein such an allegation would have been of the greatest value to the crown's cause, and that the first case in which the prima facie title of the crown was successfully asserted was in the reign of Charles I.[8] His conclusion is that originally the riparian subjects owned both the beds of fresh waters and of tidal waters so far as they were valuable for purpose of ownership.

[6] Willow River Club v. Wade, (1898) 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305, and note.

[7] History and Law of the Foreshore and Seashore.

[8] Moore, Foreshore, xxxvi, 169, 262, 644, 650.

What was the origin of the title of the subject to the bed of fresh and to the foreshore of tidal waters and how did the prima facie theory of the title of the crown to the latter arise?

It must be remembered that settlement and occupation of the lands of England preceded the development of any adequate system of law. The tribes landing on the English shores, unlike the colonists of America, brought with them only the most primitive ideas of law.[9] Their acts would determine law, rather than be determined by it. Claiming by conquest, they would own what they possessed, rather than possess what they owned. The feudal theory was as yet undeveloped.[10] It is reasonable to suppose that a people under such circumstances would take possession of whatever was worth possessing.

During both the Anglo-Saxon and the Norman periods, in so far as the crown did own and grant the lands to subjects, no distinction was made between dry and submerged lands. The charters expressly included "to the mid-stream of non-tidal rivers, and in the case of tidal rivers *inter fauces terrae,* also to the mid-stream."[11]

If these statements are correct,—and there is no evidence to the contrary,—the riparian owners in England had by actual possession or by actual grant from the crown acquired title to the submerged lands and foreshore of the kingdom. Their ownership was not a rule of law, but a statement of fact, as is the ownership of any lands. The only rule of law was that title might be acquired by the subject. That title was acquired was a fact. It was not even a recurring fact, for title once acquired continues.[12] There was consequently no place for custom which makes the law, unless indeed it were in permitting the original acquisition of title by a subject. These known facts that as a general rule title to the submerged lands was in the subjects, either by possession taken by the riparian or by being expressly included in the crown's grant of the uplands, might well raise in course of time a general presumption that the title was in the riparian. The presumption would be justified, as indeed it is later justified by

[9] Maitland's Domesday 225.

[10] Maitland, ibid., 223.

[11] Moore, 1-29, 27, 640, 651, 680; Farnham, Waters and Water Rights Sec. 36; Marshall v. Ulleswater Steam Navigation Co., (1863) 3 B. & S. 732, 736, 742, 32 L. J. K. B. 139, 9 Jur. (N. S.) 988, 8 L. T. 416, 11 W. R. 489. "The Crown had parted with almost all the sea-coast by grants to its subjects before the end of the reign of King John." Moore, Foreshore 27.

[12] Grants of forfeited and escheated lands were made to be enjoyed as before. Ibid., 652, 653.

Sir Matthew Hale with respect to non-tidal lands, by saying, "therewith agrees the common experience."[13] The order in development of the ideas and facts would thus be, first, that riparians might take title to the submerged lands; second, that they actually acquired title by express grant or its equivalent; third, the presumption that they have title. The point to be remembered is that factual titles preceded the presumptive title.

That the ownership of the submerged lands was a question of fact is strongly supported by the origin, nature, and criticism of the theory of the prima facie title of the crown to the beds of tidal waters. Its history is exhaustively traced by Moore.[14] The forfeitures in the reigns of Henry VIII and his immediate successors led to concealment of lands liable to forfeiture. "Title hunters" sought out lands to which the occupants had not a clear title, in the hope of securing grants of the lands for themselves from the crown. One of them, Thomas Digges, engineer, surveyor, and lawyer, wrote, early in the reign of Elizabeth, a treatise entitled "Proofs of the Queen's Interest in Lands Left by the Sea and the Salt Shores Thereof."

"By this treatise was first invented and set up the claim of the crown to the foreshore, reclaimed land, salt marsh, and derelict land, in right of the prerogative. Mr. Digges boldly affirms that no one can make title to the foreshore or land overflowed by the sea, and says it is a sure maxim in the common law that 'whatsoever land there is within the King's dominion whereunto no man can justly make property, it is the King's by his prerogative.'[15] He admits that some subjects may have it by grant, but 'whosoever holds it otherwise than by the Prince's grant they intrude, and no continuance of time or prescription can serve their turn.'[16] He lays the claim of the prerogative as being in respect of the King's general ownership of the land of the whole kingdom, viz.: that the foreshore is parcel of the great

[13] De Jure Maris Chap. I.

[14] Foreshore 169 et seq.

[15] "For yt is a sure Maxime in the Common Lawe that whatsoever lande there is within the Kinge's dominion whereunto no man cann iustly make propertye yt is the Kinge's by his prerogative." Mr. Digges' Arguments, Moore, Foreshore 187.

[16] "Yt maye be farder alledged a greate noomber in this realme haue of the salt shore, and thinck they haue as good propertye in yt, as in enye other of their lande or inheritance. I answere true yt is, a greate noomber in this Realme possesse part thereof, and hould yt iustly, for they have yt by pattent from the prince . . . but whosoever hould yt otherwyse then by the prince's graunte, they intrude, and in this case Publicus error non facit legem, no contynuance of time or prescription can serue their toorne, as yt is before prooued by Brittoune and Bractons owne woordes, De Priuilegijs." Ibid., 190.

waste of the kingdom not granted out; 'the fresh shore, [he says] belongs to the lord of the soil adjoining, the salt shore to the general lord of all.'[17] Thus we see that from its inception until today the claim of the prima facie title rests upon one basis, viz.: that it is parcel of the waste of the kingdom and has never been de facto granted out, and that evidence of user and longa possessio avails not to give a title to it unless the grant be shewn."[18]

With the efforts of the crown to have Digges' doctrine adopted by the courts we are not here concerned. It did not at once receive popular approval. The repeated attempts of the crown to enforce rights based on it were protested in the Grand Remonstrance to Charles I. The first decree in favor of the crown, resting on the doctrine, was rendered 7 Charles I, in the case of *The Attorney General v. Philpott.*[19] Sir Matthew Hale was counsel for the crown in subsequent cases.[20] He accepted the doctrine in his treatise "De Jure Maris," written about 1666[21] and published in 1787. This treatise is the most authoritative work on the subject and has had the greatest influence on the law both in England and in America.[22] As it is the main source of the modern law, some of the more important passages are brought together here.[23]

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[17] "It is a grounde or maxime in our lawes that there is no lande within the Kinge's Dominion but it is either the land of the Kinge or of the Kinge's naturall subiects. And againe there is no lande of any subiect but he holdeth it mediate or immediate of the crowne of Englande, so that there is not lefte within the Kinge of Englands Dominion anie place to purchase per occupationem, which Bracton in his booke de acquirendo rerum Dominio expresslie reuleth, shewing howe an Ilande risinge in a publicke stream occupantis est. And therefore inferreth with these words. Et per consequens Regi propter priuilegium suum. . . . And therefore whatsoeuer he be, subiecte or other, that shall enter upon anie wastes of or in the seas shores of Englande intrudethe upon the Kinge of Englande's inheritaunce, ratione priuilegii." Ibid., 204.

[18] Moore, Foreshore 182.

[19] Ibid., 262. cited in Attorney General v. Richards (1795 2 Anstr. 607, 3 R. R. 632.

[20] Ibid., 278.

[21] Ibid., 317.

[22] Coke's Littleton 261a, Butler's note 205; Palmer v. Mulligan, (1805) 3 Caines (N. Y.) 307, Chancellor Kent at 319; Ex parte Jennings, (1826) 6 Cowen (N. Y.) 518, Reporter's Note 536, 16 Am. Dec. 447; Shively v. Bowlby, (1893) 152 U. S. 1, (11), 38 L. Ed. 331, 14 S. C. R. 548.

[23] Ch. I. "Fresh rivers of what kind soever, do of common right belong to the owners of the soil adjacent; so that the owners of the one side have, of common right, the propriety of the soil, and consequently the right of fishing, usque filum aquae; and the owners of the other side the right of soil or ownership and fishing unto the filum aquae on their side. And if a man be owner of the land on both sides, in common presumption he is owner of the whole river, and hath the right of fishing according to the extent of his land in length. With this agrees the common experience." . . .

The theory of Digges and of Hale in respect to tidal waters was simple. By the feudal theory "all the land in the kingdom is

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"But special usage may alter that common presumption; for one man may have the river, and others the soil adjacent; or one man may have the river and soil thereof, and another the free or several fishing in that river. . . .

"Though fresh rivers are in point of propriety as before prima facie of a private interest; yet as well fresh rivers as salt, or such as flow and reflow, may be under these two servitudes, or affected with them; viz., one of prerogative belonging to the king, and another of publick interest, or belonging to the people in general. . . .

Ch. II. "The king by an ancient right of prerogative hath had a certain interest in many fresh rivers, even where the sea doth not flow or reflow, as well as in salt or arms of the sea; and those are these which follow.

"1st. A right of franchise or privilege, that no man may set up a common ferry for all passengers, without a prescription time out of mind, or a charter from the king. . . .

"And another part of the king's jurisdiction in reformation of nuisances, is, to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage, not only for ships and greater vessels, but also for smaller, as barges or boats; to reform the obstructions or annoyances that are therein to such common passage: for as the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water; and as the highways by land are called altae viae regiae so these publick rivers for publick passage are called fluvii regales, and haut streames le Roy; not in reference to the propriety of the river, but to the publick use; all things of publick safety and convenience being in a special manner under the king's care, supervision, and protection. And therefore the report in Sir John Davys, of the piscary of Banne, mistakes the reason of those books, that call these streames le Roy, as if they were so called in respect of propriety, as 19 Ass. 6, Dy. 11, for they are called so, because they are of publick use, and under the king's special care and protection, whether the soil be his or not. . . .

Ch. III. "There be some streams or rivers, that are private not only in propriety or ownership, but also in use, as little streams and 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 publick use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are prima facie publici juris, common highways for man or goods or both from one inland town to another. Thus the rivers of Wey, of Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they are become to be of private propriety as in what parts they are of the king's propriety, are publick rivers juris publici. And therefore all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments, and removed; and this was the reason of the statute of Magna Charta, cap. 23. . . .

Ch. IV. "Thus much concerning fresh waters or inland rivers, which, though they empty themselves mediately into the sea, are not called arms of the sea, either in respect of the distance or smallness of them.

"We come now to consider the sea and its arms: and first, concerning the sea itself. . . .

"The narrow sea, adjoining to the coast of England, is part of the wast and demesnes and dominions of the king of England, whether it lie within the body of any county or not. . . .

supposed to be holden mediately or immediately of the King."[24] He is the only allodial owner. Of what he has given out he is overlord. What he has not granted away remains in him not only in respect to overlordship, but in respect to property. So the waste lands of the kingdom are his, and these include the lands under tidal waters. The presumption is that the terra firma has been granted. This presumption arises from known facts; but the tidal lands have not been generally granted, and the presumption is, therefore, that they remain in the crown.[25]

"In this sea the king of England hath a double right, viz. a right of jurisdiction which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. The latter is that which I shall meddle with.

"The king's right of propriety or ownership in the sea and soil thereof is evidenced principally in these things that follow.

"1st. The right of fishing in this sea and the creeks and arms thereof is originally lodged in the crown, as the right of depasturing is originally lodged in the owner of the wast whereof he is lord, or as the right of fishing belongs to him that is the owner of a private or inland river. . . .

"But though the king is the owner of this great wast, and as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof, as a publick common of piscary. . . .

"IId. The next evidence of the king's right and propriety in the sea and the arms thereof is his right of propriety to

The shore; and
The Maritima Incrementa.

"(1) The shore is that ground that is between the ordinary high-water and low-water mark. This doth prima facie and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea. . . .

"And thus much of the king's right of propriety which he hath in the sea, and also prima facie and in common presumption in the ports and creeks and arms of the sea. . . .

Ch. V. "Although the king hath prima facie this right in the arms and creeks of the sea communi jure, and in common presumption, yet a subject may have such a right.

"And this he may have two ways.

"1st. By the king's charter or grant; and this is without question.

"2d. The second right is that which is acquired or acquirable to a subject by custom or prescription; and I think it very clear, that the subject may by custom and usage or prescription have the true propriety and interest of many of these several maritime interests, which we have before stated to be prima facie belonging to the king. I will go over them particularly, and set down which of these interests are acquirable by usage or prescription by a subject. . . .

Ch. VI. "The king of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath that propriety in the sea; but a subject hath not nor indeed cannot have that property in the sea, through a whole tract of it, that the king hath; because without a regular power he cannot possibly possess it. . . .

[24] 2 Bl. Com. 59.

[25] "The title of the King of England to the land or soil aqua maris co-operta, is similar to his ancient title to all the terra firma in his

"The ground upon which the prima facie claim of the crown rests is the allegation that the crown has seldom or never parted with the foreshore to the subject, but has from the earliest time retained it as part of the waste dominions of the crown. Here, of course, we speak of the *jus privatum* or right of property in the foreshore, which the crown may alienate, in contradistinction to the *jus publicum,* which is inalienable, and survives for the benefit of the public whether the crown retains the foreshore or grants it to a subject. It is nowhere alleged that the crown has *never* parted with any portion of the foreshore; it has always admitted that at any rate in some places it has so parted with it. The truth or untruth of the theory, and the relative value and weight of the presumption in favor of the crown which is based upon it, depend, therefore, on a question of fact."[26]

Criticism of the theory has been directed to the question whether this premise that the beds, and particularly the foreshore, of tidal waters have not been generally granted away by the crown is true. The injustice of the theory, if there be such, lay in creating a presumption which, it is alleged, is contrary to the facts. This presumption dispensed with evidence of the crown's title and enabled it to recover on the weakness of the defendant's title, and even on his inability to prove it. The private claimant, thought he be defendant, must furnish the proof of his right.[27] Grants of the upland did not carry title to the foreshore by implication. Doubts were resolved in favor of the crown. It is questioned whether the facts were such as to justify this presumption in its favor.[28] The answer to this question is im-

dominions, as the first and original proprietor and lord paramount. It is a fundamental principle of our laws of property in land, that all the lands in the realm belonged originally to the King; and, according to the feudal principles of our ancient laws of tenure, the land-owners of England are, to this day, tenants to the King, holding their lands of him, as their lord paramount.

"That part of the land which the King and his ancestors have never granted out to the subject, remains to the King, as his demesnes, in absolute ownership. The terra firma of England has become, almost entirely, the property (by grant and tenure) of the subject; but the terra aqua maris co-operta still remains to the King in wide and barren ownership." Hall, The Seashore 6.

See to same effect an earlier treatise by Sir Matthew Hale to be found in Moore's Foreshore 258, 362, 364, 367.

[26] Moore, Foreshore, 638.

[27] Attorney General v. Richards, (1793) 2 Anstr. 603, 614; Attorney General v. Chamberlaine, (1858) 4 K. & J. 292; Coke's Littleton 261a, Butler's note 205.

[28] "On consideration of the charters here referred to, and the very numerous instances in which claims to wreck will be found to have been allowed when claimed infra manerium, it will appear that the widely prevailing notion that the Crown has scarcely ever parted with the foreshore has no foundation in fact; and as the theory of the prima facie title of the Crown rests entirely upon this assumption—viz.;; that the

material to our present purpose, but the alleged basis in fact of the presumption and the ground of the criticism are to be emphasized.

Fresh water rivers, wrote Hale, do of common right belong to the riparians. That he meant nothing more than a presumption in their favor is proved by the use of the words "common presumption" immediately after, and throughout the treatise. Special usage, he adds, may alter that common presumption, for one may have the river and another the soil adjacent. How can this common presumption be justified? We find the answer in the ancient charters which expressly granted the rivers to the mid-stream. The river beds had been expressly granted away with the terra firma, as a general rule. It will be later pointed out that according to English authority they will pass in a crown grant only by express reference.[29] The riparians were in the enjoyment of them so generally that the common presumption was in the riparian's favor until a better right was shown. "Therewith agrees the common experience." Express alienation by the crown and possession by the subject were the foundation of the presumptive title. The factual titles did not grow out of a rule of law, but a presumption of ownership grew out of the factual titles.

But the narrow sea, continued Hale, including the creeks and arms of the sea, are part of the waste and demesnes of the king. Yet, although the king hath prima facie this right in the arms and creeks de communi jure, and in common presumption, a subject may have such a right by the king's grant or by prescription. Here the presumption is reversed. The factual title has remained in the king so generally that the common presumption is in his favor.

The distinction in English law, as it became settled, between fresh water beds and tidal water beds is based on the assumption that, as a general rule, the former were taken possession of by the

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Crown has retained the foreshore as part of the waste dominions of the Crown never granted out—it would seem that this theory (the origin of which we shall shew in the time of Elizabeth) is a theory based upon a presumption of fact which is, as regards, at any rate, the greater part of the kingdom, wholly untrue. It is a theory of what might have been, but it is not a theory based upon true facts." Moore, Foreshore 24.

It might be suggested that Mr. Moore's criticism is based on the state of the title to the foreshore alone, while Hale's presumption is based on the state of the title to the tidal lands as a whole. Hale treats the foreshore as the terminus of the tidal lands and therefore presumably of the same ownership. See ante note 23, Chap. VI, and post notes 30, 64, 65.

[29] Post notes 46, 48, 55.

riparian subject or were granted to him by the crown, so that prima facie the title to them is in the riparian subject, while the latter were so seldom granted by the crown that prima facie the crown still retains the property in them.[30]

The first step in determining the ownership of submerged lands in England is the application of the presumption one way or the other, according to the nature of the lands. But the presumption may be rebutted, and the title to the beds of both fresh and tidal waters is ultimately one of fact.[31] The modern English law as to fresh-water and tidal lands is thus stated by Bowen, L. J., and by Richards, C. B., respectively:

"The natural presumption is, that a man whose land abuts on a river owns the bed of the river up to the middle of the stream, and, if he owns the land on both sides, the presumption is that the whole bed of the river belongs to him, unless it is a tidal river. There is also a presumption that the owner of the bed of the river has the right to fish in the stream, and to prevent other persons from fishing there. But these are presumptions of fact, which may be rebutted. They are not rules of law which must apply to every case, because the other facts of a particular case may shew that in that instance the presumption does not obtain. For example, it may be that in a particular place the bed of the river does not belong to the owner of the land which goes down to the bank. Or again, it may be that in a particular place a man may own the bed of the river itself, and yet someone else may have the right to fish, and to exclude others from fishing there. So that, in each case, applying the presumptions so as to throw the onus of proof on the right person, when you have got the whole of the evidence you must make up your mind how far the prima facie presumptions have been rebutted, and what is the real truth of the case apart from all technicality. It may also well be, that one person may have the right to fish in particular portions of a river; and another person may have the

[30] "It is agreed by all, that the sea-shore was at first appropriated to the King, from whom the right to it must be derived. The present state of the shore shews the manner in which the Crown must have used it. Some parts of it were held exclusively by the Crown for the purposes of fisheries, harbours, warehouses, etc. But the greatest part was left open as a common highway between the sea and the land. This is the state in which it continues to this day, and in which, from its general sterility, it must ever continue. From the state of the greatest part has arisen the general rule, or common-law right, and the state of the portions exclusively occupied has occasioned the exceptions." Per Best, J., in Blundell v. Catterall, (1821) 5 B. & Al. 268 (275), 24 R. R. 353.

[31] The Duke of Beaufort v. The Mayor of Swansea, (1849) 3 Exch. 413 (Seashore); Hindson v. Ashby, [1896] 2 Ch. Div. 1, 7, 9, 65 L. J. Ch. 515, 74 L. T. 327, 45 W. R. 252, 60 J. P. 484 (Thames above tide); Marshall v. Ulleswater Steam Navigation Co., (1863) 3 B. & S. 732 (742), 32 L. J. I. B. 139, 9 Jur. (N. S.) 988, 8 L. T. 416, 11 W. R. 489 (Lake); Bristow v. Cormican, (1878) L. R. 3 App. Cas. 641 (Lough in Ireland).

right to fish in other portions of the same stream. 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's 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. It is a question of fact, not of law, in whom the bed of the river Thames in any particular place is vested. It may be that in one place the bed belongs to the king, and that in another place it belongs to a subject. In each particular part of the river it is a question of fact, to whom the soil belongs."[32]

"It is a doctrine of ancient establishment, that the shore between the high and low water marks belongs prima facie to the King; and it is clear that the lands in question are between the ordinary high and low water marks, and consequently prima facie belong to the King; but it is equally clear that the King may grant his private right therein to subjects. It is upon such a grant that the defendants in this suit mainly rely, and such a title it is clearly incumbent on them to prove against the King. The subject may acquire a right of property in these mud lands by grant, charter, or prescription, the first question is whether the defendant has in this case established his title by either of those means of acquiring the right of possession, and shewn that the right has been taken out of the King and transferred to him. It is incumbent on the defendants to prove that case."*

It is submitted that the development and nature of the English law may be stated as follows:

1. That factual titles to submerged lands were created by express grant from the crown or by prescription.

2. That these factual titles preceded any rule of law as to ownership of submerged lands.

3. That diverse presumptions of ownership of the two classes of submerged lands arose from the existing (or alleged) diverse states of the factual titles in the two classes of lands.

4. That these presumptions are common presumptions of ownership and not rules of construction of grants.

5. That the title to submerged lands is ultimately a question of fact.

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[32] Blount v. Layard, (note to Smith v. Andrews) [1891] 2 Ch. 681 (689).

*Attorney-General v. Burridge, (1822) 10 Price 350.

The application of the rules above stated to the United States seems obvious. The crown of England claimed these territories by right of discovery.[33] The lands were held under grants from the crown to the first proprietors.[34] That the crown originally held the jus privatum as well as the jus publicum in both the dry and the submerged lands is indisputable.

Mr. Justice Shiras in the case of *Morris v. United States*,[35] which deals with titles to the Potomac Flats at Washington City, summarizes the law:

"The conclusions reached by this court in several leading and well-considered cases[36] were that the various charters granted by different monarchs of the Stuart dynasty for large tracts of land on the Atlantic coast conveyed to the grantees both the territory described and the powers of government, including the property and the dominion of lands under tide waters; that by those charters the dominion and propriety in the navigable waters, and in the soils under them, passed as part of the prerogative rights annexed to the political powers conferred on the patentee, and in his hands were intended to be a trust for the common use of the new community, to be freely used by all for navigation and fishery, and not as private property to be parcelled out and sold for his own individual emolument; that, upon the American Revolution, all the rights of the Crown and of Parliament vested in the several states, subject to the rights surrendered to the national government by the constitution of the United States; that when the Revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their common use, subject only to the rights since surrendered by the constitution to the general government."

Thus the ownership by the crown, by its grantees, the first proprietors, and by the state, the successor to both, of the lands of the colonies, antedated, both in legal theory and in actual fact, any private ownership thereof. The prima facie theory of the ownership of the crown (perhaps an erroneous doctrine for England, owing to the alleged prior possession of the submerged lands by subjects, but nevertheless applied to tidal lands), would be and remain logically applicable in the colonies to all submerged lands, unless and until these submerged lands were generally

[33] Martin v. Waddell, (1842) 16 Pet. (U. S.) 367 (409), 10 L. Ed. 997.
[34] Van Rensselaer v. Hays, (1859) 19 N. Y. 68, 75 Am. Dec. 278.
[35] (1899) 174 U. S. 196 (336), 43 L. Ed. 916, 19 S. C. R. 649.
[36] Citing Martin v. Waddell, (1842) 16 Pet. (U. S.) 367, 10 L. Ed. 997; Den v. Jersey Co., (1853) 15 How. (U. S.) 426; Shively v. Bowlby, (1893) 152 U. S. 1, 38 L. Ed. 331, 14 S. C. R. 548.

conveyed away. Whether they were thus conveyed or not is a question of fact.

The American decisions agree, as should be expected, with the English rule as to the beds of tidal waters. The general rule is, except where changed by legislation, that the state has at least a prima facie title below high water mark.[37]

The decisions in respect to public fresh waters are in hopeless conflict.[38] A considerable number of jurisdictions purport to adopt the English common law rule, but they construe it as a rule of substantive law rather than a presumption. The majority of jurisdictions have repudiated the English rule, thus construed, as to some or all of their public fresh waters. Some states have title to the beds of all their public waters; others to the beds of their public rivers, but not of their public lakes; still others to the beds of their public lakes, but not of their public rivers.[39] The truth appears to be that the decisions purporting to repudiate the common law rule accord with its basic reason, while those which purport to follow it do not.

The courts refusing to follow the English rule as to fresh waters put their refusal on several grounds. One of the most common reasons is based on the statement that in England only tidal waters were navigable.[40] In *Barney v. Keokuk*,[41] Justice Bradley, speaking of the right of riparian owners to accretions, said:

"By the common law, as before remarked, such additions to the land on navigable waters belong to the crown; but as the only waters recognized in England as navigable were tide-waters, the rule was often expressed as applicable to tide-waters only,

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[37] 22 L. R. A. (N. S.) 338, note.

[38] For example, the riparian titles on the Mississippi River extend, according to the cases, in Minnesota, to low water mark? Merrill v. St. Anthony Falls Power Co., (1879) 26 Minn. 222 (226), 2 N. W. 842, 37 Am. Rep. 399; in Wisconsin to the center of the stream, Mariner v. Schulte, (1861) 13 Wis. 775; in Iowa, to high water mark, Barney v. Keokuk, (1876) 94 U. S. 324, 24 L. Ed. 224; in Illinois, to the center of the stream, Cobb v. Lavelle, (1878) 89 Ill. 331, 334, 31 Am. Rep. 91; in Missouri, to low water mark, Cooley v. Golden, (1893) 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300; in Kentucky, to center of the stream, Strange v. Spalding, (1895) 29 S. W. 137; in Tennessee, to low water mark, Elder v. Burrus, (1845) 6 Hump. (Tenn.) 358; in Arkansas, to high water mark, Wallace v. Driver, (1896) 61 Ark. 429, 33 S. W. 641, 31 L. R. A. 317; in Mississippi, to the center of the stream, Morgan v. Reading, (1844) 3 S. & M. (Miss.) 366.

[39] 1 MINNESOTA LAW REVIEW 39 and citations.

[40] Farnham, Waters Sec. 23a et seq. and citations. The cases are very numerous.

[41] (1876) 94 U. S. 324, 334, 336, 24 L. Ed. 224.

although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. The confusion of navigable with tide water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British Island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation in many states of doctrines with regard to the ownership of the soil in navigable waters above tide water at variance with sound principles of public policy."

That the reason of the prima facie title of the crown to tidal beds was that it should have control over navigable waters does not stand well with the statement of Hale, who more than any other is responsible for the rule. Navigable rivers in which the tide does not ebb and flow are spoken of by Hale as public rivers in which the king has a right of jurisdiction to preserve for himself and his subjects a right of passage, but he does not state that the soil ought to belong to the king for that reason, but says that it belongs to the riparians, as in the public highways. There is not a suggestion in the treatises either of Digges or of Hale that the public right of navigation had any bearing on the title to the soil.

The right of the crown of England to the tidal lands rested and still rests on its right to the waste lands not conveyed to its subjects. The question at issue in every case since the prima facie theory was adopted was one of fact whether the private claimant could show a title by conveyance or prescription. If he could, it was his; if not, it belonged to the crown. The distinction between fresh and tidal waters was taken on the assumption that the beds of fresh waters had in fact been conveyed, but that the beds of tidal waters had not been alienated. *Fresh or tidal was not a test in itself, but distinguished the class of lands which had been generally alienated from that which had not.* The public right of navigation did not in any degree affect the decisions. It was not deemed necessary that the title be in the crown to secure this public right, for the right existed whether the lands were in private ownership or in the crown.

It is submitted that the fundamental error in the American cases has been in treating the matter as a question of law. The

notion has been common that title to lands on the banks of fresh water rivers and lakes includes by a rule of law title to a portion of the bed. The courts which lay down this rule purport to be following the common law of England. In this they fall into two errors: (1) they mistake a rebuttable presumption for a conclusive rule of law; (2) they overlook the absence of the factual basis upon which even the presumption rests.

In England "the common experience" was that riparians owned the beds of fresh rivers. This created a presumption in favor of a riparian in any particular case. But nothing could justify the application of such a presumption in America where without doubt the sovereign for the time being originally owned the beds, except the general alienation of them by the sovereign. The cases are few where the sovereign expressly granted the submerged lands, as the crown in England granted what it held. But, it is answered, the riparians hold by the English common law to midstream. The inversion is complete.

In America titles may usually be traced back to the sovereign grant, and the riparian rights depend on the effect of these grants. The courts frequently state the rule to be that, on a grant from the sovereign of land bordering on public fresh waters, the riparian *takes* title to the middle thread of the stream. Thus, in *Keewatin Power Co. v. The Town of Kenora,*[42] Meredith, J. A., in construing the effect of a crown grant of land in Ontario bounded by a navigable river, said:

"That, according to the law of England, title would pass to the medium filum aquae or viae, as the case might be, cannot be questioned. Such has always been the law of England, though in regard to some waters it does not appear to have been well understood until after Lord Hale's time; that, however, is immaterial."

Such statements involve an error in addition to those indicated above. The presumption of the English common law is that the riparian *owns* the bed, not that he *takes* it by a particular grant.

The original title of riparians to the soil of fresh water rivers in England arose, according to the evidence of the old charters, by express grant of the land to midstream. Perhaps in other cases it arose from possession taken. Centuries passed, and original charters were lost. But it was a fact that the riparians generally were in the enjoyment of the submerged lands. From

[42] (1908) 16 Ont. L. R. 184 (196).

these facts of the generally express conveyances and general enjoyment arose the common presumption that the riparian owned the bed. It is significant that although Hale cites considerable authority for the prima facie title of the crown to tidal beds, he rests the riparians' rights to the fresh water beds largely on "common experience," and that, in the few cases cited, the issue was decided by the jurors, on the evidence, as a question of fact. The presumption is of ownership, and not that ownership is acquired in any particular way.

There is no rule of law, nor even presumption, in the common law of England that a crown grant of riparian lands on public waters, which is silent as to the submerged land, carries title to the middle of the stream. With respect to tidal lands the prima facie theory rests on the assumption that they had never been conveyed. It is consequently a necessary basis to the crown's claim that they had not passed when the uplands were conveyed away. And on the construction of particular crown grants, no soil below high water mark will pass without express mention.[43] With respect to non-tidal lands the common presumption is that the riparian owns them. This may be based on the assumption that title passed generally out of the crown by the original grants. But it does not necessarily follow that it passed by implication, and the evidence of the charters is that it did not, but that it passed by express words.[44] Still less is there any presumption that it passes by a particular grant. *It is not the function of the common presumption of riparian ownership to determine the effect of a particular grant.* It is not a rule of construction. It is a substitute for a grant, is operative only so long as the grant is not in evidence, or, being in evidence, does not determine the extent of the riparian owership. In the same manner, where the terms of the grant of a several fishery are unknown, the owner of the fishery may be presumed to be the owner of the soil; but where these terms appear and are such as to convey an incorporeal hereditament only, the presumption is destroyed.[45]

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[43] Moore, Foreshore 468; Hall, On the Seashore 20, 65, 106, and post note 55.

[44] Moore, Foreshore 1-29.

[45] Best, Principles of Evidence Sec. 427; Duke of Somerset v. Fogwell, (1826) 5 B. & C. 875 (886), 8 D. & R. 747, 5 L. J. (O. S.) K. B. 49, 29 R. R. 449. There is a similar presumption that the lord of the manor owns the waste lands of the manor, which may be rebutted by the terms of a grant. Doe v. Williams, (1836) 7 C. & P. 332; Simpson v. Deudy, (1860) 8 C. B. (N. S.) 433, 6 Jur. (N. S.) 1197. So the presumption that the abutting owners have the soil in the highway exists only in absence

There is surprisingly little authority on the point as to fresh waters in the decisions of the English courts. In the case of *Lord v. The Commissioners of the City of Sydney*[46] the Privy Council had to pass on the effect of a grant by the crown of land in New South Wales bounded in part by a small, non-navigable creek. The court said:

"Upon the true construction of this grant, the creek where it bounds the land is, ad medium filum, included within it. In so holding they do not intend to differ from old authorities in respect to crown grants; but upon a question of the meaning of words the same rules of common sense and justice must apply, whether the subject matter of construction be a grant from the crown, or from a subject: it is always a question of intention, to be collected from the language used with reference to the surrounding circumstances. . . . The Crown had the power of granting it; no reason can be assigned why it should have reserved what might be directly and immediately useful to the grantee and could scarcely have been contemplated as of any probable use to the Crown."

The decision is based on this and other special circumstances. Kent's Commentaries was the only authority cited.[47] The lack of English authority for even this limited rule, and the admission that the general rule was to the contrary, throws not a little light on the origin and meaning of the presumption of riparian ownership.

In *Bloomfield v. Johnston*[48] the Court of Exchequer Chamber had to pass on a grant by James I of lands on the bank of Lough Erne. The court regarded the question whether the presumption of riparian ownership of submerged lands applied to large inland lakes as unsettled, but held that in any case the title to the bed did not pass by this grant. Whiteside, C. J., said:

"We are required by the pleading of the plaintiff to give him eight miles of land covered with water. Where is the grant of these lands? Lord Coke says such should be conveyed by the words 'terra aqua cooperta.' Where are such words to be found on this grant? Nowhere. Certain lands described are given to the grantee,—certain islands by name, and others parcels of the premises, but the lands covered with water are not granted nor intended to be granted. Is the Crown, the grantor, excluded by

of evidence of ownership. Beckett v. Corporation of Leeds, (1872) L. R. 7, Ch. App. 421.

[46] (1859) 12 Moore P. C. 472, 496.

[47] Vol. III 433.* There is no specific reference in the passage to grants by the sovereign. See post note 55.

[48] (1868) 8 Ir. Rep. Com. Law 68, 94, 97.

this grant from the fishery or from the bed and soil of the lake, and if so, by what means? . . . The bold doctrine that, without any words to pass this property, it has passed from the Crown cannot be maintained. The law as to riparian ownership of the banks of a river or stream flowing between the estates of adjoining proprietors cannot here dispense with a grant of the land covered with water."

O'Brien, J., said:

"The presumption that a riparian proprietor is entitled to the adjacent subaqueous soil of non-tidal waters along his lands may be rebutted, and in my opinion such presumption in the present case is rebutted by the facts and documents before us."

Lord v. The Commissioners was pressed upon the court, but distinguished on the special ground on which it was decided.

O'Brien, J., said:

"This does not apply to the case before us, as from the size and extent of Lough Erne, so well adapted for general navigation and used by the public for that purpose, there is no absurdity in supposing that the Crown, in granting all the lands lying along the lake, should have reserved the soil of the lake, but, on the contrary, various reasons may be suggested why it should be advisable to reserve it."

The right of the riparian grantee is often expressed in terms of construction of the boundary of the grant to him. Where a private riparian owns the bed of a river and conveys the upland bounded by the river, the presumption is that he intends to convey to the middle of the stream. It is urged that this rule of construction should apply to original grants by the sovereign. In *Schurmeier v. St. Paul & Pacific R. Co.*,[49] the court, in discussing the effect of a federal patent for land on the Mississippi River, issued while Minnesota was a territory, said:

"At common law, grants of land bounded on rivers above tide water carry the exclusive right and title of the grantee to the middle thread of the stream, unless an intention on the part of the grantor to stop at the edge or margin is in some manner clearly indicated; except that rivers navigable in fact are public highways, and the riparian proprietor holds subject to the public easement. In this case no intention is in any way indicated to limit the grant to the water's edge, and if the common law rule prevails here, Roberts, by his purchase, took to the center of the river."

There seems to be no authority in the English decisions for applying this rule to crown grants, except *Lord v. The Commis-*

[49] (1865) 10 Minn. 82 (G. 59), 102 (G. 76), 88 Am. Dec. 59.

sioners. Even in grants by private riparian proprietors it is but a presumption of intention and may be rebutted by showing the land to be bounded by the margin, bank, or shore,[50] or by proof of surrounding circumstances in relation to the property tending to negative such an intention.[51] In a leading case[52] the court describes the rule as:

"A presumed understanding of the parties that the grantor does not retain a narrow strip of land under a stream or other highway, because the title of it left in him would generally be of little use, except for a purpose of annoyance and litigation."

The rule might well be applied to sovereign grants on small, non-navigable streams. Such is the basis of the decision in *Lord v. The Commissioners.* But in respect to navigable waters the reasoning of *Bloomfield v. Johnston* seems conclusive. The better view is also stated in an Ontario case:[53]

"The title to both bed and banks being in the Crown, its grant of the latter may be construed according to the rules which govern the construction of grants made under similar conditions in England. There the nature of the tenure upon which the Crown holds title to the alveus of rivers navigable in law [tidal] precludes any presumption of an intention to part with any portion of it, unless such portion is granted in express terms. Since in all waters of this country which are navigable in fact the interest of the Crown in the bed is precisely the same as that which it possesses in the fundus of tidal navigable waters in England, it is a logical deduction that by nothing short of an express grant should the Crown be held to have parted with its title to the alveus of our navigable rivers."

The importance of the lands to the public should alone suffice to rebut any presumption of intention to convey them which is not expressed. But, in addition, conveyances by the sovereign should not be construed against the grantor as are conveyances of individuals. Especially is this true where the subject matter in dispute affects or is charged with a public interest.[54]

"The English common law does not allow the riparian owner, under the grant of the sovereign, of lands bounded on tide waters,

[50] Starr v. Child, (1838) 20 Wend. (N. Y.) 149; (1842) 4 Hill. (N. Y.) 369.

[51] Duke of Devonshire v. Pattinson, (1887) L. R. 20 Q. B. D. 263, 57 L. J. Q. B. 189, 58 L. T. 392, 52 J. P. 276.

[52] Sleeper v. Laconia, (1880) 60 N. H. 201, 49 Am. Rep. 311.

[53] Keewatin Power Co. v. Kenora, (1906) 13 Ont. L. R. 237 (262), 8 O. W. R. 369.

[54] Stourbridge Canal Co. v. Wheeley, (1831) 2 Barn. & Adol. 792; Charles River Bridge v. Warren Bridge, (1837) 11 Pet. (U. S.) 420, 9 L. Ed. 773.

to go beyond ordinary high-water mark. Such grants are construed most favorably for the King and against the grantee; and Sir William Scott has vindicated such a construction as founded in wise policy; for grants from the Crown are made by a trustee for the public, and no alienation should be presumed that was not clearly and indisputably expressed."[55]

That grants by the sovereign of land bounded on public waters ought to be construed by the stricter rule in favor of the public right has been asserted in many American cases.[56]

The foregoing reasoning is most clearly applicable in the states formed out of the territories of the United States. That the federal government held both the jus publicum and the jus privatum in the lands of these territories is manifest. The nature and effect of the federal patents of riparian lands is thus described by the federal Supreme Court:

"Meander lines are run, in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser.

"In preparing the official plat from the field notes, the meander line is represented as the border line of the stream, and shows, to a demonstration, that the water-course, and not the meander line, as actually run on the land, is the boundary.

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[55] 3 Kent's Commentaries 432.*

In grants from the Crown, "nothing passes unless the intention that it should pass is manifest." Bayley, J., in Somerset v. Fogwell, (1826) 5 B. & C. 875 (885), 8 D. & R. 747, 5 L. J. (O. S.) K. B. 49, 29 R. R. 449.

"It is established on the best authority, that, in construing grants from the Crown, a different rule of construction prevails from that by which grants from one subject to another are to be construed. In a grant from one subject to another, every intendment is to be made against the grantor, and in favour of the grantee, in order to give full effect to the grant; but in grants from the Crown an opposite rule of construction prevails. Nothing passes except that which is expressed, or which is matter of necessary and unavoidable intendment in order to give effect to the plain and undoubted intention of the grant. And in no species of grant does this rule of construction more especially obtain than in grants which emanate from, and operate in derogation of, the prerogative of the Crown." Cockburn, C. J., in Feather v. Reg., (1865) 6 B. & S. 257 (283), L. J. Q. B. 204, 12 L. T. N. S. 114.

[56] Canal Appraisers v. The People, (1836) 17 Wend. (N. Y.) 571 (574); Shively v. Bowlby, (1893) 152 U. S. 1 (10), 38 L. Ed. 331, 14 S. C. R. 548; Concord Mfg. Co. v. Robertson, (1889) 66 N. H. 1 (12), 25 Atl. 718, 18 L. R. A. 679; Castner v. The Steamboat Dr. Franklin, (1852) 1 Minn. 73 (G. 51). Cases illustrating the rule are collected in 3 Rose's Notes on United States Reports (Rev. ed.) 699.

"Proprietors, bordering on streams not navigable, unless otherwise restricted by the terms of their grant, hold to the centre of the stream; but the better opinion is, that proprietors of lands bordering on navigable rivers, under titles derived from the United States, hold only to the stream, as the express provision is, that all such rivers shall be deemed to be, and remain public highways."[57]

"It has been the practice of the government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines. It has frequently been held both by the federal and state courts that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary. Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the state of Illinois. . . .

"This right of the states to regulate and control the shores of tide waters, and the land under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also, in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the state; but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised. In the case of *Barney v. Keokuk*[58] we held that it is for the several states themselves to determine this question, and that 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. That was a case which arose in the state of Iowa with regard to land on the banks of the Mississippi, in the city of Keokuk, and it appearing to be the settled law of that state that the title of riparian proprietors on the banks of the Mississippi extends only to ordinary high water

[57] St. Paul, etc., R. Co. v. Schurmeier, (1868) 7 Wall. (U. S.) 272 (287), 19 L. Ed. 74.
[58] (1876) 94 U. S. 324, 24 L. Ed. 224.

mark, and that the shore between high and low water mark, as well as the bed of the river, belongs to the state, this court accepted the local law as that which was to govern the case."[59]

These passages state the clearly settled rule of the federal courts. Whether the federal patents of the riparian land were issued before or after the admission of the state, the effect of the patent is now to be determined by the state law. With respect to the prior patents the rule seems indeed peculiar. Either the patentee had, under the federal law, title to the bed of the public water bordering his land from the date of his patent or he had not. In the former case, a denial of his right by state law would be taking his property without compensation; in the latter case, to hold that he now has the property is making a gift to him of the submerged lands. As to federal patents issued after the territory has become a state, the federal Supreme Court decided in *Pollard's Lessee v. Hagen*[60] that a state admitted to the Union becomes by force of its sovereignty the owner of the soil under its public waters, and that the federal government has thereafter no power to convey the submerged lands. The decisions of the federal courts are clear that the property in the submerged lands does not pass by the federal patents, no matter when they are issued, and that the riparians have it, if at all, only by the bounty of the state. The conclusion is unavoidable that it can come to them only by an arbitrary rule of state law."*

Some courts are adopting a less rigorous test than formerly to determine what waters are public. The older test was—were they capable of navigation for commercial purposes. But in *Lamprey v. State*[61] it is said:

"Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing,

[59] Hardin v. Jordan, (1891) 140 U. S. 371 (380), 35 L. Ed. 428, 11 S. C. R. 808.

[60] (1845) 3 How. (U. S.) 212, 11 L. Ed. 565.

*"When land under navigable water passes to the riparian proprietor, along with a grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the state which does own it that it is attached to the shore." Holmes, J. in Hardin v. Shedd, (1902) 190 U. S. 508 (519), 47 L. Ed. 1156, 23 S. C. R. 685.

[61] (1893) 52 Minn. 181 (199), 53 N. W. 1139 (1143), 18 L. R. A. 670, 38 A. S. R. 541. See also City of Grand Rapids v. Powers, (1891) 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498, 28 A. S. R 276; State v. Korrer, (1914) 127 Minn. 60 (63), 148 N. W. 617.

fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes which cannot now be enumerated or even anticipated. To hand over all these lakes to private ownership under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated."

If the riparians owned the beds of even non-navigable lakes from the date of their patents, this change of test of navigability would appear to violate the rule of stare decisis, and to take from them a vested property right. But there is no good reason for holding that the riparians have even the beds of non-navigable waters in all cases, without express grant. Submerged lands should pass by implication on sovereign grants, on the principle of *Lord v. The Commissioners,* only where they could scarcely have been contemplated as of any probable use to the sovereign, but might be regarded as useful to the grantee. Probably beds of navigable waters would never pass under this test, but it does not follow that all others would. The submerged lands might be of probable use to the sovereign because of their area, or for other reasons, although too shallow to be navigable. Navigation was in fact the one public use which was not dependent on crown ownership of the bed, while such uses as fishing, fowling and bathing were not of public right by the English common law, after the beds had passed into private ownership. To secure these uses to the public is sufficient reason against presuming an intention to pass the beds, where none is expressed. In *Noyes v. Collins*[62] the court held that riparians did not have title to the bed of a large, shallow lake, though it was not navigable. The decision seems sound.

The courts have been approaching the result suggested although by varied reasoning. Mr. Justice Hallam says:[63]

"When it comes to the soil underlying public or navigable fresh waters, the confusion is great. As to the Great Lakes and other lakes, like Lake Champlain, it is agreed that the title to the underlying soil is in the state. 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

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[62] (1894) 92 Ia. 566, 61 N. W. 250, 26 L. R. A. 609.

And dissenting opinion of White, J. in Kean v. Calumet Canal and Improvement Co., (1902) 190 U. S. 452 (461-507), 47 L. Ed. 1134, 23 S. C. R. 651.

[63] 1 MINNESOTA LAW REVIEW 38.

the two are the many bodies of water which are the subject of controversy."

This summary of the decisions suggests the thought that the absurdity of giving away these lands by a rule of law has been at times too apparent to permit the rule's usual operation. But why should the courts give them away at all?

The English test of Digges and Hale was—were the lands part of the waste lands, part of the ungranted land of the kingdom and so belonging to the crown. The fresh water soils they admitted had been granted away to the king's riparian subjects and the presumption was in a riparian's favor; the tidal soils they claimed had seldom been granted. The king owns "that great waste," the sea;[64] no one could claim that it had been granted; its distinguishing feature is the tide and the shores and rivers where the tide ebbs and flows are part of "that great waste."[65] He may have granted away parcels, but that is so unlikely, the presumption is against it. There was no idea of benefiting navigation and commerce; he could do that without owning the soil. He intended to benefit himself. Digges and Hale were stating no great rules of public policy for the benefit of the subject; they were arguing a question of real property for the benefit of the crown's revenues.[66] Whether the crown still has these lands is a question of fact, with the presumption in its favor. Digges and Hale took their feudal theory seriously.

In the American colonies the sovereign power for the time being owned all the lands, in theory and in fact. Such as were

[64] "For although the use of the sea be common, yet the propriety thereof belonges to the Kinge as a royal wast; which is the reason that as well all the bona vacantia upon the seas belonge to the Kinge as the right of his admirall jurisdiction, so likewise ilands in the sea, which although by civil law fiunt occupantis, yet in our law they are annexed in point of interest to the crowne, who is thereof presently in possession, and so prevents any right to bee acquired per occupationem." Hale's first Treatise, Moore, Foreshore 367.

"If it beelonge to any other, it cannot bee but by a title derived from the Kinge, as by investiture or graunt; or elce by a presumption of such derivation from the Kinge, as prescription or custome, for all land within the realme is the Kinges or held of him." Ibid., 362.

[65] "Bycause as in forests so espetially in dominions termini sunt integre Regi; the shore is as it were part of the ocean, which is terminus though not jurisdictionis, yet perchance proprietatis." Ibid., 364.

"The reason for which the king hath an interest in such navigable river, so high as the sea flows and ebbs in it, is, because such river participates of the nature of the sea, and is said to be a branch of the sea so far as it flows; . . . and the sea is not only under the dominion of the king; . . . but it is also his proper inheritance." The Royal Fishery of the Banne, Davies' Rep. 152, (8 Jac. I).

[66] The immediate object of the many suits brought by the crown for the foreshore was to raise money by selling or releasing the claim. Digges, himself, thus obtained grants. Moore, Foreshore 212.

not expressly granted away remained in it as part of the waste lands. Grants of land bounded by public waters, tidal or fresh, should pass nothing under these waters, the reasoning governing construction of private grants not applying. These are, therefore, still part of the waste lands. And this reasoning is even more clearly applicable in the states formed from the territories of the United States.

It may be objected that it should make little difference what Digges and Hale meant three centuries ago. That would be true had our courts adopted an independent, uniform, logical rule on the matter. But as the original presumption in favor of the crown was itself reasonable and logical, assuming its premises true in fact, and since it was peculiarly applicable to our situation, there being no possible doubt of the truth of the premises here, yet our courts, overlooking the reason of the rule, have either restricted its application to tidal waters, thereby giving away great areas of public lands, or applied it more broadly on diverse reasoning, introducing confusion to the law, it seems desirable that a reorientation be had to the original meaning of the rule itself. It is now, perhaps, too late to change the rules adopted in the older states. But in a state like Minnesota, where the original riparian patents were largely issued by the federal government, where the federal Supreme Court is of the opinion that the federal government has received nothing from the riparians for the submerged lands, that these lands were not intended to pass by the patents, and that if the riparian owns them it is not by force of these federal patents, but by some rule of state law, and where there has been no settled rule of state law on the matter, it is submitted that it is not yet too late to adopt the essence of Hale's rule and to hold that these waste lands remain in the sovereign, except where they have been expressly granted or have been acquired by citizens through adverse possession.

Submerged land constitutes about one-twentieth of the area of Minnesota. It would be an extraordinary doctrine that, because the crown, in England, recognized the actual possession of the submerged lands by its riparian subjects or expressly conveyed these lands to them, riparians in Minnesota own the corresponding lands without either actual possession or actual grant.

(To be continued.)

EVERETT FRASER.

UNIVERSITY OF MINNESOTA.

CONSTITUTIONAL AND PRACTICAL OBJECTIONS TO THE EXCLUSIVE FEDERAL REGULATION OF INTRASTATE RAILROAD RATES

IN considering the extent of the power possessed by the Congress of the United States to regulate the intrastate rates of railroads, it is well to remember that all of the power which it possesses in relation to that matter was granted to it in the following portions of Section 8 of Article 1 of the constitution of the United States:

"The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

It is at once apparent from a reading of the section in question, that the Congress is entirely without *express authority* to regulate intrastate commerce in any way. Such authority as it possesses over such commerce is entirely due to the necessity which has arisen of reconciling conflicts between the federal regulation of interstate commerce and the state regulation of intrastate commerce, in favor of the paramount authority.

Its extent depends, therefore, not upon a construction of the commerce clause of the constitution, but upon the length which the federal Supreme Court will consider it necessary to go in order to preserve, by judicial construction, the power thus expressly granted.

With that understanding of the situation, it is apparent that caution should be exercised in applying the language used in the decided cases to situations which are not in all substantial respects the same. The result of failing to do so is shown in connection with the question of the power of a state to regulate the rates of transportation on shipments, the points of origin and destination of which are both within a single state, but which pass through an adjoining state en route.

In the case of *Lehigh Valley R. R. v. Pennsylvania,*[1] it appeared that the state of Pennsylvania attempted to enforce a tax against the Lehigh Valley Railroad Company, basing the same,

[1] (1892) 145 U. S. 192, 36 L. Ed. 673, 12 S. C. R. 806.

in part, upon the gross earnings of business originating and terminating in that state, but passing through New Jersey en route. The right of the state to do this was contested upon the ground that it was in effect regulating interstate commerce. The court held otherwise, and, in sustaining the tax, said in its opinion:[2]

"The tax under consideration here was determined in respect of receipts for the proportion of the transportation within the state, but the contention is that this could not be done because the transportation was an entire thing, and in its course passed through another state than that of the origin and destination of the particular freight and passengers. There was no breaking of bulk or transfer of passengers in New Jersey. The point of departure and the point of arrival were alike in Pennsylvania. The intercourse was between those points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same state, made interstate, because in its accomplishment some portion of another state may be traversed? Is the transmission of freight or messages between two places in the same state made interstate business by the deviation of the railroad or telegraph line on to the soil of another state?

"If it has happened that through engineering difficulties as the interposition of a mountain or a river, the line is deflected so as to cross the boundary and run for the time being in another state than that of its principal location, does such detour in itself impress an external character on internal intercourse? For example, the Nashville, Chattanooga & St. Louis Ry. Co. is a corporation created under the laws of Tennessee, and through freight and passengers transported from Nashville to Chattanooga pass over a few miles in Alabama and perhaps two miles in Georgia, but we had not supposed that that circumstance would render the taxation of that company, in respect of such business, by the state of Tennessee invalid.

"So as to the traffic of the Erie Railway between the cities of New York and Buffalo, we do not understand that that company escapes taxation in respect of that part of its business because some miles of its road are in Pennslyvania, while the New York Central is taxed as to its business between the same places because its rails are wholly within the state of New York.

"It should be remembered that the question does not arise as to the power of any other state than the state of the termini, nor as to the taxation upon the property of the company situated elsewhere than in Pennsylvania, nor as to the regulation by Pennsylvania of the operations of this or any other company elsewhere, *but it is simply whether, in the carriage of freight and passengers between two points in one state, the mere passage over the soil of*

[2] (1892) 145 U. S. 192 (201), 36 L. Ed. 672, 12 S. C. R. 806.

another state renders that business foreign, which is domestic. We do not think such a view can be reasonably entertained, and are of opinion that this taxation is not open to constitutional objection by reason of the particular way in which Philadelphia was reached from Mauch Chunk."

It is true that the Lehigh Valley case involved a question of taxation and not a question of rate regulation. In another case the federal Supreme Court, however, had said:[3]

"It is impossible to see any distinction in its effect upon commerce of either class between a statute which regulates the charges for transportation and a statute which levies a tax for the benefit of the state upon the same transportation; and in fact, the judgment of the court in the State Freight Tax Case rested upon the ground that the tax was always added to the cost of transportation and thus was a tax in effect upon the privilege of carrying the goods through the state."

Following the decision in the Lehigh Valley case, a number of the state and federal courts applied the language of the opinion in that case to rate cases, and held that it was within the power of the states to regulate the rates on commerce between two points in the same state, even though the route, which it traversed, passed for a portion of the distance through an adjoining state.[4]

In *Campbell v. Chicago, Milwaukee & St. Paul R. Co.,* it was held that the Railroad and Warehouse Commission of that state had a right to regulate the rates on traffic between Beloit, Iowa, and Sioux City, Iowa, although the railroad between the two cities ran through the state of South Dakota for a little less than half of the total distance and crossed the boundary of the state four times. In its opinion the court said:[5]

"The question presented for our determination is whether freight shipped from Beloit to Sioux City over the railway described, is interstate commerce within the meaning of that provision of section 8 of article 1 of the constitution of the United States, which reads as follows: 'The Congress shall have power to regulate commerce with foreign nations and among the several states, and with the Indian Tribes.' " "In construing the constitutional provision under consideration, the court, in *Gib-*

[3] Wabash, etc., R. Co. v. Illinois, (1886) 118 U. S. 557 (570), 30 L. Ed. 244, 7 S. C. R. 4.

[4] Some of the cases which so held were: Campbell v. Chicago, etc., R. Co., (1892) 86 Ia. 587, 53 N. W. 351, 17 L. R. A. 443; State ex rel. R. R. Commissioners v. Western Union Telegraph Co., (1893) 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570; Seawell v. Kansas City, etc., Ry. Co., (1893) 119 Mo. 222, 24 S. W. 1002; United States ex rel. Kellogg v. Lehigh Valley R. Co., (1902) 115 Fed. 373.

[5] (1892) 86 Ia. 587 (589), 53 N. W. 351, 17 L. R. A. 443.

bons v. Ogden, 22 U. S. 9 Wheat. 189, 6 L. Ed. 68, defined commerce as follows: 'Commerce undoubtedly is traffic, but it is something more; it is intercourse. It described the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' The language last quoted was used to refute the claim that the commerce contemplated by the constitution was mere traffic, the buying and selling or the interchange of commodities; but it was quoted with approval by the court which used it in the recent case of *Lehigh Valley R. Co. v. Pennsylvania,* 145 U. S. 192, 36 L. Ed. 672, 4 Inters. Com. Rep. 87, and applied to facts similar to those under consideration. The question involved in the case last cited was whether the state had the power to levy and collect a tax on the gross earnings of a railway for the continuous transportation of passengers and freight from points in Pennsylvania to other points in the same state, over a line of railway which passed from that state to another and back. It was held that such transportation was not interstate commerce within the meaning of the federal constitution, and that the tax was valid. Since the question under consideration is a federal one, the decision last cited is decisive of it. Following that decision, we hold that the continuous transportation of articles of commerce from Beloit to Sioux City over the line of railway described is not interstate commerce, and that the statute under which the schedule of rates in question was made is not unconstitutional, so far as it has been questioned on this appeal. The board of railroad commissioners were authorized to make a schedule of reasonable maximum charges for the continuous transportation of freight from points in this state to other points in this state over a railway partly in another state."

The case of *State v. Western Union Teleg. Co.,* was a case in which the authority of the State Board of Railroad Commissioners to regulate the rates on telegraph messages between two points in the state, but which passed through Virginia en route was involved. The supreme court of North Carolina held that the Board had such authority. In passing upon the point it said:[6]

"Without attempting to discuss these cases, and to distinguish them in some particulars from ours, it is sufficient to say that if they are not distinctly overruled, their principle is certainly in conflict with the reasoning of the opinion of the Supreme Court of the United States (Fuller, C. J.) in *The Lehigh Valley Railroad Co. v. Pennsylvania,* 145 U. S., 192.

"The State of Pennsylvania levied a tax on the gross receipts of all railroad companies derived from the transportation by continuous carriage from points in Pennsylvania to other points in

[6] (1893) 113 N. C. 213 (223), 18 S. E. 389, 22 L. R. A. 570.

the same state—that is to say, passing out of Pennsylvania into other states and back again into Pennsylvania in the course of transportation.

". . . . The Court sustained the tax, and although it may be said that the decision relates only to that part of the receipts which arose from the transportation within the state, yet it must be apparent from a perusal of the opinion that this conclusion was reached on the ground that such continuous transportation was not interstate commerce. Indeed the entire course of the reasoning of the court is in support of this very principle, and is clearly applicable to the question involved in this appeal. The language of the court is plain and emphatic, and we do not feel at liberty to ignore it and especially when it is applied to telegraphic communication, under the peculiar circumstances of this case. . . . It is in evidence that the defendant owns and operates a continuous wire, or system of wires, from the offices mentioned to other points in North Carolina, and therefore it is not compelled to transfer its business to any other agency outside of North Carolina in order that it may reach its destination in this state. In this respect our case is stronger than the one from Pennsylvania, as the road from Phillipsburg to Philadelphia was owned and operated by another corporation, and not by the Lehigh Valley Railroad Company. We refrain from entering into an extended discussion of the subject, and are content to follow the reasoning of the Supreme Court of the United States, whose authority upon such questions is conclusive.

"We will observe, however, that we think the principle laid down by that Court is peculiarly adaptable to cases like the present, in which there is such an exceptional facility for the evasion of state authority to fix the rate of charges. This may be done in an instant and without expense by so adjusting the wires that messages must go through a part of the territory of another state. We think the exception should be overruled."

In *Seawell v. Kansas City, etc., Ry. Co.,* it appeared that a railroad company had been charging more for transporting coal from Carbon Center to Kansas City than from Liberal and Minden to Kansas City, although the distance from Kansas City to Carbon Center was less than the distance from Kansas City to either Liberal or Minden. All of the towns were in the state of Missouri. This was claimed to be a violation of the state law and a shipper brought an action under the statute to recover treble the amount of his damages. The railroad line, between the towns in question and Kansas City, ran for the greater portion of the distance through the state of Kansas; and it was therefore claimed that traffic over it was interstate commerce and not affected by the state law.

In overruling this objection and affirming the judgment for the plaintiff the supreme court of Missouri, after discussing, at considerable length, the federal and Missouri laws and many of the cases said:[7]

"The Supreme Court of the United States has never held that this was interstate commerce, even when such continuous transportation was partly through the limits of another state, but to the contrary."

Then in pointing out the applicability of the decision in the *Lehigh Valley Railroad Co.* case, it said:[8]

"It would seem that this ruling is directly in point in the present case, when it is remembered that the question here is not as to the power of any other state than the state of the termini, nor as to the regulation of the operations of the defendant or any other company's road elsewhere than in Missouri, for by its terms this statute can only operate between points in the state of Missouri."

Then came the case of *Hanley v. Kansas City Southern Ry. Co.*, in which the federal Supreme Court held that the transportation of goods on a through bill of lading from Fort Smith, Arkansas, to Grannis, Arkansas, a total distance of 116 miles, of which 52 miles were in Arkansas and 64 miles in Indian Territory, was interstate commerce and free from interference by the state of Arkansas. As one of the reasons for so holding, the Court, in its opinion, said:[9]

"The present railroad gets the authority for its line in the Indian Territory, through a predecessor in title, from an act of Congress of 1893, c. 169, 27 Stat. 487, and that, by that act, Congress 'reserved the right to regulate the charges for freight and passengers on said railroad . . . until a state government shall be authorized to fix and regulate the cost,' etc.; 'but Congress expressly reserves the right to fix and regulate at all times the cost of such transportation by said railroad or said company whenever such transportation shall extend from one state into another, or shall extend into more than one State.' "

However the Court quoted with approval the following language of Justice Field in the case *P. C. Steamship Co. v. Railroad Commissioners*:[10]

"To bring the transportation within the control of the state, as part of its domestic commerce the subject transported must be within its entire length under the exclusive jurisdiction of the Court."

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[7] (1893) 119 Mo. 222 (238), 24 S. W. 1002.
[8] (1893) 119 Mo. 222 (240), 24 S. W. 1002.
[9] (1903) 187 U. S. 617 (619), 47 L. Ed. 333, 23 S. C. R. 214.
[10] (1883) 9 Sawyer (U. S. C. C.) 253, 18 Fed. 10.

It will be noticed that the Hanley case possesses essential facts peculiar to itself. Notwithstanding that fact, a number of the state courts, relying upon the general statement of the law, have accepted it as an authority requiring them to hold that all commerce between two points in the same state, but passing over the Territory en route, is interstate.

A notable exception, however, is the supreme court of Virginia. In a case decided by it, since the decision of the Hanley case, it was held that where the initial and terminal points of a telegram were both within that state, and it was transmitted over the wires of a single company and concerned only citizens of that state, the message was a domestic one, and its character, as such, was not affected by the circumstances that the line passed in part over the territory of West Virginia, or that the company had established a relay office in such other state at which the message was lost. In its opinion, the court said:[11]

"The case in judgment, in our opinion, involves the exercise of an important police power of the state, a power which ought not to be surrendered, and which we are unwilling to surrender, in the absence of a direct and authoritative declaration on the part of the Supreme Court of the United States that it is violative of the federal constitution."

It is improbable that the cases, above mentioned, which were decided in reliance upon the language used in the *Lehigh Valley case* and those decided in reliance upon the language used in the *Hanley case,* were all correctly decided. Yet, they were equally well supported by the general statements in those opinions.

These cases we believe illustrate the danger of seizing on statements of a general nature in a decision and applying them to dissimilar facts. The statement in the *Lehigh Valley case* that: . . . "The question . . . is simply, whether in the carriage of freight and passengers between two points in one state, the mere passage over the soil of another state renders that business foreign, which is domestic. We do not think such a view can be reasonably entertained;" and the statement in the *Hanley case,* that; "To bring the transportation within the control of the state, as part of its domestic commerce the subject transported must be within its entire length under the exclusive jurisdiction of the Court;" are apparently irreconcilable.

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[11] Western Union Telegraph Co. v. Hughes, (1905) 104 Va. 240 (242), 51 S. E. 225.

While it may be that the federal Supreme Court will hold, when a proper case is presented to it, that a state is without control over the rates to be charged by a carrier on shipments between two points in the same state, where the major part of the route is within the state, and where the diversion into another state is purely incidental, it has not done so yet. Until it renders such a decision it would be unwise to conclude prematurely that such is the law. Especially is this true when the result of such premature conclusion would be to divest the various states of an important element of police power.

We will now consider the cases in which the federal Supreme Court has considered and passed upon the question of the extent to which Congress has the power to regulate purely intrastate rates. The first case is that of *Houston, etc., Ry., Co. v. United States,*[12] known as the *Shreveport Case.* In that case the question under consideration was the validity of an order of the Interstate Commerce Commission. The Commission found that an unlawful discrimination existed between the class rates established by the Railroad Commission of Texas, between certain points in that state, and the rates established by the Interstate Commerce Commission between Shreveport, Louisiana, and the same points in Texas. The carriers were directed to desist from charging higher rates for transportation of any commodity from Shreveport to Dallas and Houston, respectively, and intermediate points, than were contemporaneously charged for the carriage of such commodity from Dallas and Houston toward Shreveport for equal distances. The decree of the Commerce Court, sustaining the order of the Commission was sustained.

In that case it was held:

1. Under the commerce clause of the constitution Congress has ample power to prevent the common instrumentalities of interstate and intrastate commerce, such as the railroads, from being used in their intrastate operations in such a manner as to affect injuriously traffic which is interstate.

2. *Where unjust discrimination against interstate commerce arises out of the relation of intrastate to interstate rates* this power may be exerted to remove the discrimination, and this whether the intrastate rates are maintained under a local statute or by the voluntary act of the carrier.

3. In correcting such discrimination Congress is not restrict-

[12] (1914) 234 U. S. 342, 58 L. Ed. 1341, 34 S. C. R. 833.

ed to an adjustment or reduction of the interstate rates, but may prescribe a reasonable standard to which they shall conform and require the carrier to adjust the intrastate rates in such a way as to remove the discrimination; for *where the interstate and intrastate transactions of carriers are so related that the effective regulation of one involves control of the others, it is Congress, and not the state, that is entitled to prescribe the dominant rule.*

That case does not hold that the Interstate Commerce Commission has the same control over intrastate rates that it possesses over interstate rates. Such a conclusion is both unwarranted and extravagant. Such control was only held to extend to intrastate rates which were so related to interstate commerce as to cause an unjust discrimination against the same.

In the case of *American Express Co. v. South Dakota ex rel. Caldwell,* a distinction was made between intrastate rates which were established by the carrier and those established by the state. In its opinion the Court said:[13]

"Where a proceeding to remove unjust discrimination presents solely the question whether the carrier has improperly exercised its authority to initiate rates, the Commission may legally order, in general terms, the removal of the discrimination shown, leaving upon the carrier the burden of determining also the points to and from which rates must be changed, in order to effect a removal of the discrimination. But where, as here, there is a conflict between the federal and the state authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under state authority, *unless, and except so far as, it is definite as to the territory or points to which it applies, for the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic.*"[14]

The case of *Illinois Central Railroad Co. v. Public Utilities Commission of Illinois et al,* decided by the federal Supreme Court on January 14th, 1918, arose out of an alleged discrimination against the cities of St. Louis and Keokuk caused by the fact that the intrastate passenger rates in Illinois were on a basis of 2 cents per mile while the interstate rates in that territory were on a 2½ cents per mile basis. The Interstate Commerce Commission made an order requiring the carriers to remove the discrimination. After various proceedings in the lower courts the case was finally

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[13] (1917) 244 U. S. 617 (625), 61 L. Ed. 1352, 37 S. C. R. 656.

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

taken to the federal Supreme Court. In its opinion that Court said:[15]

"The parties differ widely about the scope of the order. The carriers assert that it covers every intrastate passenger rate in Illinois, is addressed to the removal of discrimination found to be state-wide, and gives ample authority for increasing all rates from points in Illinois from 2 cents to 2.4 cents per mile. On the other hand the state authorities assert that it is not state-wide and that the extent to which it is intended to affect the state-made rates is so indefinite and vaguely stated, as to make it inoperative and of no effect."

In considering the validity of the order, it was said:

"To be effective in respect of intrastate rates established and maintained under state authority an order of the Commission of the kind now under consideration must have a definite field of operation, and not leave the territory or points to which it applies uncertain . . .

"In construing federal statutes enacted under the power conferred by the commerce clause of the constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even when that may be done, unless, and except so far as, its purpose to do so is clearly manifested. *Reid v. Colorado,* 187 U. S. 137, 148; *Cummings v. Chicago,* 188 U. S. 410, 430; *Savage v. Jones,* 225 U. S. 501; *Missouri, Kansas & Texas Ry. Co. v. Harris,* 234 U. S. 412, 419. This being true of an act of congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a state rate statute otherwise valid, unless, and except so far as, it conforms to a high standard of certainty.

"We conclude that the uncertainty in this order is such as to render it inoperative and of no effect as to the intrastate rates, established and maintained under a law of the state, and therefore that the suits by the carriers were rightly dismissed on the merits."

These cases do not warrant the statement that Congress is vested with power to regulate all intrastate rates. On the contrary they only pass upon the authority of the Interstate Commerce Commission, under the act to regulate commerce, and hold that such authority only extends to the regulation of such particular intrastate rates as are clearly shown to discriminate against interstate rates. Of the multitude of intrastate rates the number which could be so held is obviously but a small part.

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[15] (1918) 38 S. C. R. 170 (175), U. S. Adv. Ops. 1917 p. 204.

It is only where the relationship between the two classes of rates renders a single control imperative that congressional control may be exercised. The rest of the intrastate field is left to the states. This is clearly shown by the recent decision of the federal Supreme Court, in the case of *Chicago, Milwaukee & St. Paul Ry. Co. v. Public Utilities Commission of Illinois,* in which it was said:[16]

"The contention based upon an interstate commerce element in a rate, that is, the relation of interstate and intrastate rates and their reciprocal effect, was at one time quite formidable, but since the *Minnesota Rate Cases* (*Simpson v. Shepard*) 230 U. S. 352, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729, Ann. Cas. 1916A, 18, its perplexity, arising from a conflict of powers has been simplified. *In those cases it was decided that there is a field of operation for the power of the state over intrastate rates and the power of the nation over interstate rates.* In other words, and in the language of Mr. Justice Hughes who delivered the opinion of the Court; 'the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the states and the agencies created by the states to deal with that subject (*Missouri P. R. Co. v. Larrabee Flour Mills Co.,* 211 U. S. 612, 63 L. Ed. 352, 29 Sup. Ct. Rep. 214)', until the authority of the state is limited 'through the exertion by Congress of its paramount constitutional power *where there may be a blending of interstate and intrastate operations of interstate carriers.*' "[17]

Inasmuch as the power and authority to remove discriminations existing between interstate and intrastate rates is now vested in the Interstate Commerce Commission, the need for further federal control of intrastate rates is not apparent. There is, however, a fully organized movement, having for its object nothing less than the absolute elimination of the states and the state commissions from all jurisdiction over intrastate rates of the railroads. The success of such a movement would, of course, deprive the states of their control, even within the somewhat restricted field which the decisions of the federal Supreme Court have now left to them.

At the time the Act to regulate commerce was enacted such a proposition would have been promptly rejected as plainly violative of the federal constitution. The recent decisions of the Supreme Court of the United States, however, have somewhat encouraged the view that, under the commerce clause of the constitution, the

[16] (1917) 242 U. S. 333, 61 L. Ed. 341, 37 S. C. R. 173.
[17] Italics are the author's. [Ed.]

Congress may have the necessary power. It therefore becomes important to consider the plan which the proponents of such action wish to see adopted and to consider the objections thereto.

For a statement of the plan and a consideration of the objections to its adoption, I have taken the liberty of quoting from an address, which was delivered in November, 1916, before the National Association of Railway Commissioners, at its annual convention in Washington, by Hon. Robert R. Prentis, the President of the Association. At the time the address was delivered, Mr. Prentis had been appointed and is now acting as one of the Justices of the supreme court of appeals of the state of Virginia. The quotation is as follows:

"This plan embodies two main features:

"First: That there be a federal incorporation law, under which every railway company in this country which is engaged in interstate commerce, and all of them will be construed to be so engaged, shall be required to incorporate. Such companies are to be given no option as to this, but incorporation under the proposed act of Congress is to be made compulsory, and thus the entire control of such companies, including their rates, intra and interstate, and their stock and bond issues, is to be vested in the agencies of the federal government.

"Second: Then it is proposed that in place of the Interstate Commerce Commission there shall be two commissions. One to be called the Interstate Commerce Commission, which is to be the supreme body, in charge of all the powers of regulation, on appeal as to some of such powers, and directly as to others. Another commission is to be organized, which it is suggested shall be known as the Federal Railroad Commission, whose members shall be presidential appointees. This new commission is to be vested with the power and charged with the duty of detection, correction, and prosecution, and those feeling aggrieved by their conclusions are to have the right to have them reviewed by the Interstate Commerce Commission.

"In addition to these two great organizations they propose, as a method of getting closer to the people in the various sections of the country, and as a substitute for the present state commissions, that there shall be regional boards in every transportation region that the Congress may divide the country into; that their offices shall be in such localities. These bodies to be authorized to take evidence as to all the graver and more important questions which remain within the jurisdiction of the Interstate Commerce Commission, including the making of rates and the establishment of proper relations of rates between localities; they are also to take evidence in any case that shall be pending before the Interstate Commerce Commission as commissioners

in chancery would do, reporting their conclusions to the Interstate Commerce Commission, subject to exception; the orders and conclusions of these regional boards, if not excepted to, are to be effective without further action by the Interstate Commerce Commission, unless that Commission should itself see some reason for ordering rehearings. If they are excepted to by shippers, representatives of localities or by the carriers then such differences are to be argued before and settled by the Interstate Commerce Commission.

"This plan, as will be observed, is most ambitious, and the manifest purpose of this vast machinery to be organized under federal legislation is to relieve the railway companies from any effective supervision by the states . . .

". . . It seems to me that this proposition, considered in its entirety, is in the highest degree unwise, and that its effect will of necessity be retrogressive instead of progressive.

"Most of the true progress of this world is made, not by tearing down, but by building up, by construction, not by destruction.

"For thirty years the federal and state governments have been enacting laws and administering them with the view of exercising efficient control over the rates and practices of the railroads. A long catalogue of the benefits which have arisen from such regulation can easily be made. Forty-six states of the Union at great expense have organized commissions for the purpose of controlling intrastate rates, and exercising their constitutional powers hitherto conceded to them. The proposition is to take over all the important jurisdiction of these local commissions and concentrate the power in two federal commissions in the city of Washington. Then, knowing that the Interstate Commerce Commission is already overwhelmed with its work, and apparently realizing the utter futility of expecting central commissions in Washington to deal effectively with all of the many and varied questions that arise locally all over the country, it is proposed to establish regional boards in various sections of the country which shall be subordinate to the central authority at Washington. In other words they see that just as soon as they tear down the existing system they must immediately commence to rebuild a vast hydra-headed administrative bureau, with two big heads and many small ones, which will correspond in many particulars with the very organization we already have.

"It is impossible for me to escape the conclusion that if these suggestions shall be adopted the cause of public regulation will be practically just where it was thirty years ago. It seems to me that experience has demonstrated that all the powers of all the states combined with all the powers of the federal government must be exercised if public regulation is to be effective.'

"The slogan or shibboleth of those antagonistic to state regu-

lation is, that they have forty-nine masters, that is, that forty-eight states and the federal government are all regulating them at the same time. Let us examine these catch words for a moment. Possibly in the heat of argument exaggeration may be excused, but what railroad in this country runs through forty-eight states? May we not at once say then without hesitation that no railroad in this country has forty-nine masters. Their masters in this sense of the word are the federal government as to matters referring directly to interstate commerce, and as to local matters and intrastate commerce those states only in which they are located and doing business. Then again, have they any more masters than every other citizen of this country? When I travel from Virginia to California I am subject to the laws of the federal government all the time, and from time to time subject to the laws of the state in which I happen to be travelling. Some of the large private corporations do business in as many states, or more, as any large railroad system. Have the railroads any more masters than such corporations, which are subject to the federal law, and at the same time are subject to the laws of the various states in which they do business and by which they are protected? They have one master—the law, and the sovereignty of the law is, and should be, master of us all.

"Tested in this way it may be said to be simply an attack upon, and criticism of, our form of government.

"That is to say that the framers of the federal constitution were not wise when they adopted the form of government which provides for the dual state and federal sovereignty; that the encomiums bestowed upon this federal system of ours by students of political history are all based upon erroneous conceptions of its value; that the imitations of it by other nations in their struggles for political freedom have been undertaken without due consideration and are unwise; that the magnificent progress which we have made during the one hundred and twenty-nine years of its existence owes nothing to our governmental system,—indeed that all the lessons of the remote and recent past are to be forgotten in our thoughtless and headlong rush in the name of progress, towards centralized power and bureaucratic government.

"Possibly this process of centralization of authority in the federal government at Washington is to go on, with accelerated pace in the future, but if so let us fully realize what we are doing. Let us not close our eyes to the fact that if those who believe in thus changing the form of our government succeed in their efforts then that change will be radical and far-reaching, and let us quit boasting of the wisdom of our fathers in providing that form of government which they evidently intended when they adopted the United States constitution.

"If the mature judgment of our nation is that we have made a serious mistake in the form of our government let us meet the

situation frankly and without subterfuge, let us amend the constitution and abolish state control over local affairs, and cease our labored and dubious reasoning in our efforts by construction to enlarge the plain provisions of the federal constitution.

"I commend to the Congress and to the Railway Executive Committee these weighty and carefully considered words of that master of logic and diction, the Hon. Elihu Root, taken from his recent annual address as President of the American Bar Association.

"After referring to the necessity of developing our vast new body administrative law, and calling attention to the fact that it is still in its infancy and still crude and imperfect, he says:

" 'The development of our law under the conditions which I have pointed out will be accompanied by many possibilities of injurious nature. There will be danger that progress will be diverted in one direction and another from lines really responsive to the needs of the people, really growing out of their institutions, and will be attempted along the lines of theory devised by fertile and ingenious minds for speedy reforms. Ardent spirits, awakened by circumstances to the recognition of abuses, under the influence of praiseworthy feeling often desire to impose upon the community their own more advanced and perfect views for the conduct of life. The rapidity of change which characterizes our time is provocative of such proposals. The tremendous power of legislation, which is exercised so freely and with little consideration in our legislative bodies, lends itself readily to the accomplishment of such purposes. Sometimes such plans are of the highest value. More frequently they are worthless and lead to wasted effort and abandonment. The test of their value is not to be found in the perfection of reason. Man is not a logical animal, and that is especially true of the people of the United States and the people of Great Britain, from whom our methods of thought and procedure were derived. The natural course for the development of our law and institutions does not follow the line of pure reason or the demands of scientific method. It is determined by the impulse, the immediate needs, the sympathies and passions, the idealism and selfishness, of all the vast multitudes who are really from day to day building up their own law.'

"Pursuing the same line of thought he says:

" 'There will always be danger of developing our law along lines which will break down the carefully adjusted distribution of powers between the national and state government. Upon the preservation of that balance, not necessarily in detail but in substance, depends upon one hand, the preservation of that local self-government which in so vast a country is essential to real liberty.'

"Then growing impassioned he concludes his thought upon this general subject with this dire prophecy:

" 'And if the process goes on our local governments will grow weaker and the central government stronger in control of local affairs until local government is dominated from Washington by the votes of distant majorities indifferent to local customs and needs. When that time comes the freedom of adjustment which preserves both national and local liberty in our system, will be destroyed and the breaking up of the Union will inevitably follow.'

"Recollect, these are not the words of a swashbuckling Southerner, but they are the words of Honorable Elihu Root.

"When this association was organized under the guiding hand and inspiration of Judge Cooley, the first chairman of the Interstate Commerce Commission, as its president, and at its first meeting in this city on the fifth day of March, 1889, he emphaszied the need for co-operation and concert of action between the Interstate Commerce Commission and the State Railroad Commissions, and this doctrine has been continuously emphasized by all of our leaders from that day to this. The most serious complaint now made of the present system is the lack of uniformity, growing out of the differing legislation of the Congress and the states, as well as the differing legislation of various states, and yet the proposition is that in order to secure uniformity the very agency through which such uniformity as does exist has, in great measure, been secured, must be destroyed.

"Every important question involving the regulation of the railways, almost without exception, has been first proposed, argued and debated upon the floor of this association. Following these debates has come practically every amendment of the act to regulate commerce, and in almost every instance a number of the states of the Union adopted similar legislation before it had been adopted by the Congress.

"This Association has not simply advocated and favored uniformity as a sentiment. It has done much of importance to promote uniformity. To enumerate: The accounting methods of the railways and of making the annual operating reports has been greatly improved, and is practically uniform throughout the country, so that they now know more about their own business than they ever knew before; the safety appliance laws have been enacted. Such slow progress as has been made in classification owes much to the insistence and persistence of this Association; the demurrage rules which are now practically uniform throughout the country, were framed by a committee of this Association under the chairmanship of the Hon. Franklin K. Lane, then a member of the Interstate Commerce Commission; this is true also of the express rates, not long since in a state of confusion, which are also now practically uniform throughout the country. At this very session of this Association much progress will be reported in bringing about uniformity in the elimination of dangerous crossings and the precautions to be taken at crossings.

The list might be prolonged to cover almost every phase of public regulation, and I cannot conceive of any better method under our dual form of government for the creation of nation-wide sentiment for the promotion of uniformity of legislation and practice than the maintenance of the state commissions, with unimpaired powers, and of this Association with all of its activities.

"The charge of lack of uniform laws in this great country may doubtless be sustained by reference to a number of laws passed by the various states, but notwithstanding these laws we may safely venture to say that uniformity has been greatly promoted since the federal and state governments began to exercise their powers as well as by such exercise, and that it exists today in a far greater degree than formerly, when each railway company was free to compete with every other and to make its own rules and regulations. While there may be some glaring exceptions, it is unquestionably true that the great work of this Association from its beginning to this day has been in the promotion and securing of uniform laws, federal and state, and uniform regulation, and there has never been a year since its organization that substantial progress has not been made. If the state commissions are shorn of their powers the cause of regulation will be hindered and not promoted."

It must be apparent from the foregoing that the cause of regulation has been advanced, not retarded, under the present system. That some form of local supervision and control is necessary to meet the public needs is tacitly admitted by the carriers themselves. This is shown by the plan which Mr. Prentis has outlined. It is in reality the plan of the Railway Executive Advisory Committee—a committee composed of executive officials of a number of railroads, and representing slightly more than eighty-three per cent of the railway mileage of the United States.

The railroad commissions of the various states have long been exercising this power. They are each acquainted with the conditions existing in their own state; they are in a position to act expeditiously on matters coming before them; they are responsible to all of the citizens of the state for their actions.

The regional boards would not be so well acquainted with local conditions. There would be more delay in obtaining relief through them, as their reports would go to the Interstate Commerce Commission for final action. This delay and the necessary additional expense would, in many cases, deter citizens from filing meritorious complaints. Then, too, the regional boards would only be responsible to the persons appointing them.

Under these circumstances, and entirely aside from the grave constitutional question involved, it would seem to be advisable to

continue to maintain and develop the present effective system of intrastate rate regulation rather than to adopt this new system which possesses so many obvious disadvantages, without any compensatory advantages.

HENRY C. FLANNERY.*

ST. PAUL, MINN.
* Assistant Attorney General.

THE NEW MONROE DOCTRINE AND AMERICAN PUBLIC LAW.[1]

In this paper I have the honor to undertake an explanation of a subject of capital importance at the present moment: the Monroe Doctrine. I will discuss this doctrine from the Latin-American point of view, an aspect of the subject which will shed a new light upon the true character of the doctrine. The Monroe Doctrine is not, as generally believed (especially in this country), a personal policy of the United States, but an American international rule, professed and accepted by all the states of the New World.

In 1823, the year following the recognition of some of the Latin states by the United States[2] and a time when it foresaw the perils of another conquest of these countries or of intervention in their domestic politics, President Monroe, in his famous message of December 2,[3] stated in unambiguous terms the same principles as had earlier been declared by the statesmen of Latin America. Therefore, even if the famous message had never been written, the ideas contained in its first three declarations would none the less have been maintained by the states of the New World. In this sense, it may be said that the Monroe Doctrine is not a doctrine of a single nation, nor the special invention of Mónroe. It is an American doctrine.[4] But it will continue to be the Monroe Doctrine in the sense that American aspirations are therein collected and condensed in doctrinal form. In this way all America has acquired a creed for its foreign policy, and the United States has become the defender thereof whenever it is threatened.

I need not repeat President Monroe's message of 1823, as it is well known. It contains two series of provisions very different in character. The first series relates to the political independence of the New World and includes the three principles of

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[1] The footnotes to this article have been prepared by Professor C. D. Allin of the University of Minnesota.

[2] 1 Moore, Digest of International Law 36.

[3] 2 Richardson, Messages and Papers of the Presidents 207.

[4] Alvarez, Le Droit International Américain 145.

the acquired rights to independence, to non-intervention, and to non-colonization on the American continent.[5]

The second series is made up of special declarations relating to the non-intervention of the United States in European affairs.[6]

The message stated that attempts of the countries of Europe against the American Republics are dangerous to the peace and security of the United States. This would seem to indicate that Monroe was declaring these principles with the interests of his country only in view, and that is why this doctrine is considered merely a policy of the United States. But the fact is lost sight of that the assertion of such principles is also favorable to the entire continent, and that the statesmen of Latin America had maintained these same principles before 1823. The best evidence of this is that at the Congress of Panama in 1826[7] the Latin American states desired not only solemnly to declare the Monroe Doctrine, but also to unite to compel respect for it. From that time these states have persevered in this idea, and on several occasions invoked the Monroe Doctrine, particularly in 1865 when Spain and Peru were at war.[8] In 1910, at the Fourth Pan American Conference,[9] when the centenary of Latin-American independence was celebrated, the delegation of Brazil proposed to the delegations of the Argentine and of Chile that the Conference be asked to adopt a vote of thanks to the United States for the beneficial effects of the Monroe Doctrine on the independence of the New World. The resolution was not passed, lest it should give the impression that the Latin states by approving the Monroe Doctrine likewise approved the hegemony of the United States. The idea of upholding the Monroe Doctrine throughout the continent is one of present interest. According to accounts appearing in a press which claims to be well informed, President Wilson has submitted to the various American Governments a proposed treaty, the first article of which declares that the "high contracting parties agree to unite in a common and mutual guaranty of territorial integrity under the republican form of government." And the National Association of International Law of Chile, among divers propositions submitted to the Institute for approval, including one for the "mutual guaranty of the independ-

[5] 2 Richardson, Messages and Papers of the Presidents 218-19.
[6] Ibid. p. 218.
[7] Curtis, The United States and Foreign Powers 55.
[8] 6 Moore, Digest of International Law 507-09.
[9] Senate Doc. Vol. 55, 61st Cong. 3rd Sess.

ence and territorial integrity of the American states against aggression on the part of the states of other continents."

So far as concerns the maintenance of respect for the Doctrine by the states of Europe, it is the United States that has undertaken this task for the past century, a task which naturally fell to it as being the most powerful of the American countries. And that is another reason why the Monroe Doctrine is believed especially in the United States to be only a policy of this country. But the Latin states have also come forward in its defense. In 1865 Chile declared war on Spain simply to safeguard the independence of Peru, which was threatened by Spain.

Another reason why there exists such a misunderstanding concerning the Monroe Doctrine is because people have attempted to hang upon it all the policies of the United States. There is not an act of this country, especially in its intercourse with Latin America, that is not looked upon as being bound up with this Doctrine, in spite of the fact that the latter originally referred to no other principles than the three already pointed out. During the nineteenth century the United States built up alongside of this Doctrine a personal policy, which does not represent the interest of the continent, but quite the reverse; wherefore it inspires fear rather than sympathy in the states of Latin America. This so-called policy of hegemony or supremacy consists in intervention by the United States, on behalf of its own interests, in the domestic affairs of certain states of Latin America, especially those that are situated in or near the Caribbean Sea and those bordering the Gulf of Mexico.[10] This policy is the well-nigh natural result of the tremendous territorial, economic, and maritime superiority of the United States. Any other country in the same situation would have developed the same, perhaps a still more aggressive, policy. The European Concert is really nothing more nor less than a hegemony of the great powers over the rest of Europe. But the fact that the origin of this policy can be explained does not justify it. The states of Latin America have always rejected this doctrine of the hegemony of the United States in the name of the independence and the liberty of the states.

Consequently, the policy of the United States on the American continent may be divided into three main groups or catgories:

[10] Alvarez, Le Droit International Américain 149.

(1) Maintenance, application, and development of the Monroe Doctrine, or doctrine of all the states of the New World.

(2) Political hegemony.

(3) Political imperialism.

I shall confine myself here to a statement of the principal cases in which each of these policies has been applied.

(1) *Maintenance, Application, and Development of the Monroe Doctrine.* The United States has prevented European states from bringing American countries under their domination (French intervention in Mexico from 1862 to 1866), from the meddling in American affairs. It has also developed the Monroe Doctrine by opposing the acquisition by European states, on any grounds whatever, even with the consent of the American countries, of any portion of the territory of the latter and the placing of any portion of such territory under the protectorate of a foreign power. (Statement made by President Polk in his message of April 29, 1848,[11] with regard to Yucatan; declaration made by the United States in 1895 respecting Nicaragua's intention to cede to England, as damages for the imprisonment of an English vice consul, the island of Corn, to be used as a coaling station.)

The United States also opposed the more or less permanent occupation by a European state, even as a result of a war, of any portion of American territory. (President Van Buren's declaration in 1840 that the United States would prevent by force the military occupation of Cuba by England.[12] President Roosevelt's declaration on the occasion of the Anglo-Italian-German coercive action against Venezuela in 1903.)[13]

(2) *Policy of Hegemony.* The United States has on various occasions contended that European states may not, without its consent, transfer to one another, on any ground whatever, the colonies which they possess in the New World. (Clay's declaration in 1825 to the governments of France and England to the effect that the Union would not permit Spain to transfer Cuba and Porto Rico to other European states).[14]

Another phase of the hegemony of the United States is that of intervening at the birth of a new state in America, either by

[11] 4 Richardson, Messages and Papers of the Presidents 581-83.
[12] 6 Moore, Digest of International Law 450.
[13] 10 Richardson, Messages and Papers of the Presidents 646.
[14] 6 Moore, Digest of International Law 447.

emancipation or by secession, and then restricting its foreign relations, as in the case of Cuba[15] and Panama.[16]

With regard to Cuba, Article 3 of the appendix to its constitution expressly recognized that the United States has the right to intervene in the country, not only to defend its independence, but also to preserve order.[17]

The object of this was to keep the island from passing through crises like those through which the Latin American countries passed in the early days of their independence, and to have from the very beginning an era of peace, not only for the good of the island and of the continent, but also for the security of the interests of the United States.

Cuba, evacuated by the United States in 1902, concluded with that country, on May 23, 1903, a perpetual treaty,[18] which considerably restricted its independence. Among other stipulations, the United States is authorized to defend the independence of Cuba, which cannot conclude with any other state a treaty that may compromise its independence. The United States also reserves the right to have naval stations on the island.

With regard to Panama, there was, in the first place, the Hay-Bunau Varilla treaty of November 18, 1903, between the United States and Panama,[19] providing that, in consideration of the payment of ten million dollars and a certain annual rental, the United States should acquire a strip of land in the territory of Panama, extending five miles from the median line of the proposed canal, on each side, and three miles into each ocean. The canal was thus to pass through American territory. Panama ceded to the United States sovereignty over the islands situated within the limits of the indicated zone and other islands situated in the Bay of Panama. However, the cities of Panama and Colon and the adjacent ports were not included in the concession. The Canal and its entrances are to be perpetually neutral, in accordance with the conditions of the treaty of November 18, 1901,[20] between England and the United States. The latter country guarantees the independence of Panama.

[15] 1 Malloy, Treaties, Conventions, etc., between the United States and Foreign Powers 362.
[16] Ibid. Vol. 2 p. 1349.
[17] 2 Rodriguez, American Constitutions 147.
[18] 1 Malloy, Treaties, Conventions, etc., between the United States and Foreign Powers 362.
[19] Ibid. Vol. 2 p. 1349. Compilation of Treaties in Force. Senate Document No. 318, 58th Cong. 2nd Sess. p. 609.
[20] 1 Malloy 782.

The negotiations concerning the Panama Canal and the independence of Panama plainly show to what lengths the United States policy of hegemony may go. In the first place, just as in the case of Cuba, while allowing Panama to be self-governing, the United States retains a sort of protectorate over it, in order the better to maintain its independence and to preserve order within the country.

Article 136 of the constitution of Panama[21] confers upon the United States authority to intervene for the purpose of restoring order, in case it assumes, by virtue of a treaty, the obligation of guaranteeing the independence or the sovereignty of the Republic.

In connection with this phase of the policy of the United States to intervene at the founding of every new state in America, let us remember that in 1867, at the time of the constitution of Canada, many protests arose in Congress against the formation of this political entity, which really was a European state.[22] Although these protests came to naught, the fact is none the less worth noting, because it shows the scope that certain politicians would like to give to the United States' policy of hegemony.

A third manifestation of this policy is to be seen in the intervention of the United States in the foreign affairs of certain Latin American states. The two most conspicuous cases were its intervention in 1895 in the dispute between Venezuela and England regarding the boundary of Guiana,[23] and the other we mentioned a little while ago—the Anglo-Italo-German intervention in Venezuela in 1903.[24] In the first case, the Congress of the United States adopted on January 10, 1895, a resolution inviting the two parties to look with favor upon a proposal that they resort to arbitration.[25]

The fourth phase of the policy of hegemony is to be found in the intervention in the domestic affairs of certain states in case of insurrection, particularly in Cuba in 1906. This case is known in diplomatic history as the second intervention.

The fifth manifestation of the policy of hegemony is the exclusive control that the United States wishes to exercise over any interoceanic canal in America, especially the Panama Canal and the proposed canal through Nicaragua.

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[21] 1 Rodriguez, American Constitutions, 420.
[22] Cong. Globe, pt. IV, 1st Sess. 39th Cong. p. 3548. Cong. Globe, 1st Sess. 40 Cong. p. 392.
[23] 6 Moore, Digest of International Law 533-583.
[24] 2 Thayer, Life of John Hay 284.
[25] 6 Moore, Digest of International Law 535.

(3) *Political Imperialism.* So far as regards the policy of imperialism, the United States has obtained various acquisitions or increases of territory, both on the American continent or elsewhere, by peaceable means, such as purchase, or by war or the use of force. At the very beginning of their independence the United States started its policy of territorial extension. The ability with which it proceeded, with the help of such favorable circumstances as the absence of powerful neighbors, has enabled it to build up the gigantic federal state that it is today.

We have said that the policy of hegemony and the imperialistic policy do not represent the interests of the American continent. The Latin-American states do not accept these policies, but on the other hand they do not condemn them, or at least not in all their manifestations.[26]

Quite recently its statesmen have declared explicitly that the United States wants no further increase of territory, especially at the expense of American states; that all it desires is to develop its commerce and its business with these countries. A majestic idea this, if, as is to be hoped, it is sincere, by which the United States would show the imperialistic powers of Europe that prestige and material wealth and power are to be acquired, not through armed oppression of weaker states nor through crafty acquisition of their territory, but through the more humane but no less effective influence of peaceful, economic development, which creates bonds of genuine friendship and sympathy.

From these ideas of all the American states, which are synthesized in the Monroe Doctrine of 1823, with the later manifestations we have indicated, it follows that the American continent conceives the right of independence and of liberty in an entirely different light from that in which it is viewed in Europe. The differences between the two continents in this respect are three in number:

(1) In Europe every nationality is not constituted as an independent state.

(2) All states do not enjoy full and complete independence. Some are semi-sovereign; others are neutralized without consulting their will.

(3) An independent state may lose its independence in whole or in part, either by its own voluntary act or as the result of war.

[26] Alvarez, Le Droit International Américain 173.
[27] 1 Richardson, Messages and Papers of the Presidents 213.

In America things are done otherwise. In the first place, all nationalities are constituted as independent states, with the exception of Canada and the other European colonies, which have not considered it advisable to exercise this right, so fully recognized in our hemisphere.

The American states are also absolutely and definitely independent with regard to Europe. Their sovereignty may no longer be placed under a limitation to the benefit of a European country. But they may lose or cede a portion, more or less extensive, of their territory to an American state, or voluntarily limit their sovereignty in the matter of their foreign relations, as in the case of Cuba and Panama.

Some statesmen have, however, manifested a desire that the American states mutually guarantee their territory, thus rendering it inviolable, not only with respect to Europe, but also as regards the states of the American continent. According to reports in well-informed newspapers, President Wilson recently submitted to the various American governments a proposed agreement, the first article of which states that "the high contracting parties agree to unite in a common and mutual guarantee of their territorial sovereignty under the republican form of government."

This new doctrine of Monroe is entirely independent of the other declarations of President Monroe in his message of 1823, especially in the point regarding the nonintervention of the United States in European affairs. This nonintervention is the personal policy of the United States, and was enunciated before Monroe by Washington in his "Farewell Address" to the American people.[27] This policy the United States can abandon if it wish. Consequently the opinion of different statesmen and publicists of Europe that the United States will abandon the Monroe Doctrine because her actual intervention in European affairs is unacceptable.

The last consideration. The five principles of what we call the new Monroe Doctrine are now affirmed by all the states of the continent and all are disposed to maintain its application in our hemisphere.

The foregoing views on the Monroe Doctrine, its real scope, and the distinction to be drawn between it, on the one hand, and the acts of hegemony and imperialism on the part of the United States, on the other, throw light on the question whether or not the Monroe Doctrine properly so called is part of American public law. There can be no doubt that it is, since we find in it

all the necessary conditions of continental international law; that it be proclaimed and maintained by all the states of the New World and respected by those of the Old. Europe has indeed recognized it on various occasions, although some of her statesmen, conspicuous among them Bismarck, have characterized it as "international impertinence."

It has long been recognized expressly by certain states, England in particular, and tacitly by others. Moreover, it has constantly been applied in practice; and, finally, at the Hague Conference of 1899 the United States made, unchallenged, an express declaration in this sense.[28]

The Monroe Doctrine has likewise been categorically recognized in the present war. Toward the end of October, 1914, the newspapers of Europe and of the United States stated that the German Ambassador at Washington had mentioned the possibility of German troops landing in Canada. The American press said that this declaration was contrary to the Monroe Doctrine, and on October 28, these same newspapers contained a report that the Ambassador of the German Empire had declared in an interview published in one of them that his country was of those that respected the Monroe Doctrine.

With regard to this declaration let it be remembered that the Monroe doctrine applies to the whole continent, including Canada, although that country has a share in Pan Americanism, which is entirely different from the Monroe Doctrine.

The last point which must be considered in connection with the Monroe Doctrine and which is intimately connected with its legal nature is whether the states of a continent, specifically our continent, may freely proclaim such international rules as they may deem expedient.

The prevailing opinion up to very recent times, even in America, has been that a continent has no power to proclaim international rules, because such rules are by nature universal and require the consent of all the states.

Lately the opinion of publicists has undergone a change. They have admitted—what is indeed true in fact—that there are American continental rules to be applied in our hemisphere when the states composing the continent have proclaimed them. These rules apply only to our continent, but they must be respected on our continent by all the states of the world, even the European.

[28] 2 Scott, The Hague Peace Conferences of 1899 and 1907, 165.

The American Institute of International Law has declared itself clearly in this sense. Article 2 of its constitution says that one of its objects is "to study questions of international law, particularly questions of an American character, and to endeavor to solve them, either in conformity with generally accepted principles, or by extending and developing them, or by creating new principles adapted to the special needs of the American Continent."

The constitutions of all the American Societies of International Law contain this same provision. And the European publicists who were consulted on the matter of founding the Institute unanimously declared that the pursuit by it of these objects would make an epoch in the evolution of international law, both universal and continental.

ALEJANDRO ALVAREZ.*

UNIVERSITY OF CHILE,
Santiago, Chile.

* Secretary General of the American Institute of International Law; member of the Institut de Droit International; member of the Permanent Court of Arbitaration at The Hague; formerly Counselor to the Ministry of Foreign Affairs of Chile; formerly Counselor to the Chilean Legations in Europe; represented Chile at the Fourth Pan American Conference; member of the Committee of Jurists charged, in conformity with a resolution of that Conference, with the codification of International Law.

Author of: "La Nationalité dans le Droit International Américain" (1907); "Le Droit International Américain" (1910); "La Codification du Droit International" (1912); "La Grande Guerre Européenne et la Neutralité du Chili" (1915).

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LESSEES—RIGHT TO POSSESSORY ACTION BEFORE ENTRY.—Bracton writing during the reign of Henry the Third, in his treatise on the laws of England, remarks upon several kinds of tenancy in addition to the feudal tenures, distinguishing them especially from freeholds (liberum tenementum). These tenancies were: holdings in villenage (villenagium), and leases for terms of years.[1] The degree of protection attaching to possession under each of these three methods of holding was strikingly different. Originally *possession* of the land was alone protected, and full protection was incident only to freehold possession.[2]

*Resigned to enter military service.

[1] Williams, Real Property, 17th International Ed., 16.

[2] See note 1, supra.

This fact should be stressed in view of the subsequent development of the law with regard to terms for years.

If one were dispossessed of his freehold he could always secure redress by means of an action at law to recover the holding. Success in such an action resulted in restoration to possession by the hands of the sheriff, the King's officer.[3] The tenant in villenage held possession under conditions characterized by the greatest instability. His holding was merely at the pleasure and on behalf of his lord.[4] "No direct action for the recovery of a holding in villenage, as such, was ever permitted to be brought in the king's court of law."[5] However, if the lord entered into a covenant with his villein, to secure the continued enjoyment of the tenure, this covenant could be enforced; and, perhaps, by a writ of covenant, the *villenagium* itself could be recovered.[6] "To hold land for a term of years was to hold under a *contract* with the freeholder that the tenant should have possession of the land for a certain time."[7] The possession of the tenant for a term of years was merely on the behalf of the freeholder—in the capacity of bailiff—and the freeholder's remedies for dispossession were not available.[8] Like the holder in villenage, nevertheless, if he held under covenant with his lord, he had an action on the covenant, whereby he could recover possession of his holding for the rest of his term, if it was unexpired, but otherwise damages only.[9] Even this action was available only when he had been rejected by the landlord himself.[10]

To summarize briefly the original status of the various holders of land at this time, it will be noted that the only true property was a freehold in land, since a freehold alone was recoverable in specie. The holder in villenage enjoyed possession at the will of his lord, and the termor was merely in possession under contract. As pointed out by Williams:[11]

"The fact that originally freeholds were the only property specifically recoverable, is the reason why they came to be called

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[3] Williams, Real Property, 17th International Ed., 17.
[4] Digby, History of the Law of Real Property 153.
[5] Williams, Real Property, 17th International Ed., 17.
[6] Digby, History of the Law of Real Property 153.
[7] Williams, Real Property, 17th International Ed., 16.
[8] Digby, History of the Law of Real Property 176; Williams Real Property, 17th International Ed., 17.
[9] See note 8, supra.
[10] See note 8, supra.
[11] Williams, Real Property, 17th International Ed., 22.

real things. For the word *real* in English law is used not in its common sense, in which it is opposed to sham, or imaginary, or ideal, but principally to convey the notion of the capability of specific restitution."

It will be remembered that the lessee did have an action, that of covenant, whereby he could sometimes recover possession when his lord had ejected him. Speaking of this, Bracton says:[12]

"But inasmuch as this action was not available except as between lessor and lessee, and third persons could not be bound by the covenant, and even as between lessor and lessee it was an insufficient and inconvenient mode of determining the matter, by the advice of the Curia Regis a remedy was provided which the farmer could avail himself of as against any person whatsoever who should turn him out of possession."

Thus a great step was taken toward the protection of the lessee's possession. Not only did he now have a remedy against his lord, whether the lease was in the form of a deed or not, but against ejectment by "any person whatsoever." Digby adds[13] that it was, "probably, an additional remedy, by enabling the lessee to recover possession of the land, and not merely damages for the breach of covenant. This new writ was called *quare ejecit infra terminum*, and was analogous to the remedy of a freeholder for wrongful ouster from his freeholding.[14] As a result the interest of the lessee was no longer contractual at best, but was an actual estate or property in the land.

Quare ejecit, valuable as it was, was not a complete relief from former disabilities. There were two cases in which it was of no avail. In the first place, not having the freehold, the lessee could be ousted by the successful plaintiff in a collusive action against the lessor, wherein the latter allowed judgment to go against him by default, or, as it was technically called, suffered a recovery.[15] This was in part remedied by the Statute of Gloucester,[16] but not until the statute of 21 Henry VIII, Chapter 15,

[12] Bracton 220, translation in Digby, History of the Law of Real Property 180.

[13] Digby, History of the Law of Real Property 177.

[14] Digby, History of the Law of Real Property 177. "In the following passage of Bracton [220, supra], the recovery of the possession of the land is mentioned as if it were part of the extended remedy provided by the council. If so, the importance of the passage in the history of the recognition of leasehold interests is much increased. In later times it was doubted whether the judgment was not for damages merely, and not for the recovery of the term. It was, however, finally settled that in *'ejectio firmae'* the term itself could be recovered." P. 177, note 1.

[15] 1 Co. Litt., 46a.

[16] 6 Edw. I, Chap. 11, (1278).

was complete relief given.[17] Furthermore, if the lessor ejected the lessee, and subsequently enfeoffed a third person, *quare ejecit* would not lie against either the feoffee, or the feoffor (lessor), because the feoffee was not the ejector, and the lessor was not in possession. To relieve the injustice of this situation, the writ of *ejectione firmæ* was developed out of the writ of trespass, and was available against the feoffee.[18] *Ejectione firmae* has since been developed into the modern action of ejectment, by a series of fictions now fallen into disuse. Today, ejectment, aside from statute, is the usual substitute for all real actions.

So far we have traced the development of the lessee's interest in his leasehold from a mere contractual relationship, with possession protected only by virtue of a covenant between the lessor and the lessee, to that of an estate in the land, possession of which, after entry, was as fully protected as a freeholding. In other words, our discussion has dealt entirely with a completed lease.

However, entry at common law was absolutely necessary to complete a lease.[19] It is laid down in Coke on Littleton, 46b, "that, to many purposes he [lessee] is not tenant for years until he enter; as a release made to him is not good to increase his estate, before entry. . . . Neither can the lessor grant away the reversion by the name of the reversion before entry." Both of these consequences depend on the assumption that the estate has not passed out of the lessor into the lessee, before he has by entry accepted such estate; for, if the estate had actually passed to and vested in him, there can be no reason why a release would not increase such estate, nor why the reversion should not pass by that name.[20] Bacon likewise points out the necessity of entry,[21] that an estate may vest in the lessee, putting it on the ground that entry is an acceptance of the estate.

It is not to be supposed, from the foregoing discussion, that all the lessee formerly got by virtue of the execution of a lease, was a contract right to the land for the term. Lord Coke, on the contrary says,[22] "But the lessee before entry hath an interest, *interesse termini*, grantable to another," thus clearly showing the difference between the interest of the lessee and a contract. Fur-

[17] Digby, History of the Law of Real Property 243.
[18] 2 Pollock and Maitland, History of English Law 109.
[19] Litt. s. 459; Williams, Real Property, 17th International Ed., 232.
[20] Miller v. Green, (1831) 8 Bing. 92 (105).
[21] Bacon's Abridgment, tit. Leases, M.
[22] 1 Co. Litt., 46b; Bruerton v. Rainsford, (1583) Cro. Eliz. 15.

ther than this, the *interesse termini* was capable of being taken by the lessee's representatives after his death.[23] Entry, however, was necessary to the vesting of the *estate* in the lessee.[24] Prior to entry none of the remedies previously discussed were available.

An interesting problem arises at this stage of the development of the lessee's rights as to the effect of the Statute of Uses,[25] rendered necessary by the continued use of the expression, *interesse termini*, by the modern courts. An early case,[26] subsequent to the passage of the statute, holds that where a deed of bargain and sale was given for years of lands, "the estate was executed and vested in the lessee for years by the statute; and was divided from the reversion, and not like a lease for years at the common law; for in that case there is not any apparent lessee until he enters; but here, by the operation of the Statute, it absolutely and actually vests the estate in him, as the use, . . ." A later case,[27] involving a lease in a conveyance by way of lease and release, where the words used in the lease were these, that the lessor did "demise, grant, and to farm let the land . . . for six months, rendering a pepper-corn, if demanded," holds that though there were not the words "bargain and sell," yet the lease would operate by way of use, there being sufficient consideration, so that the lessee should be said to be in possession without entry. It will be seen that in this case the value of the consideration was considered of no particular moment; and, furthermore, the consideration was executory. These two cases illustrate clearly the point that leases could operate under the Statute without the words *bargain and sell,* and where the consideration was merely nominal, and executory; that, so operating entry was not necessary to vest in the lessee the *estate* for the term of years. Bearing in mind the tendency of the courts to construe conveyances as operating under the Statute, it may well be said that leases have so operated ever since that time.

On the other hand, it will be remembered that when ejectment became the mode of trying title to realty, the defendant was required to confess entry, lease and ouster, denying title alone. This being the case, could it not be said that the courts having in

[23] 1 Co. Litt., 46b.
[24] See note 22, supra.
[25] Stat. 27 Hen. VIII Chap. 10 (1535).
[26] Lutwich v. Mitton, (1620) Cro. Jac. 604; 1 Gray, Cases on Property, 2nd ed., 388.
[27] Barker v. Keete, (1698) Freem. 249; 1 Gray, Cases on Property, 2nd ed., 389.

mind the essential elements of the action of ejectment, seized upon these fictitious confessions as operating to vest an estate in the lessee without entry?[28]

The text-books remark that a lease *may* be so made, where it is in the form of a bargain and sale and a sufficient consideration is expressed as having been executed or paid, as to operate under the Statute of Uses as an effectual creation of an estate, without a formal entry; but still speak of the *interesse termini* as if the lease operated under the common law.[29] The cases, likewise, cling to the ancient expression and, in general, attribute to the period between the execution of the lease and the date when *entry may be made* under the lease (as distinguished from actual entry, as at common law), the incidents of the common law *interesse termini*.[30] This is by no means inconsistent with the idea that the lease is operating under the Statute of Uses, for the use would not be executed until the time for the estate to vest in possession, and so the *estate* does not vest until the time for enjoyment has arrived, *i. e.*, the right to enter, under the terms of the lease.

However this may be, the interest which the lessee has before entry, but after the right to enter has accrued, under a present lease for years, is sufficient to the maintenance of ejectment.[31] And under a lease to commence in futuro, though the estate of the lessee can be perfected only by his entry, yet when he becomes entitled to immediate possession he has then such a present interest in the term as will enable him to maintain ejectment.[32] On principle there seems to be no valid objection to the exercise of this mode of securing possession of the leasehold, even where the lessor is withholding the possession.

A recent case in North Dakota,[33] a code state, has laid down the rule that a lessee may, before entry, obtain possession of the land leased when his right of entry accrues, by means of the statutory action to determine adverse claims,[34] even where the lessor is the person withholding the possession. Though none of

[28] 1 Tiffany, Real Property 90.
[29] 1 Washburn, Real Property, 5th ed., 472-3.
[30] Wallis v. Hands, [1893] 2 Ch. 75; Gillard v. Cheshire Lines Committee, (1884) 32 W. R. 943.
[31] Doe v. Day, (1842) 2 Q. B. 147 (156); Whitney v. Allaire, (1848) 1 N. Y. 305 (311).
[32] Johnston v. Corson Gold Mining Co., (1907) 157 Fed. 145, 84 C. C. A. 593, 15 L. R. A. (N. S.) 1078.
[33] Cooper v. Gordon, (1917) 164 N. W. 21.
[34] 2 Compiled Laws of North Dakota 1913 Sec. 8144.

the cases cited by the court[35] are directly in point, yet the result seems consonant with better reason.

The decision was rendered on the assumption that the action to determine adverse claims partakes of the nature of ejectment and the equitable action to quiet title, with particular emphasis on the element of ejectment. Some other states have similar statutes,[36] and the decision in the instant case may be the forerunner of a broadening tendency in the interpretation of such statutes in these jurisdictions.

Minnesota has a statute[37] which, while similarly denominated, has, on account of its wording, received a much narrower interpretation. An action lies under the Minnesota statute only when the plaintiff is in possession or the land is vacant.

BARGAINING AWAY A SOVEREIGN POWER—POWER OF EMINENT DOMAIN.—The police power, the power of taxation and the power of eminent domain are inherent governmental powers which belong to a state in its sovereign capacity. It is a well settled proposition that the police power cannot be bargained away, given away, or in any manner relinquished.[1] The theory upon which this rule is based is that in respect to the public health, safety, morals, the public welfare in general, and all other matters coming within the broad scope of the police power, an existing legislature cannot so act as to curtail the power of succeeding legislatures to make such laws as the special exigencies arising in the future might require. On the other hand, it is equally well settled that the power of taxation may be bargained away. In an early decision of the United States Supreme Court,[2] Chief Justice Marshall expressed the opinion that a legislative act authorizing the purchase of certain lands for Indians and exempting such lands from any tax, constituted a contract and could not be subsequently repealed on account of the provision of the

[35] McDonald v. Early, (1883) 15 Neb. 63, 17 N. W. 257; Merrill v. Gordon, (1914) 15 Ariz. 521, 140 Pac. 406; Berrington v. Casey, (1875) 78 Ill. 317; German American Savings Bank v. Gollmer, (1909) 155 Cal. 683, 102 Pac. 932, 24 L. R. A. (N. S.) 1066.

[36] 3 Kerr's Cyc. Codes of California 1907 Sec. 738; 2 Cobbey's Ann. Stat. of Nebraska 1911 Sec. 10868.

[37] Minnesota G. S. 1913 Sec. 8060.

[1] Metropolitan Board of Excise v. Barrie, (1866) 34 N. Y. 657; Stone v. Mississippi, (1879) 101 U. S. 814, 25 L. Ed. 1079.

[2] State of New Jersey v. Wilson, (1812) 7 Cranch. (U. S.) 164, 3 L. Ed. 301.

federal constitution forbidding a state to pass any law impairing the obligation of a contract. The rule there laid down has been adhered to by that court,[3] and has also been adopted by many states.[4] The theory upon which exemption from taxation is permitted frequently, though not always, is that of commutation. The exemption contracts are based upon a consideration, for example, a public hospital is provided by private funds at the time the contract is made or a share of the gross earnings of a corporation is agreed to be paid. Consequently, something is received by the state in lieu of the taxes relinquished, and it is clear that money derived from one source is as good as that derived from another source. There remains no necessity for the state to exercise its power to compel a contribution. But although the power of permanent or temporary exemption or commutation exists and is recognized on the principle of stare decisis, it is looked upon with disfavor and every possible limitation is placed upon it. The rule of strict construction is applied to every contract purporting to exempt property from its proportional share of taxes, and there are other cardinal rules which are applied by all courts. These rules are well stated in a note to *Adams v. Yazoo, etc., Ry. Co.*,[5] where it is said that:

"In construing and interpreting contracts of this class, the courts are guided by a set of principles that have now become fundamental. . . . These, in brief, are chiefly, that taxation is the rule, and exemption the exception; the power of taxation is an essential attribute of sovereignty, necessary and vital to the very existence of government; the whole community is interested in its maintenance unimpaired; it is presumed never to have been surrendered; and the intention to surrender it must be expressed in language so clear and free from ambiguity as to admit of no reasonable doubt. An exemption never arises by implication; it is always restricted to its lowest possible terms; . . . every doubt must be resolved in favor of the government and against the claimant."

With respect to the power of eminent domain, there seems to be no question but that it may be delegated. Accordingly, the power may be exercised by municipal corporations and by other

[3] Gordon v. Appeal Tax Court, (1845) 3 How. (U. S.) 132, 11 L. Ed. 529; Jefferson Branch Bank v. Skelly, (1861) 1 Black, (U. S.) 436, 17 L. Ed. 173.

[4] Oliver v. Memphis, etc., R. Co., (1875) 30 Ark. 128; Day v. City of Lawrence, (1897) 167 Mass. 371, 54 N. E. 751; City of Richmond v. Richmond, etc., R. Co., (1872) 21 Gratt. (Va.) 604.

[5] 60 L. R. A. 33, 38.

governmental subdivisions of the state;[6] it may be exercised by quasi-public corporations,[7] or private corporations.[8] But can a state, acting through its legislature, enter into a contract that it will entirely desist from exercising this power, and if it does so, will the agreement be binding? Is it more logical to follow the settled rule with regard to the police power, and say that the power of eminent domain cannot be relinquished, or to follow the rule with regard to taxation, and say that it may be permanently or temporarily bargained away? Clearly, the basis for the rule that the police power cannot be derogated from is applicable to the power of eminent domain; the exigencies of the moment might require that a particular piece of property be appropriated for the use of the public, but if a contract not to condemn that particular property is to be given effect a sovereign prerogative which exists even without constitutional grant is rendered nugatory. On the other hand, the theory upon which a legislature is permitted to sell the power of taxation can have no application here. The sole object of taxation is to procure means for meeting the public burden, and if those means can be obtained through some other process than that of taxation, the object is accomplished; whether the means obtained be taxes or whether they be a commutation for taxes, the result is the same. When, however, the public convenience or necessity demands that a roadway be built at this particular place or that a bridge be constructed at that particular point, specific property and no other will answer the purpose; it will not do to build the roadway or construct the bridge a block or a mile away, as the case may be, in order that property purporting to be protected from condemnation will not be affected. Furthermore, it is an obnoxious principle that a power which is inherent in sovereignty can be so dealt with that it cannot be exercised when the occasion demands it, and the courts have recognized that such a principle ought not to be extended.[9] The trend of the decisions is that the power of eminent domain is inalienable; that no legislature has the power to bind itself or succeeding legislatures not to exercise the power;[10] and that any such legislative grant or contract is not

[6] Mercer County v. Wolff, (1908) 237 Ill. 74, 86 N. E. 708; Board of Supervisors of Norfolk County v. Cox, (1900) 98 Va. 270, 36 S. E. 380.

[7] Little Rock Junction Ry. v. Woodruff, (1887) 49 Ark. 381, 5 S. W. 792; Brown v. Beatty, (1857) 34 Miss. 227, 69 Am. Dec. 389.

[8] Jones v. North Georgia Electric Co., (1916) 125 Ga. 618, 54 S. E. 85.

[9] This is shown by the limitations placed upon the power to bargain away the taxing power.

[10] In re Opening of Twenty-Second Street, (1883) 102 Pa. St. 108.

binding upon the state and does not fall within the inhibition of the federal constitution relative to laws impairing the obligation of contracts.[11]

The existing law and the theories upon which it is based is well represented by the recent case of *Pennsylvania Hospital v. City of Philadelphia*.[12] The Pennsylvania Hospital Company procured the passage of a bill by the state legislature, whereby it was enacted "that no streets, alleys, roads or lanes shall ever be opened through the property belonging to the corporation of the contributors to the Pennsylvania Hospital . . . without the consent of said corporation, . . . any law to the contrary notwithstanding,"[13] and in consideration thereof the Hospital contributed certain land to the city and county of Philadelphia. Subsequently the city of Philadelphia, acting under authority given by the state legislature to municipal authorities, "any private or special statute to the contrary notwithstanding,"[14] passed an ordinance opening a street through the property belonging to the Hospital. Thereupon, the Hospital sought to restrain the opening of the street on the ground that the state had no power to take away the right and privilege granted to it by the state under the previous act, and that the ordinance was illegal under the constitutions of Pennsylvania and the United States, inasmuch as it impaired the obligation of an existing contract. The supreme court of Pennsylvania concluded that the power of eminent domain had not been lost by this contract, but in reaching that conclusion it proceeded upon a peculiar theory, namely, that the contract itself was property which was subject to the power of eminent domain, that the taking of this contract with compensation therefor did not violate the constitutional inhibition upon the impairment of the obligation of contracts, that the contract being thus done away with there was nothing to hinder the exercise of the power with respect to the property. Upon review by the Supreme Court of the United States it was held[15] that the correct result had been reached, but here an entirely different theory was relied upon, namely, that the power of eminent domain is so

[11] Village of Hyde Park v. Cemetery Ass'n, (1886) 119 Ill. 141; Cincinnati v. Louisville, etc., R. Co., (1920) 223 U. S. 390, 56 L. Ed. 685, 32 S. C. R. 267.

[12] (1916) 254 Pa. St. 392, 98 Atl. 791.

[13] Act of April 17, 1854, Pa. Laws 1854 p. 385.

[14] Acts of June 8, 1881, Pa. Laws 1881 p. 68 and May 23, 1874, Pa. Laws p. 230.

[15] (1917) 38 S. C. R. 35, U. S. Adv. Ops. 1917 page 55.

inherently governmental in its nature that the sovereignty can in no way be barred from the exercise thereof. The Court, speaking through Chief Justice White, said:

"There can be now, in view of the many decisions of this court on the subject, no room for challenging the general proposition that the states cannot, by virtue of the contract clause, be held to have divested themselves by contract of the right to exert their governmental authority in matters which, from their very nature, so concern that authority that to restrain its exercise by contract would be a renunciation of power to legislate for the preservation of society or to secure the performance of essential governmental duties.[16] And it is unnecessary to analyze the decided cases for the purpose of fixing the criteria by which it is to be determined in a given case whether a power exerted is so governmental in character as not to be subject to be restrained by the contract clause, since it is equally true that the previous decisions of this court leave no doubt that the right of government to exercise its power of eminent domain upon just compensation, for a public purpose, comes within this general doctrine."[17]

The theory of the Pennsylvania court is faulty in that it gives validity to the contract and deems it necessary to first do away with it, whereas the true result of the decisions is that such a contract, since it purports to divest the sovereign of a power which is inalienable, was never efficacious for any purpose whatever, but was totally void ab initio, and never vested any right in any one or imposed any obligation upon the state which might subsequently be impaired by an exercise of the power.

THE INHERITANCE TAX AND THE STATUTORY ONE-THIRD INTEREST OF THE SURVIVING SPOUSE.—A question upon which some diversity is developing among the courts is whether the surviving spouse's statutory one-third interest in the realty of which the deceased spouse was seized during coverture is subject to the inheritance tax placed on property which passes by will or by the intestate laws. If the widow, for instance, takes as an heir the tax should apply; but if she receives the land by virtue of an interest of her own, as a remainderman might, if she has a property during coverture which simply vests in possession on her survivorship, then it seems that the tax should not apply. The

[16] Stone v. Mississippi, (1879) 101 U. S. 814, 25 L. Ed. 1079, and other cases cited by the court.

[17] Charles River Bridge v. Warren Bridge, (1837) 11 Pet. 420, 9 L. Ed. 773, and other cases cited by the court.

question resolves itself into an inquiry as to whether a wife has a property right in the lands of which her husband is seized. The statutes, as a rule, provide that a conveyance or will by the husband, unless she consents, does not defeat her right to one-third of the realty.[1] Courts, in defining a wife's right under these statutes have said she had "a valuable property interest," "property with incidents *sui generis*,"[2] or merely "an inchoate expectancy";[3] but too often the term "inchoate right" has served only to obscure their meaning.

When, however, concrete cases come up, the courts formulate the rules of law more definitely. Where a husband had been disseised of his land and the statute of limitations had run against him before his death, it has been held that his widow is not barred,[4] the reason being that she has a right other than that of her husband but which does not become one of possession until the death of the husband. The husband's heirs are barred, but his widow is not regarded as an heir. Accordingly a wife may enjoin the grantee of her husband from waste.[5] The majority of the courts which have passed upon the subject have also held that the widow's share of the realty is not subject to the inheritance tax for the same reason.[6] In some states, legislation has been held merely to have enlarged the common law dower;[7] in others it has been held that dower was completely abolished, that the right given in the statute is sufficient in itself, and that comparison of the statutory one-third with the ancient dower and curtesy can serve an academic interest only;[8] in others it has been held that legislation abolishing dower and curtesy is largely a matter of words.[9] Looking then to the statute as the

[1] Minn. G. S. 1913 Sec. 7238.
[2] Fitcher v. Griffiths, (1913) 216 Mass. 174, 103 N. E. 471.
[3] Heisen v. Heisen, (1893) 145 Ill. 658, 34 N. E. 597, 21 L. R. A. 434.
[4] Taylor v. Lawrence, (1894) 148 Ill. 388, 36 N. E. 74; Lucas v. Whitacre, (1903) 121 Ia. 251, 96 N. W. 776; Thompson v. McCorkle, (1893) 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334.
[5] Brown v. Brown, (1913) 94 S. C. 492, 78 S. E. 447. Contra, Rumsey v. Sullivan, (1914) 166 App. Div. 246, 150 N. Y. Supp. 287.
[6] McDaniel v. Byrkett, (1915) 120 Ark. 295, 179 S. W. 491; Crenshaw v. Moore, (1911) 124 Tenn. 528, 137 S. W. 924, Ann. Cas. 1913A 165, 34 L. R. A. (N.S.) 1161; In re Bullen's Estate, (1915) 47 Utah 96, 151 Pac. 533, L. R. A. 1916C 670; In re Estate of Strahan, (1913) 93 Neb. 828, 142 N. W. 678. Contra, Billings v. People, (1901) 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807; State ex rel. Pettit v. Probate Court, (1917) 137 Minn. 238, 163 N. W. 285; Corporation Commission v. Dunn, (N. C. 1917) 94 S. E. 481.
[7] Johnson v. Plume, (1881) 77 Ind. 166.
[8] See Scott v. Wells, (1893) 55 Minn. 274, 56 N. W. 828.
[9] Purcell v. Lang, (1896) 97 Ia. 610, 66 N. W. 887.

foundation upon which the decisions must stand, there is the fact that the surviving spouse will receive a fee or life estate in one-third of all the land of which the other was seized during marriage, a conveyance or will by the other notwithstanding.[10] According to the statute, if a husband convey all his interest away and if his wife does not join she will have her third on surviving. It seems clear that she does not take anything from him when she comes into her estate, but that she merely receives the enjoyment of her own property right in the land. The right which she has would appear analogous to a limitation to her contingent on her survivorship, one which cuts short in a certain event the prior estate rather than a mere continuance of that estate. But whether or not the matter be thus stated, it is an almost unanswerable proposition that she has an interest of her own in the land.

In North Carolina it has been recently held that the widow's right passes to her by the intestate laws and so it is subject to the inheritance tax.[11] The same holding obtains in Illinois.[12] The Minnesota case of *State ex rel. Pettit vs. Probate Court,*[13] decided a few months before the North Carolina case, held that the tax on the widow's statutory third was valid. Her husband could dispose of personalty during his life without the necessity of his wife's consent; the statute has no effect whatever on personalty until death and it could have no other effect than to control the distribution. Manifestly the court was correct in holding the tax a valid one on the personalty. But the court also held that "it is not to be presumed that the legislative intention was to discriminate between personal and real property in the imposition of this tax" and that the tax was valid as to the realty as well.

There are certain things in the statutes which may be referred to as indications of the legislative intent that the tax should apply, as well to the realty as to the personalty. The tax exemption of $10,000 allowed in favor of a widow[14] seems to raise the implication that what she receives in excess of the amount is taxable. The phrase in the inheritance tax statute is "when the transfer is by will or by the intestate laws of this state."[15] Holt,

[10] Minn. G. S. 1913 Sec. 7238. North Carolina, 1 Revisal of 1905 Secs. 3080, 3081, 3084, and 3085.

[11] Corporation Commission v. Dunn, (N. C. 1917) 94 S. E. 481.

[12] Billings v. People, (1901) 189 Ill. 472, 59 N. E. 798, 59 L. R. A. 807.

[13] (1917) 137 Minn. 238, 163 N. W. 285.

[14] Minn. G. S. 1913 Sec. 2272 Sub-sec. 2c (2).

[15] Minn. G. S. 1913 Sec. 2271 (1).

J., points out[16] that, in Minnesota at least, the rights of both widow and heirs are found in the same statute; viz., Secs. 7237, 7238, and 7243, and that these are the only intestate laws of the state. Is there any thing that takes the widow's right to one-third of her husband's realty out of the phrase "intestate laws?" Looking at the statute which gives the third to the surviving spouse, it is clear that the legislature intended merely a statute of descent and distribution, and it apparently did not set out to create a property right of any nature before the statute should operate at the time of death; the words are: "The surviving spouse shall also inherit an undivided one-third."[17] The statute also makes the "inheritance" completely subject to the debts of the decedent,[18] a thing not true of dower.[19] The ancestor is prevented from willing his land to whomsoever he pleases; but it has often been said by the courts that a man has no natural or inherent right to dispose of his property by will;[20] the legislature may control wills and the descent of property. The law-making body, however, in order to give practical protection to the surviving spouse and to insure its own effectual regulation of descent, provided that one spouse must consent to a conveyance by the other in order to cut out the right of survivorship. It seems that what was intended simply as a protecting clause must in effect grant something more than an expectancy, something very much like an interest.[21] But, by the great weight of authority the "inchoate" right whether it be that given by statute or the right at common law, may be modified or cut off by statute. The question is not whether the wife's interest before her husband's death is vested or not, but whether she has an interest not analogous to inheritance and beyond the reach of any acts of the husband to destroy it. It is submitted that the North Carolina court is in error when it rests the decision in *Corporation Commission v. Dunn* on the ground that the widow had no *vested* right during her husband's lifetime.

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[16] State ex rel. Pettit v. Probate Court, (1917) 137 Minn. 238, 163 N. W. 285.

[17] Minn. G. S. 1913 Sec. 7238.

[18] Allen v. Allen's Adm'r, (1843) 4 Ala. 556; Butler v. Fitzgerald, (1895) 43 Neb. 192, 61 N. W. 640, 27 L. R. A. 252, 47 Am. St. Rep. 741.

[19] Magoun v. Illinois Trust and Savings Bank, (1898) 170 U. S. 283, 42 L. Ed. 1037, 18 S. C. R. 594; People v. Griffith, (1910) 245 Ill. 532, 92 N. E. 313.

[20] See Sutton v. Askew, (1872) 66 N. C. 172, 8 Am. Rep. 500.

[21] Guerin v. Moore, (1879) 25 Minn. 462; Hatch v. Small, (1899) 61 Kan. 242, 59 Pac. 262; Lucas v. Sawyer, (1864) 17 Ia. 517.

The strongest grounds for upholding the tax, regardless of the technical nature of the surviving spouse's interest, are doubtless these: the legislature without question *can* tax it; there is no good reason why it should be wholly exempted; it has been expressly exempted in part; the taxing power is the life of the state, and technical distinctions should not be encouraged in order to create an exemption.

POWER OF COURT TO SUSPEND SENTENCE.—Some conflict has existed and unhappily still exists in this country as to the power of courts of law to suspend sentences after conviction. Properly to consider the cases and the points involved it is necessary that the cases where this question arises be divided into two classes, namely, those in which the sentence is suspended temporarily, and those in which it is suspended indefinitely.

As to the first class of cases—those where the sentence is suspended temporarily—the courts are practically unanimous in allowing suspension in order to afford time for a motion for new trial,[1] for appeal,[2] for a hearing on error,[3] and to enable the court to determine what sentence should be imposed:[4] in granting such suspension the court can in no way be said to be exercising the pardoning power but is merely staying the enforcement of the sentence until the court has ruled finally on questions of law involved. The appellate courts of the states are given the authority to review and revise and if, in order to effectuate this end, it is necessary to suspend sentence temporarily the court is merely exercising its proper functions.[5] While it may not be obligatory on the trial court aside from statute, to

[1] Weaver v. People, (1876) 33 Mich. 296.
[2] State ex rel. Cary v. Langum, (1910) 112 Minn. 121, 127 N. W. 465.
[3] Webster v. State, (1885) 43 Ohio 696, 4 N. E. 92.
[4] People v. Kennedy, (1885) 58 Mich. 372, 25 N. W. 318; in re Hart, (1914) 29 N. D. 38, 149 N. W. 568, L. R. A. 1915C 1169.
[5] Parker v. State, (1893) 135 Ind. 534, 35 N. E. 179, 23 L. R. A. 859. The court strikingly illustrates the proposition by the following example: "Under the construction contended for, if one convicted of murder and sentenced to suffer the death penalty should appeal to this court, and by the exercise of all diligence possible should not be able to file his transcript earlier than the day before the time fixed for his execution, leaving no time to investigate his case, if the chief executive should not be accessible, or, if accessible, he should refuse to grant a reprieve, the result would be an execution of the appellant and an investigation of his case afterwards. If, upon investigation, we should reach the conclusion that he had been illegally convicted, the most that could be done would be to reverse the judgment and to that extent vindicate his memory."

suspend the sentence pending an appeal, certainly no constitutional objection that it is an encroachment on the executive's pardoning power can be urged against it.

It is in the second class of cases that the conflict of opinion exists. One line of decisions maintains that there is an inherent right existing in the courts by common law to suspend sentence indefinitely as well as temporarily.[6] The other, and majority view in this country, is that there is no such inherent power in the courts as to enable them to suspend sentences indefinitely and that statutes conferring such powers on the courts are unconstitutional as attempts to confer on the judiciary the pardoning power given to the executive by the constitutions of the several states.[7]

Those courts which allow a sentence to be suspended indefinitely do so on the ground that the courts had such inherent power at common law and that, being power distinct from the pardoning power, it does not fall within the constitutional provision referred to. Probably the leading case for this view is that of *People ex rel. Forsyth v. Court of Sessions,*[8] wherein the court said:

"The power to suspend sentence and the power to grant reprieves and pardons, as understood when the constitution was adopted, are totally distinct and different in their origin and nature. The former was always a part of the judicial power. The latter was always a part of the executive power. The suspension of the sentence simply postpones the judgment of the court temporarily or indefinitely, but the conviction and liability following it, and all civil disabilities, remain and become operative when judgment is rendered. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender. It releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. It removes the penalties and disabilities and restores him to all his civil rights."

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[6] People v. Stickle, (1909) 156 Mich. 557, 121 N. W. 497; State v. Fjolander, (1914) 125 Minn. 529, 147 N. W. 273; State v. Crook, (1894) 115 N. C. 760, 20 S. E. 515, 29 L. R. A. 260; State ex rel. Buckley v. Drew, (1909) 75 N. H. 402, 74 Atl. 875; Miller's Case, (1828) 9 Cow. (N. Y.) 730.

People ex rel. Forsyth v. Court of Sessions, (1894) 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

[7] Neal v. State, (1898) 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175; State v. Voss, (1890) 80 Iowa 467, 45 N. W. 898, 8 L. R. A. 767; People ex rel. Boenert v. Barrett, (1903) 202 Ill. 287, 67 N. E. 23, 63 L. R. A. 82, 95 Am. St. Rep. 230.

Brabandt v. Commonwealth, (1914) 157 Ky. 130, 162 S. W. 786; In Re Webb, (1895) 89 Wis. 354, 62 N. W. 177, 27 L. R. A. 356, 46 Am. St. Rep. 846.

[8] (1894) 141 N. Y. 288, 36 N. E. 386, 23 L. R. A. 856.

Conceding the validity of the court's distinction between a temporary suspension of sentence and a pardon, is that between an indefinite suspension and a pardon also a valid one? It is said that the liability and all civil disabilities remain and become operative when judgment is rendered. While this may be true in theory, in fact it is a pardon when the court suspends sentence indefinitely and without reason. If the court by refusing to enter the judgment can prevent the liability and civil disabilities from becoming operative, it certainly is doing nothing more or less than granting a pardon. A decision of the United States Supreme Court[9] illustrates the logical results which follow if we concede the power of the court to suspend sentence indefinitely. There the court points out that if the legislative command fixing the punishment for a crime can be permanently set aside by an implied judicial power upon considerations outside of the legality of the conviction, then there could be implied a discretionary authority to refuse to try a criminal case because the court thinks a particular act made criminal by law ought not to be such. The judiciary in this manner could destroy the conceded powers of the other two branches. The Supreme Court in this case, speaking through Chief Justice White, goes into the subject at length and comes to the conclusion that such power does not exist inherently in the courts of this country. It seems clear that those courts which seek to distinguish between an indefinite suspension of sentence and a pardon are drawing a distinction more imaginary than real.

Coming to the argument that this power existed in the courts at common law and is an inherent power, it is necessary to examine the power and conditions surrounding its exercise at common law. Blackstone,[10] in discussing the power of the courts to suspend sentences, enumerates certain cases where this may be done. In all of the cases it seems it was suspended only in order to allow time to apply to the Crown for a pardon. Chitty[11] lays down the rule that while the court could grant reprieves, which merely de-

[9] Ex Parte United States, (1916) 242 U. S. 27, 61 L. Ed. 129, 37 S. C. R. 72.

[10] 4 Blackstone, Commentaries Chap. 31, pp. 394, 395.

[11] 1 Chitty, Crim. Law pp. 616, 620. It is true that the author says in speaking of the power of the judge to grant these reprieves: "When he is disposed to spare the life of the criminal on condition of transportation to the colonies, either limited or perpetual, he is by recent provision enabled to do so, ex mero motu, and as soon as his majesty's acquiescence has been obtained to make an order for his conveyance to the place of his exile." But it will be noted that the King's consent is needed.

layed the execution of the sentence, the sole power to pardon was in the King. He says:

"The term reprieve is derived from reprendre, to keep back, and signifies the withdrawing of the sentence for an interval of time, and operates in delay of execution . . . The prerogative of pardoning is inseparably incident to the Crown."

That this conferred upon the courts the power to suspend sentence indefinitely or practically as long as the court shall see fit manifestly does not follow. Moreover the conditions under which this practice grew up in England were entirely different from what they are in this country today. At common law the prisoner was not allowed to call any witnesses in his own behalf for the jury decided as to his guilt or innocence upon the evidence offered in support of the prosecution. This practice of rejecting the testimony of witnesses for the defendant ceased about the time of Queen Mary, but for a long time thereafter the witnesses were not sworn and so obtained little credit from the jury.[12]

Under our theory of government the power to affix punishment for crime is lodged in the legislative department, subject to the pardoning power of the executive. In the exercise of this power the legislature may confer on the judges the widest discretion as to the sentence to be imposed. But when a certain punishment is fixed the judges have no alternative upon conviction but to impose the sentence provided. A distinction must be borne in mind between those cases where the legislature gives the court a discretion in the imposition of a sentence and the case where the legislature imposes a maximum and a minimum limit and allows the court to decide what sentence shall be imposed within these limits. In the former case the legislature gives to the court the power to name the punishment for the particular act but in the latter case it allows the court a certain latitude only in the punishment to be given. It is clear in the latter case that the court must keep within the limits set by the legislative branch or it in fact is refusing to enforce a positive statute.[13]

There is little doubt that the courts which hold there is no power in the court to suspend sentence indefinitely are right on principle and that the contrary holding is untenable, at least under our form of government. The case of *Ex Parte United*

[12] 1 Chitty, Crim. Law p. 509.
[13] State v. Abbott, (1910) 87 S. C. 466, 70 S. E. 6, 33 L. R. A. (N. S.) 112.

States,[14] supra, and the opinion therein should go far toward settling the question in this country.

RECENT CASES

BILLS AND NOTES—INTEREST—OPTION TO PAY LOWER RATE AS AFFECTING NEGOTIABILITY.—A promissory note contained the following provision: "With interest at the rate of 9 per cent per annum, payable annually from date until paid: Provided however, if the note is paid on or before maturity, interest shall only be at 7 per cent." *Held*: This instrument does not contain an unconditional promise to pay a sum certain, and therefore is non-negotiable. The sum payable is indefinite and uncertain and depends on the option of the maker. *Union Nat. Bank v. Mayfield,* (Okl. 1917) 169 Pac. 626.

It is well recognized that certainty as to the amount payable is one of the requisites of a negotiable promissory note. *Parsons v. Jackson,* (1878) 99 U. S. 434 (440), 25 L. Ed. 457; *Jones v. Radatz,* (1880) 27 Minn. 240, 6 N. W. 800; 1 Daniel, Negotiable Instruments Sec. 53; *Loring v. Anderson,* (1905) 95 Minn. 101, 103 N. W. 722; Minn. G. S. 1913, Sec. 5813 (2). But the authorities are in conflict as to the effect of an interest clause similar to the one in the instant case. One of the older interpretations was that the contract in effect reserves the higher rate of interest, with a provision for its abatement, upon a condition to be performed, and therefore the difference between the two rates is not a penalty, but the contract is to be enforced according to its literal terms. *Nicholls v. Maynard,* (1747) 3 Atk. 519. In *Smith v. Crane,* (1885) 33 Minn. 144, 22 N. W. 633, 53 Am. Rep. 20, the instrument contained the clause "with interest at ten per cent per annum from date until paid, seven if paid when due." The court held that the clause had the same effect as if it had reserved the lowest rate, with a higher rate if not paid at maturity, thus making the difference between the two rates a penalty and making the note a negotiable promissory note at seven per cent interest. (In Minnesota, an agreement for a higher rate after maturity works a forfeiture of the entire interest: G. S. 1913, Sec. 5805.) A contrary view was laid down by the South Dakota court in *Hegeler v. Comstock,* (1890) 1 S. D. 138, 45 N. W. 331, 8 L. R. A. 393, where an interest clause similar to the one in the *Smith case,* supra, was held to render the note non-negotiable. The court said that there was no certainty until after due, as to the amount that will discharge the instrument; the amount depending on whether paid then or not. In *Loring v. Anderson,* supra, the Minnesota court held that a clause allowing a discount of six per cent if the instrument was paid on or before maturity, did not render the amount uncertain, and that the note was negotiable. But the better view seems to be that such a clause renders the note non-negotiable. *Farmers' Loan & Trust Co. v. McCoy & Spivey Bros.,* (1912) 32 Okl. 277, 122 Pac. 125, 40 L. R. A. (N. S.) 177, and note. Although it is the tendency of the courts to hold

[14] (1916) 242 U. S. 27, 61 L. Ed. 129, 37 S. C. R. 72.

promissory notes negotiable, yet so long as certainty as to the amount payable is necessary to give a promissory note as far as possible the quality of a circulating medium, the decision in the instant case, agreeing with the *Hegeler case,* supra, seems to adopt the better view.

CARRIERS—FREIGHT RATES—JURISDICTION.—Plaintiff brought an action in the state court to recover an alleged overcharge by defendant for freight on interstate shipments, according to the published and filed schedules. Plaintiff did not attack the validity of such rates, but contended for a construction of the tariff in accordance with its claims. Defendant questioned the jurisdiction of the state court on the ground that the Interstate Commerce Commission, or the federal court, had exclusive jurisdiction in such a case. The district court sustained this contention. On appeal, *held,* that the state court has jurisdiction of the action, although in this case plaintiff cannot recover because it appears that defendant charged and collected the legal rate. *Reliance Elevator Co. v. Chicago, Milwaukee & St. Paul Ry. Co.,* (Minn. 1918) 165 N. W. 867.

The distinction drawn by the court, as well as the authorities generally, is that where the plaintiff seeks to recover only an overcharge of freight, or the difference between the charge made by defendant and the rate established by its tariff, although involving an interpretation of the latter, the state court has jurisdiction; whereas, if the rate established is attacked as unreasonable or discriminatory, the Interstate Commerce Commission would have exclusive jurisdiction. This principle is well established by the authorities cited in the opinion. The circuit court of appeals, eighth circuit, has held that in such a case the federal district court has jurisdiction, and that of the Interstate Commerce Commission is not exclusive. *National Elevator Co. v. Chicago, etc., Ry. Co.,* (1917) 246 Fed. 588.

CHATTEL MORTGAGE—INDEX AS PART OF THE RECORD.—A chattel mortgage was left with the deputy clerk for filing. The mortgage was properly filed but not indexed. *Held,* the mortgagee was protected, *Dodds v. O'Brien,* (1917) 166 N. Y. Supp. 1065

The authorities in this country are almost equally divided as to whether or not a chattel mortgage index is a part of the record. The early tendency was to follow the decision in the instant case. The theory upon which these cases are decided is that when the mortgagee has delivered the mortgage to the clerk for filing and paid the fees, he has done all that the law requires of him and subsequent purchasers will be charged with constructive notice of the mortgage. *People v. Bristol,* (1876) 35 Mich. 28; *Murray Co. v. Randolph,* (Tex. Civ. App. 1915) 174 S. W. 825; *Eastman v. Parkinson,* (1907) 133 Wis. 375, 113 N. W. 649, 13 L. R. A. (N. S.), note.

The modern tendency, however, seems to be to adopt the opposite view, that the duty of the mortgagee is not fully performed until the mortgage is actually filed, since he is in a better position to verfiy the record than is the purchaser. This view has lately been adopted in Michigan. *People v. Burns,* (1910) 161 Mich. 169, 125 N. W. 740, 137 Am. St. Rep. 466 and note at p. 493. See also *Bamberg v. Harrison,*

(1911) 89 S. C. 454, 71 S. E. 1086, Ann. Cas. 1913B 68, note, 25 Harv. L. Rev. 195.

The early Minnesota decisions adopted the former view, in harmony with the instant case. *Gorham v. Summers,* (1878) 25 Minn. 81; *Appleton Mill Co. v. Warder,* (1889) 42 Minn. 117, 43 N. W. 791. There seem to be no recent cases in Minnesota on this point, but the Minnesota statutes have been amended so as apparently to make the index a part of the record, and the modern tendency would undoubtedly be followed in Minnesota. Minn. G. S. 1913 Secs. 6969, 6988; Dunnell, Minn. Digest, Sec. 1441. Sec. 6988, after requiring the register of deeds to keep an index book and to enter chattel mortgages therein, provides: "Every such instrument so filed shall be notice to all persons of the existence thereof." This harmonizes the law in relation to chattel mortgages with the long settled rule in respect to conveyances of real estate "that it is the duty of a grantee to see that his deed is correctly recorded, and that a misdescription of such a character that reformation is necessary in order to pass the legal title is fatal to the effect of the record as notice." Hallam, J., in *Latourell v. Hobart,* (1916) 135 Minn. 109, 160 N. W. 259.

CONSTITUTIONAL LAW—BARGAINING AWAY A SOVEREIGN POWER—POWER OF EMINENT DOMAIN.—In consideration of money paid and land conveyed to the county and city of Philadelphia, the plaintiff procured the passage of an act by the legislature of the state of Pennsylvania, whereby it was enacted that no streets, roads, alleys or lanes should be built through the property belonging to the plaintiff, any special or general law to the contrary notwithstanding. Subsequently, under authority conferred upon it by the state legislature, the city of Philadelphia passed an ordinance opening a street through the property of the plaintiff. Plaintiff thereupon sought to restrain the opening of such road, contending that the state had no power to take away the privilege previously granted to the plaintiff. *Held,* that the power of eminent domain is so inherently governmental in its nature that a sovereign cannot effectlvely dispose of the power, or bind itself, either temporarily or permanently, not to exercise the power. *Pennsylvania Hospital v. City of Philadelphia,* (1917) 245 U. S. 20, 38 S. C. R. 35, U. S. Adv. Ops. 1917 p. 55.

For a discussion of the principles involved, see Notes p. 373.

CONTRACTS—OPTIONAL SALE—MEASURE OF DAMAGE—RESCISSION.—Under written contract, the defendant sold to the plaintiff five shares of stock, plaintiff having the option to resell to the defendant on a day certain. Plaintiff elected to resell and although no tender was made, a willingness to surrender was implied from the demand to the defendant that he abide by the terms of the agreement. Defendant refused. *Held,* the plaintiff could recover the full contract price. *Mattson v. Baumann,* (Minn. 1918) 166 N. W. 343.

The defendant contended that the measure of damages should have been the difference between the contract price and the market price at the time and place of delivery. The general rule is that for a breach of contract for the sale and delivery of personal property, the measure of

damages is as urged by the defendant. *Guetzkow Brothers Co. v. A. H. Andrews & Co.,* (1896) 92 Wis. 214, 66 N. W. 119, 53 Am. St. Rep. 909, 52 L. R. A. 209 and note; *Tufts v. Bennett,* (1895) 163 Mass. 398, 40 N. E. 172; *McCormick Machine Co. v. Balfany,* (1899) 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 393. There is another line of authority, however, which holds that the full contract price may be recovered in both executory and executed contracts. *Bement v. Smith,* (1836) 15 Wend. (N. Y.) 493. It seems anomalous, however, that a seller should be able to force title on the buyer. See, on this subject, Williston on Sales, Secs. 562-568 inclusive.

The instant case is distinguishable from cases arising out of a mere contract for the sale and delivery of goods. Here there was an option to resell. Some courts treat the option to resell as an election to rescind. *Thorndike v. Locke,* (1867) 98 Mass. 340; *Lyons v. Snider,* (1917) 136 Minn. 252, 161 N. W. 532. Others call it specific performance. *Klein v. Johnson,* (1915) 191 Mo. App. 453, 178 S. W. 262. In either case the intention of the parties is carried out. Although the court, in the instant case, makes no mention of rescission it is manifest that their decision rests on that ground, because they specifically state that they follow *Lyons v. Snider,* supra, where recovery is based on rescission.

DRAINS—IMPROVEMENT BY MUTUAL AGREEMENT—ESTOPPEL.—Landowners, pursuant to a mutual understanding united in constructing a drainage ditch to improve their several holdings. A subsequent grantee filled in the ditch. *Held*: Each of the owners is thereafter estopped from closing the ditch whereby the others are deprived of the drainage provided. *Stoering v. Swanson,* (Minn., 1917) 165 N. W. 875.

In the opinion of the court, the case is ruled by the case of *Munsch v. Stelter,* (1910) 109 Minn. 403, 124 N. W. 14, 25 L. R. A. (N. S.) 727, and is stated to be within the exception to the general rule announced in *Johnson v. Skillman,* (1882) 29 Minn. 95, 12 N. W. 149, 43 Am. Rep. 192. This latter case involved a parol agreement whereby plaintiff's grantor verbally promised that if the defendant would erect a good custom mill, he would give the defendant the privilege of flowing his land. Although the defendant built the dam and incurred expense it was held to take effect as a parol license, revocable at pleasure, and not an easement or interest in land. The court there said that such an agreement might properly be construed as an intended gift of an interest in land and be subject to equitable relief on the basis of part performance, but relief was denied on the ground that the terms of the agreement were not sufficiently definite and the defendant relied on the agreement only in part. In the case of *Munsch v. Stelter,* supra, the controversy arose between the original parties to the agreement, and it was held that although a verbal contract for an easement unexecuted and unaccompanied by other circumstances is contrary to the statute of frauds, nevertheless if entry is made under the license and the conduct of the licensor is such that it would be fraud on the licensee to permit the licensor to revoke, the doctrine of equitable estoppel applies. For early application of the doctrine see *Rerick v. Kern,* (1826) 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497.

A license in respect of realty is defined in 25 Cyc. 640, as "An authority to do a particular act or series of acts upon the land of another without possessing an estate therein;" see also, Tiffany, Real Property 678. A license is founded on personal confidence, *Mumford v. Whitney,* (1836) 15 Wend. (N. Y.) 380, 30 Am. Dec. 60, is not assignable, and extends only to the person to whom it is given. *East Jersey Iron Co. v. Wright,* (1880) 32 N. J. Eq. 248. Where nothing more than an oral license appears, it is revocable at the will of the licensor regardless of the expenditures of the licensee, provided the licensee has reasonable notice. 25 Cyc. 647, Where the licensor with knowledge of the acts of the licensee assents to the expenditure of money by the licensee, a majority of the courts are agreed that such acquiescence is not sufficient, and that the licensor has not lost his right of revocation. See note, in 25 L. R. A. (N. S.) 727. Valuable consideration for the license does not render it irrevocable. *Minneapolis Mill Co. v. Minneapolis, etc., Ry. Co.,* (1892) 51 Minn. 304, 53 N. W. 639; *Thoempke v. Fiedler,* (1895) 91 Wis. 386, 64 N. W. 1030; *Dark v. Johnston,* (1867) 55 Pa. 164, 93 Am. Dec. 732; 1 Tiffany, Real Property 680. Where the right created or conveyed by the agreement is of such a nature that the court construes it to be an interest in land, *Bolland v. O'Neal,* (1900) 81 Minn. 15, 83 N. W. 471, 83 Am. St. Rep. 362, or a personal servitude in the nature of a right in gross, *Willoughby v. Lawrence,* (1886) 116 Ill. 11, 4 N. E. 356, 56 Am. Rep. 758, it is clear that the right becomes more than a mere license. It would seem to follow that no burden on land which is not revocable at will can be granted by license because the moment it ceases to be revocable it becomes an interest in land and rises to the dignity of an estate or easement, and a conveyance of such an interest, to be valid under the statute of frauds, must be in writing. The courts avoid the difficulty in different ways. The theory resorted to in the principal case is that of equitable estoppel. The difficulty with this theory is that it is necessary to find fraud on the part of the licensor in denying there was a contract for an interest in land, and if the contract is not in writing it seems to be created by the court from the circumstances of the case. The opinion in *Pifer v. Brown,* (1897) 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497, is an instance of this reasoning. Other courts resort to specific performance. Here it is necessary to convert the license into an agreement for an interest in land and then decree specific performance of the agreement on the ground that there has been such performance as will take the contract out of the statute of frauds. The court formulates the contract from the license and decrees its performance. *Wynn v. Garland,* (1857) 19 Ark. 23, 68 Am. Dec. 190; *Pifer v. Brown,* supra. The Indiana court in *Ferguson v. Spencer,* (1890) 127 Ind. 66, 25 N. E. 1035, held that when the license had been executed by the expenditure of money, its revocation would be fraud without compensation to the licensee.

In the principal case there seems to have been a mutual agreement to construct a ditch at joint expense and effort and for mutual benefit. The controversy arose between grantees. To bind them it must have been more than a license. While there is evidence of an agreement, it is difficult to find fraud on which to base estoppel. Under a similar state

of facts the Nebraska court reached a like result by holding that such an agreement was a parol grant of an easement which is enforceable in equity if for consideration and partially performed, *Gilmore v. Armstrong,* (1896) 48 Neb. 92, 66 N. W. 998, and the Iowa court held that there was an easement created which passes with the land, *Brown v. Honeyfield,* (1908) 139 Iowa 414, 176 N. W. 731. While a just result may be reached in the particular case, on principle, it is difficult to justify the establishment of a permanent burden on the land to bind all subsequent grantees by such an agreement.

EXECUTOR AND ADMINISTRATOR—ALLOWANCE TO NON-RESIDENT WIDOW. —Plaintiff is the surviving widow of one Krumenacker, who died in North Dakota. The plaintiff is a resident of Austria-Hungary, having never come to North Dakota to reside with her husband. She claims an allowance of $1,500 as provided by statute for the widow, which includes "all the personal property of the testator which would be exempt from execution if he were living, including all property absolutely exempt and other property selected" to the amount of $1,500. An allowance having been granted the executor of the deceased appeals. *Held*: Such a statute is one of exemption and not of inheritance, and that to entitle one to the benefits of such section such person must bring himself within the letter or spirit of the exemption laws of this state as to residence therein, or, at least, circumstances must show an intent and desire to establish and have such residence within the state. *Krumenacker v. Andis,* (N. D. 1917) 165 N. W. 524.

This case turns on the point of whether the widow's allowance as granted by statute is a matter of exemption or of distribution. As evidenced by the vigorous dissent, there is a sharp conflict on this point. It would seem that the majority of decisions are to the effect that such a statute is one of exemption and that its purpose is to tide over the period immediately after the death of the father of the family as maintained in the state itself, having no application to a wife who, residing in another state, is not a member of the household of the deceased. *Ex Parte Pearson,* (1884) 76 Ala. 521; *Spier's Appeal,* (1856) 26 Pa. 233; As pointed out in *Grieve's Estate,* (1895) 165 Pa. 126, 30 Atl. 727, this holding must be modified to carry out the spirit of the act which establishes the widow's allowance, in cases where the wife is willing to become a member of the husband's household, but is prevented by desertion on the part of the husband. This is the exact basis of the North Dakota decision. On the other hand, it is contended with equal vigor that such an allowance is a part of the inheritance law, and should be given to the widow in any case, whether living with the husband or apart from him in a foreign jurisdiction. Such is the view expressed in *Farris v. Battle,* (1887) 80 Ga. 187, 7 S. E. 162, where it is laid down that it requires nothing to give a right to this benefit except the relation of wife or minor child. *Stromberg v. Stromberg,* (1912) 119 Minn. 325, 138 N. W. 428, is in accord with the latter holding.

The situation of the widow with regard to her right to this allowance, is further complicated by the question of how the separation came about.

In the absence of a written agreement for separation, the courts are at considerable variance concerning the right of a wife living apart from her husband to claim the statutory allowance of a widow. Where the abandonment has been by the wife, without legal cause, a majority of the courts have held that she is not entitled to the widow's allowance from the estate of her deceased husband. *Odiorne's Appeal,* (1867) 54 Pa. St. 175, 93 Am. Dec. 683; *In re Bose,* (1910) 158 Cal. 428, 111 Pac. 258; *Nye's Appeal,* (1889) 126 Pa. 341, 17 Atl. 618, 12 Am. St. Rep. 873. The prevailing idea which is woven into the decisions of the courts on this point is that the exemption is grounded on the existence of family relations between the husband and wife, which being disrupted by the withdrawal of the husband's support, involve the widow in pecuniary difficulties. This presumption is not present where she has voluntarily abandoned him and has not been a member of his family for any considerable length of time. Where the abandonment has been by the husband, and without legal cause, the widow is by the prevailing view entitled to her widow's allowance from the husband's estate. *Grieve's Estate,* (1895) 165 Pa. St. 126, 30 Atl. 727; *Shaffer v. Richardson,* (1866) 27 Ind. 122; *Terry's Appeal,* (1867) 55 Pa. St. 344. As pointed out by the court in *Grieve's Estate,* supra, it was no fault of the wife's that she was not a member of his family at his death, but her absence was due to his illegal acts and bad faith; with the result that the family relation must still be considered as existing, and his domicile hers. The instant case seems to fall within this classification. The husband had originally deserted his wife, soon after concluding an imprisonment of seven months for beating the wife. She made no attempt within the fifteen years which elapsed between his departure and death to follow him to his new home. "There seems to have been a tacit relinquishment by each against the claims upon the other . . . ," as was said in *Kersey v. Bailey,* (1863) 52 Me. 198, where it was held that such a state of affairs would bar the wife from claiming a widow's allowance, though the matter of allowance was discretionary with the court. Where the separation is by mutual consent, there is a conflict among the decisions. *Park's Estate,* (1902) 25 Utah 161, 69 Pac. 671, holding that the widow cannot have her allowance. *Linares v. De Linares,* (1899) 93 Tex. 84, 53 S. W. 579, seems to take the contrary view. Some courts have allowed the widow her allowance if the marriage relation has not been dissolved at the time of the husband's death, though the wife was living apart from him, irrespective of the cause. *Smith v. Smith,* (1900) 112 Ga. 351, 37 S. E. 407; *Matter of Shedd,* (1891) 60 Hun. (N. Y.) 367, 14 N. Y. Supp. 841. Minnesota has also taken this view, *Sammons v. Higbie,* (1908) 103 Minn. 448, 115 N. W. 265, where it was said that the operation of the statute can be suspended or prevented only by a decree annulling or dissolving the marriage. The theory of the Minnesota court is that such property rights arise out of the marriage of the parties, and if the relation in fact exists at the time of the husband's death, effect must be given to the provisions of the statute. Massachusetts has taken the stand that the granting of this allowance is a matter of discretion for the court and depends on the needs of the wife and the circumstances in each case. *Hollenbeck v. Pixley,* (1855) 3 Gray 521.

Where the separation is the result of a written agreement, it is quite generally held that the agreement can be enforced as a bar. *In re Noah,* (1887) 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829; *Speidel's Appeal,* (1884) 107 Pa. St. 18. However, a recent case in Colorado has laid down the rule that where the agreement contained no plain provision that the wife waived her widow's allowance in case of the husband's death, there is no waiver, and the separation agreement is no bar to its allowance. *Deeble v. Alerton,* (1914) 58 Colo. 166, 143 Pac. 1096, Ann. Cas. 1916C 863.

FRAUDULENT CONVEYANCES—HOMESTEAD EXEMPTION—HOMESTEAD IN WIFE'S NAME.—A judgment debtor transferred the whole of his unexempt property to his wife, and took from her a conveyance of certain real estate which he thereafter claimed as a homestead. *Held*: The debtor's receiver may pursue the property so transferred to the wife since the sole reason for the transfer was to defeat creditors, inasmuch as the husband had, before the transaction, "full and complete homestead rights in the particular property so received from his wife." *Small v. Anderson,* (Minn. 1918) 166 N. W. 340.

Generally, the statutes exempting homesteads from seizure or sale under legal process are very liberally construed. A debtor, even though he be insolvent, and his creditors pressing, may transfer unexempt property in exchange for a homestead; and the transaction is not fraudulent as to creditors. *Reeves v. Peterman,* (1895) 109 Ala. 366, 19 So. 512; *Simonson v. Burr,* (1898) 121 Cal. 582, 54 Pac. 87; *Cipperly v. Rhodes,* (1870) 53 Ill. 346; *Tucker v. Drake,* (1865) 11 Allen (Mass.) 145. In Michigan this method of evading creditors is approved. *Meigs v. Dibble,* (1888) 73 Mich. 101, 40 N. W. 935; but apparently it is evidence of fraudulent intent if the debtor transfers the whole of his exempt property. *Pratt v. Burr,* (1850) Fed. Cas. 11372. In Kentucky the exemption extends only to debts contracted after the homestead is established. *Fish v. Hunt,* (1884) 81 Ky. 584, 5 Ky. L. R. 653. The Minnesota court has upheld the proposition that an insolvent debtor may convert unexempt property into a homestead without committing fraud against his creditors. A debtor moved into a building which was not exempt and thereby made it his homestead. The property was held exempt. *Jacoby v. Parkland Distilling Co.,* (1889) 41 Minn. 227, 43 N. W. 52. The court in the instant case suggests a distinction on the ground that the transfer could have no other purpose than to defeat creditors for the husband had at the time full and complete homestead rights. It is true that he had homestead rights in the property of his wife; he could set up the exemption against her creditors: Minn. G. S. 1913 Sec. 6960; she could not alien the property without his consent: Sec. 6961; he would, as surviving spouse, receive a life estate or fee after her death: Sec. 7237. But these rights are distinct from the homestead itself. Minn. G. S. 1913 Sec. 6957, defines homestead as "The house owned and occupied by a debtor as his dwelling place, together with the land upon which it is situated." While title was in his wife the debtor had no right of possession. *Bassett v. Farmers' & Merchants' Ins. Co.,* (1909) 85 Neb. 85, 122 N. W. 703, 19 Ann. Cas. 252. Her property is separate. Minn. G. S. 1913 sec. 7143, and she is not

charged with his support. She could move out, lease the property to a stranger, who could eject the husband. *Perkins v. Morse,* (1885) 78 Me. 17, 2 Atl. 130, 57 Am. Rep. 780. It seems clear that the debtor in the instant case intended and attempted to acquire a homestead, something more than certain rights in a homestead, and that the decision in this case necessarily limits the rule in *Jacoby v. Parkland Distilling Co.,* supra.

INJUNCTION—PERSONAL RIGHTS—COMPULSORY MILITARY SERVICE.—The complainant alleges that plaintiff is an alien, and therefore not subject to conscription under the provisions of the Conscription Act. He was certified and ordered to report for military service. He asks an injunction enjoining the draft board from certifying his name for military service. *Held,* It is beyond the power of a court of equity to enforce mere personal rights as distinguished from property rights, and therefore the injunction must be denied. There is a full and adequate remedy at law for the redress of wrongs to the person. *Angelus v. Sullivan,* (1917) 246 Fed. 54.

The decision in the instant case seems contrary to the modern tendency. For a discussion of the principles involved see 1 MINN. LAW REVIEW 71.

INSURANCE—LIABALITY INSURANCE—VIOLATION OF LAW.—Plaintiff was insured by defendant company against liability for injuries inflicted on other people in the operation of his automobile. A woman recovered judgment against plaintiff for an injury sustained by her when she was struck by the automobile which was at the time under the control of a minor under 18 with plaintiff's permission, contrary to a penal statute. Notwithstanding that there was no exception in the policy as to accidents occurring in violation of law it was *held,* that the violation of the statute barred recovery. *Messersmith v. American Fidelity Co.,* (1917) 167 N. Y. Supp. 579.

This decision is squarely in conflict with *Taxicab Motor Co. v. Pacific Coast Casualty Co.,* (1913) 73 Wash. 631, 132 Pac. 393. In that case it was held that violation of a speed ordinance did not relieve the indemnity company from liability although the accident occurred during the criminal act. And it was remarked further that the contract of indemnity was not void on the grounds that it afforded protection to the commission of a criminal act. Had the indemnity policy in the instant case expressly stipulated that there should be no liability for accidents occurring in the violation of laws there is no reason why the insurer should not have been relieved. The case of *Royal Indemnity Co. v. Schwartz,* (Tex. Civ. App. 1914) 172 S. W. 581, so held although in that case the ordinance itself which defined the age at which a minor might lawfully drive a car was held invalid because the words "within the city limits" included streets and alleys over which the city had no such jurisdiction.

In *Brock v. Travelers Insurance Co.,* (1914) 88 Conn. 308, 91 Atl. 279, the indemnity policy denied liability for accidents occurring while the car was being driven by one "under the age fixed by law." The statute permitted minors between the ages of sixteen and eighteen to drive only if accompanied by a licensed chauffeur. It was held that although the driver was only sixteen and alone, and thus was violating the law, at the

time of the accident, the indemnity company was, nevertheless, liable. The court stated that the driver was not under the age fixed by law as a minimum. Had the exception been "in violation of law" instead of "under the age fixed by law" the decision undoubtedly would have been contrary.

It may be relevant to note that an insurance contract to defend any suits arising on account of automobile accidents has been held not to include criminal proceedings. *Patterson v. Standard Accident Insurance Co.*, (1913) 178 Mich. 288, 144 N. W. 491.

In the instant case the court has gone far in making a distinction between violations of speed ordinances and ordinances as to the age of the driver, as it is difficult to say which violation is the more conducive to accidents.

INSURANCE—PROXIMATE CAUSE.—Defendant insured the life of assured against accidental death, with a provision in the policy that there should be no liability for death caused by explosives. Assured later took passage on the Arabic which was torpedoed by a submarine. Assured was drowned after leaving the ship. *Held*, that the beneficiary might recover on the policy. *Woods v. Standard Accident Insurance Co.*, (Wis. 1918) 166 N. W. 20.

This case holds that the explosion was not the proximate cause of the death of the assured. In *Russell v. German Fire Insurance Co.*, (1907) 100 Minn. 528, 111 N. W. 400, 10 L. R. A. (N. S.) 326, proximate cause is said to be "that from which the effect might reasonably be expected to follow without the concurrence of any unforeseen circumstances." An instance of its application is to be found in cases where accident or life policies provide that no liability for the death or accident shall accrue where it occurred while the insured was violating law. In such cases the violation of law must be the proximate cause of the accident. Thus it has been held that where a deserter from the army was killed in an attempt to arrest him his desertion was no defense because it was not the proximate cause of death. *Utter v. Travelers' Insurance Co.*, (1887) 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913. And where insured was killed upon leaving a bawdyhouse and while carrying concealed weapons it was held that those violations of law were not the proximate cause or causes of the death of the insured. *Jones v. U. S. Mutual Acc. Association*, (1894) 92 Iowa 652, 91 N. W. 485. And see *Supreme Lodge v. Crenshaw*, (1907) 129 Ga. 195, 58 S. E. 628, 13 L. R. A. (N.S.) 258. The causal connection between excepted acts and the injury is equally essential in order to relieve the insurer from liability. Thus it was held that where a fraternal certificate provided that there should be no liability for accidental death occurring while the insured was employed as an electric lineman and the insured died as a result of a fall caused by being struck by a co-worker who had fallen, and both were at the time engaged in repairing an electric trolley wire, the employment as a lineman was not as a matter of law the proximate cause of the accident. *Fellers v. Modern Woodmen of America*, (Iowa, 1917) 165 N. W. 584. The same question frequently arises in fire insurance. Thus in *Russell v. Ger-*

man Fire Insurance Co., supra, a fire left one wall standing which was blown down seven days after the fire onto the plaintiff's building and it was held that plaintiff's loss was from fire. In *Bird v. St. Paul Fire Insurance Co.* (1917) 167 N. Y. Supp. 707, plaintiff's canal boat was insured against fire. The boat was damaged by concussion from a terrific explosion of dynamite which was caused by a large fire, which had been caused by a slight explosion, caused by fire, and it was held that the loss was from fire. As illustrated by this case the last link in the chain of causation is not necessarily the proximate cause. And as illustrated by the instant case it is not necessarily the first cause which is the proximate cause and never is where an independent efficient cause intervenes.

INSURANCE — SUICIDE — LIFE INSURANCE — PRESUMPTIONS — CAUSE OF DEATH.—In an action on a life insurance policy, which was defended on the grounds that the insured committed suicide, the jury rendered a verdict for the plaintiff. The evidence shows that a pistol of .32 caliber, which the deceased had purchased the day before, was found lying a few inches from his right hand, and an empty cartridge shell of .32 caliber was found near the body. There was nothing to indicate a struggle, as the clothing was not disordered, nor was the ground disturbed at the point where the body lay. An investigation failed to disclose any reason why the deceased should have killed himself, as his family life was happy, and his financial affairs were in good order. *Held*, that in view of the presumption against suicide the verdict was supported by the evidence. *Neasham v. New York Life Insurance Co.*, (1917) 244 Fed. 556.

There is always a strong presumption against suicide, where death has been caused by violence. *Aetna Life Insurance Co. v. Milward*, (1904) 118 Ky. 716, 82 S. W. 364, 68 L. R. A. 285, 4 Ann. Cas. 1092; *O'Connor v. The Modern Woodmen of America*, (1910) 110 Minn. 18, 124 N. W. 454, 25 L. R. A. (N. S.) 1244. So strong is this presumption that the courts will uphold a verdict against suicide, if there is any reasonable hypothesis of natural or accidental death. *Kornig v. Western Life Indemnity Co.*, (1907) 102 Minn. 31, 112 N. W. 1039. Motive for suicide is an important element in overcoming the above presumption. *O'Connor v. Modern Woodmen of America*, supra; *Kornig v. Western Life Indemnity Co.*, supra. That the pistol is found in the hands of the deceased does not necessarily prove suicide. *Leman v. Manhattan Life Insurance Co.*, (1894) 46 La. Ann. 1189, 15 So. 388, 24 L. R. A. 589, 49 Am. St. Rep. 348; *Travelers' Insurance Co. v. Nitterhouse*, (1894) 11 Ind. App. 155, 38 N. E. 1110. See also note in 50 L. R. A. (N.S.) 1008.

LANDLORD AND TENANT—LESSEE—RIGHT TO BRING POSSESSORY ACTION BEFORE ENTRY.—Plaintiff leased a farm from defendant, and when the time for entry arrived the defendant refused to allow the plaintiff to take possession. Plaintiff brought an action under the statute to determine adverse claims, to obtain possession. *Held*: Where possession of the demised premises is withheld from the lessee, he may maintain such action

against any person, including the lessor, who so wrongfully withholds the possession from him. *Cooper v. Gordon,* (N. D. 1917) 164 N. W. 21.

For discussion of the principles involved, see 2 MINNESOTA LAW REVIEW, p. 367.

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—AUTOMOBILE COLLISION—DUTY OF PASSENGER TO WARN DRIVER—QUESTION FOR JURY.—Plaintiff was injured while riding in the back seat of his brother's automobile as an invited guest. The streetcar of defendant company could not be seen by the occupants of the automobile because of a high bank which intervened, but plaintiff heard the car approaching rapidly. He did not warn the driver and when the automobile reached the car tracks it was struck by the car. In the action against the streetcar company for negligence, *held,* first that the negligence of the driver was not as a matter of law imputable to the plaintiff; and secondly, that since the jury had found that an ordinarily prudent person under the same circumstances would have warned the driver the plaintiff cannot recover; and, thirdly, that this question was properly left to the jury. *Christison v. St. Paul City Railway Co.,* (Minn. 1917) 165 N. W. 273.

It is well settled that the negligence of the driver of an automobile cannot, ordinarily, be imputed to a passenger of the automobile as contributory negligence. *Sutton v. City of Chicago,* (1915) 195 Ill. App. 261; *Dale v. Denver City Tramway Co.,* (1909) 173 Fed. 787, 19 Ann. Cas. 1223, 97 C. C. A. 511.

The fact that he is a passenger for hire does not alter the rule. *Bancroft v. Cota,* (1916) 90 Vt. 358, 98 Atl. 915. And the same rule applies to passengers on motorcycles. *Karpeles v. City Ice Delivery Co.,* (Ala. 1916) 73 So. 642. Michigan and Wisconsin are the only exceptions. In those states the driver's negligence is always considered imputable to the passenger, and bars his recovery. *Granger v. Farrant,* (1914) 179 Mich. 19, 146 N. W. 218, 51 L. R. A. (N. S.) 453; *Lauson v. Fond du Lac,* (1909) 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30. In all other states only the special relation of master and servant, or of principal and agent, or of being engaged in a joint enterprise will render the passenger guilty of contributory negligence by imputation to him of the driver's negligence. *Lytle v. Hancock County,* (1917) 19 Ga. App. 193, 91 S. E. 219; *Christopherson v. Minneapolis, etc., Ry. Co.,* (1914) 28 N. D. 128, 147 N. W. 791, L. R. A. 1915A 761, note.

But, although it is clear that the passenger's recovery will not, in the absence of special circumstances, be barred by the driver's negligence, it may be defeated by his own personal negligence. It has been held, for example, that the guest is guilty of contributory negligence as a matter of law where he consented to ride in an automobile at night without lights. *Rebillard v. Minneapolis, etc., Ry. Co.,* (1914) 216 Fed. 503. And one case has gone so far as to hold the pasesnger guilty of contributory negligence as a matter of law where he failed to request the driver to stop, look, and listen when approaching a railway crossing. *Brommer v. Pennsylvania Ry. Co.,* (1910) 103 C. C. A. 135, 179 Fed. 577. Usually, however, the contributory negligence of the passenger is considered a

question of fact for the jury. *Terwilliger v. Long Island R. Co.*, (1912) 152 App. Div. 168, 136 N. Y. Supp. 733. In the instant case the question was disposed of by leaving it to the jury, and in view of the authorities, this was proper. But the practical result of the doctrine is this: that in order to protect himself from the vagaries of the jury, the passenger or guest must advise and warn the driver of every danger which he does see or hear, or can be reasonably expected to see or hear. At least one court has recognized the absurdity of such a situation. In *Wilson v. Puget Sound Ry. Co.*, (1909) 52 Wash. 522, 101 Pac. 50, the court says, "We are impressed with the statement of the learned counsel of the respondent, that ordinarily the only obligation on such passenger is to 'sit tight.'"

SALES—LIABILITY OF MANUFACTURER OR ORIGINAL SELLER TO ULTIMATE VENDEE.—The defendant is a manufacturer and seller of baby food consisting of a dried milk product, prepared and put on the market in sealed cans and represented as safe and wholesome food for infants. The plaintiff, an infant of several months, had some of the food administered to it which resulted in sickness. Plaintiff brings action directly against the manufacturer for negligence. *Held,* that it is the duty of the manufacturer to issue with such food, proper instructions with respect to its preservation and safe use, and failure so to do makes him liable on the theory of negligence. *Rosenbush v. Ambrosia Milk Corporation,* (1917) 168 N. Y. Supp. 505.

As a general rule there is no liability for negligence on the part of the manufacturer or seller of goods to those who are not in privity of contract with him. *McCaffrey v. Mossberg, etc., Mfg. Co.*, (1901) 23 R. I. 381, 50 Atl. 651, 55 L. R. A. 822, 91 Am. St. Rep. 637; *Marquardt v. Ball Engine Co.*, (1903) 122 Fed. 374, 58 C. C. A. 462; *Bragdon v. Perkins-Campbell Co.*, (1898) 87 Fed. 109, 30 C. C. A. 567. The authorities are collected in *Huset v. J. I. Case Threshing Machine Co.*, (1903) 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303. This general rule, however, is subject to some well recognized exceptions. Thus the manufacturer and seller has been held liable in tort to persons not in privity of contract with him where the article put on the market by him was one inherently or intrinsically dangerous, or was one which, though ordinarily not dangerous, still, by reason of some defect in its manufacture, had become imminently dangerous to those using it. *Thomas v. Winchester,* (1852) 6 N. Y 396, 57 Am. Dec. 455; *MacPherson v. Buick Motor Co.*, (1912) 138 N. Y. Supp. 224, 153 App. Div. 474; *Lewis v. Terry,* (1896) 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146; *Schubert v. J. R. Clark Co.*, (1892) 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. Rep. 559; *Huset v. J. I. Case Threshing Machine Co.*, supra. Another and more modern exception has been made with regard to manufacturers and vendors of food. *Tomlinson v. Armour & Co.*, (1908) 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923 and note; *Mazetti v. Armour & Co.*, (1913) 75 Wash. 622, 135 Pac. 633, 48 L. R. A. (N. S.) 213 and note; *Crigger v. Coca-Cola Bottling Co.*, (1915) 132 Tenn. 545, 179 S. W. 155, L. R. A. 1916B 877. But see contra, *Nelson v. Armour Packing Co.*,

(1905) 76 Ark. 352, 90 S.W. 288, 6 Ann. Cas. 237. The theory of recovery, however, is not uniform. In some cases it is based on negligence. *Crigger v. Coca-Cola Bottling Co.*, supra.

In others it is based on implied warranty. *Mazetti v. Armour & Co.*, supra. See note 48 L. R. A. (N.S.) 213. In practically all the cases, however, involving the liability of a manufacturer or seller of food that was found to be unwholesome, such unwholesomeness existed before it had left the manufacturer or seller. In the instant case the food product left the manufacturer in good condition and there was no negligence in the manufacture of it. The court does not base its decision on any of the precedents involving food, but seems to follow the rule laid down in the case of *MacPherson v. Buick Motor Co.*, supra, and the so-called "step-ladder case," *Schubert v. J. R. Clark Co.*, supra. In both of these cases, however, the defect which made the article one imminently dangerous to life and limb was due to the neglect of the manufacturer or seller, while in the instant case it was inherent and unavoidable in so far as it can be termed a defect at all. The court, therefore, by imposing upon the manufacturer the affirmative duty of stating on the label the time during which the contents may be safely used, seems to extend the fairly well settled rule to a novel and unique set of facts thus bringing about a commendable result from a practical standpoint.

BOOK REVIEWS

CASES IN QUASI-CONTRACTS. Selected from Decisions of English and American Courts. By Edward S. Thurston. American Casebook Series. St. Paul: West Publishing Co. Pp. xx, 404. 1916. Price, $4.00.

The subject of quasi-contracts, notwithstanding its comparatively recent distinct differentiation from older branches of the law, yields to few of them in importance for students. There exists but one real text book on the subject, for Professor Keener's little book with that title scarcely purports to be more than a discussion—very acute, indeed—of certain questions in quasi-contracts. So Professor Woodward's excellent, but too brief discussion is all that remains of general exposition. When it comes to case books, however, this branch of the law has received perhaps more than its share of attention. In the opinion of the writer no better selection of cases on the subject has ever been made than the first one, published twenty years ago by Judge Keener. It consisted, however, of three hundred and seventy-four cases printed *in extenso*, absolutely without editing or annotation and filling two fair-sized volumes, with an aggregate of nearly twelve hundred pages. For law school use there was obviously room for either a revision of this collection by way of excision, condensation and annotation, or of some new collection less voluminous and more edited. This want has since been met by the collections of Professor Edwin H. Woodruff, Professor James Brown Scott—both published in 1905—and now by Professor Thurston's. The number of cases in these collections respectively is:

Keener	374	pp. 1188
Woodruff	303	pp. 683
Scott	284	pp. 762
Thurston	266	pp. 613

Of course no one will suppose that these collections have nothing in common. The landmarks of the law are not movable and any case book on this subject which omitted such cases as *Moses v. MacFerlan, Bilbie v. Lumley, Britton v. Turner, Kelly v. Solari, Merchants' Insurance Co. v. Abbott* and *Price v. Neal* would invite attention to its defects. As a matter of fact, sixty of Scott's cases appear in Thurston and thirty-four other of Scott's cases are summarized in Thurston's notes. But this is no fault. Nay, rather the editor is to be commended for having no false pride of discovery to prevent him from making use of all the materials at hand without reference to their prior use. He has sufficient justification for his work in the many new cases which have increasingly illuminated this relatively unexplored ground, since its predecessors appeared, and in the excellence of his editing and annotation. These seem to me to be the distinguishing merits of this collection. The editor has neither pared his cases down to the bone, as Ames used to do, nor printed everything, as Keener did. In annotation, too, he has struck a very happy

medium between the exhaustive lists of *accord and contra* cases, which constitute Ames' foot notes—erudite and for many purposes useful as these are—and the total lack of annotation which leaves the bottom of Keener's pages fair white paper. Without pretending to be exhaustive his notes are illuminating and critical, the important cases cited being mostly sufficiently stated to be readily comprehensible without reference to the report itself, and the comment judicious. In these two important particulars—condensation of his cases, and lucidity and helpfulness of notes—Professor Thurston's book is particularly fortunate.

But after all, the acid test of a casebook is found in the class room. The writer has subjected this book to this test and it has stood it to his perfect satisfaction.

HOWARD L. SMITH.

University of Wisconsin.

FORMS, RULES AND GENERAL ORDERS IN BANKRUPTCY.—By Marshall S. Hagar and Thomas Alexander, Second Edition, Albany: Matthew Bender & Company. 1916. Pp. liv, 909. Price $9.00.

This work, as its title indicates, is devoted almost entirely to forms used in bankruptcy practice. The authors have used the official forms adopted by the United States Supreme Court and supplemented them by others where the official forms proved to be inadequate. Great care has been shown in the preparation of these supplementary forms. Elaborated references are made to court decisions construing the language used. A total of 390 forms are presented.

The authors then quote the bankruptcy acts of 1898 as amended, the general orders adopted by the Supreme Court, and the rules adopted by the United States district courts in bankruptcy in nineteen of the states.

Practically everything of value in the work is found in the good text books on bankruptcy. Most of the forms given not found in the standard works on bankruptcy apply to situations which could hardly occur twice, and if they did the peculiar circumstances surrounding the transactions would necessitate a careful practitioner drafting a form of his own to present his particular situation. The work seems to have been based on the idea that courts in bankruptcy adhere more closely to form than substance, when as a matter of fact, those courts are extremely liberal. If one has the law applicable to his particular question well in hand, he usually experiences little difficulty in being able to put it in such form as will be found necessary to present it. The rules adopted by the various United States district courts are different in each district and apply only in the particular districts where adopted and hence are of very little value to those practicing in other districts.

CLARK R. FLETCHER.

Minneapolis.

A TREATISE ON THE LAW OF PERSONAL PROPERTY.—By James Schouler, Fifth Edition, Albany: Matthew Bender & Company. 1918. Pp. xci, 886. Price $7.50.

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THE PASSING OF THE CORPORATION IN BUSINESS

IN this period of upheaval, nothing is more marked in the business world than the growing conviction that the corporation as a business instrumentality for ordinary enterprises must soon be abandoned. Revolutions in business affairs seem to be as inevitable as revolutions in politics. As soon as a business method is established there seems to spring up an antagonistic force which eventually compels its abandonment or modification. The history of the law abounds in instances substantiating this proposition, and in the history of the corporation in business we are finding its truth again presented.

The corporation, while not an American invention, nevertheless was developed as a business instrumentality to its present high state of efficiency by American genius. Its wonderful growth has been ascribed to the effect of the *Dartmouth College case*,[1] but the writer is rather inclined to think that it was due more to the broadening effect of the development of the railroad, with the subsequent introduction of the telegraph and the telephone, than it was to this famous case.

We will consider the business reasons which have led to the adoption and development of the corporation, then we will discuss in a general way the causes which are tending to destroy the usefulness of the corporation in business, after which we will

[1] (1819) 4 Wheat. (U. S.) 518, 4 L. Ed. 629.

point out what seems to us to be an available method as a substitute.

The individual in business finds his activities limited by the extent of his capital and his capacity for getting things done through others. He is also operating under the shadow of loss through his sickness and inability to look after his business, and must always face the certainty that at some time his death will necessitate the liquidation of his affairs. In addition to these disadvantages, his liability is, in a sense, unlimited.

The partnership combines the capital of several, and may multiply its business activity by the number of its partners. To that extent it possesses a much wider scope than the individual in business. Its disadvantages, however, are well known and fully appreciated. There is unlimited personal liability; the absence of perpetual succession; and the possibility that a readjustment of the business may be rendered necessary by the death or bankruptcy of one of the members, or by the withdrawal of some one from the firm.

The idea of the corporation was seized upon by the business world when rapid development, rapid transportation and rapid communication made it possible for business men to combine large interests, scattered over an extensive territory, and in time the corporation became, as we all know, the common method for combining the funds of several in a common enterprise. While the corporation was known in business in England prior to the creation of the American government, its development into the common form of business activity has taken place in this country within less than one hundred years. In fact, it may be safely stated that the enormous growth of the corporation in business, and of corporation law as applied to its business operations, has taken place within the last sixty years.

The advantages of the corporation are well known and fully appreciated. It makes possible the combination of the funds of a large number of individuals, by which there may be created a powerful organization with sufficient capital to accomplish any reasonable purpose. The business is secured against frequent reorganizations by the perpetual succession in the membership and the treatment of the corporation as a separate legal entity. To the lawyer, all of these advantages are commonplace, and as compared to a partnership, the corporation is obviously preferable, so far as all of these things are concerned, but, being a

creature of the law and easily within the reach of all of those political elements which are unfriendly to successful business, it has been made the object of burdensome and adverse legislation for a great many years.

Soon after the civil war, the spirit of antagonism to the corporation began to manifest itself. Unscrupulous individuals had used the corporation as a shield, and it also had been made the instrumentality through which transactions had been carried on, which were questionable and clearly against public welfare. It is not the writer's purpose in this paper to attempt to analyze all of these factors,—it is enough for present purposes to remark that on the one side the privileges of the corporation had been abused, while on the other side was the growing determination to eradicate the abuse by practically killing the instrumentality. Legislation in congress forbade the co-operation or pooling of competing lines of railroad instead of following the wiser and more constructive method of encouraging pooling under public control. The Sherman Act, aimed at illegal combinations in restraint of trade, operated principally to discourage strong business combinations, which, in our present predicament, are found to be the very things which we should, under proper public control, have developed and encouraged. Year by year we have seen statutes passed, not only by congress but by the legislatures of the several states, each one imposing some additional duty or burden upon the corporations. The very common requirements in the statutes of most of the states, compelling every foreign corporation to file a copy of its charter in every state in which it desires to do business, and to become subject to the laws of that state, and to pay taxes upon the percentage of its capital engaged in that state, while perfectly proper from the standpoint of the state, become extremely burdensome to business interests endeavoring to carry on enterprises of an extended character over a large territory. As a further instance, we may note the enactment of the so-called "Blue Sky" laws. These laws express the benign purpose on the part of the states to protect their citizens from their own cupidity, although the purpose of these laws is generally expressed in another way. It is an instance of paternalism, and the various commissions appointed under these Blue Sky laws assume not only to pass upon the value of the assets of a corporation whose securities may be offered for sale, but to determine the feasibility of the plan of the corporation or the prob-

ability of the success of its business venture. This attitude on the part of the states in that respect is cited merely as an instance of the increasing difficulties which are being thrown around the organization and conduct of a business in a corporate form.

Following all of these troubles, with which every corporation lawyer and manager is familiar, we find ourselves confronted with the federal income tax. One of the advantages of the corporation is the facility with which several persons are enabled to combine their individual funds in a common enterprise having perpetual succession, and in which the individual interest of each is transferrable without involving a readjustment of the business. This very feature of combination, however, now operates to the disadvantage of the individuals associated in the corporation, because their combined earnings through the corporation become subject to the increasingly heavy excess profits tax. Thus, if a corporation having ten stockholders, each owning an equal amount of stock, were to make a profit of $50,000.00, it is obvious that the probability of an excess profits tax falling upon that fund is much greater than if the stockholders as individuals had each earned one-tenth as much.

It would be presumption for any writer to undertake to discuss in other than the most general terms the probable operation of the surtax and excess profits tax provisions of the federal income tax law, and, as applied to the present discussion, it will be wholly unprofitable, because every corporation lawyer, as well as every one connected with the management of corporations in the United States at the present time, knows from bitter experience the perplexities involved in an attempt to make out an income tax return for a corporation. Some optimistic individuals may be indulging the vain hope that when this war is over we shall see the repeal of these income tax provisions which so largely increase the difficulties of corporate management. The writer is not by nature pessimistic, but he ventures the prophecy that no person now in business will ever live to see the corporation relieved entirely from these income tax laws. What the future may bring forth in added burdens, duties and requirements, we cannot now imagine, but it is safe to assume from our past experience that the path of the corporation will not be made any easier to follow in the future than it is at the present time.

But, if the corporation must go, is there any method by which business interests may be combined in effect without encountering

all of the obstacles and difficulties to which the corporation in business is now subject? For some kinds of business the corporation may be the only method by which a large number of individuals can be combined for a common purpose. Some lines of business must be carried on through the medium of corporations, as for instance, banks and trust companies. Eleemosynary institutions and public or *quasi* public business enterprises must unquestionably continue to be carried on through corporations. But the writer is of the opinion that a method can be worked out through the ancient law of uses and trusts, by which the advantages of the corporation, or some of them, can be retained, and at the same time the interests and the income of the individuals interested in the enterprise be kept distinct for purposes of taxation. In fact, such a method is in process of development at the present time.

In Massachusetts the plan suggested in this paper has been in vogue to a certain extent for a number of years, although, according to the writer's present information, the business of such trusts has been confined largely to real estate and investments. This plan has also been a favored one for carrying on the business of estates which a testator has seen fit to tie up for a long term of years. It naturally occurs to a lawyer, when the subject has been carefully considered, that there is no very good reason why the estate of a person cannot be managed by a trustee in his lifetime, if it can be managed for a term of years by a trustee after his decease. The pertinent inquiry also presents itself whether, if a trustee can be appointed to wind up a business and distribute its assets, one cannot likewise be appointed to continue the business and distribute the profits. On principle, it must also follow that if one man can create a trust of his own property, with power in the trustee to continue the business indefinitely, subject to the right of the beneficiary to terminate the trust agreement on notice and take the business back again, two or more men can turn their property, or a portion of it, over to a trustee, with power to combine the funds for a common purpose, so long as such purpose is lawful. It follows also that a man likewise can divide his property among several trustees, empowering each of them to conduct a different sort of business. It does not require the invention of any new legal principles in order to effectuate this general design.

The trust principle seems to have originated in the Roman law. The idea was invented or adopted for the purpose of enabling a testator to avoid the rigorous provisions of Roman law which forbade the distribution of property to certain classes of heirs or legatees. By devising property to a third person, who was capable of taking under the law, with a request or direction that the property so devised be used for the benefit of the real person intended as heir or legatee, the general law was complied with, and at the same time circumvented. The request to the trustee was in time treated by the Roman magistrates as a command, imposing an obligation on the conscience or good faith of the trustee, which the courts would enforce, and there grew up in the Roman law those testamentary trusts known as fidei commissa.

The idea of using a trustee to accomplish purposes which could not be carried out directly was again resorted to when the statutes of mortmain in England forbade the granting of lands to the monasteries and religious houses. The Roman plan was revived, and lands were granted to natural persons for the use or benefit of the monasteries or religious houses. The chancellors, following the principle of the Roman law, and imposing the sanction of the court upon the consciences of these third parties, held them to be trustees and bound to regard the terms of the trust. Without pausing to discuss the growth and development of this idea, it is enough to say that for the past six hundred years it has been known and applied in English and American law, and under no head of jurisprudence is the law better established than under that relating to trusts and trustees. It is interesting to note that lawyers seem to turn instinctively to the trust principle, whenever laws or legal rules become harsh or irksome; while at the same time the courts resort to the trust principle to enforce the dictates of conscience and good faith, whenever a case is presented wherein the law, by reason of its universality, fails to furnish an adequate remedy.

We have, then, the law and the machinery all established and at hand, and the interesting question is whether or not ordinary business can be successfully conducted through the medium of such trusts. And why not? Everybody knows that a trustee can be designated and empowered to control, manage, or wind up estates of decedents, bankrupts or incompetents; to administer charities; and to perform all sorts of similar functions. It is

settled that a man can create a trust for his own benefit, and, to a certain extent, under his own control. It seems just as clear that a man can create a trust for himself, and direct the trustee to combine his funds with similar funds of others for a common purpose.

While the practice has not been extended very generally outside of Massachusetts, it is well established there, (and the principles under which the practice there has developed are as well recognized elsewhere), that individuals may create a fund in the hands of a trustee, or trustees, and direct the trustees to embark in a certain line, or lines, of business for such period as will not violate the rule against perpetuities, and such business organizations are not only held to be valid, but they are considered meritorious, and the legislature of Massachusetts was advised that to attack such organizations "would be an unwarranted interference with the right of contract, and would raise serious constitutional questions." Let us consider briefly some of the questions which will naturally occur to a lawyer investigating this plan.

(1) *The Trustee.* In considering whether the trustee shall be a public trust company or a private individual, and whether a single trustee, or several trustees, shall be nominated, the statutes of the state in which the contract is made must be carefully observed, particularly as to the provisions relation to perpetuities. The statute of Minnesota relating to this subject provides:[2]

> . . . "that the trust shall not continue 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 them, and that the free alienation of the legal estate by the trustee is not suspended for a period exceeding the limit prescribed in Chapter 59."

Inasmuch as the sort of trusts we are discussing would not suspend the power of alienation of real estate at all, we need pay no attention to the limitation referred to in the foregoing quotation. For some purposes a public trust company would be preferable, while in other enterprises it would be more satisfactory, perhaps, to have private trustees. In either case, however, the period of duration of the trust should be made with due regard for the statutes we have just mentioned, subject of course, to the right of the beneficiaries to terminate the trust by notice, or voluntary agreement, as may be provided for in the deed of trust. Large business concerns having extensive and varied interests

[2] Minn. G. S. 1913 Sec. 6710.

can create either a trust company, under the general statutes relating to the creation of such companies, or they, doubtless, under the statutes of some of the states, can create a holding company, with power to act as a trustee. In the case of large business interests, where the number of persons interested in business is comparatively small and the holdings are compact, arrangements can be made to have some of the business associates named as trustees, for there is no doubt but that, under the authority of proper terms incorporated in the trust agreement, such members of a business organization can be both trustees and beneficiaries.

(2) *The Trust.* Care must be taken to make the trust an active one, and not a dry or passive trust in which the trustee has nothing to do but hold the title to the property engaged in the business. Under the statutes of many of the states a dry or passive use or trust would be executed, and the entire title legal and equitable, as to real property certainly, and quite likely as to the personality, would be cast upon the beneficiary, or beneficiaries, as the case might be. Another reason why the dry or passive trust should be avoided is that the beneficiaries would probably be held to be subject to a partnership liability, if they were given entire control of the enterprise.

(3) *Transferability of Shares or Interests.* The common practice in Massachusetts is to make the beneficiaries practically an unincorporated association, transacting business through the trustees, and the interest of each beneficiary is represented by a transferable certificate representing his proportionate share in the enterprise. The certificate gives the member no voice in the direction or management of the business and is intended more as evidence of the extent of his interest and the basis upon which he is entitled to a proportion of the profits. The writer is of the opinion that the relation as between the trustee and the beneficiary should be made more direct and intimate. In other words, instead of creating the association first, and then nominating the trustees, as trustees for the association, the contract between the trustees and each member should, if possible, be made direct and personal, although the object which the trustees may be directed to pursue is a common one. While the trustees would be guided, of course, by the wishes of the beneficiaries, expressed either severally or collectively, and would be removable for malfeasance, and the trust would be liable to termination in accordance with the provisions of the trust deed, nevertheless it is apparent from a con-

sideration of the authorities, that the less the beneficiaries have to do with the actual conduct of the business, the more remote will be the probability that they can be held personally liable in any manner for any of the debts contracted in the conduct of the business. This brings us to the question of liability.

(4) *The Trustee's Liability.* We will pass over without discussion the question of a trustee's liability for torts or malfeasance, and consider only the trustee's liability to creditors for debts contracted in the conduct of a going business. In this respect the law is well settled and cannot be stated more clearly than by quoting from the opinion of Mr. Justice Woods in the case of *Taylor v. Davis:*[3]

"A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is, therefore, the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. The mere use by the promisor of the name of trustee or any other name of office or employment will not discharge him. Of course when a trustee acts in good faith for the benefit of the trust, he is entitled to indemnify himself for his engagements out of the estate in his hands, and for this purpose a credit for his expenditures will be allowed in his accounts by the court having jurisdiction thereof.

"If a trustee, contracting for the benefit of a trust, wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate."

From this it will be seen that the question of the liability of the trustee should be carefully provided for in the trust agreement, and pains should be taken to see to it that every creditor dealing with the business has notice of the limitation of the trustee's liability.

(5) *The Liability of the Beneficiaries.* The question of the liability of the beneficiaries is the one to which the legal mind immediately turns whenever this plan of doing business is sug-

[3] (1883) 110 U. S. 330 (334), 28 L. Ed. 163, 4 S. C. R. 147.

gested. The beneficiaries of such a trust business are certainly free from all of the provisions relating to stockholders of a corporation, and they cannot be held to be subject to the liability of stockholders. The legal title to the entire property has passed to the trustee and the equitable interest remaining in each investor is a right to share in the profits of the business conducted by the trustee, and to share proportionately in the distribution of the property remaining, if any, in case the trust is dissolved. As we have just seen, the trustee is in no sense an agent, and it is just as clear that there is no such thing as the relation of agency existing as between the beneficiaries, if the trust has been properly organized. So far as the authorities have gone in considering cases involving the principles applicable to this question, two propositions may be safely considered as reasonably established: First, it may be assumed that where the trust is an active one and the trustee is given entire and unlimited control and management of the business, the beneficiaries are subject to no liability whatever on account of any indebtedness or obligation incurred by the trustee in the conduct of such business. Second, where the trust is a dry or passive trust, and the business is managed, controlled and conducted by the beneficiaries, they will be held to be partners and subject to a partnership liability. Between these two established propositions, however, there lies a variety of undetermined questions, the principal one of which being as to how far, or to what extent the beneficiaries may direct the management of the business, either in the original instrument creating the trust, or by subsequent vote of the beneficiaries without incurring a partnership liability. It is hard to see how a partnership liability would be created by a provision in the trust agreement giving the trustee full control of the business, but suggesting the employment of one or more of the beneficiaries in the conduct of the business, and permitting the beneficiaries, or a majority of them, to terminate the trust, in case the management of the trustee was unsatisfactory. The basic principle of partnership liability is mutual agency, but it is clear that in the trust arrangement nothing like the relation of principal and agent exists as between the trustee and the beneficiaries. In fact, as the writer has previously suggested, it seems that it would not be a very difficult or cumbersome undertaking to create such a trust in which there would be no mutuality whatever as between the beneficiaries. Here again the question of notice becomes important. It is a fundamental

proposition that where creditors have been led to deal with an organization on the faith of representations, actual or implied, the members of such organization will be compelled to make such representations good whenever it is necessary to do so for the protection of such creditors. This is the principle which lies at the root of the so-called trust fund theory of the liability of stockholders for unpaid subscriptions. The same principle would apply in cases of the sort we are now discussing. But if the trust agreement explicitly limits the liability of the trustee to the funds placed in his hands, and declares that the beneficiaries shall not be liable in any case for any of the debts contracted by the trustee in the conduct of the business, and the terms of the trust agreement in that respect are brought home to the notice of creditors dealing with the trustee before their debts are contracted, it is difficult to see how the creditors could claim that they had been misled, or how they could escape being bound by such notice.

(6) *Business Credits.* At first, doubtless, the banks will be inclined to scrutinize such organizations with a great deal of care; but it can readily be observed that, since, the entire property of the trust must necessarily be pledged to the payment of its debts, and since that entire property is in the control of a trustee, the credit of such a business ought to be as sound, if not more so, than if the same organization were incorporated. Such, probably, will be the final verdict among the bankers.

(7) *Taxation.* The tangible property in the hands of the trustee will be subject to taxation, exactly the same as though held by the individual owner. The trustee should be required to keep his accounts in such a way as to show the individual share of each investor, and the plan should be organized so as to keep the interests of the several beneficiaries as separate and distinct as possible. The income of each investor, therefore, would be subject to the provisions of the income tax law relating to the income of individuals. The profits, if any, which the trustee may have made in the conduct of the business would not be aggregate or joint profits, but the several profits of each investor, and ought to be taxed accordingly. In determining the place of taxation the courts of Massachusetts have treated associations of beneficiaries as partners, but not so as relating to their liability.

(8) *Comparative Advantages and Disadvantages as between such a Trust and a Corporation.* One of the prominent advantages of the corporation has been the fact that it was an entity

which survives for the stated period, regardless of the continued existence of the incorporators. The same effect can be achieved by a trust such as we have outlined. The death of one of the beneficiaries would pass his equitable interest in the trust to his personal representatives, but it would not dissolve the trust in any way, and the business would continue just the same. This equitable interest can be devised, sold, levied upon and transferred by operation of law. It can be divided among different purchasers or devisees exactly as the interest of a stockholder in a corporation may be divided, without affecting the trust in any way or interfering with the continuance of the business. Through the medium of incorporation large funds may be accumulated for the conduct of an extensive business, and hundreds of persons may become interested in the corporate business as shareholders. There is no reason why the same cannot be done through the medium of the trust. The corporation, being a creature of the law, cannot operate outside of the state of its domicile, except upon such terms as other states may see fit to impose, but a trustee, especially if he be an individual, has all the rights of a natural person and a citizen of the United States, and he can transact business with the trust funds in any or every state of the union, and any attempt to place a limitation upon his right to extend his business from one state to another would fall within the constitutional prohibitions. The business would escape entirely from all of the statutory limitations or requirements relating to corporations. There would be no reports to make, such as are required from corporations, either to home or foreign governments, and as we have pointed out, there would be no capital stock to tax, and the objects of taxation would be simplified to the mere question of tangible property and individual income. The expense of such an organization is much less than the expense of organizing a corporation, and the only fees required to be paid would be the fees of the register of deeds for recording the trust agreement, in case real property were involved. If private trustees are used there will be no reports or records of a public character, and the taxing authorities are the only ones who would have any authority to examine the books of the business, other than the interested parties themselves.

(9) *Some Suggestions as to the form of such a Trust Agreement.* The practicing lawyer would not think of organizing a business along the lines herein outlined without giving the subject

considerable study, and in doing so he would, from the various authorities, readily perceive what the general provisions of such a trust agreement should be. There are a few matters in that connection, however, which may be properly suggested in this paper. The trust agreement should, of course, designate the trustees, and cover with sufficient detail the purposes for which the trust is formed, and contain such general directions to the trustee as the special circumstances may seem to require. The agreement should provide for the period during which the trust is to continue. It should also provide for the manner in which the trust may be terminated; the time, place and manner in which the funds shall be turned over to the trust company; the manner in which the business shall be managed and the manager selected. It should also provide for the issuance of trust receipts or certificates to each investor, showing the proportionate amount of his investment in the trust, and stating that such interest is transferable. By its terms each individual investor should be treated as a separate, independent owner of a proportionate part of the trust property, determined by the proportion of his investment to the total fund, and should require that all accounts as to earnings be kept by the trustee with each individual investor. In other words, while the general purpose which the trustee may be required to carry out is a common one, the investment should not be made a joint investment any more than a common ownership of income paying real property is a joint investment. Special features, not contrary to law, that may occur to the parties at the time of the organization of such a trust, should, of course, be incorporated in the trust agreement. In selecting a name under which the business is to be carried on, those should be avoided which may suggest either a corporation or a partnership, and the words "company" or "association" should not be used. Preferably, the word "trust" should be adopted, and such names as the "Home Building Trust," or the "Paul Lumber Trust" should be applied to the business. It may appear objectionable to make use of the word "trust" because of the prejudice existing against trusts, but undoubtedly the way to get rid of the prejudice in the public mind is to use the term to designate every sort of commonplace business.

(10) *Summary and Conclusion.* The foregoing is a hastily prepared and rather crude attempt to stimulate interest in what appears to the writer to be a most promising development of a

business method, and to invite a general discussion of the subject. Continued prosperity and development require that business be as free and untrammeled as possible, and while this general plan is yet in its experimental stage, it would seem that its general adoption in business may well be considered. Some objections may be suggested, and such a method, of course, cannot always be resorted to, even in cases where a corporation may be undesirable, but in the light of twenty years' experience as a practicing lawyer, constantly dealing with corporations in business, the writer has reached the conclusion that a development of the general plan herein hastily outlined will enable the great majority of business enterprises to be carried on with greater freedom, more certainty and less annoyance than is possible by corporations under existing law and the present state of the public mind toward such organizations. Those who may become interested in this subject will find it very ably discussed in a volume entitled "Trust Estates as Business Companies," by Mr. John H. Sears. Mr. S. R. Wrightington also has collected the authorities and treated many phases of the subject in an accurate and exhaustive manner in a volume entitled "Unincorporated Associations." The writer has thought best not to obscure the discussion with the citation of authorities other than those just mentioned, for the law on the subject, aside from the general principles of trusts, which are well established, is in its formative period, and the authorities are not very numerous.

R. J. POWELL.

MINNEAPOLIS, MINN.

RIGHT OF ANGARY

THE recent requisition of Dutch ships in American ports affords us an interesting example of a revival of *Jus Angariae,* or as it is sometimes called *Prestation.*[1] This right has had a varied and often highly controversial history. In its origin it signified the right of the sovereign, or other public authority, to employ compulsory service for the carriage of messages.[2] It was essentially a royal prerogative, very similar in character to certain feudal claims, such as the right of purveyance.

During the middle ages the term somewhat changed its meaning, and came to acquire a distinct maritime significance. As then employed, it described the practice of belligerent nations in seizing neutral ships within the local jurisdiction, and in pressing them, and their crews, into service for the transport of troops, food, supplies, munitions,[3] etc. The validity of this practice was clearly recognized both by the civil and common law. By the civil law, according to the Black Book of the Admiralty,[4] "a king was justified in pressing into service, or seizing ships of every description and of every nation which might be found in his ports for purposes of urgent necessity, but, nevertheless, a tacit condition of safe return was annexed to such seizure or pressing. By the ancient laws of England, the admiral might arrest any ships for the King's service, and after he had made a return of the arrest in chancery, the owner of the ship could not plead against such return because 'L'Admiral et son Lieutenant sont de record."

It is also evident, "from the ancient writs and patents of England that the Admiral, the wardens of the Cinque Ports, and others, were authorized to seize ships of war and other vessels, to impress seamen, and commandeer provisions and arms for pur-

[1] Some of the older writers drew a distinction between Prestation and Angary. The former was applied to the impressment of neutral vessels and crews into the transport service of the belligerent: the latter was restricted to the requisitioning of neutral cargoes. But this distinction has been disregarded by modern writers. The terms are now used interchangeably.

[2] Woolsey, International Law, Sec. 118, note.

[3] 2 Oppenheim, International Law 394.

[4] 1 Halleck, International Law 485, note.

poses of national defense."[5] The exercise of this right apparently was not limited to English ships only. By way of partial satisfaction to the neutral, it was customary for the belligerent to pay freight for such services in advance.

The exercise of this right became so vexatious to neutrals that a series of treaties were drawn up in the 17th and 18th centuries, in some cases abolishing and in others modifying the practice.[6] According to the terms of some of these agreements, the states mutually agreed to prohibit the seizure of ships or merchandise for public purposes, either in times of peace or war. By the treaty of 1785 between Prussia and the United States,[7] Article 16, it was provided "that the subjects or citizens of each of the contracting parties, their vessels and effects, shall not be liable to any embargo or detention on the part of the other for any military expedition or other public or private purposes whatsoever." In certain other cases, where the right of angary was conditionally recognized, it is expressly stipulated that the neutral owners shall be fully compensated for their services. In the revision of the treaty with Prussia in 1799,[8] the above clause was eliminated, and in its place there was inserted a provision authorizing the requisition of vessels of the respective countries, but providing that "the proprietors of the vessels which shall have been detained whether for some military expedition, or for what other use soever, shall obtain from the government that shall have employed them, an equitable indemnity, as well for the freight as for the loss occasioned by the delay." Similar stipulations are to be found in a number of treaties with the Central and South American states.[9]

Writing in 1789 De Martens[10] declared that:

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[5] Ibid.

[6] 2 Oppenheim, International Law 394.

[7] 2 Malloy, Treaties and Conventions, etc., between the United States and Other Powers 1482.

[8] Ibid. p. 1492.

[9] Article 7 of the treaty of 1828 with Brazil provides that the citizens of the contracting parties shall "not be liable to any embargo nor be detained with their vessels, cargoes, or merchandise or effects, for any military expedition nor for any public or private purpose whatever, without allowing to those interested a sufficient indemnification." 6 Moore, Digest of International Law 907. The treaty of 1830 with Venezuela runs to the same effect. 8 Stat. at L. 470. Germany has also entered into similar agreements with Salvador, Portugal, Costa Rica, Mexico, Dominican Republic, Gautemala, Honduras, Colombia, and Nicaragua. Perels, Das internationale offentliche Seerecht p. 222, note.

[10] De Martens, Précis du droit des gens moderne de l'Europe, Sec. 269.

"It is doubtful if the common law of nations gives to a belligerent, except in case of extreme necessity, the right of seizing neutral vessels lying in its ports at the outbreak of war, in order to meet the requirement of its fleet on payment of their services."

But, notwithstanding some misgivings, the majority of jurists continued to recognize the validity of the practice in time of national emergency, subject, of course, to the payment of proper compensation. Azuni, for example, boldly asserted[11] that a neutral vessel which attempted to escape from such requisition, would be liable to confiscation.

The close of the century witnessed a revival of the right. Napoleon again called the practice into play. The fleet that carried his expedition into Egypt in 1798 was largely made up of neutral ships, which were commandeered in French ports for that purpose.[12]

With the development of more humane methods of warfare and a more general recognition of the rights of neutrals in the 19th century, the right of angary took on a less arbitrary and oppressive character. According to modern usage the right is restricted to the seizure or use of neutral ships and property which may be found within the local jurisdiction or on the enemy territory or the high seas.[13] In case of military necessity it is sometimes recognized that the property may even be destroyed.

The right of angary in many respects resembles an embargo. But the two powers, as Calvo points out:[14] "different dans leur nature comme dans leurs effets." An embargo "pour etre legitime, doit etre general, restreint dans les plus etroites limites et fonde sur des raisons majeurs: il n'implique, le plus communement, que la responsabilite morale du gouvernement qui l'exerce." The right of angary "au contraire, est essentiellement special, et, en raison des risques et des charges onereuses qu'il impose au navire qui le subit, il engage la responsabilite materielle et financiere de l'Etat qu'une necessite d'ordre superieur condamne a y recourir."

Neutral crews, it will be observed, are no longer forced to become active participants in the war. The neutral property only remains liable to seizure for military purposes. In other words neutral ships in certain exigencies are treated the same as national property.

[11] Azuni, Droit Maritime, Pt. 1 Chap. III Art. 5; Taylor, International Law 702.
[12] Hall, International Law 767.
[13] 2 Oppenheim, International Law 395.
[14] 3 Calvo, Droit International 139.

"The object of the right of angary" says Oppenheim,[15] "is such property of subjects of neutral states as retains its neutral character from its temporary position on belligerent territory, and which therefore is not vested with enemy character. All sorts of neutral property, whether it consists of vessels or other means of transport or arms, ammunition, provisions, or other personal property, may be the object of the right of angary, provided the articles concerned are serviceable to military ends and wants. The conditions under which the right can be exercised are the same as those under which private enemy property can be utilized or destroyed, but in every case the neutral owner must be fully indemnified."

During the Franco-Prussian War the German military authorities had recourse to this right on several occasions. They took possession of a large quantity of rolling stock belonging to the Swiss and Austrian railroad systems, and used them for some time for military purposes.[16] A still more striking illustration is to be found in the seizure and sinking of several British merchant vessels in the Seine to prevent French gunboats from going up the river and interfering with the means of German communication across the river. The English Government entered a strong protest against the brutal manner in which the sinking took place, while the crew were still on board the vessels, but it did not question the legality of the act of the German commander.[17] At the same time it put in a claim for full compensation for the destruction of the ships. Bismarck defended the action of the military authorities on strictly military grounds. "The measure in question," he declared, "however exceptional in its nature did not overstep the bounds of international warlike usage." There was a pressing danger at hand "and every other means of meeting it was wanting; the case was therefore one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible under the reservation of indemnification." He was not willing to admit, however, that the German government was under any legal obligation in this instance to indemnify the neutral owners of the vessels, but as an act of comity he agreed that compensation should be paid.

A majority of the leading English and American jurists recognize the legality of the modern right of angary, provided that due indemnification is made for the use or destruction of the

[15] 2 Oppenheim, International Law 395.
[16] Ibid. p. 396.
[17] Stowell and Munro, International Cases, War and Neutrality, p. 544.

vessels. Two or three brief excerpts from representative writers will suffice.

According to Sir Robert Phillimore[18] "such a usage is not without the sanction of practice and usage and the approbation of many good writers upon international law."

Halleck remarks[19] that "By virtue of this right neutral vessels may be appropriated by a belligerent on payment of a reasonable price for compensation."

Oppenheim comes to the same conclusion:[20] "As a rule," he lays down, "this law gives under certain circumstances and conditions, the right to a belligerent to appropriate enemy property only, but under other circumstances and conditions and exigencies, it likewise gives a belligerent the right to appropriate and destroy neutral property."

Calvo,[21] the greatest of South American jurists, likewise declares: "En cas de troubles civils ou de guerre exterieure l'interet de se defense ou de sa surete peut mettre un Etat dans l'obligation morale de porter momentanément atteinte a la liberte des transactions commerciales, de paralyser les mouvements des navires marchands, et meme de requerir ceux-ci pour les employer a des transports de troupes et de munitions ou a d'autres operations militaires. La raison d'Etat prime ici l'interet prive, national ou etranger, et legitime l'emploi de ces moyens extremes designes sous le nom d' arret de prince et d'angarie."

The same view is entertained by many continental writers.[22] Perels, who is perhaps the leading German authority on Seerecht is apparently ready to admit the legality of the right of angary, even in its older and more arbitrary form.[23] "Das Kriegsrecht erkennt nicht nur die Zuruckhaltung neutraler Handelsschiffe als statthaft an, sondern auch die Befugnis der Kriegfuhrenden, sie in ihren Hafen zu Transportdiensten und ihre Besatzungen zu Dienstleistungen hierbei heranzuziehen."

The views of the continental writers on the legitimacy of angary have been greatly influenced, as Professor Oppenheim points out,[24] by their attitude towards the doctrine of conditional

[18] 3 Phillimore, International Law 43.
[19] 1 Halleck, International Law 485.
[20] 2 Oppenheim, International Law 397.
[21] 3 Calvo, Droit International 138.
[22] For example, Heffter, Bluntschli, Massé, Hautefeuille, von Liszt, Konig, and Kleen.
[23] Perels, Das internationale offentliche Seerecht 221.
[24] 2 Oppenheim, International Law 444.

contraband. Inasmuch as they deny the validity of the Anglo-American doctrine of conditional contraband, they have been forced to set up another principle in its place to justify the right of the belligerent to pre-empt all goods which are bound for a hostile state. That principle they have found in the right of angary.

These precedents and opinions find confirmation in the provisions of the United States Naval code of 1900. Article 6 of that code expressly stipulates:

"If military necessity should require it, neutral vessels found within the limits of the belligerent authority may be seized and destroyed, or otherwise utilized for military purposes, but in such cases the owners of neutral vessels must be fully recompensed. The amount of the indemnity should, if practicable, be agreed on in advance with the owner or master of the vessel. Due regard must be had to treaty stipulations upon these matters."[25]

No provision of the Hague Convention deals directly with the question of angary in relation to ships, but chapter 4, article 19 of the Fifth Convention, 1907, respecting the rights and duties of neutral powers and persons in case of war on land, provides that:[26]

"Railway material coming from the territory of neutral Powers, whether it be the property of the said Powers, or of companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin."

"A neutral power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of a belligerent Power."

"Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage."

There is no material difference in principle, it is submitted, between the rules which should govern the requisition of instruments of commerce on land and in port. The two cases are clearly analogous. The above convention is, by necessary implication, equally adapted to transportation by sea. To lay down any other rule would discriminate against sea powers. It would confer upon a powerful inland state with excellent railroad connections an effective control over neutral means of communication, while

[25] Naval War College, International Discussions, 1903, p. 104.
[26] 2 Scott, The Hague Peace Conferences 411.

similar powers would be denied to its enemies who were forced to rely upon naval forces and instrumentalities for purposes of communication. It would be singular indeed if the right of angary in respect to ships should be abrogated at the very moment when the corresponding right of requisition of rolling stock on land was receiving full recognition.

Notwithstanding these precedents, it must be admitted, there are many jurists, including several English and American writers of recent date, who either deny the legality of the right or, as is usually the case, while admitting its validity, severely condemn its exercise and demand its abolition. Dana acknowledges that angary is recognized both by treaty and in practice but declares: "It is not a right at all, but an act resorted to from necessity for which an apology and compensation must be made at the peril of war."[27]

DeBoeck pronounces[28] it as "odieux et vexatoire." Lawrence lays down[29] that "nothing but long and uninterrupted usage can justify a practice which runs counter to the rudimentary principle that a belligerent must make war with his own resources." He admits, however, that "unfortunately there can be no doubt that the practice of states, even in modern times, has permitted such seizures." The Institute of International Law has also pronounced most strongly in favor of its abolition.[30] Article 39 of the "Règlement sur le regime legal des navires . . . dans les ports etrangers" adopted by the Institute in 1898 provides: "Le droit d'angarie est supprime soit en temps de paix soit en temps de guerre quant aux navires neutres."

The British Regulations and Admiralty instructions furnish perhaps the most striking argument in support of this view. Article 446 reads:

"In the case of any British merchant ship, whose nationality is unquestioned, being coerced into the conveyance of troops or into taking part in other hostile acts, the senior naval officer, should there be no diplomatic or consular authority on the spot, will remonstrate with the local authorities, and take such other

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[27] Wheaton, International Law, Dana Ed. note 152. He admits, however, after a review of the treaties on the subject that "these treaties certainly seem to recognize this angaria as a right, or at least as a practice of nations, and only seek to regulate its exercise."

[28] De Boeck, De la propriété privée ennemie sous pavillon ennemie Sec. 737.

[29] Lawrence. T. J., The Principles of International Law 516.

[30] 5 Revue Generale de Droit International Public, 1898, 858.

steps to assure her release or exemption as the case may demand, and may be in accordance with the regulations."

But this provision, it would seem, is directed primarily against the older and now discredited form of angary, rather than against the present mode of exercising the right. Moreover the regulations do not venture to deny the legality of the practice. They simply provide an effective means for securing the release of the British vessel, which may have been requisitioned for naval purposes without just cause.

But, notwithstanding the numerous protests against the right of angary, it must be admitted, that the opponents of the legality of the measure are in a minority. History and precedent are alike against them. Some of these jurists, it is to be feared, have allowed their righteous indignation at the frequent abuses of the right to bias their judgment as to its legality, and to lead them to the conclusion that the right has disappeared or at any rate ought to be abolished. "The wish has been father to the thought." But it is "worse than idle" as Phillimore says:[31]

"To speak or write in a depreciatory tone as some modern writers do on the value and influence of usage in all international affairs. Not only is it a law to which both contending parties may be held to have assented, but its notoriety acts as a notice and warning to foreigners, that in certain contingencies certain consequences will fall within a certain jurisdiction. It is optional with them to place themselves or not within that jurisdiction; but when the contingency does arise and a consequence does follow *ignorantia juris* is morally and legally a bad plea."

The right of angary has indeed received either expressly or by implication too frequent recognition, both in treaties and practice, even in modern times to be abrogated by the opinions of international publicists. Most of these criticisms, moreover, it will be observed have been directed rather against the abuses than the legality of the right. As is too often the case in international discussions, law, policy and expediency have become hopelessly confused in the minds of the writers, and of the general public.

A number of international jurists, particularly those on the continent, base the right of angary upon the doctrine of military necessity.[32] Von Liszt, for example, looks upon it as a form of *Kriegsraison*.[33] To him it is a rule of force rather than a principle of law. But this conception savors altogether too much of

[31] 3 Phillimore, International Law 42.
[32] For example, Dana, Rivier, and von Liszt.
[33] Von Liszt, Das Völkerrecht 197.

Prussian militarism to commend it to the great majority of students of international law. To this interpretation of the right is doubtless due in part, much of the suspicion as to the legitimacy of its exercise.

The true basis of the right, according to most Anglo-American jurists, is to be found in the principle of territorial sovereignty.[34] The law of every state is supreme over both persons and property within the local jurisdiction. In the case of the *United States v. Diekelman,*[35] the Supreme Court laid down emphatically 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 other words, neutral vessels enter a belligerent port at their own risk. They cannot claim the privileges of international commerce in time of war, without subjecting themselves to the legitimate rights and operations of war. Neutral ships and neutral property in belligerent territory enjoy the rights, and must share the liabilities of the ships and property of citizens of the state, save insofar as they are exempted by treaty or by the rules of international law. The jurisdiction of the belligerent, it is true, is seldom exercised over neutral goods which are only temporarily within the country.[36] But this limitation is essentially self-imposed; it is a concession which is made to neutral interests on the ground of public policy and convenience. It is a relaxation of the rights of the belligerent state, rather than an acknowledgement of the legal claims of the neutral. In short, an ancient Roman maxim, *salus populi est suprema lex* is operative in time of national danger upon citizens and neutrals alike, within the local jurisdiction.

But as this power is from its very nature a dangerous measure, it should be exercised with the greatest caution, and only under the pressure of national emergency.[37] This right most vitally affects the political and commercial interests of neutrals. It ousts the captain and crews from the vessel; it dispossesses the neutral of his property; it interrupts the regular course of business; and diverts the ordinary channels of commerce. And what is even more serious, from a national standpoint, is the fact that it

[34] Hall, International Law 743.
[35] (1875) 92 U. S. 520, 23 L. Ed. 742.
[36] Hall, International Law 743.
[37] Phillimore says "it can only be excused and perhaps scarcely then justified by that clear and overwhelming necessity which would compel an individual to seize his neighbor's horse or weapon to defend his own life." 3 International Law 42.

changes the flag of the vessel, and forcibly withdraws it from the protection and control of its own government. To assert this right is certainly a legitimate though extreme exercise of the war power, but its enforcement is almost certain to occasion a feeling of resentment and humiliation on the part of the weaker nations. There is all the greater reason on this account that the right should be exercised with all due consideration to the national pride and financial interests of neutral states.

According to the older view, the belligerent was seemingly under an obligation to compensate the neutral for loss of freight only.

"Il serait juste aussi" says Massé,[38] "de les indemniser en outre des dommages qu'ils ont eu souffrir par suite de l'interruption de leur voyage ou de leurs expeditions; mais l'usage ne parait pas aller jusque-la."

But it is safe to say that this restricted view of the liability of the belligerent would not be entertained today. In all cases full compensation should be made, not only for the use of the vessel, but also for the loss of profits and for the damage and destruction of any of the ships during the voyages.[39] Whenever possible an agreement for indemnity should be arranged in advance. This obligation is recognized not only in numerous treaties, but is confirmed in spirit, if not by the letter of the law, by article 53 of the Hague Convention, providing for compensation for the use of requisitioned means of communication in occupied territory.[40]

The action of the United States government in this instance is the more justifiable, because of the peculiar circumstances of the case. The United States naval regulations, as we have seen, distinctly recognized the legality of angary.[41]: The Dutch vessels accordingly entered the United States ports at their own risk, and they knew, or ought to have known, that they were subject to requisition at any time.

In this case, moreover, the vessels were not simply birds of passage temporarily within the jurisdiction. On the contrary, the masters of the vessels at the instance of the Dutch government had tied up the ships, and had permitted them to lie idle for months in American ports, because they were either unwilling or afraid to put to sea. Meanwhile the United States government

[38] 3 Phillimore, International Law 42, note.
[39] 3 Calvo, Droit International 139.
[40] Scott, The Hague Peace Conferences.
[41] Ante p. 420.

was negotiating with the Netherlands for the reciprocal exchange of Dutch shipping for American supplies.[42] But the efforts of the government at Washington to effect an equitable arrangement were defeated by German pressure at the Hague. During all this time, the Dutch vessels were enjoying the protection of the American government. It was evidently the intention that the ships should remain in American ports indefinitely. For all practical purposes, these vessels had acquired a new commercial domicile; they had been transferred from Rotterdam to New York. They were enjoying all the privileges of American ports, and yet were refusing to make any return for the same.

At any time, as Secretary Lansing well says,[43] "the United States might have exercised its right to put these ships into a service useful to it." Still it refrained from taking drastic action, so long as there was any likelihood that the Dutch government would agree to carry out the temporary arrangement[44] which had been entered into between the two countries early in the year for such an exchange. The attitude of the Dutch government is the more surprising in view of the fact that Norway has recognized the justice of the American position and has agreed to place a portion of its shipping at the disposal of the United States upon most favorable terms.[45] All that the United States has demanded is that the Dutch shall put their vessels into active service again. But the Dutch government has refused to make any concessions or to meet the United States half way; it has continued to clamor for food stuffs, but it has declined to charter its ships or restore them to normal activity.[46]

Meanwhile, the railroads and canal boats of Holland have been busily employed conveying goods to and from Germany and the occupied districts of Belgium and France. And this commerce, it would seem, has not been confined solely and exclusively to innocent goods.[47] A different rule has apparently been applied to the continental, than to the sea board traffic of the country. Private and public organizations have been free to carry on trade

[42] Memo. of Secretary of State Lansing. The Minneapolis Morning Tribune, Apr. 13, 1918.
[43] Ibid.
[44] Memo of President Wilson, New York Times, Mar. 21, 1918.
[45] New York Times, Mar. 15, 1918.
[46] Ibid.
[47] Correspondence respecting the Transfer Traffic across Holland of Materials susceptible of employment or Military Supplies. Misc. No. 17 (1917) Cd. 8693.

through the regular instrumentalities with the Central Powers. There has been no interdict on commerce with Germany, as in the case of trade with England and the United States. There can be little doubt in the present instance but that the action of the Dutch ship owners has been governed by political considerations. They have not been free-will agents. Almost from the outbreak of the war, the commerce of the country has been placed under the direct service of the government or of semi-public organizations, such as the Netherlands Over-Sea Trust, acting on its behalf.[48] Rotterdam masters and merchants have had no occasion for discriminating against the United States. The Allies have undoubtedly exercised their belligerent rights upon the high-seas in a high-handed manner at times to the great annoyance and disadvantage of Dutch shipping, but they certainly have not been guilty of flagrant illegality, or of the wholesale destruction of the lives and property of Dutch citizens, by a systematic policy of piracy. There was every reason to expect that the Dutch government would meet the United States in a frank and conciliatory spirit. But the German menace evidently got on the nerves of Dutch statesmen.[49] They dared not enter into an advantageous shipping agreement which might offend their powerful and threatening neighbor. The spirit may have been willing, but the flesh was weak.

There is another factor which cannot be overlooked. The rights and privileges of neutral nations must always be affected somewhat adversely during a period of war. But it has been one of the primary objects of international law to protect these rights as far as possible. During the last fifty years more attention has probably been paid to this phase of international law than to any other. The extravagant claims of belligerent nations have been gradually restricted in favor of neutral rights. But from the very outbreak of the present war Germany has systematically flouted these restrictions. She has cast the principles of international law to the winds. The rights of neutrals have been no more respected than those of belligerents. By a policy of terrorism she has forced some of her neighbors to serve her own purpose. In fact, if not in theory, the latter have been reduced to a condition of physical subjection.

[48] Measures Adopted to Intercept the Sea-borne Commerce of Germany. Official Documents bearing uppn the European War, Series 12. International Conciliation, April, 1916, No. 101.

[49] The German government threatened to destroy all Dutch vessels that engaged in the carriage of food supplies between America and Europe.

This was the practical problem that the United States and the other Allies had to face. It was useless to protest to Germany against these flagrant violations of international law. She heeded them not. The Allies had already learned in the course of the bitter struggle, that force could only be met by force. Slowly and unwillingly they have been obliged to adopt retaliatory measures of war, to meet gas attacks with counter attacks and Zeppelin raids by bombing expeditions against German cities. To have adopted any other policy would have placed a premium on illegality, and have imperilled the fighting efficiency of their own forces. They would have fought the enemy with their own hands tied.

It was equally futile to appeal to neutral states to vindicate their rights against Teutonic aggressions. They were powerless to act. And in their helplessness they sacrificed not only their own rights, but imperilled the rights of the Allies. When Holland, under coercion, withdrew her ships from the high seas, she, wittingly or unwittingly, played the German war game. The conduct of the Dutch government was even more effective than the German submarine in driving commerce off the ocean. Here was a new phase of the same problem. Neutrals as well as belligerents were now involved. How was the illegal action of Germany in respect to neutral commerce to be met by the Allied Powers? The latter could not be indifferent to such a dangerous indirect attack upon their most vital interests. The United States, as we have seen, had no desire to resort to arbitrary measures. But it could not permit Germany to carry out her submarine policy through the medium of a neutral state. If Holland was unwilling or unable to protect herself against Germany, she could not justly complain if the United States should take such legal measures, short of war, as might be necessary to defend this country against her unneutral conduct. The requisition of the Dutch ships was the American reply to the Dutch or more truly the German embargo. In other words, it was a legitimate act of reprisal. But the act, it should be remembered was a blow at Germany not at Holland. The United States found it necessary to fight Germany with the latter's own weapons and in this case the weapons proved to be the ships of a neutral nation. There is however, a fundamental difference in the mode in which the opposing belligerents have dealt with neutral shipping. It is the difference between full compensation and "spurlos versenkt," between an extreme but legitimate exercise of war power and ruthless murder on the high seas.

Throughout the negotiations, the United States has acted with marked consideration. It not only postponed action until the last possible moment, but also, on taking over the ships, offered the most generous terms to the Dutch owners, for the use of them.[50] Only a relatively small proportion of Dutch shipping has been requisitioned. The remaining tonnage is more than sufficient to supply the domestic and colonial needs of the Netherlands. The transaction is indeed a most profitable one for the Dutch ship owners, since they receive the returns from the operation of the ships, whereas the Allied governments assume all the risks. Not only so, but the United States government has been more liberal than the law demands.

"In order to insure to The Netherlands the future enjoyment of her merchant marine intact, not only will ships be returned at the termination of the existing war emergency, but the associated governments have offered to replace in kind, rather than in money, any vessels which may be lost whether by war or marine risk. One hundred thousand tons of bread cereal which the German government when appealed to refused to supply, have been offered to The Netherlands by the associated governments out of their own inadequate supplies, and arrangements are being perfected to tender to The Netherlands government other commodities which they desire to promote their national welfare and for which they may freely send their ships."[51]

In short, the United States government has sacrificed its own belligerent rights and commercial interests to promote the national well being and prosperity of a neutral nation.

In view of all these circumstances we may then conclude that the action of the United States government is not only justifiable in law and by precedent, but may also be defended on the grounds of morality and fair dealing. On this issue the American government need not fear an appeal to the judgment of history.

C. D. ALLIN.

UNIVERSITY OF MINNESOTA.

[50] The New York Times, Mar. 21, 1918.

[51] Memo. of Secretary of State Lansing, The Minneapolis Morning Tribune, Apr. 13, 1918.

TITLE TO THE SOIL UNDER PUBLIC WATERS*—THE TRUST THEORY

THE history of land titles in America precludes any presumption of ownership of the beds of public waters by the riparian proprietors, and raises a presumption in favor of the state. The ownership of all lands in the American colonies was originally in the crown, and the ungranted lands passed to its sovereign successors. Grants were made by the sovereign to subject or citizen from time to time, but these grants do not appear to have expressly included the beds of public waters as a general practice. By the English common law these beds would not pass by implication in sovereign grants. There is no authority to show that the subaqueous soil of England ever passed in this manner, and there is much authority that such an implication should not be made against the crown. This rule against implication on a crown grant is as old as the presumption of the riparians' ownership of the soils of public fresh waters.[1] The co-existence of the two helps to explain the origin and meaning of the latter. It is a presumption of ownership arising from the general, exclusive enjoyment of the public fresh water beds by the riparians, and this enjoyment must have originated in some way other than by implication in crown grants, as by possession from time immemorial or by express crown grant. But as riparians in America have not, as a general rule, such grants, possession, or enjoyment, there should be no presumption of ownership by them. Moreover, as their original grants may generally be shown, there is no need for such a presumption. Conversely, as the sovereign has seldom expressly alienated the submerged lands, and as they are rarely in the exclusive possession or enjoyment of citizens, the presumption as to all the lands under public waters in America ought to be that of the English common law as to lands under tidal waters, that they remain in the sovereign.[2]

Assuming that title in these lands should be presumed to be in the state, it is not an unqualified ownership. The public as

* Continued from 2 MINNESOTA LAW REVIEW 313.
[1] The Royal Fishery of the Banne, (1610) Davies Rep. 149.
[2] 2 MINNESOTA LAW REVIEW 313.

individuals have certain special rights, quasi-easements and quasi-profits, which are paramount. These include navigation and perhaps fishing and others. They constitute the jus publicum. There may be also certain special rights in the riparians, such as the right of access to the navigable waters.[3] What are public and riparian rights will be considered hereafter; for the present it will be assumed that such exist and that the ownership of the state is subject to them. But these rights are not exhaustive of possible uses of the soil, and the state's ownership, qualified in extent of use as it may be, extends to all the rights not included in these special rights. These residuary rights make up the jus privatum in the land which is presumed to belong to the state.

The next problem is what may the state do with the jus privatum in the subaqueous lands to which it is presumed to have title? May it grant the jus privatum to its citizens? May the state or its grantees make any use of the lands which does not interfere with the jus publicum or with the riparian rights? May the state, for example, mine the minerals in the lands? It is not within the scope of the present article to consider the power of the state to impair or to destroy either the jus publicum or any special riparian rights that may exist. It will be assumed that these are preserved.

The problem is fairly presented in *State v. Korrer.*[4] The state sought to restrain the riparian proprietor from mining iron ore from the bed of a navigable lake, from destroying the waters of the lake, and asked an accounting for any ore unlawfully removed. After commencement of the action a stipulation was made which recited that from a certain area of the lake the waters had already been forced back by the defendants, and that a body of ore had been stripped and prepared for mining, and it was agreed that the defendant might remove the ore so stripped, and that the state should be paid for ore removed which it should finally be adjudged did not belong to the fee owners of the shore land. This stipulation was confirmed by order of court. The defendant had judgment in the lower court, but on appeal it was declared that the state was entitled to an injunction restraining the defendant from taking ore below low water mark, and the cause was remanded.

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[3] Lyon v. Fishmongers' Co., (1876) L. R. 1 A. C. 662, 45 L. J. Ch. 68, 35 L. T. 569; Brisbine v. St. Paul, etc., R. Co., (1876) 23 Minn. 114.

[4] (1914) 127 Minn. 60 (78), 148 N. W. 617.

On petition that further directions be given the trial court as to the stipulation, the Supreme Court said:

"A majority of the court construe this stipulation as giving the state the right to an accounting only in the event that the state is found to be the owner in a proprietary capacity of the mineral underlying Longyear Lake. The decision of this court explicitly holds that the state owns the bed of this lake below low water mark, 'not, however, in the sense of ordinary absolute proprietorship with the right of alienation, but in its sovereign governmental capacity, for common public use, and in trust for the people of the state for the public purposes for which they are adapted.' From this it necessarily follows that the state has no right to recover the value of the ore, and no right to an accounting under the stipulation."

Words of similar import occur in many cases in several jurisdictions.[5] They express the trust theory of state ownership.

The passage quoted is susceptible of various meanings. It may mean that the state has only a special right in the soil, measured by the jus publicum of which it is the conservator. That interpretation has already been considered and the conclusion reached that the state has presumptively the jus privatum as well. Again, it may mean that although the state has title, it must not use its title to the impairment or destruction of the public right. That is doubtless intended, and will be discussed hereafter, but is it the whole meaning? It is true that in *State v. Korrer* the waters had been thrown back to get at the ore, but that had been done before the stipulation for payment of the value of the ore to the state had been entered into, and it is difficult to see how the mining of the ore could further infringe the public right and why the state should not recover for the taking of its property although the taking involved a prior invasion of the public right to which the state was not a party. If the state should not recover for ore so taken, it would appear at least doubtful whether it has the right itself to extract the ore even in a manner nowise interfering with the public right.[6]

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[5] McLennan v. Prentice, (1893) 85 Wis. 427 (444), 55 N.W. 764; Flisrand v. Madson, (1915) 35 S.D. 457 (470), 152 N.W. 796. Compare People v. Kirk, (1896) 162 Ill. 138, 45 N.E. 830, 53 Am. St. Rep. 277; Florida v. Black River Phosphate Co., (1893) 32 Fla. 82, 13 So. 640, 21 L.R.A. 189.

[6] "The governor, attorney general and state auditor are hereby empowered to enter into contracts . . . for the mining and disposing of the iron ore situate under any waters of any public lake or river in the state of Minnesota." Minn. Laws 1917 Chap. 110.

The phrase "sovereign governmental capacity" is equivocal. The state owns all its public lands in this manner, yet it may alienate them. "For common public use" is inapplicable to the minerals in the land, for the use of them is not part of the common public right and could not be from its very nature. Nor is the phrase "in trust for the people of the state for the public purposes for which they are adapted" any more enlightening, for the taking of minerals is not such a purpose.

Few legal phrases are more loosely used than "in trust." In the typical trust A has the legal title to property in which B has the whole beneficial interest. But it is used to describe other situations. A's land is charged with a payment of money to B. He is said thereafter to hold it in trust for B.[7] The capital stock of a corporation is said to be a trust fund for the benefit of its creditors. In the first example A has no beneficial interest and cannot rightfully use or alien the trust property for his own benefit. But in the other examples A and the corporation have beneficial interests and may use the property in any way not inconsistent with the beneficial interests in B or in the creditors.

That the state holds the subaqueous lands in trust with respect to the jus publicum is, for the present, assumed. That it holds them in trust with respect to the just privatum is impossible, unless there may be an inalienable trust without a cestui que trust in esse or in posse. An owner of land subject to an easement may make any use of the land which does not disturb the enjoyment of the easement.[8] The owner of land dedicated for a public highway may take the grass, trees, or minerals from the land, or make other uses thereof, provided he does not hinder the use of the land for highway purposes.[9] These owners hold their lands subject to these special uses. They may be said to hold them in trust for these uses as truly as the corporate state holds the soil of public waters in trust for public purposes. It is submitted that the corporate state has both legal and beneficial interest in the jus privatum, with power to use or alien it for any enjoyment not inconsistent with the public or riparian rights, that the trust theory only requires at the most that these special rights be preserved, and that its extension to include the jus privatum is unsound.

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[7] Woodward v. Walling, (1871) 31 Ia. 533.
[8] Atkins v. Boardman, (1840) 2 Met. (Mass.) 457.
[9] Makepeace v. Worden, (1816) 1 N. H. 16.

The origin to which the trust theory is referred confirms this view. It is frequently said that it was the theory upon which the crown's title to the tidal lands in England was based. In *Union Depot Company v. Brunswick,*[10] the court by Justice Mitchell said that:

"At common law the king as representative of the nation held in trust for them all navigable waters and the title to the soil under them. This was a sovereign or prerogative and not a proprietary right. At the revolution the people of each state became sovereign, and in that capacity hold all these waters and the title to the soil under them for their common use, subject only to the rights since surrendered to the general government."

The statement that the title of the crown to the subaqueous lands was not a proprietary right, if that means without any right of enjoyment or power of alienation, is incorrect. It has no support in the English common law and the authority to the contrary is conclusive. It is true that the ownership of the king was in his sovereign or prerogative right. He was presumed to own the tidal lands as part of the ungranted lands of the kingdom, that being the state of the greater part of them. They were part of the jura regalia of the crown. By the same right he owned the bona vacantia in the kingdom, and the crown estates which went to successors and not to heirs. They were all part of the regalia of the crown, interests attached to the corporate office of the sovereign. The king owned them in right of the crown, and such as remained at his death went by the same right to his successor.[11] But the right in which they were held did not narrowly limit the modes in which they might be enjoyed. The king had the profits of crown lands for revenues.[12] He could use the lands or grant them away. His prima facie title by the prerogative to the tidal lands could be rebutted by proof of a grant to a subject. Revenue might be had from these waste lands which still remained in the crown by granting them away. The power of the king as sovereign to dispose of them was not different from the power of an American state to dispose of its public lands. The corporate state owns its public lands by the same sovereign right, on trust for all the people of the state, and yet with the power of use and alienation to raise revenue for the government, and so for the people through it. The revenue of

[10] (1883) 31 Minn. 297 (300), 17 N. W. 626, 47 Am. Rep. 789.
[11] Co. Lit. 16a, Butler's Note 4.
[12] 7 Halsbury's Laws of England 108, 112.

the state was the revenue of the king under the English constitution. That by the king's grant or charter a subject might have the right of property in the arms and creeks of the sea is asserted by Sir Matthew Hale, adding that it is without question.[13] It has never been denied in the English cases that the crown might grant the fee in the foreshore or other tidal lands where it did not already subsist in the hands of a subject.[14] On the contrary, it made grants of these lands down to the reign of Anne, when the power of the crown to make further grants was modified by act of parliament.[15] It is clear that the terms "sovereign and prerogative" and "proprietary" in the common law were not antithetical but consonant and that the king's title was at once sovereign and proprietary.

The crown, however, held these lands subject to the jus publicum. To say that it held them in trust for the public use is perhaps proper enough in view of the variable meaning of the expression "in trust." It might indeed be said to hold the use privatum in trust as well. But there is a great difference in the administration of the two trusts. It holds the lands as representative of the people, as the corporate state would in America, in trust as to the jus privatum to raise revenue for the purposes of government, and as to the jus publicum to permit the people directly to enjoy them. The one is an active trust; the other is a passive trust. The people have the benefit indirectly in the one case and directly in the other. In the former the people have no property, but only a beneficial interest as members of

[13] De Jure Maris Chap. V (Hargrave's Law Tracts 17).

[14] Hall on the Sea-shore, 14 (Moore's Foreshore 672); Attorney General v. Parmeter, (1811) 10 Price 378; Blundell v. Caterall, (1821) 5 B. & Ald. 268; Attorney General v. Burridge, (1822) 10 Price 350 (371); Duke of Beaufort v. Swansea, (1849) 3 Exch. 413; Corporation v. Ivall, (1871) L. R. 19 Eq. 558; Brew v. Haren, (1874) 9 I. R. C. L. 29; Wyse v. Leahy, (1875) 9 I. R. C. L. 384; Attorney General v. Portsmouth, (1877) 25 W. R. 559.

"From the earliest times in England the law has vested the title to, and the control over, the navigable waters therein, in the crown and Parliament. A distinction was taken between the mere ownership of the soil under water and the control over it for public purposes. The ownership of the oil, analogous to the ownership of dry land, was regarded as *jus privatum*, and was vested in the crown. But the right to use and control both the land and water was deemed a *jus publicum*, and was vested in Parliament. The crown could convey the soil under water so as to give private rights therein, but the dominion and control over the waters, in the interest of commerce and navigation, for the benefit of all the subjects of the kingdom, could be exercised only by Parliament." Per Earl, J., in Langdon v. Mayor, etc., of City of New York, (1883) 93 N. Y. 129 (155).

[15] 1 Anne Chap. 7 Sec. 5; Coulson and Forbes, The Law of Waters.

the state; in the latter they have a direct enjoyment. The analogy of shareholders' interests in a business corporation is apt. The shareholders do not own the property of the corporation, although they have an interest in its management. The corporation by its corporate officers has the control and power of disposition of the property for the corporate purposes. But when a dividend has been declared, the shareholders' interests therein are direct and regarded as antagonistic to the corporation.[16] So the crown had complete control over the jus privatum in the land for the purposes of government, while its subjects' interests in the jus publicum were direct and antagonistic. The limitation on the crown's power over the jus privatum was the duty to preserve the jus publicum.

The disputed question in the English cases was not whether the crown could grant the fee in the tidal lands, but what public uses the lands should be subject to in the hands of the crown's grantees.[17] That they should be subject to the public right of navigation was clear.[18] They were also subject to the public right of fishing on grants made after Magna Charta.[19] They were free from any public right of bathing.[20] But whatever were the public rights to be subtracted, the residuary rights, the jus privatum, remained to be enjoyed by the crown or by its grantees.

An effective cause of the error that the crown's title to the tidal lands was on an inalienable trust, and also of the trust theory in America, was that other fundamental error widely current in the American cases that the reason of the crown's title to the tidal lands was the navigability of tidal waters and the duty of the crown to preserve the public right of navigation.[21] To explain the riparian ownership of fresh water soils, and so to maintain the reason, it was repeatedly said that only tidal waters were navigable in England. The same reasoning used to establish the crown ownership of the tidal lands, in the first instance,

[16] Beers v. Bridgeport Spring Co., (1875) 42 Conn. 17.

[17] Attorney General v. Tomline, (1880) L. R. 14 Ch. Div. 58, 49 L. J. Ch. 377; Weston v. Sampson, (1851) 8 Cush. (Mass.) 347, 54 Am. Dec. 764.

[18] Gann v. Free Fishers of Whitstable, (1865) 11 H. L. C. 191, 20 C. B. N. S. 1.

[19] Carter v. Murcot, (1768) 4 Burr. 2162; Warren v. Matthews, (1704) 1 Salk. 357; Duke of Somerset v. Fogwell, (1826) 5 B.&C. 875 (884); Malcomson v. O'Dea, (1863) 10 H. L. C. 593 (618).

[20] Blundell v. Caterall, (1821) 5 B. & Ald. 268.

[21] 2 MINNESOTA LAW REVIEW 326; Carson v. Blazer, (1807) 2 Binn. (Pa.) 475, 4 Am. Dec. 463; The Daniel Ball, (1871) 10 Wall. (U. S.) 557 (563), 19 L. Ed. 999; Illinois Central R. Co. v. Illinois, (1892) 146 U. S. 387, 36 L. Ed. 1018, 13 S. C. R. 110.

required its continuance. So it was argued that the crown cannot alienate the lands. It is curious how this à priori reasoning, ostensibly based on the English common law, persisted in America despite the fact that all the English authority was against it. It was only sustained by referring to cases where the jus publicum itself was in issue. Regarding the title to the subaqueous soils as a matter of law, and assigning the duty of conserving the public right of navigation as the reason of the crown's title to the tidal lands, have at once led some American courts to say that the crown held the lands on an inalienable trust and to hold that the state in America holds the title to the soils under all navigable waters, and upon a similar trust. It has already been pointed out that the common law treats title to subaqueous lands as a question of fact, with a presumption as to tidal land in favor of the crown, and that this presumption arose not from the navigability of tidal waters but from the fact that the tidal lands had not been generally alienated. The true reason is sufficient cause for presuming title to all subaqueous lands in the state, but not for holding them to be on an inalienable trust. On the contrary, it admits the alienability of the lands, at least in respect to the jus privatum.

The American decisions do not support the extension of the trust theory to the jus privatum, however much their dicta might justify it. The actual decisions have been on questions of the public right. In *Martin v. Waddell,*[22] important as a main source of the trust theory, Waddell brought ejectment in the circuit court of the United States for a several oyster fishery of one hundred acres of tidal land in a bay of New Jersey against Martin who also claimed a right of fishery. The plaintiff derived his title by mesne conveyances from the Duke of York, who had received the patent of this territory from the English crown. All governmental power granted by the crown patent to the Duke of York had been surrendered to the crown by later proprietors before the grant under which the plaintiff claimed had been made by them. The plaintiff had verdict and judgment, but the judgment was reversed in the federal Supreme Court on the ground that the dominion and property in the navigable waters, and in the soils under them, passed as a part of the prerogative rights annexed to the political powers conferred on the Duke, to be held on the same trust on which they were held by the crown; that they were

[22] (1842) 16 Pet. (U. S.) 367, 10 L. Ed. 997.

returned to the crown by the surrender of the governmental powers, so that the proprietors could not thereafter grant an exclusive right of an oyster fishery in the bay. The decision is logical, if planting and growing oysters in a tidal bed is part of the public right. But the opinion of the court, rendered by Chief Justice Taney, discusses the problem as if the ownership of the soil were inseverably connected with the public right and as if the right were dependent upon the continuance of the ownership in the governing power. The opinion contains the important dictum which has been reiterated with variations in the trust theory cases:

"When the revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the constitution to the general government."[23]

The opinion ignores the jus privatum and discusses the problem as if the jus publicum were exhaustive of the possible uses of the land. The defect is clearly pointed out by Justice Thompson, who said in a dissenting opinion:

"That the title to land under a navigable stream of water must be held subject to certain public rights, cannot be denied. But the question still remains, what are such public rights? Navigation, passing and repassing, are certainly among these public rights. And should it be admitted that the right to fish for floating fish was included in this public right, it would not decide the present question. The premises in dispute are a mud flat; and the use to which it has been and is claimed to be applied, is the growing and planting of oysters. It is the use of the land, and not of water, that is in question. For the purpose of navigation the water is considered as a public highway common to all; like a public highway on land. If land over which a public highway passes is conveyed, the soil passes subject to that use, and the purchaser may maintain an action, for injury to the soil, not connected with the use; and whenever it ceases to be used as a public highway, the exclusive right of the owner attaches; so with respect to land under water, the public use for passing and repassing, and all the purposes for which a public way may be used, are open to the public; the owner, nevertheless, retaining all the rights and benefits of the soil that may not impede or interfere with the public highway. Should a coal mine, for instance, be discovered under such highway, it would belong to the owner of the soil, and might be used for his benefit, preserving unimpaired the public highway. So, with respect to an oyster

[23] Ibid. at p. 410.

bed, which is local and is attached to the soil. It is not the water that is over the beds that is claimed; that is common, and may be used by the public; but the use of the soil by the owner which is consistent with the use of the water by the public, is reserved to the owner."[24]

Pollard's Lessee v. Hagan,[25] the most important case on the trust theory, was decided by the federal Supreme Court three years later. The decision is the culmination of a series of cases from the state of Alabama which presented the question of the ownership of the subaqueous lands in states once territories of the United States.[26] When Alabama was admitted to the Union in 1819, the federal government reserved title to the public lands in the state. It thereafter attempted to grant to private persons lands which were covered by the tidal waters of the Bay of Mobile when Alabama became a state. The final decision was that the federal government no longer owned these subaqueous lands, but that they belonged to the state. The pertinent history of the litigation is as follows:

The supreme court of Alabama decided in *Hagen v. Campbell*[27] that a grant of lands extending to the channel, which was made by congress before the union, was valid. The court said: "The shore below the common tide belongs to the public, though by grant it may become the property of the citizen," showing that no trusteeship in the then sovereign was present to the mind of the court. As to the federal grants after statehood, several cases were disposed of by both the Alabama and the federal Supreme Courts on the construction of the grants, without questioning the power of the federal government, but in *Mayor v. Eslava*[28] the Alabama supreme court held that the federal government had no power to make such grants, for the reasons, inter alia,—

"By the acts of congress regulating the survey and disposal of the public lands, the federal government has renounced the

[24] Ibid. at p. 421.

[25] (1845) 3 How. (U. S.) 212, 11 L. Ed. 565.

[26] Hagen v. Campbell, (1838) 8 Port. (Ala.) 9, 33 Am. Dec. 267; Pollard's Heirs v. Kibbe, (1839) 9 Port. (Ala.) 712, reversed (1840) 14 Pet. (U. S.) 353, 10 L. Ed. 490; Mayor and Aldermen of the City of Mobile v. Eslava, (1839) 9 Port. (Ala.) 577, 33 Am. Dec. 325, affirmed (1842) 16 Pet. (U. S.) 234, 10 L. Ed. 948; Mobile v. Hallett, (1842) 16 Pet. (U. S.) 261, 10 L. Ed. 958; Mobile v. Emanuel, (1843) 1 How. (U. S.) 95, 11 L. Ed. 60; Pollard's Lessees v. Files, (1841) 3 Ala. 47 reversed (1844) 2 How. (U. S.) 592, 11 L. Ed. 391; Pollard's Lessee v. Hagan et al., (1845) 3 How. (U. S.) 212, 11 L. Ed. 565.

[27] (1838) 8 Port. (Ala.) 9, 33 Am. Dec. 267.

[28] (1839) 9 Port. (Ala.) 577 (604), 33 Am. Dec. 325.

title to the navigable waters and the soil covered by them. . . . The original states, in virtue of their royal charters, are entitled to the right of property in the navigable waters within their territory, while the public are only entitled to an easement. . . . Alabama is admitted into the Union on an equal footing with the 'original states' and of consequence is entitled to the right of property in the tide waters within its limits. By the admission of Alabama into the Union, without a reservation of the right of property in the navigable waters, the state succeeded to all the rights of the United States."

The decision was affirmed by the federal Supreme Court on the construction of the act of congress, without examination in the opinion of the court of the reasoning of the Alabama court. But that reasoning was adopted in *Pollard's Lessee v. Hagan,* which followed shortly after. The opinion of the court was given by Justice McKinley, who said:[29]

"Taking the legislative acts of the United States, and the states of Virginia and Georgia, and their deeds of cession to the United States, and giving to each, separately, and to all jointly, a fair interpretation, we must come to the conclusion that it was the intention of the parties to invest the United States with the eminent domain of the country ceded, both national and municipal, for the purposes of temporary government, and to hold it in trust for the performance of the stipulations and conditions expressed in the deeds of cession and the legislative acts connected with them. To a correct understanding of the rights, powers, and duties of the parties to these contracts, it is necessary to enter into a more minute examination of the rights of eminent domain, and the right to the public lands. When the United States accepted the cession of the territory, they took upon themselves the trust to hold the municipal eminent domain for the new states, and to invest them with it, to the same extent, in all respects, that it was held by the states ceding the territories. . . .

"When Alabama was admitted into the union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative; because the United States have no constitutional capacity

[29] (1845) 3 How. (U. S.) 212 (222), 11 L. Ed. 565.

to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.

"Alabama is, therefore, entitled to the sovereignty and jurisdiction over all the territory within her limits, subject to the common law, to the same extent that Georgia possessed it before she ceded it to the United States. To maintain any other doctrine, is to deny that Alabama has been admitted into the union on an equal footing with the original states, the constitution, laws, and compact, to the contrary notwithstanding. But her righs of sovereigny and jurisdiction are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of *Martin and others v. Waddell,* 16 Peters, 410, the present chief justice, in delivering the opinion of the court, said: 'When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution.' Then to Alabama belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights. . . .[30]

"This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers. But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, 'and the laws which shall be made in pursuance thereof.'

"By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and juris-

[30] Ibid. at p. 228.

diction over this subject as the original states. Thirdly, The right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."[31]

These cases considered together establish:

1. The United States had both sovereign and proprietary interest in the territory out of which Alabama was formed.

2. Such sovereign and proprietary interest included the public waters and the soils under them.

3. Riparian titles did not include soil under the waters of the Bay of Mobile, being tidal waters.

4. The federal government could grant the soil under the Bay to private persons.

5. It reserved title to the public lands upon the admission of Alabama as a state.

6. It ceased to have power to grant the soil under the Bay upon the admission of Alabama as a state.

Subaqueous lands are thus distinguished from public lands. The former pass to the state, although the latter are reserved. Where did the proprietary right in them go? That the state would have the powers of sovereignty, including regulation of navigation and fishing, save in so far as they were granted to the United States by the federal constitution, is clear. But did it get the proprietary right as well? It was not in the riparians. It is no longer in the United States. The argument of counsel for the defendant in *Pollard's Lessee v. Hagan* is illuminating:[32]

"A right to the shore between high and low water mark is a sovereign right, not a proprietary one. . . . The right passes in a peculiar manner; it is held in trust for every individual proprietor in the state or the United States, and requires a trustee of great dignity. Rivers must be kept open: they are not land which may be sold, and the right to them passes with a transfer of sovereignty."

By ignoring the jus privatum and treating the title to the soil and waters as altogether a trust to be maintained by the sovereign, it is made to pass to the state.

The doctrine was vigorously opposed by Justice Catron. In a separate opinion in *Mayor v. Eslava,* referring to the reasoning of the supreme court of Alabama, he said:[33]

[31] Ibid. at p. 230.
[32] Ibid. at p. 215.
[33] (1842) 16 Pet. (U. S.) 234 (254).

"That the original states acquired by the Revolution the entire rights of soil, and of sovereignty, is most certain. And if it be true that Alabama was admitted on an equal footing in regard to the rights of soil with the original states, she can hold the high lands equally with the land covered by navigable waters; and so can nine other states equally hold, to the utter destruction to all claim to the lands heretofore indisputably recognized as belonging to the United States, as being a common fund of the Union.

"The clause inserted into the constitution of Alabama, reserving the rights of property to the United States, as a compact with them, embraces lands under water as emphatically as those not covered with water. But if no stipulation saving the interest of the United States had been made, they would have had just as much right to their private property as an individual had to his. They hold, as a corporation, an individual title. . . .

"That such waters are common for the purposes of navigation and commerce, in the widest sense, is free from doubt; that Alabama has jurisdiction and power over them, the same as the original states have over their navigable waters, is equally clear. Yet it does not follow that the fee of the shores, banks, and soils under water, is in the state of Alabama. The United States, as owner, can do no act to obstruct the free public use of the waters, more than a private owner of the soil under water could obstruct the navigation. The individual owner in fee of the bottom of a navigable river, can cultivate and take out the shell fish or the minerals from the bed; nor can it be doubted that the United States may pursue veins of silver, tin, lead, or copper, under the bottom of a bay, the river Mississippi, or a great lake; although they could not impede in any degree their navigation. So may the assignees or lessees of the United States do the same. Nor can it be otherwise in regard to the occupation of the lands between high and low water mark."

And in a dissenting opinion in *Pollard's Lessee v. Hagan,* he said:[34]

"Between 1840 and 1844, a doctrine had sprung up in the courts of Alabama, (previously unheard of in any court of justice in this country, so far as I know,) assuming that all lands temporarily flowed with tide-water were part of the eminent domain and a sovereign right in the old states; and that the new ones when admitted into the union, coming in with equal sovereign rights, took the lands thus flowed by implication as an incident of state sovereignty, and thereby defeated the title of the United States, acquired either by the treaty of 1803, or by the compacts with Virginia or Georgia. Although the assumption was new in the courts, it was not entirely so in the political discussions of the country; there it had been asserted, that the new states coming in, with equal rights appertaining to the old ones, took the high lands

[34] (1845) 3 How. (U. S.) 212 (230).

as well as the low, by the same implication now successfully asserted here in regard to the low lands; and indeed it is difficult to see where the distinction lies. That the United States acquired in a corporate capacity the right of soil under water, as well as of the high lands, by the treaty with France, cannot be doubted; nor that the right of soil was retained and subject to grant up to the time Alabama was admitted as a state. . . .

"That the lands in contest, and granted by the acts of 1824 and 1836, were of the description of 'waste or unappropriated,' and subject to the disposition of the United States, when the act of Congress of the 2d of March, 1819, was passed, is not open to controversy, as already stated; nor has it ever been controverted, that whilst the territorial government existed, any restrictions to give private titles were imposed on the federal government; and this in regard to any lands that could be granted. And I had supposed that this right was clearly reserved by the recited compacts, as well as on the general principle that the United States did not part with the right of soil by enabling a state to assume political jurisdiction. That the disclaimer of Alabama, to all right and title in the waste lands, or in the unappropriated lands, lying within the state, excludes her from any interest in the soil, is too manifest for debate, aside from all inference founded on general principles. It follows, if the United States cannot grant these lands, neither can Alabama; and no individual title to them can ever exist. And to this conclusion, as I understand the reasoning of the principal opinion, the doctrine of a majority of my brethren mainly tends. The assumption is, that flowed lands, including mud-flats, extending to navigable waters, are part of such waters, and clothed with a sovereign political right in the state; not as property, but as a sovereign incident to navigation, which belongs to the political jurisdiction; and being part of state sovereignty, the United States could not withhold it from Alabama. On this theory, the grants of the United States are declared void: conceding to the theory all the plenitude it can claim, still Alabama has only political jurisdiction over the thing; and it must be admitted that jurisdiction cannot be the subject of private grant. . . .

"In *Pollard's Lessee v. Files*, 2 How. 602, the question, whether Congress had power to grant the land now in controversy, was treated as settled. As the judgment was exclusively founded on the act of 1836, (the plaintiff having adduced no other title,) it was impossible to reverse the judgment of the Supreme Court of Alabama on any other assumption than that the act of Congress conferred a valid title. I delivered that opinion, and it is due to myself to say, that it was the unanimous judgment of the members of the court then present.

"I have expressed these views in addition to those formerly given, because this is deemed the most important controversy ever brought before this court, either as it respects the amount of

property involved, or the principles on which the present judgment proceeds—principles, in my judgment, as applicable to the high lands of the United States as to the low lands and shores."

Pollard's Lessee v. Hagan is the Magna Charta of the later-admitted states to the soils under their public waters. Its principles were later extended to navigable non-tidal waters in states formed out of territories of the United States. "They (*Martin v. Waddell* and *Pollard's Lessee v. Hagan*) enunciate principles equally applicable to all navigable waters."[35]

The point decided in *Pollard's Lessee v. Hagan,* that the United States has no proprietary interest in the soil of the public waters of a state has been steadily adhered to. The Supreme Court of the United States has not, on the other hand, insisted on any particular manner of holding of these soils by the state. While they were given to the states on the trust theory as a sovereign right, the states are left free to deal with them as they see fit.

"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. It properly belongs to the states by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water. The cases in which this court has seemed to hold a contrary view depended, as most cases must depend, on the local laws of the states in which these grants were situated."[36]

The state is thus free to adopt whatever rule it pleases with regard to these lands. Assuming for the present that it may not destroy or impair the public right, yet since that right is not exhaustive of all the beneficial uses of the lands, there is a residuary interest which may be disposed of. To deny that power is to say that there are beneficial uses of the lands, harmful to no one, but incapable of enjoyment by anyone. The doctrine of *Pollard's Lessee v. Hagan* has accomplished its purpose; it has given the title to the state. But it did so on the assumption that the public use included the whole beneficial enjoyment. The United States held these lands subject to the public right; it could grant the fee in them subject to the same right; the fee might logically have been held to remain in it by the reservation of the public

[35] Justice Bradley in Barney v. Keokuk, (1876) 94 U. S. 324 (338), 24 L. Ed. 224. Cases in which the doctrine is stated are collected in Kean v. Calumet Canal Co., (1902) 190 U. S. 452 (481), 47 L. Ed. 1134, 23 S. C. R. 651.

[36] Barney v. Keokuk, (1876) 94 U. S. 324, 24 L. Ed. 224.

lands when the territory became a state; it was, however, held to have passed to the state; the state holds the fee subject to the same public right, and with the same power of use and disposition that the United States had before the admission of the state.

The courts of several states, regarding the way by which the state's title to the subaqueous lands is derived, use language that would limit the interest acquired, or the manner in which it may be enjoyed. They call it a sovereign or prerogative and not a proprietary right. It is true that the title passes to the state as an incident of sovereignty. But analysis of the cases from which the doctrine originated shows that every right in the lands passes which the United States had before. Cognizance should be taken of the fact that the United States had a proprietary right and exercised a power of disposition over these lands during the territorial status, and the interest and power of the state should be held to be equally extensive. There is no reason for limiting the power of the state more narrowly than the power of the crown or of the United States was limited. And we have seen that they could use or dispose of such interests as could be enjoyed subject to the public right. The sovereign should be able to make such use of each interest in the lands as may best subserve the public good directly or indirectly.

That the state should have power to make such disposition of these lands as will not impair the public right has been stated by the federal Supreme Court itself. In *Illinois C. R. Co. v. Illinois*[37] the Court held void a grant which it construed as giving control of navigation of Chicago harbor to a railroad company. In the opinion of Justice Field, colored as it is by the idea of the inseparableness of government ownership and the public use, it is said:

"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. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language

[37] (1892) 146 U. S. 387, 36 L. Ed. 1018, 13 S. C. R. 110. And see Hoboken v. Pennsylvania R. Co., (1887) 124 U. S. 656 (688), 31 L. Ed. 543, 8 S. C. R. 643; Shively v. Bowlby, (1893) 152 U. S. 1, 38 L. Ed. 331, 14 S. C. R. 548.

of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

The reiteration of the dictum that the state's title is not proprietary, and that it is without any power of alienation, has had peculiar results in Minnesota. The subaqueous lands were in part obviously useless for direct public purposes. The courts have consequently been not unwilling to resign the enjoyment of these lands to riparian proprietors. Riparian rights have grown to an unusual fruition through the influence of the doctrine.[38] *State v. Korrer,* however, seems to deny the riparians' right to minerals and the state's right as well. The decision is the logical, but absurd result of the doctrine.[39]

EVERETT FRASER.

UNIVERSITY OF MINNESOTA.

[38] Brisbine v. St. Paul R. Co., (1876) 23 Minn. 114; Carli v. Stillwater Co., (1881) 28 Minn. 373, 10 N. W. 205, 41 Am. Rep. 290; Union Depot v. Brunswick, (1883) 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; Lake Superior Land Co. v. Emerson, (1888) 38 Minn. 406, 38 N. W. 200, 8 Am. St. Rep. 679; Miller v. Mendenhall, (1890) 43 Minn. 95, 44 N. W. 1141, 8 L. R. A. 89, 19 Am. St. Rep. 219; Hanford v. St. Paul Co., (1890) 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144, 7 L. R. A. 722.

[39] On right to minerals in beds of public waters, see article by Justice Oscar Hallam, 1MINNESOTA LAW REVIEW 34.

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INFANT MARRIED WOMAN'S CONVEYANCE NOT VOIDABLE IN MINNESOTA.—It is not well known to the profession that in Minnesota the deed of an infant married woman is just as binding upon her as if she had reached her majority. A male infant, whether married or unmarried, has the privilege of disaffirming any deed of conveyance that he may have made before reaching his twenty-first birthday; and he has a reasonable time after reaching his majority within which to determine whether it is wise to disaffirm such conveyance or not. So the conveyance of a female infant, provided she is unmarried, may be disaffirmed, but if such female infant had the bad fortune to be married at

*Resigned to enter military service.

the time she made an unwise conveyance she is wholly denied the privilege of avoiding it. Section 6814, General Statutes 1913, which makes provision for conveyances by husband and wife, has as its concluding sentence this remarkable provision: "The minority of the wife shall not invalidate any conveyance executed by her."

A careful search has failed to reveal any similar provision in the statutes of any other state of the Union or, indeed, of any other country. In many of the states the statutes enabling married women to convey their lands or to relinquish their marital interests in the lands of their husbands expressly stipulate that such married women must be of full age. See, for example, Wisconsin Statutes 1915, Sections 2221 and 2222. This peculiar provision in the Minnesota statute seems to be so diametrically opposed to the whole policy of the law in its protection of the interests of infants that it is difficult to find any reason for its enactment. Certainly if a male infant is to be protected against his foolish contracts and conveyances up to the age of twenty-one there would seem to be rather more reason for protecting a female infant with rather less opportunity for learning the ways of the world, and especially of the real estate business, against the consequences of her improvident conveyances. The fact that she is married and subject, at a tender age, to the influence of a husband of greater age and experience who may perhaps be desirous of turning her real estate into cash, would seem to point out the married female infant as the infant of all others most needing the protection of the law. The hardship apparent on the face of the statute might suggest the possibility of relief by construction, but in the case of *Daley v. The Minnesota Loan and Investment Co.*,[1] it was held that the deed of an infant married woman given in mortgage of her own land could not be cancelled upon her suit. The court says no more concerning the policy of the statute than that "the amendment we have referred to was added to the statute in 1869, and was doubtless deemed proper for the better security of titles, and in view of the protection of the wife already afforded by the statutory provisions requiring her husband in all cases to join in her deed."

The date given by the court in the quotation above is erroneous as this particular provision was enacted in 1865 in the following form:

[1] (1890) 43 Minn. 517, 45 N. W. 1100.

"And whether the wife be a resident of this state or not, the minority of the wife shall in no case affect the validity of her conveyance. Provided, the husband join in such conveyance as herein provided."[2]

The enactment just quoted was passed as an amendment of Chapter XXXV, Section 12, Public Statutes of Minnesota (1858), which makes provision for the acknowledgement by a married woman in the territory of her joint deed of conveyance with her husband. In the Revision of 1866 it appears in Chapter 40, Section 2, providing for conveyances by husband and wife, in the following form: "Nor shall the minority of the wife in any case affect the validity of such deed." It retains exactly the same form in the Revision of 1878. The General Statutes of 1894 (Section 4161) contain the same provision except that the words "in any case" are omitted. The Revised Laws of 1905 (Section 3335) contain the provision in identically the same form as that in G. S. 1913, Section 6814, quoted above.

In *Dixon v. Merritt*,[3] it was held that a mortgage executed by an infant married woman prior to 1865 could be avoided even after foreclosure. It is probable that the possibility of such secret defects in mortgage securities which in the early days of the territory had to be marketed in eastern money centers, made the sale of such securities difficult, and that the statute of 1865 was passed for the purpose of inducing foreign investors to lend their money upon the security of mortgages upon Minnesota real estate. But such reason, if indeed it was the actuating motive of the statute, has long since ceased to operate, and such protection as the court thought was derived from the husband's joining in all cases in the wife's deeds no longer exists since the amendment of 1907[4] makes her sole deed binding upon her. There seems now no excuse for the continued existence of such an anomaly in our real estate law. While it is probable that there are now very few conveyances made by infant married women, still the legislature should lose no time in repealing this anachronism.

RULE AS TO SURFACE WATERS IN MINNESOTA.—Two well defined rules have been adopted in the various states with respect to the rights and liabilities of adjoining landowners for interfering

[2] Minn. Laws 1865 Chap. XXV.
[3] (1875) 21 Minn. 196.
[4] Minn. Laws 1907 Chap. 123 Sec. 1.

with the natural flow of surface water on their respective lands—one being called the civil-law rule, and the other the common-law rule.

"The doctrine of the civil law is, that the owner of the upper or dominant estate has a natural easement or servitude in the lower or servient one, to discharge all waters falling or accumulating upon his land, which is higher, upon or over the land of the servient owner, as in a state of nature; and that such natural flow or passage of the waters, cannot be interrupted or prevented by the servient owner, to the detriment or injury of the estate of the dominant or any other proprietor."[1]

This rule has been adopted by the greater number of states[2] and is founded upon the principle that surface water should be permitted to take the course which nature has provided for its drainage, and only when such natural flow is interfered with, whether unduly retarded or accelerated, will liability arise.

The chief objection to the civil law rule is that it is apt to impose upon the servient estate a perpetual servitude, preventing the reclamation and improvement of low and waste lands. It has no regard for the general principle that "the owner of land has full dominion over what is above, upon or below the surface."[3]

The doctrine of the so-called common law rule is that the owner of land may improve his property in any manner he sees fit regardless of its effect upon the surface water, and upon the adjoining property.[4] It follows from this rule that a lower proprietor may, in the cultivation of his land, back up the surface water on the adjoining land of his neighbor so as to render the upper land entirely unfit for cultivation.[5] This rule not only disregards the manner in which nature has provided for the drainage of surface water, but carried to its ultimate conclusion, it would mean that no action would ever lie for flooding the land of an adjoining owner, even though it could have been prevented at a very small expense. The result is that surface water becomes a common enemy which each owner may rid himself of as best he can.[6]

Recognizing the injustice which often resulted from the strict application of the above mentioned rules, and having in mind the

[1] Nininger v. Norwood, (1882) 72 Ala. 277, 47 Am. Rep. 412.
[2] The cases prior to 1905 are collected in 30 Am. and Eng. Ency. of Law pp. 326 to 331.
[3] Barkley v. Wilcox, (1881) 86 N. Y. 140, 40 Am. Rep. 519.
[4] Bowlsby v. Speer, (1865) 31 N. J. L. 351, 86 Am. Dec. 216.
[5] Bates v. Smith, (1868) 100 Mass. 181.
[6] Cass v. Dicks, (1896) 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859.

maxim, "that a man must so use his own, as not necessarily to do injury to another," Minnesota has attempted to follow a middle ground. The Minnesota doctrine as finally developed was intimated in the case of *O'Brien v. City of St. Paul*,[7] where the court said:

"Although we are not prepared to say that in no case can an owner lawfully improve his own land in such a way as to cause the surface waters to flow off in streams upon the land of another, we do not hesitate to say that he may not turn the water in destructive currents upon the adjoining land, unless it be necessary to the proper improvement and enjoyment of his own land."

When the court laid down the above rule they expressly professed to adopt the common law doctrine as to surface waters, but in a modified form based on the reasonable use of one's property. As a result Minnesota has generally been classified as following the common law doctrine.[8] This, however, is not strictly true as may be seen from an examination of the later Minnesota cases.

In the case of *Hogenson v. St. Paul, etc., Ry. Co.*,[9] defendant company for the purpose of drainage constructed along its road a ditch with cross ditches through which surface water was transferred to the land of plaintiff, there being no natural channels to convey it in that direction. Defendant was held liable on the theory that the improvement was made directly for the purpose of drainage, the court intimating that if the drainage had resulted as a mere incident of the improvement, defendant would not be liable. This distinction was again recognized in *Jordan v. St. Paul, etc., Ry. Co.*[10] where the court found that the ditches were made for the purpose of constructing the railroad, and not for the purpose of drainage. Defendant was held not liable.

[7] (1878) 25 Minn. 331, 33 Am. Rep. 470. But this case only involved the "right of a municipal corporation to so grade or improve its streets as to collect surface waters in large and dangerous quantities, and permit them to discharge upon lots of private owners, injuring or destroying them, without making compensation." It does not necessarily touch the case of adjoining proprietors.

[8] Dunnell Minn. Dig. Supp. Sec. 10165.

[9] (1883) 31 Minn. 224, 17 N. W. 374. The departure from the common law rule is seen in the following language: (Gilfillan, C. J., p. 226) " . . . it does not include the right to gather the surface waters on one's land and turn them upon the land of another, to its damage, even though the former land may as a consequence thereof be improved. In other words, he may not in this way improve his own land, by merely transferring to the land of another a burden which nature has imposed on his own land."

[10] (1889) 42 Minn. 172, 43 N. W. 849. See also Brown v. Winona, etc., Ry. Co. (1893) 53 Minn. 259, 55 N. W. 123.

The leading case in Minnesota on the subject of surface waters as between adjoining owners is *Sheehan v. Flynn.*[11] The court in this case refused to recognize the distinction brought out in the *Hogenson* and *Jordan* cases, supra, and held that a person may drain his land for any legitimate use and that it is immaterial whether this drainage is a mere incidental result of some other improvement or not. Defendant in this case dug a ditch from a low depression on his land to a ravine. The water from this ravine emptied into a lake, raising the lake and submerging about two acres of the land of the plaintiff. In an action to restrain defendant from thus submerging plaintiff's land, the court found for the defendant, holding that the common law rule which was in force in Minnesota had been modified by the doctrine of reasonable use; that what is reasonable must to some extent be measured by the "amount of benefits to the estate drained or improved as compared with the amount of injury to the estate on which the burden of the surface water is cast;" and that it is the duty of an owner draining his own land to deposit the surface water in some natural drain, if one is reasonably accessible.

Having determined that the defendant in the *Sheehan Case,* supra, was draining his land in a reasonable and proper manner, by adopting the method of drainage which would be the least injurious to the plaintiff, the court went on to say that the lower owner would have no right to obstruct a natural drain and thereby hold back the water on the land of the upper proprietor. The later Minnesota decisions have quite generally followed the doctrine of this case. At least five cases[12] have decided that the upper owner must adopt the method of drainage which is least injurious to his neighbor below, and two others[13] have held defendant liable for obstructing the natural flow of surface water.

Although Minnesota professes to apply the common law rule of surface waters in a modified form, the language of the Min-

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[11] (1894) 59 Minn. 436, 61 N. W. 462, 26 L. R. A. 632. The recognition of the principle of the civil law rule is shown in the words of Mitchell, J.: "Of course a man cannot change or divert, to the prejudice of his neighbor, the natural outlet or drainage of surface water." p. 451.

[12] Erhard v. Wagner, (1908) 104 Minn. 258, 116 N. W. 577; Peterson v. Lundquist, (1908) 106 Minn. 339, 119 N. W. 50; Howard v. Illinois, etc., R. Co., (1911) 114 Minn. 189, 130 N. W. 946; Rieck v. Schamanski, (1912) 117 Minn. 25, 134 N. W. 228; Hopkins v. Taylor, (1915) 128 Minn. 511, 151 N. W. 194.

[13] Jungblum v. Minneapolis, etc., R. Co., (1897) 70 Minn. 153, 72 N. W. 971; Skinner v. Great Northern Ry. Co., (1915) 129 Minn. 113, 151 N. W. 968.

nesota decisions would seem to indicate that they do in fact apply the civil law rule, modified by the doctrine of reasonable use. Mr. Farnham, after reviewing the Minnesota cases, reaches this conclusion.[14] And in a note to *Sheehan v. Flynn*,[15] the departure of the Minnesota court is very clearly pointed out.

"This is a complete departure from the 'common enemy' doctrine in the two most important of the three branches, i.e., the right to divert and obstruct, and a modification of the third branch in that it makes the right to hasten a positive rather than a negative right, for it denies the right to interfere with the attempt to hasten. At the same time the decision is an adoption of the two branches of the civil-law rule, which denies the right to divert or obstruct, and a modification of the third branch only in refusing to deny the right to hasten merely because of prejudice to the neighbor, provided the prejudice is not unreasonable under all the circumstances."

DISCHARGE OF SURETY WITHOUT AFFIRMATIVE ACT OF CREDITOR.—By his contract a surety makes himself directly and immediately liable to the creditor for the performance of the obligation of his principal. He is liable just as the principal debtor is; and in the strictest sense, can be discharged at law only in the way in which a principal could be discharged. But upon principles of equity, some of them long applied at law, a surety is discharged upon certain events which impair his rights. But in any such event it is the principles of equity rather than the common law rules of contract which discharge the surety.[1] Where a creditor extends time to[2] or releases[3] a principal debtor, the surety is said to be discharged because his right to pay the debt and proceed to recover it in the name of the creditor is abridged. In these cases the law courts early applied the equitable doctrine. At one time it was thought that the rule against altering a written contract by parol prevented showing that a party who appeared to be principal was merely surety.[4] It is settled now that the relationship may be shown and that the surety is discharged where the creditor know-

[14] 3 Farnham, Waters and Water Rights, Sec. 889f.
[15] 26 L. R. A. 632.
[1] Samuell v. Howarth, (1817) 3 Merivale 272.
[2] Combe v. Woolf, (1832) 8 Bing. 156; Howell v. Jones, (1834) 1 C. M. & R. 97.
[3] Cragoe v. Jones, (1873) L. R. 8 Ex. 81.
[4] Fentum v. Pocock, (1813) 5 Taunton 192.

ingly extends time to the real principal;[5] the reason is that the creditor ought not intentionally to abridge the rights of a surety. He may not release[6] or destroy the effect of[7] security he holds for the debt or substitute a new contract between himself and the principal obligor[8] without releasing the surety, for to do so would affect vitally the position of the latter. Other events may happen causing the suspension of the liability of the principal such as the intervention of war[9] or bankruptcy of the principal;[10] but in neither case is the surety discharged, because this change in circumstances comes about without any default on the part of the creditor;[11] he has done nothing to lose his right against the surety. It is also held, with but small dissent, that the mere failure on the part of the obligee to file his claim in bankruptcy against the principal[12] or to sue him personally[13] or his estate[14] before the statute of limitations has run, is no defense in an action against the surety. The creditor is under no obligation to go out and battle for the rights of the surety, neither is he in duty bound to take care of the surety's interests. The only duty he owes is not to abridge, knowingly and by his own positive act, the rights of the surety. In the case of co-sureties on a joint and several bond, the discharge of the one surety does not, per se, operate as a discharge of the others.[15] But it does unquestionably affect the position of each remaining surety, as regards his right of contribution in case he is held.[16] It does not affect the surety's several

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[5] Rouse v. Bradford Banking Co., [1894] App. Cas. 586; Porter v. Baxter, (1898) 71 Minn. 195, 73 N. W. 844.

[6] Willis v. Davis, (1859) 3 Minn. 17 (Gil. 1).

[7] Pledge v. Buss, (1860) H. R. V. Johnson 663; Wright v. Knepper, (1845) 1 Barr. (Pa.) 361.

[8] Johnson v. Eaton Milling Co., (1893) 18 Colo. 331, 32 Pac. 825; Zimmerman v. Judah, (1859) 13 Ind. 286.

[9] Paul v. Christie, (1798) 4 Harris and McHenry (Md.) 161.

[10] Cilley v. Colby, (1881) 61 N. H. 63; Ray v. Brenner, (1873) 12 Kan. 105.

[11] Guild v. Butler, (1877) 122 Mass. 498, 23 Am. Rep. 378.

[12] Jordan v. Farmers & Bank, (1908) 5 Ga. App. 244, 62 S. E. 1024; Wilson v. White, (1907) 82 Ark. 407, 102 S. W. 201, 12 Ann. Cas. 378.

[13] Villars v. Palmer, (1873) 67 Ill. 204.

[14] Yerxa v. Ruthruff, (1909) 19 N. D. 13, 120 N. W. 758, 25 L. R. A. (N.S.) 139 and note citing many cases. Contra, Siebert v. Quesnel, (1896) 65 Minn. 107, 67 N. W. 803, 60 Am. St. Rep. 441.

[15] Lechmere v. Fletcher, (1833) 1 Cr. & M. 623; Kendall v. Hamilton, (1879) L. R. 4 App. Cas. 504.

Under a statute making all contracts which were joint at common law joint and several obligations. Schneider v. Maney (1912) 242 Mo. 36, 145 S. W. 823.

[16] Water's Rep. v. Riley's Adm'r., (1828) 2 Harris and Gill (Md.) 305, 18 Am. Dec. 302.

contract with and his obligation to the creditor, but it does alter his position and affect his equitable claim for contribution. For this reason the discharge of a co-surety is treated by the majority of the courts like any other event affecting the position of the surety. If the creditor has, by some act of his own, released one of the sureties, there is no question but that the others are released in equity. But where the creditor has merely remained passive while one surety has been discharged by act of the law or by some force not originating in the creditor, there is no reason why the other sureties should be relieved of their obligations, for the creditor was under no affirmative duty to protect them. The obligee may stand by while the statute of limitations runs in favor of the estate of a co-surety,[17] or while a co-surety is discharged in bankruptcy;[18] and the fact that one surety is released by operation of the law does not exonerate the rest. Under statutes providing for a release where the obligee fails to sue the principal after notice to do so by the surety, only the surety giving notice is held to be discharged.[19] That particular surety exercised a privilege which either might have exercised but there is nothing between the obligee and the others which should affect their contract.[20] Minnesota has announced the same decision where one of the sureties on an official bond was discharged by the order of the court.[21]

The principle that a creditor is under no duty to bestir himself in his surety's interests is almost uniformly adopted. But the Minnesota court seems to have deviated from this line of authority in *Siebert v. Quesnel*,[22] in which case it was held that a surety was discharged through the failure of the creditor to present claim for payment to the estate of the deceased principal within the period fixed by statute. In a later decision,[23] Mitchell, J., commenting on *Siebert v. Quesnel* says "in view of the general trend of the authorities, it is at least doubtful whether the mere passive

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[17] Clark v. Douglas, (1899) 58 Neb. 571, 79 N. W. 158; Camp v. Bostwick, (1870) 20 Oh. St. 337, 5 Am. Rep. 669.

[18] Armstrong v. Citizens' & So. Bank, (1916) 145 Ga. 861, 90 S. E. 44.

[19] Letcher v. Yantis, (1835) 3 Dana (Ky.) 160.

[20] Ramey v. Purvis, (1860) 38 Miss. 499.

[21] State v. Bongard, (1903) 89 Minn. 426, 94 N. W. 1093.

[22] Note 14 supra. The North Dakota Court in Yerxa v. Ruthruff, (1909) 19 N. D. 13, 120 N. W. 758, 15 L. R. A. (N. S.) 139, criticises Siebert v. Quesnel and refuses to follow that case.

[23] Board of County Commissioners v. Security Bank, (1899) 75 Minn. 174, 77 N. W. 815.

omission of the creditor to file the claim would have any such effect." Although *Siebert v. Quesnel* has not been expressly overruled, the language of Judge Mitchell and other expressions of the Minnesota court[24] have been taken as indications that the court would not require a principal to do an affirmative act to guard a surety's interest.

In the recent case of *Stone-Ordean-Wells Co. v. Taylor*[25] the same situation was presented under rather novel circumstances. Taylor and Meyers both signed an unconditional continuing guaranty for the extension of credit to a trading corporation. The guaranty was written in the singular thus making it clear that each was bound severally.[26] There was a provision that the guaranty might be "revoked by written notice from me to you." Meyers revoked by proper notice. The plaintiff continued to extend credit, but did not notify the remaining surety of the new circumstances. The court held that the other surety was discharged. The court treats the contract as if it were joint only; but the words of the guaranty, being in the singular, seem to contemplate a several liability. The court recognizes that the right of contribution does not rest on contract, but on equity, yet they say the loss of this right alters the precise terms of the contract. What the court seems to have had in mind, but did not say, was that the creditor ought to have informed the remaining surety of the altered circumstances. This would hardly be demanded by a high standard of business ethics and certainly is not required on the ordinary principles of equity. To say the least it goes far toward imposing a duty to act affirmatively in the protection of a surety's interests. The fact that the case is one of guaranty rather than suretyship can hardly affect the result, and indeed the court uses the terms interchangeably.

POWER OF A CORPORATION TO BUY ITS OWN STOCK.—In England it is well settled that the power of a corporation to buy its own stock does not exist;[1] in this country a minority accept the

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[24] Berryhill v. Peabody, (1899) 77 Minn. 59, 79 N. W. 651.
[25] (Minn. 1918) 166 N. W. 1069.
[26] 2 Chitty, Law of Contracts, 11th ed., p. 1355.
[1] Re London, H. & C. Exch. Bank, (1871) L. R. 6 Ch. 918, 40 L. J. Ch. 429, 24 L. T. 787, 19 Week. R. 791; Re Walker, (1887) 57 L. T. N. S. 763; Hope v. International Financial Society, (1876) L. R. 4 Ch. D. 327, 46 L. J. Ch. N.S. 200, 35 L. T. N.S. 924, 25 Week. R. 203; Trevor v. Whitworth, (1887) L. R. 12 App. Cas. 409, 57 L. J. Ch. N.S.

English view,[2] but the majority of jurisdictions claim adherence to the doctrine, that the power to buy, to sell, and to retire their own stock is inherent in the corporation, and is limited only by constitutional or statutory prohibition.[3]

In England the principle, now recognized, had long been accepted as correct, but it showed signs of wavering in the *County Palatine Case*,[4] however, in the case of *Hope v. International, etc., Co.*,[5] the court said, that the point was not necessary to the decision in the *County Palatine Case*, and was therefore not authority on the question. The House of Lords passed on the question in *Trevor v. Whitworth*.[6] In that case a company purchased more than 4,000 out of its total issue of 15,000 shares. Held, that the transaction was ultra vires. If the shares were purchased for the purpose of selling them again, it constituted a trafficking in shares; if they were purchased for the purpose of retaining them, it constituted an indirect method for reducing the capital of the company. Lord Herschel, addressing the House of Lords, emphasized the importance and purpose of the statute in prohibiting other than the prescribed alterations in the amount of the capital stock, saying, that the reason therefor was to afford those dealing with the corporation the assurance "that the whole of the subscribed capital . . . shall remain available for the discharge of its liabilities."

28, 57 L. T. N.S. 457, 36 Week. R. 145. See notes, 7 R. C. L. 528; 61 L. R. A. 627; 13 Col. Law Rev. 148; 27 Harv. Law Rev. 747.

[2] Hall v. Alabama, etc., Co., (1904) 143 Ala. 464, 39 So. 285; Maryland Trust Co. v. Mechanic's Bank, (1905) 102 Md. 609, 63 Atl. 70; Bank v. Overman Carr. Co., (1899) 17 O. C. C. 253; Cartwright v. Dickinson, (1890) 88 Tenn. 476, 12 S. W. 1030; Vercoutere v. Golden State Company, (1897) 116 Cal. 410, 48 Pac. 375; Crandall v. Lincoln, (1884) 52 Conn. 73, 52 Am. Rep. 560; Abeles v. Cochran, (1879) 22 Kan. 287. Notes, 85 L. R. A. (N.S.) 50; 30 L. R. A. (N.S.) 694; 44 L. R. A. (N.S.) 156; 61 L. R. A. (N.S.) 621; 13 Col. Law Rev. 148; 27 Harv. Law Rev. 747; 7 R. C. L. 528; 17 Ann. Cas. 1265.

[3] Burnes v. Burnes, (1905) 137 Fed. 781; State v. Higby Co., (1906) 130 Ia. 69, 106 N. W. 382; Copper Belle Mining Co. v. Costello, (1908) 12 Ariz. 105, 95 Pac. 94; Chicago, etc., R. Co. v. Marseilles, (1876) 84 Ill. 643; Lindsay v. Arlington Co-op. Asso., (1905) 186 Mass. 371, 71 N. E. 797; St. Louis Rawhide Co. v. Hill, (1897) 72 Mo. App. 142; Richards v. Wiener Co., (1912) 207 N. Y. 59, 100 N. E. 592; Moses v. Soule, (1909) 118 N. Y. Supp. 410; Howe Grain, etc., Co. v. Jones, (1899) 21 Tex. Civ. App. 198; Rogers v. Ogden, etc., Co., (1905) 30 Utah 188, 83 Pac. 754; U. S. Mineral Co. v. Camden, (1906) 106 Va. 663, 56 S. E. 561; Pabst v. Goodrich, (1907) 133 Wis. 43, 113 N. W. 398.

[4] (1873) L. R. 9 Ch. App. 54, 22 Week. R. 286.

[5] (1876) L. R. 4 Ch. Div. 327, 35 L. T. N. S. 924.

[6] (1887) L. R. 12 App. Cas. 409, 57 L. J. Ch. N.S. 28, 57 L. T. N.S. 457, 36 Week. R. 145.

Lord Watson, in the same case, said:

". . . . but persons who deal with, and give credit to, a limited company, naturally rely upon the fact that the company is trading with a certain amount of capital, already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital, which has been paid into the coffers of the company, has been subsequently paid out except in the legitimate course of its business."

The correctness of the doctrine has never since been questioned in England, and it has been consistently followed by the later cases.[7]

Three reasons are advanced in support of the English and American minority doctrine: (1) The purchase of its own stock by the corporation violates the rights of the creditors, because such purchase decreases the amount of capitalization, and so reduces the security. The capital of a corporation is similar to a trust fund, upon which the creditors have a right to rely, and the right to insist that it be kept intact for their protection.[8] (2) Such purchase violates the rights of the non-assenting stockholders, and operates to their injury, because it decreases the number of shares, and thus strengthens the position of the majority stockholders at their expense.[9] (3) By the charter a certain amount of capital stock is authorized. It is generally prescribed by statute that the amount of such capital stock may not be reduced except by carefully therein defined methods. The purchase of its own stock by a corporation does, in effect, reduce the capital stock of the corporation,[10] and why should it be allowed to do indirectly what it cannot do directly?

Be it remembered at this point, that neither the American minority nor the English courts deny the right of the corporation to accept the shares issued to a purchaser with an option to return the stock if not satisfied therewith.[11] This is merely the failure of a conditional sale, or the rescission of an actual purchase, and

[7] Billerby v. Rowland & M. S. S. Co., [1902] 2 Ch. 14.

[8] Crandall v. Lincoln, (1884) 52 Conn. 73; Maryland Trust Co. v. Bank, (1906) 102 Md. 609, 63 Atl. 70; Trevor v. Whitworth, (1887) L. R. 12 App. Cas. 409.

[9] 1 Machen, Corporations, Sec. 1296.

[10] Trevor v. Whitworth, (1887) L. R. 12 App. Cas. 409; Fremont Carriage Co. v. Thompson, (1902) 65 Neb. 370, 375; Hall v. Alabama, etc., Co., (1904) 143 Ala. 464, 39 So. 285; Maryland Trust Co. v. Bank, (1906) 102 Md. 609, 63 Atl. 70.

[11] Schulte v. Boulevard, etc., Land Co., (1913) 164 Cal. 464, 129 Pac. 582.

not a sale to the corporation. Nor is the power of the corporation to take its own stock in payment of a preexisting debt denied. This exception rests on the necessity which arises in order to save loss.[12] Other recognized exceptions to the minority doctrine are: a corporation may take its own stock as security for an antecedent debt;[13] or in compromise of a disputed claim;[14] or in cases of insolvency;[15] or by way of gift or devise; but they should be recognized as exceptions.

It is submitted that the cases, generally cited in support of the majority doctrine, have been decided to accord with the accepted authorities; that when traced to its source such accepted authority rests upon an exception to the better rule, that the power of a corporation to buy its own stock does not exist.

Thus in the case of *Burnes v. Burnes*[16] the court makes the following statement: "In the absence of constitutional or statutory prohibition, corporations have inherent power to buy, to sell, and to retire their own stock." The authorities for this broad statement, among others, are the cases of *Commissioners v. Thayer*[17] and *City Bank v. Bruce*.[18] The former case holds squarely, that, unless prohibited by law, a corporation may become the holder of a portion of its own shares, and cites as its only authority the *City Bank Case,* which case only involves the right of a corporation to take its shares in payment of debt. The authority for the decision in the *City Bank Case* is *Taylor v. Miami Exporting Company*.[19] This case merely decided that a bank may take its own stock in payment of a debt. There are no authorities cited, and the decision is arrived at by the following process of reasoning:

"It appears that they were at one time profitably employed in buying and selling stock of the Bank of the United States. If they could so vest their funds, why have they not the power to sell their own stock—if 'they think it most advantageous to the Company?' We think they have such power."

It is clear, at least in the series of cases above set forth, that the later decision went beyond the facts of their authorities. Chief Justice Marshall in *Cohens v. Virginia*[20] said:

[12] Coffin v. Greenless, etc., Co., (1882) 38 Oh. St. 275.
[13] Draper v. Blackwell, (1903) 138 Ala. 182, 35 So. 110.
[14] State v. Building Assn., (1879) 35 Oh. St. 258.
[15] Bank v. Overman Carr. Co., (1899) 17 O. C. C. 253.
[16] (1905) 137 Fed. 781.
[17] (1876) 94 U. S. 631, 24 L. Ed. 133.
[18] (1858) 17 N. Y. 507.
[19] (1833) 6 Ohio 176.
[20] (1821) 6 Wheat. (U. S.) 264 (399), 5 L. Ed. 257 (290).

"It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control in a subsequent suit, when the very point is presented for decision."

The question has not been directly passed upon in Minnesota. It is submitted that the interests of creditors, the interests of minority stockholders, and the interests of the investing public, are better served by the minority doctrine; that this doctrine rests upon reason and well established principles of law; that the majority doctrine had its inception in the broad, comprehensive and general language used in certain early cases, which language, instead of being confined to its facts, became authority for a general principle.

RECENT CASES

ACCORD AND SATISFACTION—ACCEPTANCE OF CONTRACT IN SATISFACTION OF FORMER CLAIM.—Plaintiff offered his services to defendant for the whole year of 1916 with the further stipulation that if defendant would accept such services for the entire year, a previous bill of some $900 against the defendant was to be cancelled. Defendant accepted the offer, but refused to carry out the contract and plaintiff sues for the original $900. *Held,* defendant is not liable because the new agreement and not the performance of it was accepted as satisfaction. *Tuttle v. Metz,* (Mass. 1918) 118 N. E. 291.

Accord and satisfaction is defined in *Hennessy v. St. Paul City Ry. Co.,* (1896) 65 Minn. 13, 67 N. W. 635, as being "the discharge of a contract, or cause of action, or disputed claim arising either in contract or tort by the substitution of an agreement between the parties in satisfaction of such contract, cause of action, or disputed claim and the execution of that agreement." For other and similar definitions, see 1 C. J. 523, and cases cited. *Bull v. Bull,* (1876) 43 Conn. 55.

The same general essentials necessary to the validity of a contract must be present in a contract of accord and satisfaction. There must be a meeting of the minds. *Hennessy v. St. Paul City Ry. Co.,* supra; *Fuller v. Kemp,* (1893) 138 N. Y. 231, 33 N. E. 1034, 20 L. R. A. 785, and note. Good or valuable consideration. *Manley v. Vermont Mutual Fire Insurance Co.,* (1906) 78 Vt. 331, 62 Atl. 1020, 6 Ann. Cases 562, and note; *Demeules v. Jewel Tea Co.,* (1908) 103 Minn. 150, 114 N. W. 733, 123 Am. St. Rep. 315, 14 L. R. A. (N.S.) 954. To be a bar to an action on the original claim, an accord must be wholly executed. *Hoxsie v. Empire Lumber Co.,* (1889) 41 Minn. 548, 43 N. W. 476; *Nassoiy v. Tomlinson,* (1896) 148 N. Y. 326, 42 N. E. 715, 51 Am. St. Rep. 695. Mere readiness to perform is not sufficient. *Mayo v. Leighton,* (1905) 101 Me. 63, 63 Atl. 298; *Clifton v. Litch-*

field (1870) 106 Mass. 34; nor is part performance. *Long v. Scanlon,* (1898) 105 Ga. 424, 31 S. E. 436. There may, however, be a valid accord and satisfaction, though the promise or agreement is not performed, if the agreement itself and not the performance thereof is accepted in satisfaction of a claim. *Sioux City Stock Yards Co. v. Sioux City Packing Co.,* (1900) 110 Iowa 396, 81 N. W. 712. See also 17 Har. L. Rev. 459, at page 465. *Bandman v. Finn,* (1906) 185 N. Y. 508, 78 N. E. 175, 12 L. R. A. (N. S.) 1134 and note. Whether performance of the agreement is meant as satisfaction or the agreement itself is a question of intention of the parties. *Gulf, Colorado, etc., Ry. Co. v. Harriet,* (1891) 80 Tex. 73, 15 S. W. 556; *Henderson v. McRae,* (1907) 148 Mich. 324, 111 N. W. 1057. But it also has been held that it must appear expressly in the agreement. *Pulliam v. Taylor,* (1874) 50 Miss. 251. The presumption is against the acceptance of the new promise as satisfaction of the old claim. *Woodward v. Miles,* (1851) 24 N. H. 289; *Henderson v. McRae,* supra. See also note in 6 Ann. Cases 564. The court in the instant case showed an unusual readiness to find that the new promise had been accepted in satisfaction of the old one.

ATTORNEY AND CLIENT—PRACTICE OF LAW—WHAT CONSTITUTES UNLAWFUL PRACTICE—DRAFTING A WILL IS PRACTICING LAW.—The Peoples Trust Company advertised in a certain newspaper that they would make wills; that the advice of their trust officers was at the service of the public entirely without obligation. One Gregory visited the office, and the officers called in an attorney who drew up a will. No charge was made for the services. *Held*: The defendant corporation is guilty of unlawfully practicing law. Practicing law is not confined to performing services in the court room, but includes legal advice and counsel, and the preparation of legal instruments and contracts, which embraced the drafting and supervising of the execution of wills. *People v. People's Trust Co.,* (1917) 167 N. Y. Supp. 767.

The above decision was made under Section 280 of the Penal Laws of New York, Laws of 1916 Chap. 254, which makes it unlawful for a corporation to furnish legal advice, to furnish counsel or attorney, or to advertise that either alone or together with, or by, or through any person, whether a duly and regularly admitted attorney at law or not it has or conducts an office for the practice of law, or for giving legal advice. What constitutes unlawful practice of law, is a question of vital importance to the men of the bar throughout the country. It is well recognized that since a corporation is not an attorney at law, it cannot practice law through attorneys employed by it. *Re Co-operative Law Co.,* (1910) 198 N. Y. 479, 92 N. E. 15. But it is also a well known fact that trust companies throughout the country have encroached upon the field of the lawyers in the practice of their profession. As was said in *United States Title Guaranty Co. v. Brown,* (1914) 86 Misc. Rep. (N. Y.) 287, 149 N. Y. Supp. 186, affirmed in 217 N. Y. 628, (Kelley, J.), "The profession of the law, one of the oldest known to civilization, involving the most sacred confidence between man and man, with its past of high ideals and service to humanity, has in the last quarter of a century suffered much from the inroads of

the new financial and business methods in this great land of ours. Whether by ill-advised attempts by corporate employers to dominate and direct attorneys and counsel in the conduct of litigation, whether by so-called title companies or casualty insurance corporations, the old ideals in the relation of attorney and client, which meant so much to mankind, have suffered and have been threatened with demoralization. This is wrong. The loss of the individual personal relation involved in the attempt by corporations to practice law is so serious to the community that it is against public policy, and I am inclined to think malum in se, but at any rate, there is no question that in this state it is unlawful by force of statute. . . ."

"In order to determine whether a corporation is guilty of unlawfully practicing law, it becomes necessary to determine what is included in the term "practicing law." In *Eley v. Miller,* (1893) 7 Ind. App. 529 (535), 34 N. E. 836, 837, the court said, "As the term is generally understood, the practice of the law is the doing or performing services in a court of justice. . . . But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured. . . ."

"In *re Duncan,* (1909) 83 S. C. 186, 65 S. E. 210, 24 L. R. A. (N.S.) 750, at 753, the court said, "According to the generally understood definition of the practice of law in this country, it embraces the preparation of pleadings . . . and in addition, conveyancing, the preparation of legal instruments of all kinds, and, in general, all advice to clients, and all action taken for them in matters connected with the law." New York has taken the lead in curbing unlawful practice of the law. In *People v. Title Guaranty & Trust Co.,* (1917) 168 N. Y. Supp. 278, the defendant company drew a bill of sale and a chattel mortgage for which small charges were made. The court held that the company was guilty of unlawfully practicing law. In an address in 1914, former Attorney-General Wickersham said that it used to be common to read advertisements of New York trust companies offering the services of their officers in the preparation of wills. N. Y. L. Jour. Nov. 25, 1914. Such advertisements no longer appear in the New York street cars or newspapers. Cohen, "The Law—Business or Profession" page 264. Minn. G. S. 1913, Sec. 4947, provides: "Every person not duly admitted to practice, who shall appear as an attorney at law in any action or proceeding in a court of record, except in his own behalf when a party thereto, or who for any consideration shall give legal advice, or in any manner hold himself out as qualified to give it or as being an attorney at law, shall be guilty of a gross misdemeanor. . . ."

CONTRACTS—RIGHT OF BENEFICIARY TO SUE.—One Mrs. Beman, being on the point of death, had her husband, a lawyer, draw up her will. The will as drawn up provided that the house in which the couple lived, which was the separate property of the wife, should go to the Society for Prevention of Cruelty to Animals in fee, after the death of the husband who was to have a life estate therein. The wife protested that she wanted the house to go to her niece, a member of the household. Fearing that

she would not live to be able to sign a new will if one were prepared, she extracted from her husband a promise that when he died he would provide for the niece in his will to the extent of the value of the house. The will of the husband failed so to provide. The niece sued on the promise. *Held:* The plaintiff had a moral claim, both upon the husband and the wife, and when the husband sought to divert the wife's property from her, against the wife's wishes, the plaintiff was not such a stranger to the contract that the husband can escape his obligation under it. *Seaver v. Ransom,* (1917) 168 N. Y. Supp. 454.

This case presents an interesting extension of the doctrine of *Lawrence v. Fox,* (1859) 20 N. Y. 268, but seems to be in line with the tendency of the New York court. For a discussion of the principles involved see 2 MINNESOTA LAW REVIEW 58.

CONTRACTS FOR BENEFIT OF THIRD PARTY—WHO MAY SUE.—The city of Red Wing entered into a contract, by way of franchise, with a light and power company, wherein it was provided that any change in the rates was to be made the subject of arbitration. The company threatened to increase the rates without arbitrating the matter. The city brought an injunction suit. *Held*: The city has an interest in maintaining the arbitration clause of the franchise in behalf of the inhabitants for whom it acted when granting the franchise; and since the right of the city and its inhabitants to relief rests upon the same grounds, this action will lie if there be a threatened breach of the contract as to the gas-consuming inhabitants, for thereby a multiplicity of suits in avoided. *City of Red Wing v. Wisconsin-Minnesota Light and Power Co.,* (Minn. 1918) 166 N. W. 175.

This decision seems to point to an extension, at least so far as public utility cases are concerned, of the established rule in Minnesota in regard to contracts for the benefit of third persons. If "the right of the city and its inhabitants to relief rests upon the same grounds," and, "a multiplicity of suits in avoided" by allowing the city to enjoin the breach of the contract, surely the implication must be that the citizen himself could sue under the contract so made for his benefit. It was said in 2 MINNESOTA LAW REVIEW 58, that *Jefferson v. Asch,* (1893) 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 Am. St. Rep. 618, pointed to the adoption of the New York view that a moral consideration running from the promisee to the third party was sufficient to support an action by the third party against the promisor. Subsequent cases have veered completely away from the implication, if such there was, in *Jefferson v. Asch,* supra; *Michaud v. Erickson,* (1909) 108 Minn. 356, 122 N. W. 325; *Kramer v. Gardner,* (1908) 104 Minn. 370, 116 N. W. 925. However, judging from the implication contained in the decision in the instant case, the result reached in *Wackenhut v. Empire Gas & Electric Co.,* (1917) 166 N. Y. Supp. 29, discussed in 2 MINNESOTA LAW REVIEW 58, would find sympathy in the Minnesota court today, though not on the basis of moral consideration.

CONTRACTS—DURESS AND UNDUE INFLUENCE—EXERCISED BY STRANGERS. —EQUITY.—Plaintiff, at a church meeting, used words toward the defend-

ant which accused her of an uncontrollable sexual desire in forcing her way to a seat supposed to be occupied only by men. Defendant threatened action for damages for slander. In satisfaction of her demand the plaintiff executed notes and a mortgage to the defendant. Plaintiff brought an action to enjoin the defendant from collecting or transferring the notes alleging that members of the church other than defendant had coerced him into executing the contract. *Held,* that while the circumstances did not show duress there was undue influence and coercion exercised by persons connected with the church and that this amounted to a social and mental force which controlled the free action of his will and justified the cancellation of the notes in equity. *Macke v. Jungels et al.,* (Neb. 1918) 166 N. W. 191.

"Duress exists where one, by the unlawful act of another, is induced to make a contract, or perform some act under circumstances which deprive him of the exercise of free will." *Fred Rueping Leather Co. v. Watke,* (1908) 135 Wis. 616, 116 N. W. 174. Inasmuch as no unlawful act appears in the instant case there could be no duress according to this definition. The real basis of duress, however, is not the means used but the actual condition of the mind at the time of the making of the contract now sought to be avoided. *Galusha v. Sherman,* (1900) 105 Wis. 263, 81 N. W. 495, 47 L. R. A. 417. Accordingly, the test for duress is not the effect these acts might have had on the mind of an ordinarily firm person but what effect did they have on the mind of the party in the particular case. *Anthony and Cowell Co. v. Brown,* (1913) 214 Mass. 439, 101 N. E. 1056. The instant case cites *Hartnett v. Hartnett,* 42 Neb. 23, 60 N. W. 362, as authority for the proposition that equity will interpose and give relief where a social and mental force controlling the free action of the will but not amounting to duress has been used against the plaintiff. But in that case the social and mental force so exerted was exercised by the defendant. Certainly, the instant case has gone far in holding that undue influence exerted by strangers to the contract will avoid it. It may, however, be justifiable on the theory that the real basis of duress, namely, the interference with the free action of plaintiff's mind, was present as a fact.

CONTRACTS—VALIDITY—CAPACITY—CONFLICT OF LAWS.—The defendant, a married woman domiciled in Texas as plaintiff knew, executed a continuing contract of guaranty while temporarily in Illinois, whereby she bound herself and her separate property to liability for her husband's debts. Plaintiff brought action on this contract in the federal court in Texas. *Held,* that although this contract would have been valid in Illinois had the defendant been domiciled there, it was unenforceable in Texas where such a contract is contrary to public policy and void. *Union Trust Co. v. Grosman et al.,* (1918) 245 U. S. 412, U. S. Adv. Ops. 1917-18, page 181, 38 S. C. R. 147. (Texas has adopted the common law and has no statute enabling a married woman to make a contract of guaranty.)

The general rule, supported by the great weight of authority, is that the validity, nature, obligation and interpretation of a contract shall be determined by the lex loci contractus. *Thomson-Houston Electric Co. v.*

Palmer, (1893) 52 Minn. 174, 53 N. W. 1137; *Manhattan Life Insurance Co. v. Johnson,* (1907) 188 N. Y. 108, 80 N. E. 658; *Acme Food Co. v. Kirsch,* (1911) 166 Mich. 433, 131 N. W. 1123. If deemed valid where made, it is usually deemed valid everywhere, and a state will not ordinarily refuse to entertain an action on such a contract made by one of its citizens in another state where the contract is valid. *Milliken v. Pratt,* (1878) 125 Mass. 374, 28 Am. Rep. 241; *Richter v. Frank,* (1890) 41 Fed. 859; *Garrigue et al. v. Kellar,* (1905) 164 Ind. 676, 74 N. E. 523, 108 Am. St. Rep. 324. When an action is brought on a contract in the courts of a state other than that in which it was made, the lex fori governs only matters relating to the remedy and course of procedure. *McElmoyle v. Cohen,* (1839) 13 Pet. (U. S.) 312, 10 L. Ed. 177; *Fryklund v. Great Northern Ry. Co.,* (1907) 101 Minn. 37, 111 N. W. 727.

It is clear that capacity or want of capacity to contract is a matter going solely to the nature or the obligation of the contract, and "in regard to questions of minority or majority, competency or incompetency to marry, incapacities incident to coverture, guardianship, emancipation, and other personal qualities and disabilities, the law of the domicile of birth, or the law of any other acquired and fixed domicile, is not generally to govern, but the lex loci contractus aut actus, the law of the place where the contract is made or the act done." Story, Conflict Laws, 8th Ed. Sec. 103. See also Sec. 241. Generally, capacity is not governed by the law of the place where the act is done, and there is no settled rule which determines what law is to govern in every case in which the question of capacity arises. In cases of conveyance of land the law of the situs of the property is controlling. *Fessenden v. Taft,* (1889) 65 N. H. 39, 17 Atl. 713. With respect to contracts generally and other commercial transactions, convenience and expediency require that one contracting party should not be compelled to ascertain at his peril whether the party with whom he is dealing is a minor or an adult according to the law of his domicile, or what the law is in the state where he may be domiciled, and consequently, there are numerous decisions to the effect that the question of capacity to contract is to be determined by the law of the state wherein the contract was made and not by the law of the domicile. *Milliken v. Pratt,* supra; *Nichols & Shepard Co. v. Marshall,* (1899) 108 Ia. 518, 79 N. W. 282.

The decision in the instant case is not based upon the question of capacity to make the contract in question. It is based upon the idea that such a contract of guaranty is contrary to the public policy of the state of Texas, wherefore the principles above stated are not involved; and a federal court sitting in Texas is bound to follow the law of the state in such a case. Based as it is upon the ground of public policy, the decision is not without some support, for there are several decisions to the effect that the principles of comity will not require a state to recognize or enforce a contract which directly contravenes the public policy of that state. *First National Bank v. Shaw,* (1902) 109 Tenn. 237, 70 S. W. 807, 97 Am. St. Rep. 840; *Fox v. Postal Telegraph-Cable Co.,* (1909) 138 Wis. 648, 120 N. W. 399; *Burrus v. Witcover,* (1912) 158 N. C. 384, 74 S. E. 11. On the other hand, it has been held that a state is bound by the principles of comity to recognize the validity of such a contract.

Wright v. Remington, (1879) 41 N. J. Law 48, 32 Am. Rep. 180; *Garrigue v .Kellar,* supra. Unless the contract be clearly immoral or inherently obnoxious and shocking, it seems that the latter line of cases is the better, and as a married woman's contract of guaranty hardly can be placed in this category, and since it is difficult to perceive in what way such a contract can possibly be contrary to public policy, the decision in the instant case is a rather surprising departure from the general rule that a contract, valid where made, is valid everywhere.

CORPORATIONS—BONDS—VALIDITY—IRREDEEMABLE BONDS.—A Chamber of Commerce issued bonds to subscribers to a building fund, which bonds provided that they should be redeemable at any time at the option of the corporation on thirty days' notice, or in case of failure to pay the stipulated annual interest. The bonds did not state a particular date for repayment. Plaintiff purchased one of these bonds and demands payment thereof with interest at 6 per cent, on the theory that the bonds are payable on demand or within a reasonable time, which has elapsed. *Held*: The bonds provided for a perpetual loan, payable only at the option of the corporation, or in case of failure to pay the annual interest. Such bonds while unusual are not invalid. *Schachme v. Corporation of Chamber of Commerce,* (1918) 168 N. Y. Supp. 791.

The irredeemable bond, or "perpetual debenture," though common in England, is rarely met with in this country. As the court found in the instant case, only three cases seem to have arisen in this country dealing with this sort of security. The first one, *Union Canal Co. v. Antillo,* (1842) 4 Watts & S. (Pa.) 553, where the certificate acknowledged that there was "due . . . $200 . . . the principal to be redeemable in the option of the company at any time after the first day of January, 1840 . . .," held that a perpetual loan was provided for. The language of this case is somewhat stronger than that of the instant case since, in the latter, the money is merely acknowledged to have been *received.* The next case to arise, *Taylor v. Philadelphia & Reading Railroad Co.,* (1881) 7 Fed. 386, held that the issue of deferred bonds, which were expressly made perpetual, was beyond the authority of the corporation under its power to borrow money. Such an attempt, in the absence of express legislative authority was deemed enjoinable at the suit of a stockholder. However, in *Philadelphia & Reading R. R. Company's Appeal,* (Pa. 1882) 4 Am. & Eng. R. R. Cases 118, the opposite view was taken by the Pennsylvania supreme court. In England, the authority of corporations to issue such securities seems never to have been questioned in the courts. However, doubts seem to have arisen whether they were not objectionable "on the ground that they constituted a clog on the equity of redemption, or infringed the rule against perpetuities. . . ." The matter is no longer an open one since the passage of the Companies Act, 1907, Sec. 14. See Simonson on the Companies Acts, p. 146, which declares such bonds valid. In the instant case such doubts could hardly arise since the right of redemption at the option of the corporation is expressly given.

DEEDS—WILLS—CHARACTER OF INSTRUMENT—DELIVERY.—One Shaull and his wife gave a warranty deed to eighty acres of land to their son. Following the description of the land was this clause: "This deed to take effect immediately upon the death of both the grantors herein." The deed was deposited with a banker, and his receipt recited the fact that it was deposited in escrow, giving the conditions of delivery. The deed was subsequently recorded by the banker and delivered to the grantee under authority of the grantors. On the death of the husband, the remaining children, four in number, brought a suit to be quieted in their title to four-fifths of the land, on the ground that the instrument was void as being testamentary in its nature. *Held:* That this is a deed which passes a present interest, but postpones the enjoyment thereof. *Shaull v. Shaull,* (Iowa, 1918) 166 N. W. 301.

The same case was previously considered by the court, *Shaull v. Shaull,* 160 N. W. 36, the court at that time holding that the provision that the deed was not to take effect until the death of the grantors was a limitation on the grant, and postponed the passing of any interest not merely the enjoyment of it. As a result the deed was held to be testamentary in its character. The instant case represents a complete "about face," and the court has succeeded in executing this without even mentioning the fact that the case was up before and that exactly the opposite result was reached. The court proceeds upon the theory that the facts establish an apparent intent to pass a present interest, and that the provision for taking effect after the death of the grantors merely reserves a life estate in them. It is further stated that the instrument must be construed most strongly against the grantor. The case presents clearer evidence of intention to pass a present right than does that of *Hagen v. Hagen,* (1917) 136 Minn. 121, 161 N. W. 380. In that case an instrument was drawn up as a warranty deed containing 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." Delivery was not made until after the death of the grantor. Nevertheless, the court held that this deed passed a present interest and was not testamentary in its nature. For a discussion of the principles involved in the latter case see 1 MINNESOTA LAW REVIEW 523.

EMINENT DOMAIN—AWARD—PERSON ENTITLED—VENDOR AND PURCHASER.—In the establishment of a drainage district, award was made for anticipated injury to land while defendant vendor was owner, but no security for payment of damages was given nor payment of the same made. The land was later sold to plaintiff, the conveyance being silent as to the right to the condemnation award. *Held*: The vendee is entitled to it. *Griffith v. Drainage District,* (Iowa 1918) 166 N. W. 570).

In eminent domain proceedings, compensation is generally paid to the person who is owner at the time the land is actually taken or injured. 15 Cyc. 788. The award of itself cannot constitute a taking or injury to the land within the meaning of the statutes because the condemnor has no right to take until payment or until security is given for payment. *Burns v. Chicago, etc., Ry. Co.,* (1900) 110 Iowa 385, 81 N. W. 794; *Sis-*

son v. Board of Supervisors, (1905) 128 Iowa 442, 104 N. W. 454, 70 L. R. A. 440. In the recent case of *People ex rel. Stuckart v. Price et al.* (1918) 118 N. E. 759, it was held that since title to condemned property does not vest in the condemnor until damages are paid, a lien for taxes unpaid by the owner attaches to the property during the pendency of the condemnation proceedings, and is not divested thereby. The owner is not entitled to compensation until there is damage or until the land is taken, *East San Mateo Land Co. v. Southern Pac. R. Co.,* (1916) 30 Cal. App. 223, 157 Pac. 634, or at the earliest, when the proceedings have reached the point where it is not subject to abandonment and the right to compensation becomes an enforceable demand against the condemnor. *In re Twelfth Ave. South,* (1913) 74 Wash. 132, 132 Pac. 868, Ann. Cas. 1915A 730. It follows, therefore, that the award in the principal case did not cause injury or give the then owner an enforceable right to compensation. It could at most give an option to the condemnor to take the land on payment of the damage. *Gear v. Dubuque, etc., R. Co.,* (1866) 20 Iowa 523, 89 Am. Dec. 550; *St. Louis, etc., R. Co., v. Wilder,* (1876) 17 Kan. 239. In the case of *Underwood v. Penn. etc., R. Co.,* (1917) 255 Pa. 553, 99 Atl. 64, it was held that the owner at the time the security was entered was entitled to the damages as against the heirs of the person who was owner when the railroad route was adopted. It is settled that such a claim for damages is personal and does not run with the land. *East San Mateo Land Co., v. Southern Pac. R. Co.,* supra; *Kaufmann v. City of Pittsburg,* (1915) 248 Pa. 41, 93 Atl. 779; 10 R. C. L. 215; 15 Cyc. 795. Action for damages must be brought in the name of the owner and not his assignee. *Ferrell v. United States,* (1914) 49 Ct. Cl. 222.

In the principal case the security was given and the land was taken after the land had passed to the vendee, who, both on principle and authority is entitled to the compensation unless it be expressly reserved by the vendor. See *Chandler v. Morey,* (1902) 195 Ill. 596, 63 N. E. 512; *Obst v. Covell,* (1904) 93 Minn. 30, 100 N. W. 650.

FRAUDULENT CONVEYANCES—CONTRACTS—MARRIAGE A VALUABLE CONSIDERATION—CONSTRUCTIVE NOTICE TO GRANTEE.—A judgment having been recovered against James Conway, in order to evade payment thereof, he conveyed his realty to his son, William, who immediately renewed an offer of marriage to one Isabelle McGrath, a previous offer having been rejected by her. As an added inducement William offered to convey to her all the realty which he had recently acquired from his father, and under these circumstances she promised to marry him. William had the agreement put in writing and properly signed by his fiancée and himself. Isabelle McGrath was totally ignorant throughout of the ulterior purpose of the conveyance. In an action by the creditors it was *held,* that the wife was an innocent purchaser for value and that the land in her hands was free from creditors' claims. *American Surety Co. v. Conway,* (N. J. 1917) 102 Atl. 839.

It has long been settled that an antenuptial settlement supported only by the promise to marry is valid and conveyances in pursuance thereof cannot be set aside by creditors unless it can be shown that the fraudu-

lent motive was known to both parties. *Magniac v. Thomson,* (1833) 7 Pet. (U.S.) 348, 8 L. Ed. 709; *Prewit v. Wilson,* (1880) 103 U. S. 22, 26 L. Ed. 360; *Huntress v. Hanley,* (1907) 195 Mass. 236, 80 N. E. 946. If, however, the antenuptial agreement was merely verbal and hence void under the statute of frauds the creditors may procure the setting aside of a conveyance made in pursuance of such verbal contract. *Keady v. White,* (1897) 168 Ill. 76, 48 N. E. 314; *Barnes v. Black,* (1899) 193 Pa. 447, 44 Atl. 550, 74 Am. St. Rep. 694; *Gagnon v. Baden-Lick Sulphur Springs Co.,* (1914) 56 Ind. App. 407, 105 N. E. 512. Although the innocence of the grantee is ordinarily a perfect defence to an action contesting the sale, yet the ordinary rule respecting fraudulent conveyances applies, and the sale may be set aside if the grantee was possessed of facts sufficient to put him on inquiry. *Ferguson v. Daughtrey,* (1897) 94 Va. 308, 26 S. E. 822; *Gollober v. Martin,* (1885) 33 Kan. 252, 6 Pac. 267. It has been held, however, that to invalidate a sale the grantee for a valuable consideration must have had actual notice of the fraudulent intent of the vendor and participated therein and it is not enough to show that he had knowledge of facts sufficient to put a prudent person on inquiry. *Van Raalte v. Harrington,* (1890) 101 Mo. 602, 14 S. W. 710, 11 L. R. A. 424, 20 Am. St. Rep. 626. As to what facts will be sufficient to put the grantee on inquiry there is considerable variance. It has been held, for example, that where the purchaser of a stock of goods knew nothing of the business or of the value of the goods and failed to invoice them or to investigate the title, and paid for them only with promissory notes, these facts supported the finding that the sale was fraudulent and that the purchaser had knowledge of the fraud. *Benson v. Nash,* (1899) 75 Minn. 341, 77 N. W. 991. Where an alleged fraudulent grantee knew that the grantor intended to use the consideration in paying certain creditors in preference to others it was held not to show a fraudulent intent. *Scholle v. Finnell,* (1914) 167 Cal. 90, 138 Pac. 746. And where one of three purchasers participated in the fraud the sale was set aside, holding that the innocence of the other two parties was immaterial. *Maires v. Northside Metal & Machinery Co.,* (1914) 221 Fed. 115.

The instant case is peculiar in that the vendor admitted his fraudulent intent, and successfully planned to place his intended wife in the position of an innocent purchaser for value.

GUARANTY—EFFECT OF RELEASE OF CO-GUARANTOR.—Taylor and Meyers signed a guaranty to the plaintiff, in consideration of future advances of credit to their principal, a trading corporation. The guaranty was written in the singular, with a provision for revocation "by written notice from me to you." Meyers gave notice to the plaintiff, but no one notified the co-guarantor, Taylor, of the revocation. The plaintiff continued to furnish goods to the principal. In a suit against the remaining guarantor it was *held* that he also was discharged from obligation on account of indebtedness incurred subsequent to the revocation by his co-guarantor, on the ground that the release of a guarantor discharges his co-guarantor. *Stone-Ordean-Wells Co. v. Taylor,* (Minn. 1918) 166 N. W. 1069.

For a discussion of the principles involved see 2 MINNESOTA LAW REVIEW 453.

INFANTS—INFANT SUING BY NEXT FRIEND—JUDGMENT—SATISFACTION.—An infant recovered judgment against defendant in suit brought by the infant's father suing as next friend. Defendant paid the judgment to the father. In action of debt upon the same judgment brought against the defendant by the infant suing by his guardian, *Held*, that payment to infant's next friend did not satisfy the judgment. *Paskewie v. East St. Louis, etc., Ry.*, (Ill. 1917) 117 N. E. 1035.

Where an infant sues by his next friend it is almost universally held that the next friend cannot discharge the judgment upon receiving payment thereof. *Horowitz v. Independent Order*, (1913) 183 Ill. App. 162; *Cody v. Roane Iron Co.*, (1900) 105 Tenn. 515, 58 S. W. 850. See also notes 7 Ann. Cas. 607; 11 L. R. A. (N.S.) 913. Most of the few cases which hold that the next friend can discharge a judgment in favor of the infant are not inconsistent with this general rule, since they are based on statutes which require the next friend to give a bond to secure the payment of such moneys to the infant. *Baker v. Pere Marquette R. Co.*, (1905) 142 Mich. 497, 105 N. W. 1116, 3 L. R. A. (N. S.) 76; *Oxford v. Sutton*, (1906) 127 Ga. 162, 56 S. E. 298; *Wileman v. Met. St. Ry. Co.*, (1903) 80 App. Div. 53, 80 N. Y. Supp. 233. A few cases, however, are squarely in conflict with the holding of the instant case. *Baltimore, etc., R. Co. v. Fitzpatrick*, (1872) 36 Md. 619; *State v. Ballinger*, (1905) 41 Wash. 23, 82 Pac. 1018, 3 L. R. A. (N.S.) 72. Furthermore, the next friend has no power to bind the infant by a compromise of his claim. *Burt v. McBain*, (1874) 29 Mich. 260; *Tripp v. Gifford*, (1891) 155 Mass. 108, 29 N. E. 208, 31 Am. St. Rep. 530. Such compromise is void whether made before judgment or after. *Fletcher v. Parker*, (1903) 53 W. Va. 422, 44 S. E. 422, 97 Am. St. Rep. 991; *Johnson v. McCann*, (1895) 61 Ill. App. 110. If the next friend makes such compromise, the infant may recover from him the amount of the judgment with interest. *Forbes' Heirs v. Mitchell*, (1829) 1 J. J. Marshall (Ky.) 440. A compromise approved by the court, however, is held valid. *Butler v. Winchester Home for Aged Women*, (1914) 216 Mass. 567, 104 N. E. 451.

In the instant case the defendant could have protected itself by paying the money into court. See *Smith v. Redus*, (1846) 9 Ala. 99, 49 Am. Dec. 429.

NAVIGABLE—WATERS—ADVERSE POSSESSION BY THE STATE—ARTIFICIAL ENLARGEMENT.—The Outing Club owned land on Horseshoe lake. One thousand acres of it was flooded in 1905 when a levee was put in at the outlet of the lake. The Club unsuccessfully attempted to lower the lake by a siphon; and it now claims to exclude the public from hunting and fishing by fencing in its land. *Held*: The efforts to siphon did not interrupt the state's possession and after seven years from the date of the flooding the title is in the state, and the right to fish and hunt thereon is in the public. *State v. Parker*, (Ark. 1918) 200 S. W. 1014.

In Arkansas it is held that the title to the bed of a navigable stream is in the state as trustee for the public. *Barboro v. Boyle,* (1915) 119 Ark. 377, at 380, 178 S. W. 378. The result in the instant case cannot be sustained on prescriptive grounds.

An essential requisite of title by adverse possession is intent to claim adversely; it must be hostile and under a claim of right. *Rupley v. Fraser,* (1916) 132 Minn. 311, 156 N. W. 350. This elementary rule is recognized in Arkansas. *Madlock v. Owen,* (1912) 105 Ark. 460, 151 S. W. 995. This is as true where the adverse possessor is the state as in the case of ouster by an individual. Here, the levee was constructed not for the purpose of flooding the land in question, but for wholly different purposes; the backing up of the waters was a mere incident, and evinced no intention on the part of the state to oust the owners from their possession or to claim either title or possession for itself. Such possession was wholly unnecessary for levee purposes. In the case of *Barboro v. Boyle,* supra, involving the same lake and levee, it was held that the land owners had the right to siphon out the waters so as to restore the lake to its former level. Their efforts to do so were futile, but, if they had been successful, no interest of the state would have been prejudiced thereby, and in fact, it does not appear that any attempt was made to prevent them. Under such circumstances it would be a stretch to call the state's possession of the submerged land hostile or adverse. Further, title by adverse possession is founded upon the principle that the disseisee had a cause of action against the disseisor which has been barred by lapse of time. But in this case the owners were powerless to prevent the flooding. It is not perceived that they could have maintained ejectment against anybody. The state was damaging their property, but not even asserting an easement of flowage. Whatever damage they may have suffered is supposed to have been compensated for in the proceedings in eminent domain, if consequential damage is an element of compensation in Arkansas. The case for the state is not as strong as is the case of one who erects a dam for the purpose of raising a head of water and thereby floods the land of upper proprietors. Yet such a person would, at most, acquire by prescription only an easement of flowage and the right perpetually to maintain the dam. *Swan v. Munch,* (1890) 65 Minn. 500, 67 N. W. 1022; *Kray v. Muggli,* (1901) 84 Minn. 90, 86 N. W. 882, 1102. All of the Arkansas cases cited in support of the opinion in the instant case are cases where an easement only was acquired by prescription. In the *Muggli Case* it would have been thought an amazing doctrine if it had been asserted that the owner of the dam acquired title to all the vast tract of submerged land extending for sixteen miles up the river.

McCulloch, C. J., in the instant case, while denying the state's title by prescription, asserts its right on the ground that the lake has encroached upon these lands, the defendants have abandoned their efforts to reclaim their land, and the state is the owner of the entire bed as enlarged. Land gradually encroached upon by water ceases to belong to the former owner; but such is not the rule where the change occurs by sudden advance of water. *In re Hull and Selby Railway,* (1839) 5 M. & W. 327, 8 L. J. Ex. 260. In *Foster v. Wright,* (1878) 49 L. J. C. P. 97 L. R. 4 C. P.

Div. 438, 44 J. P. 7, the river-bed shifted by imperceptible degrees until it covered part of the defendant's land. The court held that the river had not lost its identity and that the title to the bed had not changed. In a Missouri case the defendant owned a lot which was separated from the river by the plaintiff's lot. The plaintiff's lot was gradually washed away, as was part of the defendant's lot. Later both lots were restored and additional land was added. The court held that the plaintiff had lost his land, because the defendant's lot had become riparian land and he took the new land as an accretion. *Widdecombe v. Chiles,* (1903) 173 Mo. 195, 73 S. W. 444, 61 L. R. A. 309, 96 Am. St. Rep. 507. "The whole doctrine of accretion is based on the theory that from day to day, week to week, and month to month a man cannot see where his old line of boundary was by reason of the imperceptible accretion of alluvium to his land." Smith, L. J., in *Hindson v. Ashby,* [1896] 2 Ch. 1, 27, 65 L. J., Ch. 515, 74 L. T. 327, 45 W. R. 252, 60 J. P. 484. But where the land of the riparian owner is swept away by avulsion, the title remains in the riparian owner. *Stockley v. Cissna,* (1907) 119 Tenn. 135, 104 S. W. 792. None of the cases seem to hold that sudden inundation of the land changes the title to it. Wisconsin has held that the title of the state to submerged lands of lakes and rivers will be extended to include lands covered by artificial raising of the water provided such artificial condition continues for the prescriptive period so as to become the natural condition. *Village of Pewaukee v. Savoy,* (1899) 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859. It has been held that the state can acquire title to a pond by adverse possession. *Attorney-General v. Ellis,* (1908) 198 Mass. 91, 84 N. E. 430. But unless we are willing to hold that one can be deprived of his land openly and against his will without appropriate proceedings, and without affording him any means by ejectment or otherwise of asserting his rights, it is difficult to see how the riparian owner here has lost his title to the inundated land.

SCHOOLS AND SCHOOL DISTRICTS—*STATUTE* REGULATING AFFILIATION WITH FRATERNITIES—VALIDITY.—Under an Iowa statute, Sec. 2782a, Code Supplement 1913, as amended by Act of the 37th General Assembly, making it unlawful for any pupil of a public school to join or belong to a fraternity or society, the school board saw fit to make a rule which practically embodied the words of this statute, and upon the rule being broken by the plaintiff and others, they were excluded from the benefits of the public school. Plaintiff attacked the statute as unconstitutional, and sought a mandatory order to restore him to admission to the school. *Held,* the statute was not unconstitutional and the petition was accordingly dismissed. *Lee v. Hoffman,* (Ia. 1918) 166 N. W. 565.

In *Board of Trustees v. Waugh,* (1913) 105 Miss. 623, 62 So. 827, affirmed by the Supreme Court of the United States in 237 U. S. 589, 35 S. C. R. 720, 59 L. E. 1131, a similar statute was held not to be against the 14th amendment of the constitution, and hence enforcible. The question arose in Seattle, Washington, under somewhat different circumstances. Here the school board passed a rule prohibiting any student from joining any of the student activities if he belonged to a fraternity or secret society.

The rule did not, however, prohibit attendance at school. The rule was held reasonable and not unfair. *Wayland v. Hughes,* (1906), 43 Wash. 441, 86 Pac. 642, 7 L. R. A. (N. S.) 352. A somewhat similar rule was put into effect by the Chicago Board of Education, and the court in *Wilson v. Board of Education,* (1908) 233 Ill. 464, 84 N. E. 697, 15 L. R. A. (N. S.) 1136, 13 Ann. Cas. 330, held such a rule to be within the reasonable exercise of the Board's power and discretion as to the management of the schools, and not in violation of the state constitution.

The only case appearing to be contra to this doctrine is *State v. White,* (1882) 82 Ind. 278, 42 Am. Rep. 496. Here the Board of Trustees of Purdue University passed a rule making one of the requirements of admission to the school the signing of a pledge by the individuals to refrain from joining or having anything to do with fraternities. The court held this to be an unreasonable exercise of the power held by the trustees to regulate the school affairs, but stated that after the student once got into school such a rule could take effect, as then the authorities had a right to properly regulate the school affairs, and this would come within that right.

SPECIFIC PERFORMANCE—VENUE—STATUTE.—In an action brought in the district court of Pennington county to compel specific performance of a contract for the sale of land situated therein, defendant, a Ramsey county corporation, demanded a change of venue to that county. Upon refusal it sued out a writ of mandamus to have the files transferred. *Held,* action is not wholly local under Minn. G. S. 1913 Sec. 7715, but is transitory. *State ex rel. Johnson Land Company v. District Court,* (Minn. 1917) 164 N. W. 1014.

In the absence of statute equity regards an action for the specific performance of a contract respecting land as one in personam. *Massie v. Watts,* (1810) 6 Cranch (U. S.) 148, 3 L. Ed. 181. See also note in 3 Ann. Cas. 1004. In most states statutes have been passed similar to the one set up by the plaintiff in the instant case to the effect that actions for the recovery of real property and the determination in any form of an estate or an interest therein shall be tried in the county where such real estate is situated. The great majority of decisions seem to be in accord with the instant case, holding that this statute applies only to cases where the judgment operates directly on the land itself and not where it has merely a consequential effect thereon. *Hearst v. Kuykendall,* (1856) 16 Tex. 327; *Close v. Wheaton,* (1902) 65 Kan. 830, 70 Pac. 891; *Silver Camp Mining Company v. Eickert,* (1904) 31 Mont. 488, 38 Pac. 967, 67 L. R. A. 940, 3 Ann. Cas. 1000 and note on p. 1004; *Morgan v. Bell,* (1892) 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614. A contrary construction of the statute obtains in a few jurisdictions where such action is held to affect the realty and therefore is local. *Hall v. Gilman,* (1902) 77 N. Y. App. Div. 464, 79 N. Y. Supp. 307; *Ensworth v. Holly,* (1863) 33 Mo. 370. Another view of the statute is that the action may be brought either in the county of the res or in the county of the defendant's residence. *Burrow v. Clifton,* (1914) 186 Ala. 297, 65 So. 58. The instant case, though seemingly in conflict with the words of the statute is in line with the weight

of authority in holding that the statute did not change the old equity rule as to specific performance of contracts to convey land.

STATUTE OF FRAUDS—CHECK—PAYMENT.—Plaintiffs and defendant entered into an oral contract for the sale of cattle, and plaintiffs paid the purchase price in the form of a bank check. This check was given and taken without any agreement between the parties that it should constitute payment and discharge the debt. A dispute having arisen as to the amount of the check, defendant tendered it back to the plaintiffs without ever having presented it to the bank upon which it was drawn for payment. *Held,* that this check did not constitute such payment as would take the contract out of the statute of frauds. *Bates et al. v. Dwinnel,* (Neb. 1917) 164 N. W. 722.

A check, according to the commonly accepted definition, is a bill of exchange drawn on a bank payable on demand. N. Y. Laws, 1909, Chap. 43, Sec. 321; Minn. G. S. 1913 5997. There follows from this the general rule that in the ordinary transaction a check must be presented for payment and accepted by the drawee in order to constitute a valid tender, that is, the mere handing over of a check is not sufficient to constitute an absolute payment. *Collier v. White,* (1889) 67 Miss. 133, 6 So. 618; *Te Poel v. Shutt et al.,* (1899) 57 Neb. 592, 78 N. W. 288; *Rumpf et al. v. Schiff et al.,* (1908) 109 N. Y. Supp. 51. The reason is that a check does not operate as an equitable assignment, even though there be funds in the hands of the drawee to meet its payment, *Florence Mining Co. v. Brown,* (1888) 124 U. S. 385, 8 S. C. R. 531, 31 L. Ed. 424; N. Y. Laws, 1909, Chap. 43, Sec. 325; Minn. G. S. 1913 Sec. 6001; for at any time before the check is presented for payment and accepted by the drawee, the maker may withdraw his funds or may stop the payment of his check and the banker will be bound by his countermand. Consequently, it is generally held that a creditor will not be compelled to accept his debtor's check in payment of an indebtedness. *Grussey v. Schneider,* (N. Y.) (1875) 50 How. Pr. 134. In Minnesota there has been no controversy on this point, for as was said by Justice Mitchell in *National Bank of Commerce v. Chicago, etc., R. Co.,* (1890) 44 Minn. 224, 46 N. W. 342, 9 L. R. A. 263, 20 Am. St. Rep. 566, "Nothing is better settled than that a check is not payment, but is only so when the cash is received on it."

If, however, there is an agreement between the parties that the check shall constitute payment and discharge the debt, then no question arises, for parties are at liberty to make such an agreement if they wish. But such agreement must be in specific and express terms. It will not be presumed that the mere acceptance of the check is an agreement that it is itself a payment of the amount therein named. *Groomer v. McMillan,* (1910) 143 Mo. App. 612, 128 S. W. 285; *Johnson-Brinkman Co. v. Central Bank,* (1893) 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615. The presumption is that the check is but a mode of making a cash payment, and is only conditional. *National Bank of Commerce v. Chicago, etc., Co.,* supra.

It is settled beyond a question that the payment which is necessary to take an oral contract out of the statute of frauds need not be in money,

but may be in anything of value. *Howe & Co. v. Jones et al.*, (1881) 57 Iowa 130, 8 N. W. 451, 10 N. W. 299; *Dow v. Worthen*, (1864) 37 Vt. 108; *Kuhns v. Gates*, (1883) 92 Ind. 66. The question as to whether or not a check is a thing of value was discussed in *McLure v. Sherman*, (1895) 70 Fed. 190, and it was held that a check drawn upon a deposit in the bank named therein as drawee, had a money value, and must be considered as sufficient payment to take an oral contract out of the statute. This is directly contrary to the result reached in the principal case, but the principal case seems to be correct, for it is in line with the decisions of the courts relative to the nature and effect of a check, and with the more numerous decisions that in the absence of evidence that the check was given and taken under a special agreement, there was no such payment as to take the contract out of the state. *Logan v. Carroll*, (1897) 72 Mo. App. 613; *Hessberg v. Welsh*, (1914) 147 N. Y. Supp. 44; *Groomer v. McMillan, supra.*

VENDOR AND PURCHASER—PURCHASER'S EQUITABLE INTEREST—PAYMENTS—ADJUDICATION.—Plaintiff and defendant entered into an oral contract whereby the defendant agreed to build a house and convey it to the plaintiff, who agreed to accept it and pay for it by installments. Plaintiff took possession, made improvements, paid installments at irregular intervals, but in advance of accruals. Defendant attempts to repudiate and plaintiff seeks specific performance with a prayer for general relief. *Held*, there was sufficient part performance to take the contract out of the statute of frauds and the plaintiff is entitled to an adjudication of his equitable title though not to specific performance. *Porten v. Peterson*, (Minn. 1918) 166 N. W. 183.

What is sufficient part performance of an oral contract for the sale of land to satisfy the statute of frauds is a question on which the courts are not in harmony. Some courts hold mere possession by the vendee sufficient. *Jomsland v. Wallace*, (1905) 39 Wash. 487, 81 Pac. 1094. While others hold that mere possession standing alone is not sufficient. *Wisconsin, etc., Ry. Co., v. McKenna*, (1905) 139 Mich. 43, 102 N. W. 281; *Heflin v. Milton*, (1881) 69 Ala. 354, (decided under peculiar statute). Still others repudiate the entire doctrine of part performance. *Fischer v. Kuhn*, (1877) 54 Miss. 480. In any case, where part performance is held to take the contract out of the statute of frauds, such possession or other acts required must have been in pursuance of the contract and in execution of it. *Wood v. Thornly*, (1871) 58 Ill. 465. *Benedict v. Bird*, (1897) 103 Iowa 612, 62 N. W. 768. For a collection of the cases on this subject see 3 L. R. A. (N. S.) 790. The nature of the rights of a vendee under an executory contract for the sale of land prior to the time when he is entitled to call in the legal title is not altogether clear. Some courts speak of him as being the equitable owner. *Coel v. Glos*, (1907) 232 Ill. 142, 83 N. E. 529, 15 L. R. A. (N.S.) 413, and note. Others deny that such vendee has any equitable title.. *Bradley v. Bell*, (1905) 142 Ala. 382, 38 So.

759. That an adjudication may be had in equity of a present claim, though unchoate and susceptible of change, was held in the case of *Slingerland v. Slingerland,* (1910) 109 Minn. 407, 124 N. W. 19. Though the facts in the instant case are somewhat unusual, the principles of equity involved seem fairly well settled.

BOOK REVIEWS

AMERICAN CITY PROGRESS AND THE LAW. By Howard Lee McBain. New York: Columbia University Press. 1918. Pp. viii, 269. Price $1.50.

The social frontiers of modern society are unquestionably to be found in the great centers of industry and commerce, our cities. It is there that the richest and the poorest, the most cultured and the most degraded, dwell in cramped and disagreeable juxtaposition. There it is that squalid and pernicious slums, with their stark, half-lighted and ill-ventilated tenements crowd the "better residence districts" steadily out toward the suburbs. The work of "leveling up" these conditions, of narrowing the gap between the fortunate and the wretched, is the never ending problem of our cities. If there be any social problems, they will be found most acute in urban districts; and if there be any legal impediments to social progress, the cities are likely to be among the first to find them out.

It is, therefore, particularly interesting to find a book dealing with "American City Progress and the Law." This volume, which now comes from the pen of the Eaton Professor in Columbia University, is to be read in connection with his recent exhaustive study of "The Law and the Practice of Municipal Home Rule," 1916, and the much earlier volume on "Municipal Home Rule" by his predecessor, Professor Goodnow, now president of Johns Hopkins University.

The study before us covers the following topics: home rule by legislative grant, the rule of strict construction of municipal powers, the control of the smoke nuisance, and of billboards, the regulation of building heights, zoning, excess condemnation, municipal ownership of public utilities, control over living costs, provisions for recreation, and the promotion of commerce and industry by cities. From this statement it will be seen to constitute a study both in constitutional law and in the law of municipal corporations.

In form it is a book of lectures, a type of discourse with well-known short-comings and advantages. In felicity of style it is better than most books of its kind. It is not an ordinary legal commentary, nor a digest of many cases, useful as a book of ready reference. Far better, though not as practical as that, it is a sane and well considered discussion of a few selected but fundamental legal principles applied to new city problems. In a word, it is a study of constitutional limitations, and paticularly of the limits beyond which the police power, and the powers of eminent domain and taxation, cannot be extended in the solution of certain pressing urban questions.

McBain always thinks clearly and directly, and he clings to fundamentals with tenacity. This is a great merit in a book which deals with the fringes of the law and aims to advance its frontiers. Much of the work is of a pioneer nature, as in the chapters on "home rule by legisla-

tive grant," and on what has been unfortunately dubbed "excess condemnation." Some of the older ground covered is equally difficult, due to contradictory opinions in different jurisdictions, yet we think the author has been most successful in finding and stating the principles. In several cases, to be sure, he is compelled to state the principle which ought to be, rather than that which is accepted by the courts. While thus expressing his own thoughts, however, he shows a nice discrimination. He indulges in no bizarre notions nor does he give vent to any captiousness toward the courts. As a specialist in the field, he has the right and the duty to express his mature opinions, which in this case are made the more valuable by the moderation of his language and his clearly evinced scientific attitude. We recommend to any reader the scattered passages on aesthetics as a public purpose (see index), and the brief section on "the protection of property values as a subject of the police power" (pp. 119-123), as suggestive arguments for some much needed extensions of the law in the interest of municipal progress. Both recall the Minnesota case of *State ex rel. Lachtman v. Houghton* (see this REVIEW, vol. i, pp. 86-87). On the other hand it must be said that the section on "advertising the city" in chapter IX is unsatisfactory, and that chapter VI on "municipal ownership of public utilities" is not up to some other parts of the book.

Taken as a whole it is the kind of book which the municipal reformer needs and which the legal profession cannot afford wholly to neglect. Its outlook is far more hopeful than we had been led by the title to expect, and it points out unmistakably some important forward steps which need to be taken in making the law a better instrument of municipal and social progress.

WILLIAM ANDERSON.

University of Minnesota.

HANDBOOK OF CRIMINAL PROCEDURE. Wm. L. Clark, Jr. Second edition by William E. Mikell. St. Paul: West Publishing Company. 1918. Pp. xi, 748. Price $3.75.

CASES ON FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS. By Albert M. Kales. St. Paul: West Publishing Co. 1917. Pp. xxvi, 1456. Price $6.00.

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THE RAILROAD COMMISSION AS A MODEL FOR JUDICIAL REFORM[1]

"JUSTICE," said Daniel Webster, "is the greatest interest of man on earth. It is the ligature which holds civilized beings and civilized nations together. Wherever its temple stands, and so long as it is honored, there is a foundation for social security, general happiness and the improvement and progress of our race. And whoever labors upon this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher to the skies, links himself in name, fame, and character with that which is, and must be, as durable as the frame of human society."

It is our high privilege and duty as members of the Bar to tend the flame which burns in the Temple of Justice so that all who journey to the Temple, be they men, women or children, rich or poor, shall have justice administered to them simply, directly and fairly. Are the lawyers of America doing their duty?

Speaking before the American Bar Association in 1916, Elihu Root said:

"Every lawyer knows that the continual reversal of judgments, the sending of parties to a litigation to and fro between the trial courts and the appellate courts, has become a disgrace to the administration of justice in the United States. Everybody knows that the vast network of highly technical rules of evidence and procedure which prevails in this country serves to tangle justice in the name of form. It is a disgrace to our profession. It is a disgrace to our law and a discredit to our institutions."

[1] Based upon the annual address delivered before the California State Bar Association, September 27, 1917.

William H. Taft, in his presidential message of December 1910, declared:[2]

"One great crying need in the United States is cheapening the cost of litigation by simplifying procedure and expediting final judgment. Under present conditions, the poor man is at a woeful disadvantage in a legal contest with the corporation or a rich opponent. The necessity for reform exists both in the United States courts and in all the state courts."

Roscoe Pound, now dean of Harvard Law School, said to the American Bar Association in 1906:[3]

"Our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice—direct results of the organization of our courts and the backwardness of our procedure—have created a deep seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community."

These strictures on the procedure of our courts are not new. For years our bar associations, both state and national, have been drawing attention to these conditions and have resolved that they should be remedied. However, apart from the reform by the Supreme Court of the United States of the Equity Rules in the federal courts and the institution of the municipal court of Chicago and a few similar courts, little actual progress has been made in the reform of court procedure.

In the meantime, our people have become more and more discontented with the delays and technicalities which attend the administration of justice by most of our courts. Out of this discontent has sprung the most significant phenomenon in the recent judicial history of the United States—the determination of controversies by the simple and efficient procedure of administrative tribunals instead of by the courts.

The administration of justice by administrative boards or commissions is not merely of great historic interest but also, in my opinion, points definitely and concretely to specific steps which can be taken to insure a more direct, speedy and satisfactory administration of justice in the courts.

I prefer to be constructive rather than destructive. It would give me far more satisfaction to face forward and to render assistance in actually producing a better order of things than to contemplate and bemoan the imperfections of the present. For

[2] 46 Cong. Rec. 24, 61st Congress 3rd Sess.
[3] Am. Bar Ass'n Rep. 1906 p. 408.

that reason, in the hope that I may in this way be helpful in pointing the way to what may be done in the courts, I shall devote the major portion of this paper to the determination of controversies by administrative tribunals.

This movement in the United States began with the state railroad commission. In 1864, conservative Massachusetts established the first railroad commission. Their number has increased until now each of the 48 states of the Union, with the exception of Delaware, has a state railroad or public service commission. Similar commissions have been established in the District of Columbia and in the Territory of Hawaii.

The regulation of railroads was the first work of these commissions. Their powers at the beginning were largely advisory. Their jurisdiction has grown until at the present time the commissions in most of the states regulate other classes of public utilities, as well as railroads. These commissions now exercise important judicial as well as administrative functions.

A marked similarity exists between these various state commissions. All seek to administer justice speedily and efficiently. All try to dispose of complaints informally without the necessity of formal hearings. The pleadings in their formal proceedings are simple, the hearings direct and to the point and the decisions generally promptly rendered. The railroad commissions all represent a definite and largely an effective revolt against the technicalities and the delays of many of our courts.

The Railroad Commission of California is typical of the vigorous, effective railroad and public service commissions of today. From the beginning of its reorganization in March, 1912, it has been my earnest hope that this commission, while fair, just and constructive to the public utilities and their patrons alike, might also be of service in blazing the way for the more simple, speedy and effective administration of justice by the courts. It has been my dream that this commission, created primarily to regulate public utilities, might at the same time do a work equally as great in restoring the faith of those who worship at the flame which glows in the Temple of Justice.

The California Railroad Commission has been referred to as the work of the laity in protest against the lawyers. On the contrary, few pieces of constructive legislation in the United States owe their inception and execution more to lawyers than the reorganized Railroad Commission. The political reorganization of

California from which the reorganized Railroad Commission sprang, was largely done by lawyers under the leadership of a great lawyer, Hiram W. Johnson. The Stetson-Eshleman Act of 1911 was written by two lawyers. The Public Utilities Act,[4] which became effective in March, 1912, was written by a third lawyer, who also wrote the rules of procedure under which the Railroad Commission operates. Ever since the reorganization of the Railroad Commission in 1912, a majority of the commissioners have been lawyers. These things, it is true, were done largely as a protest against the delays and the technicalities of court procedure, but they were done by lawyers who sincerely and earnestly desired to assist their profession and the people of the state by substituting simplicity, equity and phomptness for technicality, form and delay.

The fault in connection with court proceedings lies not so much with the lawyers as with the archaic and wasteful machinery of the law in accordance with which they are compelled to practice law in the courts. What we ought to do, in my judgment, instead of criticising the lawyers, is to take a committee of our lawyers who are bold and constructive and who have marked executive ability and give to them the task of sweeping away the present procedure of our courts and substitute in lieu thereof an entirely new structure which shall cover the entire ground from the first pleading until the decision on the last appeal in the state courts. When the administration of justice in our courts has thus been made simple, direct and effective, no one will more ardently champion the new order of things than the majority of the lawyers.

To show the respects in which the modern state commission has departed in its procedure from our courts of law, and in the hope that the visualization of its proceedings may be helpful in making more satisfactory the procedure of our courts, I shall, with a few strokes of the pen, paint the picture of the administration of justice by the Railroad Commission of California.

In order that the picture may be complete, I shall refer to the procedure applicable to Railroad Commission cases, from the beginning to the end, from the filing of the formal complaint to the decision of the state supreme court on writ of review.

With certain minor exceptions, to which it is not necessary here to refer, all public utilities in the state are subject to regu-

[4] Cal. Statutes 1911 Extra Sess. Chap. 14. Const. of California, Art. XII, Secs. 22, 23.

lation by the Railroad Commission. In exercising its regulatory powers, the Commission has functions partly administrative and partly judicial. The proceedings before the Railroad Commission are divided into those which are informal and those which are formal. Formal proceedings are those which require notice and hearing. All others are informal. Each year the Railroad Commission adjusts about four thousand informal complaints. These complaints come to the Commission by letter or verbally. The Commission takes them up promptly with the utility affected, either by letter or in person, and seeks to secure an adjustment fair to both parties. I am glad to be able to say that in a great majority of these cases a settlement satisfactory to both parties is reached by the Commission in this entirely informal way.

All commissions, state and federal, strive, in so far as possible, to determine controversies informally. In this paper, I shall confine myself to formal proceedings.

The provisions of the Public Utilities Act with reference to formal complaints are very simple. The Act provides that complaint may be made by the Railroad Commission on its own motion or by any injured party by complaint in writing, setting forth any act or thing done or omitted to be done by any public utility. Upon the filing of such complaint, it is the duty of the Commission to cause a copy thereof to be served upon the defendant. The Act provides that the Commission shall fix the time and place of hearing and shall serve notice thereof, whereupon the hearing is held and the decision rendered. Unless otherwise provided in the decision, the Commission's orders are effective twenty days from date.

The Public Utilities Act provides that the Railroad Commission shall have the power to adopt its own rules of practice and procedure.[5]

In view of the discussions that have taken place for a number of years at many meetings of the various state bar associations and of the American Bar Association with reference to the advisability of empowering the courts to prepare their own rules of practice and procedure, it is interesting to note that the legislature of California conferred this power upon the Railroad Commission without any opposition and without even any discussion.

In March 1912, after conference with leading lawyers of the state, the Railroad Commission adopted Rules of Procedure

[5] Ibid., Sec. 53. Ghriest v. Railroad Commission, (1915) 170 Cal. 63, 148 Pac. 195.

which, with slight modifications, have been effective ever since. The rules provide boldly for the elimination of all demurrers and dilatory motions. The only motion permitted is a motion to dismiss on the ground of lack of jurisdiction. I shall never forget the horror with which leading members of our profession in California regarded this innovation. The Railroad Commission was told, in effect, that a lawyer has a constitutional right to demur and to interpose dilatory motions, and that no procedure which does not provide for these pleadings and for the interminable delays which result therefrom can possibly succeed. The best proof of a pudding is in the eating thereof. I venture to say that if it were today proposed to restore demurrers and dilatory motions in the proceedings before the Railroad Commission, such a proposal would meet with the vigorous opposition of every lawyer who practices before the Railroad Commission.

In order not to break too suddenly with the procedure and traditions of the past, the Railroad Commission provided in its rules of procedure that upon the filing of a complaint, a copy thereof is immediately mailed to the defendant who is directed to advise the Commission in writing within five days as to whether there is anything in the form of the complaint to which substantial objection can reasonably be made. Although at first objection to the form of the complaint was frequently made, the Commission is now generally advised by the public utility that it has no objection to the form of the complaint. Not infrequently the defendant goes further and at once files its answer without waiting for formal service of the complaint. If no reply is received within five days, or if such objection as is made is found to be inconsequential, a copy of the complaint is then formally served by the Commission upon the defendant together with notice to satisfy the same or to file an answer within ten days. I may say parenthetically that the lawyers practicing before the Railroad Commission have been so well trained that answers are generally filed within the ten days allowed and that if a request for an extension of time to file an answer is made, the extension if granted rarely exceeds a few days. The Commission tries to be courteous in the matter of extensions of time but has in mind constantly the necessity of keeping its business moving.

As a result of the rules of procedure adopted by the Commission and the co-operation of the litigants appearing before it, formal complaints are generally ready to be set for hearing within

twenty days after the filing of the complaint. As soon as the answer is filed, the case is promptly assigned and set for hearing.

Hearings are generally held by a single commissioner or examiner. The most important cases are heard by several commissioners or by the Commission en banc. Hearings are held in the particular community affected so that all parties interested may appear and be heard with a minimum of expense and inconvenience. It is not necessary that parties be represented by counsel, but in important cases the litigants generally appear by attorneys.

The atmosphere of the hearing before a typical state commission is entirely different from the atmosphere of many of our courts. A hearing before a state railroad or public service commission is not a contest between trained intellectual gladiators, each seeking to take advantage of every technicality and both frequently trying the procedure instead of the facts of the case. A hearing before a state commission is a simple and direct investigation to ascertain the facts. The presiding commissioner is not an umpire for the purpose of seeing to it that counsel play the game in a particular way. His function is to have the facts developed as promptly and as fully as possible. His attitude is that of a co-investigator and he feels entirely at liberty to take an active part in the examination and cross- examination of witnesses.

The theory of proceedings before the California Railroad Commission and similar commissions is that the state itself is interested in the ascertainment of the truth. Accordingly, the Railroad Commission's own experts investigate the facts and introduce their reports in evidence, being subject to cross-examination in exactly the same manner as other witnesses.

In so far as possible, the parties are urged to present their testimony in the form of reports instead of orally. Recently, in an important rate case pending before the Railroad Commission counsel for the utility presented a witness on the question of land values. He began to testify with reference to each parcel of land involved, giving his views in detail, as would be done in court. Testimony on the same issue affecting the same utility recently consumed months of time in one of the local federal courts. After this testimony had run along for a while, the presiding commissioner suggested that much time could be saved if the witness would put his conclusions in the form of a written report,

which could then be examined by the parties, the witness being recalled for only such cross-examination as might seem wise after careful inspection of his report. The attorneys for both sides readily agreed to this procedure, which will result in having the entire matter presented in a day or two instead of consuming weeks or months.

One of the distinctive features of practically all administrative tribunals exercising judicial functions is that they are not bound by the technical rules of evidence. Specific provision to this effect is contained in the California Public Utilities Act.[6] Every business man regulates his conduct in the affairs of life largely on hearsay evidence and other evidence which would not be admitted in a court of law. He does so because it is the sensible thing to do and because he trusts himself to give to the evidence only the weight to which it is entitled. Only too frequently the technical rules of evidence result in concealing the truth instead of permitting it to be developed. The California Railroad Commission accepts hearsay evidence whenever it believes that such evidence will assist in developing the truth, but never rests its decisions solely on hearsay evidence. Objections to the introduction of evidence are seldom made before the California Commission, except occasionally by some lawyer who comes before the Commission for the first time still corrupted by the practice of the courts. To those who practice daily before the courts it will be unnecessary for me to direct attention to the enormous saving of time which results from the absence of objections to evidence.

The filing of briefs is generally discouraged by the Commission by reason of the delay in the decision which ensues therefrom. The Commission always analyzes the testimony carefully in any event and generally the filing of briefs is not helpful. Where questions of law are involved and in important proceedings, the filing of briefs is permitted and at times encouraged, but counsel are asked to co-operate with the Commission in having the briefs filed as promptly as possible. Counsel practicing before the Commission understand that such briefs as are filed must be short and to the point.

The commissioner or examiner presiding in the particular proceeding prepares and presents to the Commission a draft of opin-

[6] Ibid., Sec. 53.

ion and order, which, when approved and ordered filed, become the opinion and order of the Railroad Commission.

I shall now refer to the procedure subsequent to the rendering of the decision. In this respect, the California Public Utilities Act went further in the elimination of delays and in making the Commission's work effective than any railroad commission or public utilities act of any of the states prior thereto. In no other respect has the California Act been more widely commented upon and followed in so far as the constitutions of other states would permit.

Referring first to rehearings, the Public Utilities Act provides that no cause of action shall arise in any court out of any order or decision of the Railroad Commission, in favor of any person or corporation who has not made, before the effective date of the order or decision, application to the Railroad Commission for a rehearing. The petition for rehearing must set forth specifically the grounds of rehearing and no ground not thus set forth can be urged in any court.[7] These provisions have been sustained both by the supreme court of this state[8] and by the federal courts.[9] Their purpose is obvious. If there is any reasonable ground for objection to a decision of the Railroad Commission, it is manifestly desirable that such objection shall be pointed out to the Commission and that the Commission shall have an opportunity to review its decision in the light of such objection before the parties are plunged into the delays which inevitably ensue from court proceedings. When a petition for rehearing is filed, the Railroad Commission is given an opportunity, if it has made an error, to modify its decision or to grant a rehearing. In quite a number of cases, the decision as originally made has been modified and the necessity for proceedings in the courts has been avoided.

A writ of review lies directly from the Railroad Commission to the supreme court. No other court of the state has power to review, reverse, correct or annul any order or decision of the Commission. Nothing could have more injured the efficiency of the Commission than to have had its decisions rendered inoperative for long periods of time by proceedings, first, before the superior courts, then before the district courts of appeal and, finally, before the supreme court. The decisions of the Commission

[7] Ibid., Sec. 66.
[8] Clemmons v. Railroad Commission, (1916) 173 Cal. 254, 159 Pac. 713.
[9] Palermo Land & Water Co. v. Railroad Commission, (1915) 227 Fed. 708.

which are taken to the courts are generally such that the losing party would not be satisfied in any event until he had secured the decision of the supreme court of the state. The framers of the Act believed that it would be a waste of time to permit proceedings in the lower courts and hence provided for review solely and directly by the supreme court, in the hope and in the confident expectation that these provisions would be sustained. I am glad to be able to say that the supreme court of this state has upheld this procedure.[10]

The Public Utilities Act provides that the findings of the Railroad Commission on questions of fact shall be conclusive. Without any statutory provisions whatever, the Supreme Court of the United States has repeatedly held that the findings of the Interstate Commerce Commission on questions of fact are conclusive, at least in the absence of fraud or of any evidence whatsoever to sustain the findings. Similar effect has been given to the findings of state railroad and public service commissions, both by the state courts and by the federal courts. The conclusion thus reached seems to be both just and reasonable. When an expert body has passed on the facts, its conclusions thereon should be final if it has acted honestly.

I remember very well in this connection an opinion expressed by the late Commissioner Eshleman in connection with this very matter. When this subject was under consideration and when he was hearing the objections of certain public utility representatives, he said that some of them would not be satisfied unless they had twenty successive appeals and that then they would still be dissatisfied unless they could take one further appeal to God Almighty.

Inquiry may appropriately be made as to how the simple and direct procedure established by the Public Utilities Act and by the Commission's Rules of Procedure operates and particularly as to whether justice is done thereunder.

Since March 23, 1912, the Railroad Commission has rendered over 4,500 decisions in formal proceedings. Ninety-nine per cent of these decisions have become effective without appeal to the courts. Of the remaining one per cent, I am glad to be able to say that the federal courts have decided in favor of the Railroad Commission each case which has been brought before them affect-

[10] Pacific Telephone Co. v. Eshleman, (1913) 166 Cal. 640, 137 Pac. 1119, Ann. Cas. 1915C, 822, 50 L. R. A. (N.S.) 652.

ing the Commission and that before the state supreme court the Commission has fared almost equally as well, subsequent to the first three or four contests.

Furthermore, as far as I have been able to observe, both the public utilities and the representatives of the public are satisfied that the Railroad Commission's simple and direct procedure has not deprived them of any substantial rights and that the decisions of the Railroad Commission have generally been fair and just. Of course, we could hardly expect that a public utility claiming enormous values for franchises which have been freely granted to it by the public or excessive values for water rights or so-called intangibles would express satisfaction with the Railroad Commission's procedure. However, apart from a few sporadic cases of this kind, I think I may safely say that there is a consensus of opinion that the procedure of the California Railroad Commission and similar state railroad and public service commissions produces speed, efficiency and justice.

Another type of administrative tribunals in which simple and prompt procedure is applied is the Industrial Accident Commission or Workmen's Compensation Commission of the principal states of the Union. This type of tribunal had its genesis in the decision of the courts of the State of New York, holding unconstitutional a Workmen's Compensation Act of that state.[11]

The people of New York replied by a constitutional amendment and statutory enactments, overwhelmingly adopted, which not merely changed the substantive law with reference to the relationship between employer and employee but went further and took the entire administration of that law away from the courts and conferred it upon an administrative tribunal with simple procedure.

The movement toward the administration of justice by commissions instead of by the courts has resulted in the establishment of a number of powerful federal commissions, whose procedure is modeled more or less after that of the state commissions, which led the way. The most conspicuous example of these federal commissions is the Interstate Commerce Commission, which is charged with the duty of regulating and supervising in certain respects interstate railroads and other carriers, including now telephone and telegraph companies. By amendment to the Interstate Commerce Act, from time to time, the procedure before the

[11] Ives v. South Buffalo Ry. Co., (1911) 201 N. Y. 271, 94 N. E. 431.

Interstate Commerce Commission and on review of its decisions is now closely analogous to the proceedings before the modern effective state railroad or public service commissions.

The recently created Federal Trade Commission adopts in the exercise of its limited judicial functions an analogous procedure.

I have tried to portray briefly and succinctly, the growth and practice of the state and federal commissions which exercise judicial powers and which try most earnestly to live up to the ideal of justice simply and promptly administered. By those who disapprove of them, they are at times referred to as "lunch counter" tribunals. Why this name, I am not quite certain—perhaps because justice is supposed to be administered by them with the speed with which a man eats his lunch, or possibly because the commissioners are assumed to work so hard that they have no time for meals other than at the lunch counter. By those who approve of them, these tribunals are frequently referred to as the "peoples' courts," because in them the members of the public are supposed to be able to have justice administered without ostentation or technicality, simply and promptly.

I have referred to these tribunals in the earnest hope that an understanding of the methods by which they administer justice may be helpful to the members of the Bar in the task of simplifying judicial procedure on which they have been engaged during the last few years.

Our country is today at war. Every man who loves his country realizes more than ever the need of service to the state and to the nation. With the war has come to our people an understanding of the imperative need for efficiency in all branches of the nation's life, including the courts.

In this exigency, the lawyer's obligation is clear. It is his duty to sweep away the delays and technicalities of the law and to make the administration of justice by our courts simple, speedy and effective. We shall then again see the Temple of Justice strong and stately and beautiful, with people from all ranks of life flocking thither, their faith revived and having administered to them simply, promptly and fairly, the greatest of all blessings —Justice.

MAX THELEN.*

SAN FRANCISCO.

*President of the Railroad Commission of California.

THE MINNEAPOLIS COURT OF CONCILIATION IN OPERATION

THE bill for the act creating the conciliation court of Minneapolis, as drawn up by the special committee of the State Bar Association appointed for that purpose,[1] in the form presented to the legislature of 1917, was undoubtedly the most carefully worked out plan yet attempted for transplanting the Norwegian conciliatory procedure in the settlement of petty disputes to American soil. It was hardly to be expected that the bill as drawn would be passed without modification by the legislature. The idea of adversary procedure as the sole and indispensable method of administering justice is so deeply ingrained in the legal profession, trained under Anglo-Saxon traditions, that any suggestion that small disputes can be judicially determined by bringing the parties together through the advice and persuasion of an officer of the law seems not only unpractical, but even repulsive. The outline plan of the bill as presented is set forth in an article in I MINNESOTA LAW REVIEW, page 107. The other small debtors' courts existing in this country are primarily courts for the expeditious settlement of small disputes by summary procedure of an adversary character. Their conciliation features are rather incidental and wholly dependent upon the attitude of the judge in the conduct of his court. The State Bar Association's bill, however, boldly proposed that the new court, which was indeed but a branch of the municipal court, should be primarily a court of conciliation and only secondarily a small debtors' court.

With this end in view the bill provided in substance that the conciliation court should have jurisdiction co-extensive with that of the municipal court; that as to all causes involving amounts in excess of $100 application to the court should be purely voluntary and the powers of the court wholly confined to the effort to bring the parties to agreement; and that causes involving amounts not exceeding $100 (except actions of unlawful detainer and ac-

[1] See Minnesota State Bar Association report 1916, p. 256, 1917, p. 293.

tions in which the provisional remedy of attachment, replevin or garnishment was involved in the inception of the action), must be first brought in the court of conciliation. Of those causes required to be brought in the conciliation court two classes were made. Over the first class, involving sums exceeding $50 but not exceeding $100, the court was to have only conciliatory powers. If the parties could not be brought to agreement and judgment entered thereon, the case was to be dismissed without prejudice. The plaintiff, upon exhibiting a certificate showing that the cause had been before the conciliation court and dismissed, could then bring his action in such other proper court as he might select. In the second class of cases, those involving sums not exceeding $50, the bill gave the court power, in case the parties could not be brought to agreement, to determine the cause summarily, with provision for removal to the regular municipal court in case the plaintiff was entitled to a jury trial.

The legislature rejected the compulsory conciliation feature. The act as passed[2] gave the conciliation court jurisdiction co-extensive with that of the municipal court, but made it wholly optional in all cases whether the plaintiff should bring his case, however small, in the conciliation court or take it directly to the municipal court. The act allowed anyone having a claim within the jurisdiction of the municipal court to bring it before the conciliation court, but as to causes involving more than $50 thus optionally brought before the court of conciliation it had only conciliatory powers, and was obliged to dismiss the case without prejudice if the parties could not be brought to agreement. According to the provisions of the act, the court had the powers of summary disposition as proposed in the bill over those cases involving not more than $50 which might be optionally brought before it

From this statement it is apparent that the conciliatory features of the original bill were, to a large extent, eliminated from the act as passed. The result has been to confine the business of the court almost exclusively to cases involving not more than $50. A few disputes involving larger sums have been brought before the court and settled by agreement of the parties, but up to the present time this voluntary conciliation feature has assumed little importance.

Despite the mutilated and weakened form in which the act emerged from the legislature, the success of the court almost from

[2] Minnesota Laws 1917, Ch. 263.

the first day on which it was opened for business has outrun the expectation even of its most hopeful well-wishers. Quartered in a large court room, massively furnished, the court is clothed with that outer semblance of dignity and authority which undoubtedly has its influence upon the minds of litigants in reducing to their proper proportions the petty quarrels which they bring there for settlement. The judge's chambers, opening into the court room, are ample, and the office of the clerk is conveniently located nearby. The course of procedure, as worked out in practice, is very much the same as was anticipated. Practically all claims are filed in the clerk's office where the clerk, himself trained in the law, is always ready to lend a sympathetic ear to the infinitely varying stories of mingled wrong, folly and misfortune, and to advise the complainants what next step they should take, if any, to secure redress. Many of their complaints are beyond the power of any court to remedy, and such would-be plaintiffs are advised to go home and avoid similar mistakes or follies in the future. The clerk estimates that nearly one thousand complainants have refrained from filing claims upon being advised that they were clearly entitled to no remedy within the jurisdiction of the court. The clerk also frequently lends a helping hand when the complainant, as often happens, is too ignorant or inexperienced to fill out the simple form, stating merely the names and addresses of the parties, and the nature and amount of the claim, which takes the place of a declaration or complaint. The clerk then sets a day for the hearing. This is usually one week distant unless he learns that an earlier or later day will be more convenient to the parties. The summons, immediately sent to the defendant, usually by mail, but sometimes by telephone, notifies him of the filing of the claim and the day and hour set for the hearing, and informs him that judgment by default will be entered against him if he does not appear. The informality in the service of summons does not work any real injury since the very liberal discretion possessed by the judge in dealing with defaults enables him to protect defendants in those rare cases in which the mail goes astray. The fee for setting aside default judgments is rarely taxed.

In those cases where the plaintiff makes a sworn claim that he has been wrongfully deprived of the possession of personalty, the judge does not hesitate, where the needs of justice require such action, without requiring any bond whatever, to send a bailiff to take possession of the property to await his further order.

Of the cases thus filed little more than one-half ever come up tor hearing. The remainder are settled before hearing on the advice of the clerk or of the judge in chambers, or through the mere influence of the very harmless-looking summons to appear in court. Thus of the 3,500 cases disposed of up to April 23rd last, 1,745 are recorded as settled out of court.

Hearings are now usually set for three days in the week. When a case is called the parties advance to the bar, removed only about six feet from the judge's bench. Sometimes they bring witnesses with them, but usually they do not. From this point the proceedings are best described by reporting a typical case. After identifying the parties the judge asks the plaintiff what the dispute is about, and the following colloquy takes place:

Plaintiff: "Has this fellow got any right to fire me from my job at the end of the week without notice after I had worked seven months for him and left a good job to come to him?"

Judge: "Were you hired by the week?"

Plaintiff: "Yes, I was, but I was fired just because he got a new foreman who didn't like me. I am a good workman and I've got a right to a week's notice."

Judge: "Did the defendant promise to give you a week's notice?"

Plaintiff: "No, not just so, but that was my understanding."

Judge: "Could you have left at the end of a week?"

Plaintiff: "I always give three days' notice before I quit."

The judge then asked the defendant what he had to say about the matter, and was told that defendant's foreman concluded that the plaintiff was an unsatisfactory workman; so he "paid him up to the end of the week and let him out." The judge then, in kindly tones, explained to the plaintiff what were his legal rights under a contract of employment; how he must stipulate for notice if he wished to have it; and dismissed the parties. The clerk wrote "dismissed" on the calendar and the case was disposed of, all in just five minutes.

Something over twenty-five per cent of the cases that come to a hearing are settled by agreement of the parties upon the advice of the court, and thus disposed of without judgment. In the remainder of the cases set for hearing judgments are entered either after summary trial, or upon default.

Most of the judgments entered are satisfied by payment to the clerk or directly to the judgment creditor. Only 83 transcripts of judgments have been issued for docketing in the office

of the clerk of the municipal court in order to enable the plaintiffs to sue out writs of execution.

The cases for the most part involve disputes about wages, rents and small claims of infinitely varying origin. Many of them are petty, and some are squalid and discreditable, but all of them are very important to the participants. The greater number of contested cases turn upon issues of fact, though in some cases the quarrel is due to different theories of the parties as to their legal rights. In one case at least a litigant with flashing eyes placed her claim of right to remove furniture from the plaintiff's house squarely on the constitution, though she failed to indicate on what constitution she relied, or what particular provision was applicable. The non-technical and conciliatory method of disposing of these questions of fact may be best shown by reporting briefly a typical case.

A prosperous looking man was sued for $7.05, alleged to be due for work done upon his automobile. The defendant stated that he had told the plaintiff's foreman to renew the grease in his machine, while the plaintiff asserted that the defendant had told the foreman to change the grease and do anything else that he might find necessary, and that the foreman, finding a certain spring broken, had replaced it with a new one. The defendant, with considerable show of indignation, denied authorizing any work save the greasing. He said he was perfectly willing to pay for the work he had authorized, but he was fully determined he would not pay for a job he had never ordered; that he was tired of having repair men run up bills on him. He asked that the case be continued, and the foreman brought in as a witness. But the judge thought otherwise. Remarking that it would be a pity to use up more of the time of useful workmen on such a trifling dispute, by a few brief questions he got the defendant to admit that the work had been done, that the charge made was not particularly unreasonable, and that in his opinion the foreman had acted in good faith in doing the disputed work. "Well," said the judge, "don't you think you would better pay the whole bill, and waste no more time over the matter?" A rather sheepish grin spread over the defendant's face as he replied, "I guess you are right, Judge," and forthwith paid over the amount.

Another brief report will indicate the court's total disregard of the formal rules incident to our accustomed adversary procedure, as well as the method of disposing of conflicting testimony as to questions of fact. The plaintiff appeared with her

daughter, the desire for combat apparent in every gesture, especially in the forward thrust of her chin. There had evidently been some words between the parties. The belligerent plaintiff needed no invitation from the judge to tell about the trouble. In her opinion the defendant was a cheap skate. She had hired plaintiff's daughter to look after her children, promising to pay her $2.50 a week, but hadn't lived up to her promise, and now owed plaintiff $14.00, which sum, she averred, the defendant was trying to beat her out of. The defendant, a neatly dressed young matron of quiet bearing, evidently found her part in the trial embarrassing and painful. She stated that she had hired the daughter at $2.00 a week, and not $2.50; that she had worked for her seven weeks and had been paid all that was due her excepting $5.80, which she had always been ready to pay. Here the daughter broke in to deny that she had received the amount stated by the defendant, saying that she had received a smaller sum and had worked for a longer period. At this point it developed that the daughter was of full age and that all dealings with reference to the hiring and payment of wages had been with the daughter. This left the combative mother entirely out of the case. The judge might have told her as much; he might even have dismissed the case on the ground that it had been brought by the wrong plaintiff. But it is very doubtful whether any of the parties, particularly the mother who wanted to be in the fight at the finish, would have appreciated the principles of law that might have justified the judge in so determining the case, especially in view of the fact that the daughter, according to the mother's frank statement, was not very bright and had to "have somebody stick up for her." The judge, calmly ignoring such an irregularity, in his mind substituted the daughter as the party plaintiff and proceeded to soothe the belligerent mother and reason with the embarrassed defendant. When finally he said to the defendant, "Since you find yourself mixed up in this quarrel, don't you think you had better pay the girl $10.00 and settle the whole matter?", the defendant acquiesced at once and the parties left the court room, it is hoped, without any disposition to continue their quarrel.

Another case will illustrate the curious questions that are brought before the court and the informal way of dealing with them. Plaintiff had leased a certain furnished house from

the defendant. Trouble had arisen in regard to the furniture, the defendant threatening to remove it. The plaintiff had then brought an action in the district court and had secured a judgment declaring that under the lease she was entitled to possession of the furniture, and an order restraining the defendant from interfering with the plaintiff's possession. The defendant, however, was convinced that the decision of the district court was wrong. Acting on this belief she proceeded to remove the furniture by force. The plaintiff might have instituted contempt proceedings in the district court, but instead she brought the matter to the court of conciliation. The defendant was highly indignant and demanded that the judge should read the lease and decide the case in accordance with justice and right and the terms of the lease, which she insisted the district court had not done. She found it difficult to accept the principle of *res judicata* as the judge endeavored to explain it, so he proceeded to enter judgment. The plaintiff knew the second-hand purchase value of the furniture in question but did not know what would be its rental value for the remainder of the term. Having gotten a description of the furniture the judge, by telephone, called up a person engaged in the business of selling and renting such furniture, satisfied himself as to what was its rental value and told the defendant that she might return the furniture or pay $18.00 as its rental value. She decided that she would return the furniture, although it was manifest as she left the court room that she still had no proper appreciation of the doctrine of *res judicata*.

A final case may be given as indicating another phase of the court's work. The plaintiff, a well dressed and rather kindly looking man, was suing the defendant for $48.00 unpaid rent. The defendant explained that he had been ill for three months, that he had not yet fully recovered his strength and that he had gotten behind with all of his bills and he didn't see how he could pay the plaintiff's house rent. When questioned by the judge as to whether he had a job, he replied in discouraged tones that he wasn't strong enough to do heavy work, that the pay for light work was very small and that it wouldn't be much use anyhow as his wages would be garnisheed. The judge then proceeded to encourage him to get the best kind of job he could and to pay off his debts gradually. He told him that he ought to pay the plaintiff, and that he

would see that the plaintiff gave him as much time as was necessary. The defendant said he thought he could pay $10 a month if he wasn't pushed. The judge, however, told him that he thought he had better not undertake to pay more than $8 a month and that he would enter judgment for the $48, payable at the rate of $8 per month. The plaintiff, who evidently did not enjoy the appearance of being an oppressor of the poor, readily assented to this arrangement.

The purely conciliatory jurisdiction of the court over causes involving amounts in excess of $50 has been very little used. The act permits the written agreements drawn up by the parties to such causes under the advice of the judge, to be entered upon the docket as judgments, but in the few cases in which the judge has been called upon to bring the parties to agreement, voluntary settlements have been made in accordance with the agreements reached and no judgments whatever entered. Under the present form of the act it is not to be expected that many cases involving amounts larger than $50 will be brought to the court inasmuch as the judge, in such cases, has no power excepting to give advice, and there is no penalty whatever put upon either of the parties who refuses to settle in accordance with the advice of the judge. If the plaintiff does not like the proposed settlement he can ignore the whole proceeding and bring his action in the appropriate regular court. So, if the defendant is unwilling to consent, the plaintiff must then pursue his appropriate remedy in one of the regular courts, having his trouble for his pains. In the opinion of the writer the provision contained in the Norwegian law requiring a plaintiff, before bringing in a regular court an action that could have been settled in the court of conciliation, to produce a certificate that he had unsuccessfully attempted there to settle it, would result in greatly increasing the number of causes settled by conciliation rather than by the expensive and irritating method of adversary procedure.

The lawyer reading the outlined reports of the typical cases given above may be disposed to say that it is a very rough sort of justice that is administered, and that such justice is dear even at the very low cost entailed by procedure in this court. But it is very evident that the litigants do not entertain any such opinion. In nearly one-half of the 3,500 cases disposed of by the court of conciliation, judgments were entered. In fewer than fifty of these cases was there any ex-

pression of dissatisfaction, and only 8 of them were removed to the municipal court for jury trials.

The fact that the court of conciliation is absolutely free to all complainants naturally made it appear as an attractive agency for the collection of small claims to public utility companies and other concerns that have a large number of customers and a proportionately large number of small claims. Thus upon the establishment of the court the telephone companies, the gas and electric companies, some of the commission merchants and others expressed their intention of dumping all of their small claims into this court for collection without cost. But a rule prohibiting any single plaintiff from filing more than three suits in any month very promptly checked this flood and preserved the court's time and energy for the kind of litigation for which it was intended, that is, the petty causes of the poorer citizens of the community which could not economically sustain the heavy cost incident to adversary proceedings in our regular courts.

It is obvious that the success of such a court as the Minneapolis court of conciliation depends almost entirely upon the qualifications of the judge. The Minneapolis court has been very fortunate in the appointment of Hon. Thomas W. Salmon as its first judge. Judge Salmon's courtesy and patience, his kindly manner and deep sympathy with the misfortunes of the poor, his tact and sound judgment, have enabled him to carry on this kind of judicial work, so new and untried in this country, with gratifying success. Certainly the reproach that justice is only for the rich and prosperous is taken away from the city of Minneapolis.

It is to be hoped that in due course of time the legislature may be induced, by amendment of the existing act, to adopt the plan included in the State Bar Association's bill requiring all litigants making claims not exceeding $100 to bring them first before the court of conciliation, giving to that court the opportunity to bring the parties to an agreement without prejudice to their right to take their causes elsewhere in case of failure to agree. The operation of the court under the present act gives every reason to expect that in a large majority of the cases thus brought up for conciliation agreements would be reached at a very great saving of time to the litigants and of expense to the state.

W. R. VANCE.

UNIVERSITY OF MINNESOTA.

THE COMPACTS AND AGREEMENTS OF STATES WITH ONE ANOTHER AND WITH FOREIGN POWERS

IT is proposed in this paper to consider the meaning and scope of Section 10, Article I of the federal constitution, which provides:

"No state shall enter into any treaty, alliance, or confederation. . . . No state shall, without the consent of Congress, . . . enter into any agreement or compact with another state or with a foreign power."

May a state without the consent of congress first had and obtained make an agreement with another state or country for the construction of the outlet of a sewer or drainage project within the borders of such other state? May it contract for the leasing or purchase of ground for the construction of a terminal elevator or exposition building? May it contract for the transportation of its products and exhibits over canals which are owned by neighboring states? May it make a contract for the joint suppression of the spread of a threatened contagious disease, either among cattle or human beings, or for the joint control of the vagaries of the I. W. W.s, or for the suppression of the traffic in intoxicating liquors? What is an agreement or compact? Wherein does a treaty differ from an agreement, and an agreement from a compact?

A cursory examination of the section of the constitution cited and of the original case of *Holmes v. Jennison*,[1] to which we shall presently refer, would lead one to think that the hands of the states are absolutely tied and that the states are under congressional tutelage in all matters involving compacts or agreements not only with foreign nations but in the ordinary incidents of interstate social intercourse.

If, however, the later decisions, or rather the later dicta, of the courts are to be relied upon, this is not and perhaps should not be the case.

[1] (1840) 14 Pet. 540 (614), 10 L. Ed. 538 (579).

So far as the supreme court of the nation is concerned, we have but little more than dicta to guide us in the determination of these questions, and it is equally strange that at the time of the adoption of the federal constitution there was little, if any, discussion of the particular clauses here involved. These clauses were seemingly lost sight of in the larger question of the propriety of the delegation of the treaty making power to the federal government, and whether, if delegated at all, it should be exercised by the President alone, or by the President in conjunction with a majority or other proportion of the senate, or by the national congress as a whole. The treaty proper, indeed, seems to have been the topic under consideration rather than the compacts and agreements between the several states, and the relationship of the states with foreign nations rather than between themselves, with the single exception of interstate commerce.

The comprehensiveness of the broad grant of power to the president and the senate seems to have been conceded, and the general opposition to the grant was voiced by Patrick Henry when he protested that, under the terms of the proposed constitution, the states "might relinquish and alienate territorial rights and their most valuable commercial advantages. In short, if anything should be left, it would be because the president and senate were pleased to admit it." It will be noticed, however, that neither the great Virginian nor the critics of the new constitution in general seem in any way to have feared that that constitution would deprive the states of local property rights, interfere with their social usages, or deprive them of the inherent rights of self-protection. These dangers perhaps, in the days of a limited immigration, a limited national intercourse, an entire absence of all general state health regulations and of a scientific knowledge of the communicability of disease whether to the body or to the mind, they did not contemplate or consider.

The first case which should be considered is that of *New York v. Miln*,[2] for although in this case the interstate commerce prerogatives of the federal government rather than its treaty-making powers were directly involved and discussed, the principles of local self-government on which many of the later cases hinge were clearly enunciated.

The question at issue was the right of the state to require, under penalty, the master of every vessel arriving from any foreign

[2] (1837) 11 Pet. 102, 9 L. Ed. 648.

port or from any other state of the United States to make a report in writing of the name, place of birth, last legal settlement, age, and occupation of every person on board. This was claimed to be an interference with interstate commerce. The court, however, in sustaining the regulation, held the act to be an exercise of the police power and not in conflict with the constitution as a regulation of foreign or interstate commerce; that if it were a commercial regulation it would not be an invasion of the power of congress when tested by the rule laid down by the court in the case of *Gibbons v. Ogden*;[3] but the real basis of the decision was declared to be the reserved power of the states. The court (Barbour, J.), says:

". . . . We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation; where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; and where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified and exclusive."

The section of the act empowering the New York officials to remove from the state immigrants deemed liable to become chargeable upon the city was not before the court in *New York v. Miln*.

This decision was handed down in 1837, but three years later, in 1840, there followed the case of *Holmes v. Jennison*.[4] In this case the question to be decided was whether the state of Vermont could, without the consent of congress, recognize the extradition proceedings of the Dominion of Canada and extradite thereunder a fugitive from justice. The court being equally divided, the writ of error was dismissed and thus the main question was not determined. Chief Justice Taney and Justices Mc-

[3] (1824) 9 Wheat. 1 (197), 6 L. Ed. 23.
[4] Supra, note 1.

Lean, Story, and Wayne denied the power of the state to enter into any such relations with a foreign state as were involved in the extradition of a fugitive from justice, while Justices Thompson, Baldwin, Barbour, and Catron for various reasons favored dismissal of the bill. The reporter's note states that the judges of the supreme court of Vermont were satisfied, on an examination of the opinions delivered by the justices of the Supreme Court, that by a majority of the Court it was held that the power claimed to deliver up George Holmes did not exist, and he was accordingly discharged.

Chief Justice Taney in his opinion reaffirmed the doctrine of the inherent right of self-protection announced in the case of *New York v. Miln*[5] and held that the state, without the consent of congress, undoubtedly could remove any person guilty of or charged with crime, and might arrest and imprison him in order to effect this object. This, he held, was a part of the ordinary police powers of the state which were not surrendered to the general government. The state, if it thought proper, in order to deter offenders in other countries from coming within its borders, might make crimes elsewhere punishable also punishable in its courts, if the guilty party should be found within its jurisdiction. In all of these cases the state acts with a view to its own safety and is in no degree connected with the foreign government in which the crime was committed and the state does not co-operate with a foreign government nor hold any intercourse with it when it is merely executing its police regulations. He, however, held that in the case before him the situation was otherwise; that in an extradition proceeding the state acts not with a view to help itself, but to assist another nation which asks its aid; that the refugee from justice, Holmes, was not sought to be removed from the state of Vermont as a man so stained with crimes as to render him unworthy of the hospitality of the state, but was delivered up to the Canadian authorities as an act of comity to them. This Chief Justice Taney held was not the exercise of a police power, which operates only on the internal concerns of a state, and requires no intercourse with a foreign state in order to carry it into execution; it is the comity of one nation to another, acting upon the laws of nations and determining for itself how far it will assist a foreign nation in

[5] Supra, note 2.

bringing to punishment those who have offended against its laws. Among other things, he said:

"The power to make treaties is given by the constitution in general terms, without any description of the objects intended to be embraced by it; and, consequently, it was designed to include all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments. . . .

"It being evident, then, that the general government possesses the power in question, it remains to inquire whether it has been surrendered by the states. We think it has; and upon two grounds: (1) According to the express words of the constitution, it is one of the powers that the states are forbidden to exercise without the consent of congress. (2) It is incompatible and inconsistent with the powers conferred on the federal government.

"The first clause of the tenth section of the first article of the constitution, among other limitations of state power, declares that 'no state, shall enter into any treaty, alliance, or confederation.' The second clause of the same section, among other things, declares that no state, without the consent of congress, shall 'enter into any agreement or compact with another state, or with a foreign power.'

"We have extracted only those parts of the section that are material to the present inquiry. The section consists of but two paragraphs, and is employed altogether in restrictions upon the powers of the states. In the first paragraph, the limitations are absolute and unconditional; in the second, the forbidden powers may be exercised with the consent of congress, and it is in the second paragraph that the restrictions are found which apply to the case now before us.

"In expounding the constitution of the United States, every word must have its due force and appropriate meaning; for it is evident from the whole instrument that no word was unnecessarily used or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition, and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument therefore, can be rejected as superfluous or unmeaning; and this principle of construction applies with peculiar force to the two clauses of the tenth section of the first article, of which we are now speaking, because the whole of this short section is directed to the same subject; that is to say, it is employed together in enumerating the

rights surrendered by the states; and this is done with so much clearness and brevity that we cannot for a moment believe that a single superfluous word was used, or words which meant merely the same thing. When, therefore, the second clause declares that no state shall enter into 'any agreement or compact' with a foreign power without the assent of Congress, the words 'agreement' and 'compact' cannot be construed as synonymous with one another; and still less can either of them be held to mean the same thing with the word 'treaty' in the preceding clause, into which the states are positively and unconditionally forbidden to enter, and which even the consent of Congress could not authorize.

"In speaking of the treaty-making power conferred on the general government, we have already stated our opinion of the meaning of the words used in the constitution, and the objects intended to be embraced in the power there given. Whatever is granted to the general government is forbidden to the states, because the same word is used to describe the power denied to the latter, which is employed in describing the power conferred on the former; and it is very clear, therefore, that Vermont could not have entered into a treaty with England, or the Canadian government, by which the state agreed to deliver up fugitives charged with offenses committed in Canada.

"But it may be said that here is no treaty; and, undoubtedly, in the sense in which that word is generally understood, there is no treaty between Vermont and Canada. For when we speak of 'a treaty' we mean an instrument written and executed with the formalities customary among nations; and as no clause in the constitution ought to be interpreted differently from the usual and fair import of the words used, if the decision of this case depended upon the word above mentioned, we should not be prepared to say that there was any express prohibition of the power exercised by the state of Vermont.

"But the question does not rest upon the prohibition to enter into a treaty. In the very next clause of the constitution, the states are forbidden to enter into any 'agreement' or 'compact' with a foreign nation; and as these words could not have been idly or superfluously used by the framers of the constitution, they cannot be construed to mean the same thing with the word 'treaty.' They evidently mean something more, and were designed to make the prohibition more comprehensive.

"A few extracts from an eminent writer on the laws of nations, showing the manner in which these different words have been used, and the different meanings sometimes attached to them, will, perhaps, contribute to explain the reason for using them all in the constitution, and will prove that the most comprehensive terms were employed in prohibiting to the States all intercourse with foreign nations. Vattel, page 192, sec. 152, says: 'A treaty, in Latin foedus, is a compact made with a view to the public wel-

fare, by the superior power, either for perpetuity, or for a considerable time.' "

" 'Section 153. The compacts which have temporary matters for their object, are called agreements, conventions, and pactions. They are accomplished by one single act, and not by repeated acts. These compacts are perfected in their execution once for all; treaties receive a successive execution, whose duration equals that of the treaty.'

" 'Section 154. Public treaties can only be made by the supreme power, by sovereigns who contract in the name of the state. Thus, conventions made between sovereigns respecting their own private affairs, and those between a sovereign and a private person, are not public treaties.'

" 'Section 206. The public compacts called conventions, articles of agreement, etc., when they are made between sovereigns, differ from treaties only in their object.'

"After reading these extracts, we can be at no loss to comprehend the intention of the framers of the constitution in using all these words, 'treaty', 'compact,' 'agreement.' The word 'agreement' does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, these terms, 'treaty,' 'agreement,' 'compact,' show that it was the intention of the framers of the constitution to use the broadest and most comprehensive terms; and that they anxiously desired *to cut off all connection or communication between a State and a foreign power;* and we shall fail to execute that evident intention, unless we give to the word 'agreement' its most extended signification, and so apply it as to prohibit *every agreement, written or verbal, formal or informal, positive or implied,* by the mutual understanding of the parties.

"Neither is it necessary in order to bring the case within this prohibition, that the agreement should be for the mutual delivery of all fugitives from justice, or for a particular class of fugitives. It is sufficient, if there is an agreement to deliver Holmes. For the prohibition in the constitution applies not only to a continuing agreement embracing classes of cases, or a succession of cases, but to any agreement whatever. . . .

". . . . It was one of the main objects of the constitution to make us, so far as regarded our foreign relations, one people, and one nation; and to cut off all communications between foreign governments, and the several state authorities. The power now claimed for the states is utterly incompatible with this evident intention, and would expose us to one of those dangers against which the framers of the constitution have so anxiously endeavored to guard."

This case deals with a transaction with a foreign nation. It does not deal with a contract between the several states. It is

controlled as much by the provision which grants to the president and two-thirds of the senate the exclusive treaty making power, as by the prohibition elsewhere contained on the activities of the several states. It is none the less sweeping and comprehensive in its terms and it takes the broad position that all matters which involve a negotiation with a foreign nation come within the treaty making prerogatives of the general government, and this whether it be a treaty, a compact, or an agreement, and, if this be so, it would seem logically to follow that all compacts and agreements between the several states are also subject to the national tutelage and require the congressional consent.

At the date of the decision in *Holmes v. Jennison*,[6] there being no extradition treaty with Great Britain, and the president having disclaimed any authority to surrender up a fugitive to that government, unless Vermont could do so it could not be done at all. It could, therefore, with some propriety be asked, with what federal power does the proposed exercise of authority by Vermont conflict? This question was asked by Justice Thompson, who held that it could, at most, be repugnant to a dormant power which might possibly be brought into action in the future, by treaty, and too remote for consideration.

The reasoning of Chief Justice Taney in *Holmes v. Jennison* would seem to apply as clearly to compacts and agreements between states as between a state and a foreign nation, and to embrace literally "every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." But without even referring to that opinion, the supreme court of New Hampshire in 1845, in the case of *Dover v. Portsmouth Bridge*,[7] held that there was no violation of the federal constitution in the erection, pursuant to concurrent legislation by the states of New Hampshire and Maine, of a bridge over a navigable river, such joint action not being the result of a contract requiring the consent of congress. The court intimates that the prohibition embraces only some "league or alliance, or contract of a political nature," and was "probably not intended to require the consent of congress to enable states to agree to run the boundary line between them, or to mark and establish its particular locality, etc." Says Parker, C. J.:

"As independent states, New Hampshire and Massachusetts might have made a compact for the building of a bridge over this

[6] Supra, note 1.
[7] (1845) 17 N. H. 200.

river. 12 Peters' Rep. 91, 96. *City of Georgetown v. The Alexandria Canal Co.* And they might have authorized the erection of such kind of bridge as they deemed expedient, and have prescribed the place, terms, and conditions. All the territory above the navigable waters above or upon any thoroughfare leading to them belonged to the one or the other of these states, and the inhabitants might have had more than an equivalent for the inconvenience of a bridge in the facilities for intercourse and trade which it furnished. This must have been a matter for the consideration of the respective legislatures having jurisdiction over the soil and waters. Whether the inhabitants above received a benefit or not, they would not have been entitled to compensation for a consequential injury. 8 Cowen 146, 167.

"Prior to the Revolution, the power of the colonies of New Hampshire and Massachusetts over the soil and waters where this bridge is situated were subject to the jurisdiction and control of the mother country. On the declaration of independence, this control being removed, they might have agreed in relation to the manner of the use of the waters, or in regard to the closing of the navigation, or respecting obstructions to it; or they might, by their separate legislation, have acted upon the subject matter, without any responsibility for their acts except to each other, and except, perhaps, that the union of the colonies for their common defence required them to admit the vessels of the other colonies when resorting thither for intercourse or shelter from the common enemy.

"By the articles of confederation, in 1778, each state retained its sovereignty, freedom and independence, and every power, jurisdiction and right which was not by that confederation expressly delegated to the United States in Congress assembled. The provision that the people of each state should have free ingress and egress to and from any other state, and should enjoy there all the privileges of trade and commerce, subject to the same duties, impositions and restrictions, as the inhabitants thereof respectively, etc., would not have prevented those states from legislating in such a manner as to obstruct the navigation of the river, so long as the use of it was as free to the citizens of other states as to their own. The clause contained in those articles, by which no two or more states should enter into any treaty, confederation or alliance between them, without the consent of the United States in Congress assembled, could not have been construed as prohibiting them from authorizing the erection of a bridge by separate legislation, nor even by direct agreement or compact. In the language of the court (12 Peters 96), 'They could, by their joint will, have made any improvement which they chose, either by canals along the margin of the river, or by bridges or aqueducts across it, or in any other manner whatsoever.' The acts of agreement by which they should do this would of course

not have the character of a treaty, confederation or alliance, within the meaning of the articles of confederation.

"Maine succeeded Massachusetts in her rights to the soil and waters of this river; and New Hampshire and Maine, by their several grants, authorized the erection of this bridge.

"Unless the constitution of the United States interposes an objection, their power to do this has been fully shown. There is in the constitution no express prohibition upon the states which renders the erection of bridges over navigable waters within their jurisdiction unlawful."

The intimation in *Dover v. Portsmouth Bridge* that "this prohibition applies only to such an 'agreement or compact' as is in its nature political" is expressly declared to be the law by the supreme court of Georgia in *Union Brand R. Co. v. East Tennessee & Georgia R. Co.*,[8] involving a railroad constructed under authority granted by the legislatures of Tennessee and Georgia. Says the court:

"The framers of the constitution clearly intended nothing more than to prohibit the several states from exercising their authority in any way which might limit or infringe upon a full and complete exercise by the general government of the powers intended to be delegated by the federal constitution. . . ."

The states of Virginia and Tennessee jointly appointed commissioners to survey and fix the boundary line between them, and subsequently, by legislation enacted in 1803, adopted and ratified the boundary so ascertained. The validity of this action as concluding the respective states was before the Supreme Court of the United States in 1893 in the case of *Virginia v. Tennessee*.[9] It was held that the mere selection of parties to run and designate a boundary line imported no agreement to recognize the same, and that a legislative declaration, following the survey, that it was correct and that thereafter it should be deemed the true and established line did not in itself import a contract or agreement with the adjoining state, but at the most was merely an admission or declaration against interest. When, however, as in this case, the legislative declaration takes the form of an agreement or compact by reciting some consideration for it, for example, as made upon a similar declaration of the border state, the question arises whether it is such an agreement or compact as is prohibited by the constitution.

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[8] (1853) 14 Ga. 327.

[9] (1893) 148 U. S. 503, 13 S. C. R. 728, 37 L. Ed. 537.

"The compact or agreement," the court said, "will then be within the prohibition of the constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the states affected, and thus encroach or not upon the full and free exercise of federal authority. If the boundary established is so run as to cut off an important and valuable portion of a state, the political power of the state enlarged would be affected by the settlement of the boundary; and to an agreement for the running of such a boundary or rather for its adoption afterwards, the consent of congress may well be required. But the running of a boundary may have no effect upon the political influence of either state; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey, would in no respect displace the relation of either of the states to the general government. There was, therefor, no compact or agreement between the states in this case which required, for its validity, the consent of congress, within the meaning of the constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the states. Such ratification was mutually made by each state in consideration of the ratification of the other."

The opinion contains also the following remarkable dictum which has leavened the whole mass of constitutional construction:

"There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibit through that state in that way. If the bordering line of two states should cross some malarious and disease producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus remove the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to prevent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session.

If, then, the terms 'compact' or 'agreement' in the constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the constitution apply?"

Although the above is dictum merely, the reasoning which accompanies it and which was applicable to the question under consideration, as well as to the dictum, is full of significance and fully supports the theory that it is only in things political that congress has exclusive and original jurisdiction. The doctrine of noscitur a sociis is relied upon and the argument is made that the words "treaty," "compact," and "agreement" merely take the place of the words "confederation," "agreement," "alliance," and "treaty," which are to be found in Article 6 of the articles of confederation, and of the provision that "no two or more states shall enter into any treaty, confederation, or alliance whatever between them," which are contained in the same articles. These two clauses are as follows:

"Article VI. No state without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state, nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince or foreign state; nor shall the United States in congress assembled, or any of them, grant any title of nobility."

"No two or more states shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purpose for which the same is to be entered into, and how long it shall continue."

In the case of *McCready v. Virginia*[10] the Supreme Court of the United States held that each state owns the beds of all tide-waters within its jurisdiction and may appropriate them, to be used by its citizens as a common for taking and cultivating fish, and a law of Virginia prohibiting non-citizens of the state from planting oysters in the soil covered by her tide-waters is valid; and in *Wharton v. Wise*[11] the validity of a compact between Virginia and Maryland was involved, which gave to the citizens of Maryland the privilege of taking oysters within the waters of the

[10] (1877) 94 U. S. 391, 24 L. Ed. 248.
[11] (1894) 153 U. S. 155, 14 S. C. R. 787, 3 L. Ed. 674.

former state. The question, therefore, was whether a state by agreement with another state, and without the consent of congress, could give to the citizens of the favored state privileges which it did not accord to those of other states. The court pointed out that this agreement had been made under the articles of confederation and was not antagonistic to these articles. It held it was "not a treaty, confederation, or alliance," within the meaning of those terms as they are used; it remained as a subsisting, operating contract between them in full force when the confederation went out of existence upon the adoption of the present constitution of the United States, and it was not affected or set aside by the prohibitory clauses of that instrument. It is a prohibition that extends only to future agreements or compacts, not against those already in existence, except so far as their stipulations might affect subjects placed under the control of congress, such as commerce and the navigation of public waters, which is included under the power to regulate commerce.

By way of dictum, however, it cited with approval the language which we have before quoted from the case of *Virginia v. Tennessee*,[12] and applied this language to the articles of confederation. It did not, as it might have done, point out the fact that the articles of confederation merely prohibited "any conference, agreement, alliance or treaty with any King, Prince or state," and provided that "no two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of congress." It might have held, and plausibly, that the word "state," as used in the first paragraph of Article 6 of the articles of confederation, merely applied to foreign states, and that the word "agreement" therein used was an agreement in the nature of a treaty. It might have pointed out, as it did not, that it merely forbade two states from entering into "any treaty, confederation, or alliance, without the consent of congress;" that the words "treaty, confederation, alliance" clearly characterized transactions of a political character, which affected sovereignty; and that, on the other hand, Section 10 of Article I of the federal constitution prohibits any "agreement or compact."

The supreme court of Louisiana, in the case of *Fisher v. Steele*,[13] in 1887, sustained a contract between that state and Arkansas for the construction of a levee along the Mississippi River in Arkansas, against the objection that it was in conflict with Sec-

[12] Supra, note 9.
[13] (1887) 39 La. Ann. 447, 1 So. 882.

tion 10 of Article I of the constitution, treating the contention of invalidity somewhat scornfully:

"On reading that objection in connection with the constitutional prohibition just quoted, the mind would naturally expect a charge that the state of Louisiana was projecting a treaty of alliance with the state of Arkansas, or contemplating some joint scheme of commercial or industrial enterprise, or perhaps conspiring for the establishment of a new confederacy; but great is the relief when the mind is informed that the purpose which plaintiff resists with such a powerful shield is merely to build a piece of levee in the state of Arkansas, if necessary, and if that state does not object, or consents. It is, indeed, too clear for argument that such a transaction is no more a prohibited compact between two states than is contained in the requisition of one governor for, and the consent of another to, the capture and arrest of a fugitive from justice."

To the opinions expressed in the foregoing cases may be added the dictum of Chief Justice Marshall in *Barron v. Baltimore*:[14]

"It is worthy of remark too that these inhibitions generally restrain state legislation on subjects intrusted to the general government, or in which the people of all the states feel an interest. A state is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution."

On the other hand, Story, writing about the year 1833,[15] commenting on the two clauses under consideration before any of the cases above mentioned were decided, says:

"Sec. 1403. Perhaps the language of the former clause may be more plausibly interpreted from the terms used, 'treaty, alliance, or confederation,' and upon the ground, that the sense of each is best known by its association (noscitur a sociis) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political cooperation, and the exercise of political sovereignty; and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges. The latter clause 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary;

[14] (1833) 7 Pet. 243, 8 L. Ed. 672.
[15] Story's Commentaries on the Constitution, Sec. 1403.

interests in land situate in the territory of each other; and other internal regulations for the mutual comfort and convenience of states bordering on each other. Such compacts have been made since the adoption of the constitution. The compact between Virginia and Kentucky, already alluded to, is of this number. Compacts, settling the boundaries between states, are, or may be, of the same character. In such cases, the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief."

If we consider the history of these constitutional provisions together with the other provisions of the constitution which grant or limit authority, we are led to conclude that only political compacts or agreements which affected their sovereignty as between themselves or between them and the federal government were sought to be regulated or controlled.

We realize that the support to be found for this proposition in the federal cases is largely dicta, yet such dicta have been of long standing and, so far as we can learn, have never been judicially criticized. We realize also the difficulty of determining in every particular case whether the sovereignty of the state is enlarged or that of the federal government encroached upon. It seems clear, however, that where a state obtains permission to drain its surface waters within the borders of another state or nation, as was the situation in the case of *McHenry County v. Brady*,[16] or seeks to purchase a site for an exposition or other public building, or to do things mentioned by Mr. Justice Field in the dictum in the case of *Virginia v. Tennessee*, such a state is in no way increasing its political power or encroaching upon that of the nation. Though the transaction may involve a negotiation and perhaps an agreement or compact, it is an exercise of a corporate and property-owning rather than a governmental power. It is true that in the case of *Virginia v. Tennessee* the Supreme Court

[16] (N. D. 1917) 163 N. W. 540. An agreement was entered into between the drainage boards of certain counties in North Dakota and a municipality in the province of Manitoba for the improvement of Mouse River, which flows from North Dakota into Canada, in order to facilitate the drainage of certain lands by securing an outlet for surface waters. The contract was made under the authority of the state of North Dakota and contemplated the expenditure of money and the performance of work in the territory of a foreign country. It was attacked as being an "agreement" or "compact" with a foreign power, prohibited by the constitution. *Held*, (Bruce, C. J.) an agreement not in any way calculated to encroach upon or weaken the authority of congress, not political in its character, and therefore not within the constitutional prohibition.—Ed.

of the United States drew a careful distinction between an agreement for the survey of a boundary line and an agreement which would make that line controlling. Permanently locating a boundary line, however, would place the persons on either side of it either within or without the jurisdiction of the particular state and would increase or decrease its sovereignty and often that of the national government itself.[17]

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[17] On April 1, 1918, congress gave its consent to a compact and agreement between the states of Oregon and Washington regarding concurrent jurisdiction over the waters of the Columbia River and its tributaries, in connection with regulating, protecting, and preserving the fisheries in the river. Cong. Record, 1918, p. 4730.

Following is a list of agreements between states to which the consent of congress has been given:

ACTS OF CONGRESS GIVING CONSENT TO AGREEMENTS BETWEEN STATES.

Resolution of May 12,. 1820 (3 Stat., 609). Kentucky and Tennessee, February 2, 1820. Boundary line.

Act of June 28, 1834 (4 Stat., 708). New York and New Jersey, September 16, 1833. Boundary line, execution of process, etc.

Act of January 3, 1855 (10 Stat. 602). Massachusetts and New York, May 14 and July 21, 1853. Cession of district of Boston Corner by Massachusetts to New York.

Act of February 9, 1859 (11 Stat., 382). Massachusetts and Rhode Island. Attorney General directed to assent to agreement between States in adjustment of boundary dispute before Supreme Court.

Joint resolution of February 21, 1861 (12 Stat., 250). Arkansas, Louisiana, and Texas. Joint action for removal of raft from Red River (past or prospective agreements).

Joint resolution of March 10, 1866 (14 Stat., 350). Virginia and West Virginia. Cession of Berkeley and Jefferson Counties to West Virginia.

Act of March 3, 1879 (20 Stat., 481). Virginia and Maryland, January 16, 1877. Boundary line.

Act of April 7, 1880 (21 Stat., 72). New York and Vermont, November 27, 1876, and March 20, 1879. Boundary line.

Act of February 26, 1881 (21 Stat., 351). New York and Connecticut, December 8, 1879. Boundary line.

Act of October 12, 1888 (25 Stat., 553). Connecticut and Rhode Island, May 25, 1887. Boundary line.

Act of August 19, 1899 (26 Stat., 329). New York and Pennsylvania, March 26, 1886. Boundary line.

Act of July 24, 1897 (30 Stat., 214). South Dakota and Nebraska, June 3 and 7, 1897. Boundary line.

Joint resolution of March 3, 1901 (31 Stat., 1465). Tennessee and Virginia, January 28 and February 9, 1901. Boundary line.

Act of March 1, 1905 (33 Stat., 820). South Dakota and Nebraska. Boundary line.

Act of January 24, 1907 (34 Stat. 858). New Jersey and Delaware, March 21, 1905. Jurisdiction over Delaware River, process, etc.

Joint resolution of January 26, 1909 (35 Stat., 1160). Mississippi and Louisiana. Boundary line and criminal jurisdiction (prospective agreement).

Joint resolution of January 26, 1909 (35 Stat., 1161). Mississippi and Arkansas. Boundary line and criminal jurisdiction (prospective agreement).

Joint resolution of February 4, 1909 (35 Stat., 1163). Tennessee and Arkansas. Boundary line and criminal jurisdiction (prospective agreement).

Perhaps the true rule is that all compacts or agreements which increase or decrease political power are void, but that all others are voidable merely, at the option of the national government, and that a consent thereto may be inferred from silence and acquiescence.

ANDREW A. BRUCE.*

BISMARCK, NORTH DAKOTA.

* Chief Justice, Supreme Court of North Dakota.

Joint resolution in June 7, 1910 (36 Stat., 881). Missouri and Kansas. Boundary line and criminal jurisdiction (prospective agreement).

Joint resolution of June 10, 1910 (36 Stat., 881). Oregon and Washington. Boundary line (prospective agreement).

Joint resolution of June 22, 1910 (36 Stat., 882). Wisconsin, Illinois, Indiana, and Michigan. Criminal jurisdiction on Lake Michigan (prospective agreement).

Act of October 3, 1914 (38 Stat., 727). Massachusetts and Connecticut, March 19, 1908, and June 6, 1913. Boundary line.—Cong. Record, 1918, p. 4731.

THE LEGAL ASPECTS OF STANDARD TIME

THE passage by Congress of the "Daylight Saving and Standard Time Act,"[1] while bringing about a most desirable condition for efficiency, is likely to lead to some unfortunate legal entanglements until the various states adjust their time laws to coordinate with the federal statute.

The powers possessed by the federal government are delegated and are enumerated in the constitution. The constitutionality of this act rests on the power of Congress† to pass laws regulating the commerce "among the several states."

That the provisions of this Act relate to intrastate common carriers, to contracts made in conformity with state laws, to hours for such state regulated events as elections, court sessions, writs or process, and countless other matters in which time is a vital factor, no one would have the hardihood to contend. Particularly would this be true in states having statutory definitions of time as presently to be noted.

Most of the court holdings in states having no statutes on this subject have been in favor of the use of local sun time rather than standard time. A frequently quoted decision was given by the supreme court of Georgia[2] as follows: A question raised was on the hour of court action, it being 11:52 P. M., Saturday, by local sun time but 12:20 A. M., Sunday, by standard time:

"Local custom cannot change Sunday into Saturday. To expect courts of justice, officers of the law and the public generally, especially that large class of the population who do not live in cities or at railroad stations, to go to the railroads for the time which is to guide them in the performance of their duties under the law, when they have in the heavens above them a certain standard by which to ascertain or regulate the time, or to permit them at will to follow two standards of time, would be highly impracticable, and would be productive of great uncertainty and confusion in the administration of the law. Thus the legality of elections might be made to depend upon conflicting proof of local custom; for what might be considered a legal election in one precinct might be regarded as illegal in the next precinct, because of the time of

[1] Act of Congress Mar. 19, 1918. See Adv. Sheets 247 Fed. Rep. No. 7.
† U. S. Constitution, Art. I, Sec. 8, Clause 3.
[2] Henderson v. Reynolds, (1889) 84 Georgia 159, 10 S. E. 734, 7 L. R. A. 327.

opening or closing the polls; or the people of a precinct might differ among themselves as to this. And so with regard to the enforcement of the criminal law. The law requires the railroads to cease running their freight trains by eight o'clock on Sunday mornings. To allow the railroads to fix the standard of time would be to allow them at pleasure to violate or defeat the law. Even in cities where it is insisted the adoption of railroad time has become general, the same difficulties might exist, for instance, in the city of Augusta in this state which is at the dividing line of two railroad standards, the railroads which enter the city from the east having one standard of time, and the railroads which enter from the west another standard, an hour different, both different considerably from the meridian or sun standard."

At the present time the only Georgia statute[3] bearing on the subject would indicate that local time rather than standard time would still hold. "A policy of life insurance runs from midday of the date of the policy, and the time must be estimated accordingly if the policy is limited to a specific number of years."

Local time is the only time recognized by the courts according to the American and English Encyclopaedia of Law:[4]

"The only standard of time recognized by the courts is the meridian of the sun, and an arbitrary standard set up by persons in business will not be recognized."

In Nebraska[5] a summons was made returnable in justice court at 10:00 o'clock. At that hour, standard time, defendant failed to appear and judgment was given. Before 10:00 o'clock by the local sun time defendant appeared. The court would not recognize sun time. The circuit court held for local sun time. The supreme court upheld the circuit court. "If standard time is intended, the justice should so designate it in the summons. In the absence of proof to the contrary, the presumption is that common time was intended."

At the beginning of a session of court in Texas[6] the judge set the courthouse clock and his watch by a sundial, about 36 minutes slower than standard time. A verdict in a murder case was brought in before Saturday midnight by the local time but after the time for the legal expiration of the session of court according to standard time. The court held for sun time and the judgment was affirmed.

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[3] Code of 1910, Sec. 2501 (Sec. 2119).
[4] Vol. 26, p. 10.
[5] Searles v. Averhoff, (1890) 28 Nebraska 668, 44 N. W. 872.
[6] Parker v. The State, (1895) 35 Tex. Crim. App. 12, 29 S. W. 480, 790.

At Creston, Iowa, a fire occurred at 12:02½ P. M., standard time, or 11:44½ A. M., local sun time. At "twelve o'clock at noon" of that day the insurance policy on the burned building expired. The insurance company contended that standard time was meant, it being universally used in the state. The insured sued on the grounds that local sun time was meant. The court[7] decided that "as there is no statute requiring standard railroad time to be used in determining the time of day referred to in contracts, under a policy expiring at 12 o'clock at noon of a certain day, the exact time of noon will be determined by the common, or solar time, unless it is shown that a different time was intended."

Exactly the opposite was the holding in a Louisville, Kentucky, case of fire insurance policies which expired at noon, April 1, 1902. At 11:45 A. M. of that day, standard time, a fire broke out in the insured buildings. Central Standard time is based upon the ninetieth meridian but Louisville, being 4° 22½′ east of that meridian, the sun had crossed the local meridian and it was 12:02½ o'clock P. M. by local sun time. The insurance companies claimed that local time was meant in the policies and hence they had expired. The court,[8] however, held for standard time and the insurance company had to pay. In the Iowa case the sun was "coming" to Creston at the time of the fire and hence before noon and the insurance company had to pay. In Louisville the sun was "going" and by the same token (and by every supreme court decision on the subject up to that time save one) the company should have been exempt from payment. Insurance companies, however, usually "get it both coming and going" and this was no exception to the rule.

The only supreme court decision of which the writer is aware in which the custom of using standard time was upheld prior to 1905 was in *State v. Johnson.*[9] Defendant was found guilty of keeping a saloon open after 11:00 P. M., the hour prescribed by statute for closing. The saloon closed at 11:20, standard time, but 10:54, local time. The court held for standard time. "The standard time adopted by the railroads in 1883 were soon adopted

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[7] Jones v. German Insurance Co., (1899) 110 Iowa 75, 81 N. W. 188, 46 L. R. A. 860.

[8] Rochester German Insurance Co. v. Peaslee-Gaulbert Co., (June 15, 1905) 120 Ky. 752, 87 S. W. 1115, 27 Ky. L. Rep. 1155, 1 L. R. A. (N. S.) 364.

[9] State v. Johnson, (1898) 74 Minn. 381, 77 N. W. 293.

by the people—in some parts of the country sooner than others —and have long since become the sole standards of time throughout the United States. Cent. Dict. tit. 'Time.' In Minnesota, Central time was promptly adopted, and long before 1889 was in general use, and established as the sole standard of time in both public and private business. No other is ever used or referred to." A similar decision was made in North Dakota[10] in the case of a mortgage foreclosure which took place at "2:00 o'clock P.M." The court took judicial notice that "standard" time in designating the hour of the day has been the universal usage in this state since territorial times.

One of the earliest of court decisions on this question was given in England in 1858. It was held that the time appointed for the sitting of a court must be understood as the mean solar time of the place where the court is held and not Greenwich time, unless it be so expressed, and a new trial was granted to a defendant who had arrived at the local time appointed by the court but found the court had met by Greenwich time and the case had been decided against him.

The parliament of the United Kingdom was the first to adopt a legal standard of time.

"A Bill to remove doubts as to the meaning of expressions relative to time occurring in acts of Parliament, deeds, and other legal instruments.

"Whereas it is expedient to remove certain doubts as to whether expressions of time occurring in acts of Parliament, deeds, and other legal instruments relate in England and Scotland to Greenwich time, and in Ireland to Dublin time, or to the mean astronomical time in each locality:

"Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords, spiritual and temporal, and Commons, in the present Parliament assembled, and by the authority of the same, as follows (that is to say):

"1. That whenever any expression of time occurs in any act of Parliament, deed, or other legal instrument, the time referred to shall, unless it is otherwise specifically stated, be held in the case of Great Britain to be Greenwich mean time and in the case of Ireland, Dublin mean time.

"2. This act may be cited as the statutes (definition of time) act, 1880."

Seventy-fifth meridian time was legalized in the District of Columbia by the following act of Congress:

[10] Orvik and Olson v. John Casselman, (1905) 15 N. D. 34, 77 N. W. 1105.

"An Act to establish a standard of time in the District of Columbia.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the legal standard of time in the District of Columbia shall hereafter be the mean time of the seventy-fifth meridian of longtitude west of Greenwich.

"Section 2. That this act shall not be so construed as to affect existing contracts.

"Approved, March 13, 1884."

March 12, 1903, standard time was adopted in Germany by an imperial decree as follows:

"We, Wilhelm, by the grace of God, German Emperor, King of Prussia, decree in the name of the Empire, the Bundesrath and Reichstag concurring as follows:

"The legal time in Germany is the mean solar time of longitude 15° east from Greenwich."

An interesting standard time regulation exists in Portugal. The time is based upon the Meridian of Lisbon. Clocks on railway station platforms and those regulating the running of trains are required to be five minutes slow.

State Statutes.

A number of states have statutes providing for standard time. The following are examples:

Minnesota: "The mean solar time of ninety degrees longitude west from Greenwich, being commonly called 'central time,' shall be the standard time for all purposes."[11]

New Jersey: "That the standard time of the state of New Jersey shall be the time of the seventy-fifth meridian west from Greenwich, and that the time named in any of the statutes of this state and in public proclamations, in the rules and orders of the senate and general assembly, in the decrees and orders of the courts and in all notices and advertisements in any legal proceedings, shall be deemed and taken to be the standard time aforesaid."[12]

Maryland. "The standard time throughout the state shall be that of the seventy-fifth meridian of longtitude west from Greenwich, by which all courts, banking institutions and public offices and all legal or official proceedings shall be regulated."[13]

[11] Minn. G. S. 1913, Sec. 9412 (20).
[12] Gen. Stat. (1884), Vol. 3, p. 3132.
[13] Pub. Gen. Laws (1888), Vol. 2, p. 2068.

Michigan: "The people of the State of Michigan enact, That standard time, central division, based on the ninetieth meridian of longitude west from Greenwich, shall be legal time within this state."[14]

CHANGES NEEDED.

It should be apparent from the foregoing that states having standard time laws should as speedily as possible modify them to meet the federal requirements and those having no statutes should pass adequate laws on the subject. One problem that should not be overlooked is some automatic adjustment for the shifting hours as provided by Congress. It is unfortunate that "legislation by reference" cannot be adopted by a state[15] or a state cannot waive its rights to regulate the matter of time save through constitutional amendment.

In an appendix to this paper, the writer submits a draft of proposed law suitable for a state which has an existing law and which lies in two standard time zones. It will be noted that provision is made for complete articulation with federal regulations, both as to division points for time change and the shifting of the time to "save daylight."

WILLIS E. JOHNSON.

ABERDEEN, S. D.

APPENDIX*

A Bill

For an Act amending Chapter 46 of the Session Laws of the State of South Dakota of 1909, Providing for a Standard of Time in the State of South Dakota.

Be It Enacted by the Legislature of the State of South Dakota:

That Chapter 46 of the Session Laws of the State of South Dakota of 1909, be and the same is hereby amended to read as follows:

Section 1. That whenever the term "twelve o'clock" "noon," or other designation of time occurs in any legislative bill, reso-

[14] Compiled Laws (1897), Vol. 1, Sec. 1753, p. 614 (Act 5, 1885, p. 5).
[15] Commonwealth v. Dougherty, (1909) 39 Pa. Sup. Ct. 338.

*Italics indicate matter not appearing in the present statute. In 1909 a railroad using central time extended into Gregory county. That railroad now extends into Tripp county also. The Chicago, Milwaukee and St. Paul from Chamberlain to Rapid City (west of the Missouri river) since 1909 has adopted Central time. If this time use is confirmed by the Interstate Commerce Commission it would be an easy matter for the State Board of Railway Commissioners to adopt a similar ruling.

lution or statute; city ordinance or court record; deed, insurance policy or other contract; or other instrument, record or proceeding; unless otherwise expressly stipulated in writing, the time understood shall be, for *Tripp county and* Gregory county and for portions of the state east of the center of the main channel of the Missouri river, *United States* Standard Central Time, or the mean solar time of ninety degrees west of Greenwich; and for other portions of the state *United States* Standard Mountain Time, or the mean solar time of one hundred five degrees west of Greenwich.

Section 2. *That the State Board of Railway Commissioners of South Dakota by an order may change the boundary between the standard time belts as provided in Section One of this Act, having regard for the convenience of commerce and the junction points and division points of common carriers whose time is or may be regulated by provisions of Federal law or by the Interstate Commerce Commission acting under authority of Federal law.*

Section 3. *That the State Board of Railway Commissioners of South Dakota may by an order advance or retard the standard of time as provided in Section One of this Act during certain seasons of the year, having regard for the convenience of the general public and of common carriers whose standard is or may be regulated by Federal law.*

Section 4. All Acts and parts of Acts in conflict with this Act are hereby repealed.

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LABOR UNIONS—INJUNCTIONS.—There is no longer any doubt in the minds of the courts of this country that the law will recognize associations of workingmen, combined for the admitted purpose of acquiring and maintaining strength, influence, power and united action in securing for the members thereof the most favorable wages and conditions of labor. The result has been the organization of numerous labor unions, which, with their vast powers, have assumed control of practically every class of labor, and which have caused and continue to cause incessant litigation. Some questions have arisen so frequently and have been discussed to such an extent that they may be regarded as settled.

*Resigned to enter military service.

For example, union laborers may undoubtedly refuse or threaten to refuse to work with non-union laborers, and such refusal or threat is not unlawful.[1] But these union laborers may not resort to methods of intimidation, violence or coercion in order to force others to leave an employer.[2]

But novel situations are continuously arising which present all the phases of the question of labor unions, and we find the various courts looking at similar situations from different angles, with the result that no rule applicable to the questions involved is more nearly established than that a strike is one of the legal means which parties have a right to resort to to enforce a legal combination. The question therefore presents itself, how far may the labor union go? May it so exercise its combined power as to render an individual, be he employer or employee, helpless, or will the preventive powers of a court of equity aid such distressed individual? By way of illustration, it may be well to consider this interesting state of facts. The owner of a theater is giving public entertainments of such a nature that he must have instrumental music, and he is employing a musician who is a member of the musicians' union. He employs this union man on account of his capability and efficiency, and this one man is able to furnish all the music that is necessary. Suddenly the employer is informed by the officials of the union that a rule has been made and adopted which prohibits any member of the union from accepting employment from or playing for him in his theater, unless at least a certain number of musicians who shall all be members of the union are employed by him, and that this rule is to be strictly enforced. Will or will not a court of equity enjoin the enforcement of this rule? This very situation has arisen in Minnesota[3] and in Massachusetts,[4] and the decisions of the supreme courts of these states are in direct conflict on an identical state of facts.

In the Minnesota case, it was urged by the complainant that this minimum rule was ultra vires (the union being incorporated) and that the union had no right to enforce it to his damage, but this contention was speedily rejected, the court saying that "the

[1] Bohn Manufacturing Co. v. Hollis et al., (1893) 54 Minn. 223, 55 N. W. 1119; Pickett v. Walsh, (1906) 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N.S.) 1067, 116 Am. St. Rep. 272.

[2] Mackall v. Ratchford, (1897) 82 Fed. 41.

[3] Scott-Stafford Opera House Co. v. Minneapolis Musicians Ass'n., (1912) 118 Minn. 410, 136 N. W. 1092.

[4] Haverhill Strand Theater, Inc. v. Gillen et al., (Mass. 1918) 118 N. E. 671.

plaintiffs being entire strangers to the defendants, the acts complained of must be considered without reference to whether or not they are ultra vires." The only question therefore was whether the rule was legally enforceable against the plaintiffs, or whether the plaintiffs might invoke the aid of equity and enjoin the enforcement of the rule by the union. In holding that the rule was enforceable, the case of *Bohn Manufacturing Co. v. Hollis*[5] was wholly depended upon. In this latter case Justice Mitchell laid down the rule that any man, not under contract obligation and not charged by his employment with some public duty, may singly refuse to work for or deal with any man or class of men as he sees fit, and further, that any number of men may agree to exercise jointly this right which belongs to them as individuals. The theory upon which this rule was based was that "what one man may lawfully do singly, two or more may lawfully agree to do jointly. The number who unite to do the act cannot change its character from lawful to unlawful."

This doctrine that whatever one may do singly any number of men may do in combination has been repudiated by the Massachusetts court,[6] and it was held by that court that such a rule as this, fixing the minimum number of musicians to be employed if any were to be employed, was a manifest interference with the employer's right to a free flow of labor, not justified by the purpose for which it was made, which was a question of law for the court, and therefore illegal and unenforceable.

The extreme lengths to which the "minimum rule" may be carried, unless judicially restrained, are thus pointed out by Justice Loring, in the Massachusetts case:

"If it is legal for musicians to adopt a minimum rule fixing the number of musicians who shall be employed in all theaters within its jurisdiction, it is hard to see why a minimum rule may not be adopted by the allied trade unions of masons, carpenters and plumbers, fixing the number of stories of which every store to be erected in the business district is to consist."

POWER OF THE DIRECTORS AND MAJORITY SHAREHOLDERS TO DISSOLVE A PROSPEROUS CORPORATION AGAINST THE PROTEST OF THE MINORITY SHAREHOLDERS.—Apart from express statu-

[5] (1893) 54 Minn. 223, 55 N. W. 1119.

[6] Burnham v. Dowd, (1914) 217 Mass. 351, 104 N. E. 841, 51 L. R. A. (N. S.) 778; Picket v. Walsh, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N.S.) 1067, 116 Am. St. Rep. 272.

tory authority, the directors have no power to dissolve or to initiate proceedings for the voluntary dissolution of a prosperous business corporation.[1] Neither, it is said, can the majority of the stockholders, against the protest of the minority.[2] The theory is that the shareholders have contracted inter se that the corporation shall continue in the enterprise for the period fixed by the charter, unless the business proves unprofitable. Consequently an earlier termination of the venture requires the unanimous consent of the shareholders. And a statute passed after the incorporation, authorizing a lease or sale of the corporate property or dissolution of the corporation, on vote of the majority of the shareholders, would be invalid as impairing the obligation of the contract.[3] Legislative sanction may remove any objection that the act is ultra vires, but the legislature has no power to change the contract between the shareholders against the consent of any one of them. On the same principle, alterations in the charter which are "fundamental" must be unanimously accepted.[4] Power to determine matters relating to the conduct of the ordinary business, however, is in the directors or majority shareholders.[5] The shareholders by their contract inter se have submitted the interests of all in the conduct of the enterprise to the management of the directors and to the control of the majority, but each secures to himself the right to prevent a divergence from the purpose of the enterprise, either by sale or lease of all the corporate property, or by ultra vires acts, or a change in the purpose by alteration of the charter, or an abandonment of the purpose by voluntary dissolution of the corporation.[6]

It is by no means clear either on authority or principle that this reasoning is correctly applied to the dissolution of a corpora-

[1] 2 Machen, Corporations 1191; In re Standard Bank of Australia Limited, (1898) 24 Vict. L. R. 304.

[2] Kean v. Johnson, (1853) 9 N. J. Eq. 401; see article, Limitation of the Statutory Power of Majority Stockholders to Dissolve a Corporation, by William H. Fain, 25 Harv. L. Rev. 677 (678); 3 Clark and Marshall, Corporations 1914.

[3] Kean v. Johnson, (1853) 99 N. J. Eq. 401; Dow v. Northern R. Co., (1886) 67 N. H. 1, 36 Atl. 510; New Orleans, etc., R. Co. v. Harris, (1854) 27 Miss. 517.

[4] Stevens v. Rutland, etc., R. Co., (1851) 29 Vt. 545.

[5] Foss v. Harbottle, (1843) 2 Hare 461; Durfee v. Old Colony & Fall River Co., (1862) 5 Allen (Mass.) 230.

[6] "The contract is, we will jointly carry on the enterprise projected, and no other; and in carrying it on, the majority shall rule within the terms of our fundamental agreement. But there is no contract that the majority shall have the power to stop carrying it on, and that while it is profitable." Kean v. Johnson, (1853) 9 N. J. Eq. 401 (416).

tion. It had its origin in cases which dealt with a lease or sale of the corporate property by the majority against the dissent of the minority.[7] A lease or sale of the corporate property does not dissolve the corporation.[8] But leasing or selling the property is, unless authorized by the charter, a change in the purpose of the corporation.[9] There is clearly an implied contract between the shareholders not to engage in business originally unauthorized. But it does not follow that the shareholders contract to continue the business authorized for the period named in the charter. The charter has the double function of an authority from the state and a contract between the shareholders. Some of its provisions, as the powers conferred, are an authority only. There is no contract between the shareholders that all the powers shall be exercised. The majority determine what part of the business authorized by the charter shall be carried on.[10] Should it not equally determine for what part of the time authorized the business shall be carried on?[11] The problem at common law was complicated by the rule that there could be no surrender of a charter without acceptance by the state.[12]

General laws governing corporations have usually provided methods of voluntary dissolution. The power to initiate proceedings for dissolution is given to the directors, or to the majority or some other fraction of the shareholders, sometimes in absolute terms; at others, when beneficial to the shareholders.[13]

The power of a minority to resist dissolution of a prosperous corporation, under these statutes, because of the motive of the majority is not clear on the authorities. On one side is *Windmuller v. Standard Distilling & Distributing Co.*[14] The company was incorporated under the law of New Jersey which provided

[7] Kean v. Johnson, (1853) 9 N. J. Eq. 401; see article, Right of a Private Corporation to Transfer Property, 8 Va. L. Reg. 1.

[8] Boston Glass Manufactory v. Langdon, (1834) 24 Pick. (Mass.) 49, 35 Am. Dec. 292.

[9] Small v. Minneapolis Electro Matrix Co., (1891) 45 Minn. 264, 47 N. W. 797.

[10] Simpson v. Directors of Westminster Palace Hotel Co., (1860) 8 H. L. C. 712. 6 Jur. (N.S.) 785, 2 L. T. 707. But see In matter of Timmis, (1910) 200 N. Y. 177, 939 N. E. 522.

[11] Treadwell v. Salisbury Mfg. Co., (1856) 7 Gray (Mass.) 393, 66 Am. Dec. 490; Bowditch v. Jackson Co., (1912) 76 N. H. 351, 82 Atl. 1014, L. R. A. 1917A 1174; 4 Thompson, Corporations sec. 4443; 1 Morawetz Corporations Sec. 413.

[12] 5 Thompson, Corporations Sec. 6679; Beyer v. Woolpert (1906) 99 Minn. 475, 109 N. W. 1116.

[13] Minn. G. S. 1913 Sec. 6636; 2 Clark and Marshall, Corporations 855.

[14] (1902) 114 Fed. 491.

that any corporation may be dissolved when deemed advisable and for the benefit of the corporation by the board of directors and when voted by two-thirds in interest of the shareholders. It was held that the majority interests should not be restrained from voting for dissolution, at the suit of the minority, although the alleged motive of the majority shareholders was to be relieved of a guaranty of dividends on the preferred stock of the corporation. The court said that the majority did not stand in a fiduciary relation to the minority and could not be prevented from voting its stock to promote their own interests, although these interests might be adverse to those of the minority.[15] The recent case of *In re Paine et al.*[16] goes to the other extreme. The holders of all but a few shares of the stock wished to consolidate the business with another, equally properous which they owned, in order to secure economy in operation. They offered the minority shares of stock in the purchasing company and, the offer being refused, began action to have the company dissolved. The law authorized a court of chancery to dissolve the corporation on petition of the directors, if for any reason a dissolution would be beneficial to the stockholders. The court held that, although it might be "commendable as a business proposition," the petition should be denied because the sole immediate purpose was to get rid of the minority as stockholders.

Both decisions seem questionable. The first puts the minority completely at the mercy of the majority. Equity should require that the legal power given by the statute to the majority be exercised in good faith. That the majority should dissolve the corporation in order to relieve themselves from an obligation which they as individuals were under to the corporation seems an abuse of the legal power. Yet the mere existence of the obligation should make no more than a prima facie case against dissolution. In such a case equity should determine whether, supposing the obligors were strangers to the corporation, dissolution would be beneficial to the majority of the stockholders. But in the second case the court stopped with the motive to get rid of the minority stockholders and refused to consider the question of benefit at all. The facts were that the majority were seeking nothing more than they were willing to allow to the minority. If the majority were seeking to rid themselves of the minority, it was due to an attempt of the minority to "hold up" the majority

[15] Riker v. United Drug Co., (1912) 79 N. J. Eq. 580, 82 Atl. 930, contra.
[16] (Mich. 1918) 166 N. W. 1036.

and to prevent them from accomplishing an object beneficial to them as stockholders and equally beneficial to the minority.

There is a growing tendency to hold that the majority stockholders of a corporation stand in a fiduciary relation to the minority.[17] But this cannot go to the extent of holding all acts done in their own interests voidable at the election of the minority. The most that should be required of them is that they should not exercise the legal power to which their larger interest entitles them, to secure an advantage to themselves over the minority. But their bona fide action for the best interests of all should not be set aside.[18]

DUTY OF OWNER OR OCCUPIER OF LAND TO INVITEES, LICENSEES, AND TRESPASSERS.

1. *Invitees, or Invited Persons.* In the whole field of the law of negligence perhaps no phase is more interesting than that which deals with the duty of the owner or occupier of land to the invited person, licensee, and trespasser respectively. Once a definite test is settled upon by which to determine who is an invited person, the road is comparatively clear, in the light of the decisions, as to the *duty*. The difficulty lies largely in the application of the rule to the thousand and one situations which are brought before the courts. When, for instance, does an "invitee" cease to be an "invitee" and become a "licensee"? Why should a different standard of duty apply to a licensee, rightfully upon the premises, than to an invitee? When does the use of a tacit license through long acquiescence become an implied invitation? These are some of the most difficult and important, though by no means the only, problems in connection with this particular phase of the law of negligence.

The most satisfactory basis for distinction as between invitee and licensee is thus stated by Campbell:[1]

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[17] Ervin v. Oregon Ry. & Nav. Co., (1886) 27 Fed. 625, 23 Blatchf. (U.S.C.C.) 517; Chicago Hansom Cab Co. v. Yerkes, (1892) 141 Ill. 320, 30 N. E. 667, 33 Am. St. Rep. 315; Farmers Loan & Trust Co. v. New York, etc., R. Co., (1896) 150 N. Y. 410, 44 N. E. 1043, 34 L. R. A. 76, 55 Am. St. Rep. 689; Jones v. Missouri Edison Co., (1906) 144 Fed. 765.

[18] White v. Kincaid, (1908) 149 N. C. 415, 63 S. E. 109; Treadwell v. United Verde Copper Co., (1909) 134 App. Div. 394, 119 N. Y. Supp. 112; Bowditch v. Jackson Co., (1912) 76 N. H. 351, 82 Atl. 1014, L. R. A. 1917A 1174. And see dissenting opinion in In re Paine, (Mich. 1918) 166 N. W. 1036 (1039).

[1] Campbell, Negligence, 2nd ed., 63. Quoted in Bennett v. Louisville, etc., R. Co., (1880) 102 U. S. 577, 26 L. Ed. 235. And see 2 Cooley, Torts, 3rd ed., 1265.

"The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it.

The word *invitation* is here used in a legal, not the popular, sense. This test, while the most satisfactory, is essentially empirical, a rule of thumb rather than a scientific definition to which one can confidently refer.

It will be noted that the mere fact of benefit or advantage to the owner or occupier is not enough; there must be mutuality. For instance, in absence of statute, a fireman in discharge of his duty entering premises for the purpose of saving the property is generally considered a bare licensee.[2] As stated in a recent case[3] concerning a police officer:

". . . the officer is a quasi-licensee. . . . Under such circumstances a policeman or fireman goes on the premises by permission of the law. . . . He is not an invitee. He may enter whether the property owner is willing or unwilling, and his right to enter does not depend on the property owner's invitation, express or implied, but his entry is licensed by the public interest and what has been called 'the law of overruling necessity.' Such is the law in the absence of some statute or ordinance."

Furthermore, where the owner of premises has by his conduct induced the public to use a way in the belief that it is a public way and that they have a right to use it, this inducement is looked upon as an implied invitation and the liability to an invitee attaches. The liability in cases of this nature is generally considered to be coextensive with the implied invitation.[4] The great weight of authority, however, holds that unless one is expressly or impliedly an invitee no care is due from the owner or occupier of the premises further than to refrain, in the case of a trespasser, from wilful acts of injury, and in the case of a licensee, from knowingly exposing him to concealed dangers.[5]

Who, then, is an invitee? One expressly or impliedly invited or induced to enter the premises for mutual benefit and

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[2] Lunt v. Post Printing & Publ. Co., (1910) 48 Colo. 316, 110 Pac. 203, 30 L. R. A. (N.S.) 60; and see Hamilton v. Minneapolis Desk Manufacturing Co., (1899) 78 Minn. 3, 80 N. W. 693, 79 Am. St. Rep. 350.

[3] Burroughs Adding Machine Co. v. Fryar, (1915) 132 Tenn. 612, 179 S. W. 127, L. R. A. 1916B 791.

[4] Sweeny v. Old Colony, etc., R. Co., (1865) 10 Allen (Mass.) 368, 87 Am. Dec. 644. See Barry v. New York Central, etc., R. Co., (1883) 92 N. Y. 289, 44 Am. Rep. 377.

[5] 2 Cooley, Torts, 3rd ed., 1268.

advantage is an invitee.[6] Implied invitation comprehends knowledge, on the part of the owner, of probable use by the invitee of the former's property, on account of the situation, etc., of such property.[7] It is not to be inferred that because one is an invitee he may go upon any part of the premises and that so long as he remains there he is entitled to recover for injuries sustained. The liability of the owner or occupier extends to such parts of the premises as are a part of the business portion of a building, for instance, or are used to gain access thereto, or constitute a passageway to and from it, and not to such parts as are used for private purposes, unless by express or implied invitation extended to that particular portion.[8] Where a person, though on the premises by invitation, departs from the usual way or goes to places not included in the invitation, the owner's duty of care is at an end.[9] One lawfully on premises must leave by the customary way or exit, on penalty of becoming a bare licensee at best.[10] Briefly stated, the general rule would seem to be this:

"The owner's liability for the condition of the premises is only coextensive with his invitation. And it is incumbent upon the plaintiff to show, not only that her entry upon the premises was by invitation of the owner, but also that at the time the injury was received she was in that part of the premises into which she

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[6] The following cases illustrate some of the situations in which the party was held to be an invitee: Boyd v. United States Mortgage, etc., Co., (1907) 187 N. Y. 262, 79 N. E. 999, 116 Am. St. Rep. 599, 10 Ann. Cas. 146, 9 L. R. A. (N.S.) 399 (business caller); Miller v. Hancock, [1893] 2 Q. B. 177 (business caller of a tenant); Elliott v. Pray, (1865) 10 Allen (Mass.) 378, 87 Am. Dec. 653 (employee of a tenant); Crane Elevator Co. v. Lippert, (1894) 63 Fed. 942, 11 C. C. A. 521 (employee of a tenant); Wilcox v. Zane, (1897) 167 Mass. 302, 45 N. E. 923 (employee of a tenant); Freer v. Cameron, (1851) 4 Rich. L. (S.C.) 228, 55 Am. Dec. 663 (customer falling into a hatchway in a store); Hupfer v. National Dist. Co., (1902) 114 Wis. 279, 90 N. W. 191 (customer falling into a liquor vat); Brotherton v. Manhattan Beach Co., (1896) 48 Neb. 563, 67 N. W. 479, 58 Am. St. Rep. 709, 33 L. R. A. 598 (bather drowned); Gascoigne v. Metropolitan West Side El. Ry. Co., (1909) 239 Ill. 18, 87 N. E. 883, 16 Ann. Cas. 115 (street railway turnstile); Sweeny v. Old Colony, etc., R. Co., (1865) 10 Allen (Mass.) 368, 87 Am. Dec. 644 (public using a railroad crossing).

[7] Lepnick v. Gaddis, (1894) 72 Miss. 200, 16 So. 213, 48 Am. St. Rep. 547, 26 L. R. A. 686.

[8] Schmidt v. Bauer, (1889) 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580.

[9] See note 8 and Kinney v. Onsted, (1897) 113 Mich. 96, 71 N. W. 482, 67 Am. St. Rep. 455, 38 L. R. A. 665; Peake v. Buell, (1895) 90 Wis. 508, 63 N. W. 1053, 48 Am. St. Rep. 946.

[10] Armstrong v. Medbury, (1887) 67 Mich. 250, 34 N. W. 566, 11 Am. St. Rep. 585; Mazey v. Loveland, (1916) 133 Minn. 210, 158 N. W. 44, L. R. A. 1916F 279 and note.

was invited to enter, and was using them in a manner authorized by the invitation, whether expressed or implied."[11]

Having ascertained the test whereby the courts determine when one is an invitee, and some of the peculiarities of the application of the test, it is necessary to state the duty of the owner or occupier toward one who has been held an invitee. Briefly stated, the duty is one of ordinary care and prudence to keep the property in a safe condition. The owner or occupier is not an insurer of the safety of the invitee, nor must he exercise extraordinary care. He is under no obligation to guard against harm to which the invitee unnecessarily exposes himself. The premises must be kept in a reasonably safe condition.[12] "This duty extends to all dangers which exist there, whether due to the nature of the premises or to the nature of the operations that are being carried on there."[13] It is when the dangerous condition of the premises is known to the owner or occupant and not known to the person injured that a recovery is permitted.[14] In the case of *Bennett v. Louisville, etc., R. Co.*,[15] Justice Harlan pointed out that the liability of the owner for injuries to an invitee attached in case such injuries were "occasioned by the unsafe condition of the land or its approaches, if such condition was known to him and not to them, and was negligently suffered to exist, without timely notice to the public, or to those who were likely to act upon such invitation."

In concluding the discussion with regard to invited persons, it may be pointed out that a mere toleration of trespassers does not raise an implied invitation.[16] An exception must be noted, however, in regard to a way across land. As previously stated, if the owner or occupier has allowed persons quite generally to use or establish a way under such circumstances as to induce a

[11] Per Pitney, J., in Ryerson v. Bathgate, (1902) 67 N. J. L. 337 (338), 51 Atl. 708, 57 L. R. A. 307.

[12] Indermaur v. Dames, (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311; Crogan v. Schiele, (1885) 53 Conn. 186, 1 Atl. 899, 5 Atl. 673, 55 Am. Rep. 88; Calvert v. Springfield Elec. L. & P. Co., (1907) 231 Ill. 290, 83 N. E. 184, 14 L. R. A. (N.S.) 782. And see Ryder v. Kinsey, (1895) 62 Minn. 85, 64 N. W. 94, 54 Am. St. Rep. 623, 34 L. R. A. 557.

[13] Salmond, Torts, 4th ed., 392.

[14] Lowe v. Salt Lake City, (1896) 13 Utah 91, 44 Pac. 1050, 57 Am. St. Rep. 708. And see Donaldson v. Wilson, (1886) 60 Mich. 86, 26 N. W. 812, 1 Am. St. Rep. 487.

[15] (1880) 102 U. S. 577, 26 L. Ed. 235.

[16] Ryan v. Towar, (1901) 128 Mich. 463, 87 N. W. 644, 92 Am. St. Rep. 481, 55 L. R. A. 310.

belief that it is a public way, he owes to persons so using the way the duty due an invitee.[17]

2. *Licensees.* The licensee is upon the premises of another solely for his own benefit and advantage, and it is not to be expected that the same degree of care should be exercised in his behalf as in the case of an invited person. "He who is receiving the gratuitous favors of another has no such relation to him, it is said, as to create a duty to make safer or better, than it happens to be, the place where hospitality is tendered. The licensee must take the premises as he finds them."[18] As it is expressed in a leading English case, *Gautret v. Egerton,*[19] he is entitled only not to be led into danger by "something like fraud." Apparently the duty owed to bare licensees is not wilfully to injure or expose to concealed dangers; the fact that they are on the premises with the passive asquiescence of the owner saves them from the responsibilities of trespassers.[20] As a general rule, where the owner of premises knowingly permits the public, for a long time, to use the premises for the purpose of traveling across the same, he must give notice if in changing the condition of the premises he thereby renders them unsafe. Otherwise he is responsible for the resulting injury. Among the changes which have been held sufficient to give rise to this added duty are a newly built barb-wire fence,[21] excavations,[22] removal of boards leaving a dangerous hole uncovered,[23] and the placing of dangerous substances on the way.[24] The duty to the licensee is sometimes stated to be that the owner or occupier must not be affirmatively or actively negligent in the management of his property or business so as to increase the danger to the licensee.[25]

Among those who have been held to be licensees are firemen,[26] one seeking employment,[27] one coming on the premises with the

[17] See note 4.
[18] Burdick, Torts, 3rd ed., 516.
[19] (1867) L. R. 2 C. P. 371 (375).
[20] Vanderbeck v. Henry, (1871) 34 N. J. L. 467.
[21] Allison v. Haney, (Tex. Civ. App. 1901) 62 S. W. 933; Carskaddon v. Mills, (1892) 5 Ind. App. 22, 31 N. E. 559.
[22] Phipps v. Oregon R. & Nav. Co., (1908) 161 Fed. 376; Lepnick v. Gaddis, (1894) 72 Miss. 200, 16 So. 213, 48 Am. St. Rep. 547, 26 L. R. A. 686.
[23] Wheeler v. St. Joseph, etc., Co., (1896) 66 Mo. App. 260.
[24] Thayer v. Jarvis, (1878) 44 Wis. 388.
[25] Larmore v. Crown Point Iron Co., (1886) 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718; Corrigan v. Union Sugar Refining Co., (1868) 98 Mass. 577, 96 Am. Dec. 685.
[26] See note 2, supra.
[27] Larmore v. Crown Point Iron Co., (1886) 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718. Contra, St. Louis, etc., R. Co. v. Wirbel, (1912)

permission of the owner solely for the purpose of seeing the owner's employees,[28] and one who uses a way on another's land.[29] A recent New York case[30] has held that a street car employee who used a urinal in the building of a power company which supplied power to the street car company was a mere licensee. Consequently, when he fell into a hole left in the floor by workmen who were engaged in repairing, no liability for the injury rested upon the licensor.

3. *Trespassers.* The trespasser must take the premises as he finds them. The owner or occupier is not obliged to see that the premises are safe for the trespasser. Wanton and wilful acts must be refrained from, but that is all.[31] "A trespasser is not an outlaw, and the owner who resorts to such means of protection as pits, mantraps, and spring guns, which are calculated to destroy life or inflict grevious bodily harm, will incur the risk of finding that his use has been unreasonable."[32] After the trespasser's presence becomes known, it may become necessary to refrain from acts otherwise lawful, in order to avoid injury.[33]

JUDICIAL CONTROL OF THE DISCRETIONARY POWERS OF TRUSTEES.—In the creation of trusts it is frequently desired to clothe the trustee with considerable discretion, not only in the management of the trust, but also in the application and use of income, and in the distribution of the trust *res* itself. This is especially true of testamentary trusts which make provision for minors or for others thought by the testator to be incapable of sound judgment in the management of their local affairs. The purpose often is to place the trustee *in loco parentis* with respect to the beneficiary, in fact to secure, so far as possible, a perpetuation of the

104 Ark. 236, 149 S. W. 92, Ann. Cas. 1914C 277.

[28] Dixon v. Swift, (1903) 98 Me. 207, 56 Atl. 761; Muench v. Heinemann, (1903) 119 Wis. 441, 96 N. W. 800; Norris v. Hugh Nawn Contracting Co., (1910) 206 Mass. 58, 91 N. E. 886, 19 Ann. Cas. 424; Indian Refining Co. v. Mobley, (1909) 134 Ky. 822, 121 S. W. 657, 24 L. R. A. (N. S.) 497.

[29] See notes 21, 22, 23, and 24, supra.

[30] Vaughan v. Transit Dev. Co., (N.Y. 1918) 118 N. E. 219.

[31] Maynard v. Boston, etc., R. Co., (1874) 115 Mass. 458, 15 Am. Rep. 119; Hoberg v. Collins, Lavery & Co., (1910) 80 N. J. L. 425, 78 Atl. 166, 31 L. R. A. (N.S.) 1064.

[32] Chapin, Torts 503. See Bird v. Holbrook, (1828) 4 Bing. 628; Hooker v. Miller, (1873) 37 Ia. 613, 18 Am. Rep. 18.

[33] Herrick v. Wixom, (1899) 121 Mich. 384, 80 N. W. 117, 81 N. W. 333.

powers of the testator.[1] It is not surprising, therefore, that testators and others, in establishing trusts, have sought to give practically unlimited powers and discretion to their trustees. Thus, a trustee is empowered to make certain payments, "if in his judgment it will be for the advantage" of the beneficiaries,[2] or if he think the beneficiary "worthy,"[3] or "competent,"[4] or if he consider it to the best interests of the beneficiary;[5] and the discretion is extended to the times and amounts of payments, and even to the choice of the recipients from the members of a designated class.[6] It is sometimes expressly provided that the discretion of the trustee shall be subject to no compulsion.[7]

Under what circumstances, and to what extent, are trustees possessed of such discretionary powers subject to the control of courts of equity? It is fundamental that a trustee is always subject to the control of a court of equity, because of the peculiar jurisdiction of that court over all matters pertaining to trusts; and that is true no matter how large may be the discretion conferred upon him by the instrument creating the trust.[8] There is ample authority for the statement that the courts will require only that the trustee exercise his discretion in good faith, without thought of personal gain or advantage, and with due regard for the purpose of the trust and the interests of the beneficiaries; and that within such limits his action is final and not subject to review.[9] Accordingly, if a trustee meet these requirements, the court will not overthrow what he has done,[10] and will refuse to interfere to control contemplated action, in the exercise of his discretion.[11] On the other hand, if a trustee act from motives of

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[1] See, for example, the trust involved in Portsmouth v. Shackford, (1886) 46 N. H. 423, by the terms of which the trustee was in certain matters to proceed "as he may from time to time judge the testatrix would have done if she could have foreseen the circumstances."

[2] Read v. Patterson, (1888) 44 N. J. Eq. 211, 14 Atl. 490, 6 Am. St. Rep. 877.

[3] Bacon v. Bacon, (1882) 55 Vt. 243.

[4] French v. Northern Trust Co., (1902) 197 Ill. 30, 64 N. E. 105.

[5] Matter of Wilkin, (1905) 183 N. Y. 104, 75 N. E. 1105.

[6] Kimball v. Reding, (1885) 31 N. H. 352, 64 Am. Dec. 333.

[7] Nichols v. Eaton, (1875) 91 U. S. 716.

[8] Cromie v. Bull, (1884) 81 Ky. 646.

[9] Hill, Trustees, 507, 510; Perry, Trusts, (6th ed.) Secs. 510, 511. Thus in Bacon v. Bacon, (1882) 55 Vt. 243 (252) it is said: "The court will control the judgment and discretion of the trustee) to the extent, and only to the extent, of compelling an honest and bona fide exercise thereof for the end designed by the testator."

[10] Kimball v. Reding, (1885) 31 N. H. 352, 64 Am. Dec. 333; Matter of Wilkin, (1905) 183 N. Y. 104, 75 N. E. 1105.

[11] See Nichols v. Eaton, (1875) 91 U. S. 716.

self-interest,[12] or if he abuse his discretion,[13] or if, while keeping within the letter of his authority, his actions should threaten to frustrate the real intent of the trust,[14] the court will intervene to protect the trust and the beneficiary. His discretion has been described as judicial, and it is therefore said that he must not act "arbitrarily" or "capriciously."[15]

Further definition has been attempted. So, it has been said that the trustee must exercise a "sound", or "reasonable" or "proper" discretion, in addition to the requirement of honesty or good faith. A text-writer draws the conclusion that courts do not favor uncontrolled discretion of trustees, and that they will, whenever possible, so construe trust instruments as to limit the discretionary powers granted.[16] Opportunity for such construction is afforded frequently under the statement that the trustee must act with due regard for the purposes of the trust.

It is manifest that the balance between the inherent jurisdiction of courts of equity over trusts and the desire of trustors to secure large discretion for their trustees is delicate, and that it is no easy matter to state comprehensively, and at the same time exactly, a rule which will be sufficient for the great variety of cases which arise. The tendency seems to be to enlarge the control of the courts at the expense of the powers of the trustees.[17] A recent Iowa case, *Keating v. Keating*,[18] affords an excellent illustration of this tendency. The testator devised real estate to a son, in trust, to pay the income to another son for life, with authority, should the beneficiary "prove to be a careful and pru-

[12] Bound v. So. Car Ry. Co., (1892) 50 Fed. 853.

[13] Thus in McDonald v. McDonald, (1890) 92 Ala. 537, 9 So. 195, the court said that it will interfere if discretion be "mischievously or ruinously exercised"; and in In re Clark, (1915) 174 Iowa 449, 154 N. W. 739, "to shield it from spoliation or gross mismanagement."

[14] In re Van Decar, (1905) 98 N. Y. Supp. 309, 49 Misc. 39.

[15] See note to Read v. Patterson, supra, in 6 Am. St. Rep. 877 (885,-886); McDonald v. McDonald, (1890) 92 Ala. 537, 9 So. 195; Bound v. So. Car. Ry. Co., (1892) 50 Fed. 853.

[16] Perry, Trusts, (6th ed.) Secs. 510, 511.

[17] This tendency is shown in the inclination, by decision and statute, to acquire control, through courts of equity, of mere powers, which, as distinguished from powers in trust, or powers of trustees as such, which we are here discussing, were said to be beyond judicial control. See Remsen on Preparation and Contest of Wills, 283, 290. It is interesting to note that Hill, in the passage cited above in note 9, says that the courts anciently exercised strict supervision over powers, which they had renounced. Even in the note to Read v. Patterson, cited above, the editor says that the trustee is to do "that which his honest, disinterested judgment approves, or ought to approve." The last phrase would seem to contemplate wide latitude in judicial review of his acts.

[18] (Iowa 1917) 165 N. W. 74.

dent man," to convey the real estate to him, "if my trustee think best." The testator added that such conveyance should "not be required under any condition, or order of court, except as he (the trustee) may deem for the best interest" of the beneficiary. The trustee refused to convey, action was brought by the beneficiary to compel conveyance, and the court ordered the trust terminated and the property conveyed to the beneficiary. It was conceded that the trustee "has been and is perfectly sincere" in his opinion that the beneficiary should not have the land in fee. Nevertheless, the refusal to convey is held "unreasonable and arbitrary" because "as a matter of proved fact the plaintiff has become and is a person of reasonable care and prudence in whom the title can be vested without any apparent danger of the property being wasted." In other words, the court, on testimony adduced at the trial of the cause, decides for itself that the beneficiary measures up to the standard set in the will, although the trustee, concededly acting in good faith, has decided otherwise, and that in the face of the clear language of the will which made the decision of the trustee final. It is proper to remark that the court concludes that the trustee has shown himself unworthy to act as trustee, and that the will is construed against him because he, a lawyer, drafted its provisions, and because he might profit by refusing to convey the land to his brother; but the statements quoted are emphasized and relied upon by the court in reaching its decision. It is believed that this case clearly shows a disposition to substitute for the judgment of the trustee its own opinion based upon the evidence. Whatever restrictions may be found necessary in the control of courts of equity over the discretionary powers of trustees, it is submitted that they must stop short of such a result.[19] The owner of the property, who established the trust, has chosen his trustee, and has endowed him with broad

[19] Thus, in Nichols v. Eaton, (1875) 91 U. S. 716 (734): "To compel them. . . . is to make a will for the testatrix which she never made; and to do it by a decree of court is to substitute the discretion of the chancellor for the discretion of the trustees, in whom alone she reposed it." In Cromie v. Bull, (1884) 81 Ky. 646 (657): "When the trustee is asked why he paid over to one of the children the entire income, his response is 'that the beneficiary, in his opinion, was capable of using it to his advantage in his business affairs' (words of the will), and this is a complete response to those in remainder, or to the chancellor. . . . . His discretion, except for fraud, bad faith or an abuse of the trust, shall not be questioned or controlled." So in In re Clark, (1915) 174 Iowa 449, 154 N. W. 759, a case relied upon by the court in the principal case, it was said there would be no interference "upon a mere difference of judgment between the court and the trustees."

powers and ample discretion, obviously with the purpose of submitting to his honest judgment questions of the prudence and competence of the beneficiaries, and of the wisdom and expediency of alternative methods of working out the purposes of the trust. These are questions difficult of decision by the ordinary means of ascertaining facts in open court. They require, rather, the careful judgment of men of affairs, who have full opportunity to observe the daily life and surroundings of the beneficiaries, and whose judgment may well be based upon matters incapable of legal proof.[20] And so the testator has evidently thought, for he has confided these decisions to such a man as his trustee. Another danger to be noted is the invitation to vexatious and costly litigation, since many decisions of trustees in the exercise of their discretion must necessarily run counter to the desires of impatient beneficiaries.[21] This, in turn, would tend to rob the trustee of initiative and confidence in the administration of the trust, and prevent that free exercise of his discretion intended by the trustor, which should only be limited by the essential requirements that he act in good faith, without selfish motive, and with an eye single to the interests of the trust and of the beneficiary.

RECENT CASES

CHARITIES—HOSPITALS—LIABILITY TO INVITEES.—Plaintiff, who is a practicing physician, sustained injuries in the X-ray room of the defendant hospital through the negligence of the defendant's servants. Defendant pleaded that it is an eleemosynary institution, and as such is immune from liability. *Held*, that the plaintiff may recover, inasmuch as under the modern theory of non-liability of charitable hospitals, immunity is limited to inmates receiving charity and is not applicable to invitees. *Marble v. Nicholas Senn Hospital Ass'n of Omaha*, (Neb. 1918) 167 N. W. 208.

[20] Bacon v. Bacon, (1882) 55 Vt. 243 (251,252): "If the court is to inquire whether the person to whom the discretion is given, meaning to act honestly, has made precisely the same decision that the court would have made, it amounts to reading the will as requiring the consent of the court, and it is obvious that many considerations might operate against individual consent into which the court could not providently inquire, and which it would be quite competent to the party to refuse to disclose."

[21] See Pulpress v. African M. E. Church, (1864) 48 Pa. St. 204, where trustees, answering a complaint of beneficiaries, asked the aid of the court in exercising their discretion to avoid vexatious litigation. The court, finding no showing of bad faith, dismissed the action, with assurances that there would be no interference with honest exercise of the trustees' discretion.

Immunity from damages is generally granted to a charitable institution for the negligent or tortious acts of its servants. 6 Cyc. 975; *Duncan v. Nebraska Sanitarium & Benevolent Ass'n*, (1912) 92 Neb. 162, 137 N. W. 1120, 41 L. R. A. (N.S.) 973, Ann. Cas. 1913E 1127. Many of the courts proceed upon the theory that its funds are held upon a special trust, that to use them for the payment of damages in an action of tort against it would be an unwarranted diversion thereof. *Adams v. University Hospital*, (1907) 122 Mo. App. 675, 99 S. W. 453; *Lyle v. National Home*, (1909) 170 Fed. 842; *Hordern v. Salvation Army*, (1910) 199 N. Y. 233, 92 N. E. 626, 139 Am. St. Rep. 889, 32 L. R. A. (N.S.) 62. But it has been held that the will of the donor will not be thwarted if trust funds are depleted by payment of damages to one not a beneficiary of the trust, and that the mere fact of its being devoted to charity is not sufficient to exempt property from the operation of the general law. *Bruce v. Central M. E. Church*, (1907) 147 Mich. 230, 110 N. W. 951, 10 L. R. A. (N.S.) 74, 11 Ann. Cas. 150. In *Whittaker v. St. Luke's Hospital*, (Mo. App. 1908) 117 S. W. 1189, however, this latter case was considered weak, and it was held that the doctrine of immunity should extend to all persons, or that the doctrine of respondeat superior is not applicable to charities. See also, *Fire Ins. Patrol v. Boyd*, (1888) 120 Pa. 624, 1 L. R. A. 417, 15 Atl. 553, 6 Am. St. Rep. 745. But due care must be exercised in the selection of the servants, or liability attaches. *McDonald v. Massachusetts General Hospital*, (1876) 120 Mass. 432, 21 Am. Rep. 529.

The more liberal line of authority, however, is crystallizing to the doctrine that the immunity of a charitable institution extends only to persons entering into relations with it to obtain the benefit of the charity which it dispenses. *Powers v. Massachusetts Homoeopathic Hospital*, (1899) 101 Fed. 896, affirmed, (1901) 109 Fed. 294, 65 L. R. A. 372; *Thomas v. German General Benev. Society*, (1914) 168 Cal. 183, 141 Pac. 1186. (injury to employee) *McInerny v. St. Luke's Hospital Ass'n*, (1913) 122 Minn. 10, 151 N. W. 837, 46 L. R. A. (N.S.) 548; *Kellogg v. Church Charity Foundation*, (1911) 203 N. Y. 191, 96 N. E. 406, Ann. Cas. 1913A 883, 38 L. R. A. (N.S.) 481; 13 R. C. L. 948, sec. 12. This is in accord with the instant case.

CONSTITUTIONAL LAW—CLASS LEGISLATION—INSANE PERSONS—STERILIZATION.—The superintendent of a training school applied to the probate court for a hearing to determine the sanity and to procure authority for an operation of salpingectomy on one of his female patients. The statute under which the petition was presented provided for sterilization of the inmates of state institutions for the mentally defective or insane. In reviewing the dismissal of the petition the supreme court *held*, that the statute was class legislation and unconstitutional in that it applied only to that part of a class of natural persons which had been confined in state institutions. *Haynes, Superintendent of Michigan Home and Training School v. Lapeer Circuit Judge*, (Mich. 1918) 166 N. W. 938.

The question of restraint of procreation by those mentally defective is of growing importance because a part of the present day eugenics propaganda. Two methods have been suggested—first, asexualization, which

completely removes all sexual instincts. This method has seemingly not been provided for anywhere. Sterilization, the second method, by means of vasectomy (in the male) and salpingectomy (in the female) have been provided for in several states as a preventive of hereditary mental weakness. This method does not impair the sexual instincts but destroys the ability to procreate. St. Cal. 1909, p. 1093, c. 720; Pub. Laws Conn. 1909, c. 209; Laws Ind. 1907, c. 215; Laws Iowa 1911, c. 129; Laws N. J. 1911, c. 190, Mich. Pub. Acts 1913, Act. No. 34. The provision for sterilization of convicted rapists in Washington (Rem. & Bal., sec. 2287) was held not to be cruel and inhuman punishment in the case of *State v. Feilen*, (1912) 70 Wash. 65, 126 Pac. 75, 41 L. R. A. (N.S.) 419, Ann. Cas. 1914B 512. A contrary result was reached under the Iowa statute in *Davis v. Berry*, (1914) 216 Fed. 413. Comment on *State v. Feilen*, supra, in 41 L. R. A. (N.S.) 419, suggests that whether the object of such statutes be punitive to the convicted rapist or protective to society in general, the statute should provide for asexualization. The note suggests that mere sterilization is not punitive in that it frees the rapist of all fear of bastardy proceedings and it is not protective in that the sexual instincts of the rapist are still normal.

As applied to inmates of state hospitals, however, the statute is intended purely for the protection of society In the case of *Smith v. Board of Examiners of Feeble-Minded*, (1913) 85 N. J. L. 46, 88 Atl. 963, the statute, which like that of the instant case, applied only to inmates of state institutions, was held unconstitutional. "It is evident that by the classification of those who are and those who are not inmates in public charitable institutions a principle of selection is adopted that bears no reasonable relation to the proposed scheme for the artificial betterment of society."

CONTRACTS—DISABILITY TO PERFORM—LIABILITY.—According to the terms of a written agreement plaintiff was to purchase and defendant was to sell a certain quantity of milk each day for a stated period of time. The contract stipulated that plaintiff was to come to the premises of the defendant to get the milk. During the period of which the contract was to run, the defendant himself, all his cattle and all the products of his farm were quarantined by order of the commissioner of domestic animals, and shortly thereafter all the cows on the farm were killed to prevent the spreading of the "hoof and mouth disease." Plaintiff brought action to recover for the failure to deliver milk under the contract. *Held*, that this was an absolute and unconditional undertaking on the part of the defendant, and he is not released from the obligations of his contract because it was difficult or impossible to perform them, so long as the performance was not illegal. *Whitman v. Anglum*, (Conn. 1918) 103 Atl. 114.

A party to a contract does not become discharged from his obligation to perform merely because it becomes difficult or burdensome for him to do so. *Jones v. Anderson*, (1886) 82 Ala. 302, 2 So. 911; *Cassady and Dunn v. Clarke*, (1846) 7 Ark. 123; *Tobias v. Lissberger*, (1887) 105 N.Y. 404, 12 N. E. 13, 59 Am. Rep. 509. If one agrees to furnish goods, and his agreement is positive and wholly unqualified, he must furnish them or he is liable for not doing so, even though performance becomes dif-

ficult on account of unforeseen emergencies, *Anderson v. May et al.*, (1892) 50 Minn. 280, 52 N. W. 530; 17 L. R. A. 555, 36 Am. St. Rep. 642; *Ptacek v. Pisa*, (1907) 231 Ill. 522, 83 N. E. 221, or even though performance becomes impossible. *Cook et al. v. McCabe*, (1881) 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765. If, however, the agreement be to furnish specified goods, for example, "200 tons of regent potatoes grown on land" of the promisor in Whaplode, the promisor is discharged in case of failure of the crop, for then, by the terms of the contract itself, there is nothing to which the contract can apply. *Howell v. Coupland*, (1876) L. R. 1 Q. B. Div. 258. Or, if the failure to perform is entirely due to hindrance or prevention on the part of the promisee, then the promisor is discharged. *United States v. Peck*, (1880) 102 U. S. 64, 26 L. Ed. 46; *Newton v. Highland Improvement Co.*, (1895) 62 Minn. 436, 64 N. W. 1146. Subsequent operation of domestic law, making performance unlawful or impossible, discharges the entire obligation. *Bailey v. De Crespigny*, (1869) L. R. 4 Q. B. 180, *Buffalo East Side R. Co. v. Buffalo St. R. Co.*, (1888) 111 N. Y. 132, 19 N. E. 63, 2 L. R. A. 284; *Semmes v. Hartford Insurance Co.*, (1871) 13 Wall. (U. S.) 158, 20 L. Ed. 490. If, in the case of a contract which appears upon its face to be unqualified, the terms of the contract, the subject matter thereof, or the circumstances under which it was made, are such that a condition may be implied, such condition will probably be implied in order to excuse the performance which has become impossible. *Walker v. Tucker*, (1873) 70 Ill. 527.

The decision in the instant case is in accord with these settled principles, for the contract was simply to deliver milk, not to deliver milk produced on the premises of the defendant; the quarantine did not make it illegal to deliver milk obtained elsewhere; the disability to perform was in no way occasioned by the plaintiff; and, in fact, the contract could still be performed substantially if not literally. It might be contended that the stipulation that the defendant was to call for the milk at the defendant's premises implied that the milk was to be produced there, but apparently there was no evidence to warrant the implication of such a condition.

CORPORATIONS—VOLUNTARY DISSOLUTION—POWER OF DIRECTORS AND MAJORITY SHAREHOLDERS TO DISSOLVE WHEN SOLVENT—RIGHTS OF MINORITY SHAREHOLDERS.—Petition by the directors of X company for an order dissolving the corporation. X was a prosperous copper mining company with an improved property and increasing earnings. Dissolution was sought in order that an alleged advantageous sale of its property might be made to the Y company which owned over ninety-nine per cent of the X company shares, and wished to effect economies by unity of management and operation with other mines. Two shareholders owning less than one per cent of the shares, who had refused to exchange or to sell their shares to the Y Company, opposed the petition. A statute provided that the directors might apply to the court of chancery, and that the court should decree dissolution. . . . "for any reason . . . beneficial to the stockholders. . . ." Held, that, as the sole immediate purpose is to get rid of the respondents as stockholders, although the ultimate object may be to reduce the cost of operation, and perhaps commendable as a

business proposition, the petition should be denied. *In Re Paine et al.*, (Mich. 1918) 166 N. W. 1036.

For a discussion of the principles involved in this case see NOTES, p. 526.

EVIDENCE—ADMISSIBILITY OF TELEPHONE CONVERSATION.—Plaintiff recovered judgment in a suit for damages for injury caused to his automobile in a collision with defendant's taxicab. Plaintiff's son was called as a witness and testified that he called up the defendant company by phone, using the directory, and asked for the manager; a Mr. Paige answered the telephone and said that he was the manager. During the conversation, this person discussed the accident, said that they owned the taxicab and would send out a man the next day. It developed on cross-examination that the witness did not know Paige, nor did he recognize his voice, but bases his statement on the fact that the person said he was the manager. *Held*, This testimony was admissible, even though the witness did not recognize the voice at the other end of the wire. *Theisen v. Detroit Taxicab Co.*, (Mich. 1918) 166 N. W. 901.

It is well settled that conversations had over the telephone, if otherwise competent, are admissible in evidence where the witness testified that he recognized the voice of the other party. *Lord Electric Co. v. Morrill*, (1901) 178 Mass. 304, 59 N. E. 807; *Harrison Granite Co. v. Penn. Ry. Co.*, (1906) 145 Mich. 712, 108 N. W. 1081; *National Bank of Ashland v. Cooper*, (1910) 86 Neb. 792, 126 N. W. 656. In other words, evidence of a conversation over the telephone is not inadmissible because such communication is uncertain, unreliable and easily manufactured. *Shawver v. Chamberlain*, (1900) 113 Iowa 742, 84 N. W. 661, 86 Am. St. Rep. 411; *Galt v. Woliver*, (1902) 103 Ill. App. 71. Some courts, notably Illinois, make the voice test the sole criterion of competency. *Kimbark v. Illinois Car and Equipment Co.*, (1902) 103 Ill. App. 632; *Obermann Brew. Co. v. Adams*, (1890) 35 Ill. App. 540; *Stewart v. Fisher*, (1916) 18 Ga. App. 519, 89 S. E. 1052. The better opinion, however, seems to be that the identity of the person answering the telephone may be established by other means than the recognition of the voice. These views demand some recognition of identity. *Homeopathic Hospital of Albany v. Chalmers*, (1916) 157 N. Y. Supp. 1000; *Mankes v. Fishman*, (1914) 163 App. Div. 789, 149 N. Y. Supp. 228. In Minnesota, it has been held that recognition of the voice is not the exclusive test; it being sufficient if the identity of the person is established with reasonable certainty by means of surrounding facts and circumstances. *Barrett v. Magner*, (1908) 105 Minn. 118, 117 N. W. 245, 127 Am. St. Rep. 531. In other states, a still less stringent rule is adopted. All that is required is that the office with which the telephonic communication is had is identified, the authority of the particular individual talking being prima facie assumed to be as purported. *Guest v. Hannibal etc., R. Co.*, (1898) 77 Mo. App. 258; *Wolfe v. Missouri Pac. Ry. Co.*, (1888) 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331. All of these latter cases in accord with the more liberal view, proceed upon the theory that courts of justice take judicial notice of the place occupied by the telephone in the modern business world; its nature, operation and ordinary uses being facts of general scientific knowledge. Chamberlayne, Modern

Evidence, Vol. 1, par. 794B, cited approvingly in *Heckman v. Davis*,, (Okla. 1916) 155 Pac. 1170. Wigmore, Evidence, Sec. 2155. Some courts have gone so far as to hold that an acknowledgment taken over the telephone is good, if there be no evidence of fraud. *Banning v. Banning*, (1889) 80 Cal. 271, 22 Pac. 210, 13 Am. St. Rep. 156. For a general discussion of the whole subject see note 6 L. R. A. (N.S.) 1180 and 31 H. L. Rev. 794.

The instant case may safely be said to be in line with the general trend of the more modern decisions in favor of the admissibility of these conversations, not only when the voice is recognized, but even when it is not, provided the conversation takes place in the ordinary course of business.

EXECUTORS AND ADMINISTRATORS—RIGHT TO PERSONAL ASSETS WHEN NOT NEEDED TO PAY CLAIMS OR EXPENSES.—Defendant bank issued its certificate of deposit payable to decedent, Davids, for $1,400. By decedent's will, all of his property was left to his wife. The defendant bank paid the wife the full amount in September 1914, upon presentation of the certificate. Thereafter, the plaintiff was appointed administrator with will annexed and brought this action at law against the bank to recover the amount of the certificate for the benefit of the estate. The money was not needed for the payment of claims and expenses. *Held*, the bank was not liable to pay this money again to the administrator. *Molendorp v. First National Bank*, (Iowa 1918) 166 N. W. 733.

At the common law, title to the goods of the decedent vested in the personal representative upon the decedent's death. Schouler, Executors, 3rd ed., Sec. 199. This entitled the administrator to maintain trespass for acts done after the intestate's death and before the grant of administration. *Thorpe v. Stallwood*, (1843) 5 M. and G. 760, 12 L. J. C. P. 241. Likewise he could maintain trover for conversion in the interval. *Valentine v. Jackson*, (1832) 9 Wend. (N.Y.) 302. This is a naked legal title, with the beneficial interest in the creditors, heirs, or legatees, for whom the administrator acts as trustee. *Foote v. Foote*, (1886) 61 Mich. 181, 28 N. W. 90; *Richardson v. Cole*, (1901) 160 Mo. 372, 61 S. W. 182, 83 Am. St. Rep. 479. This title will always prevail against strangers, and even against the lawful heirs before distribution, when needed for the payment of the decedent's debts. *Woodhouse v. Phelps*, (1884) 51 Conn. 521; *Bearss v. Montgomery*, (1874) 46 Ind. 544.

But when the property is not needed for the payment of debts the naked legal title of the representative of deceased person is not sufficient in equity against one who has equitable title accompanied with the rightful possession. *Kennedy v. Davis*, (1911) 171 Ala. 609, 55 So. 104. It has been held that a settlement by the sole heir at law of a claim for damages for wrongful death is binding on administrator of decedent's estate, subsequently appointed, where the assets are not needed for creditors or expenses of administration. *McKeigue v. Chicago & Northwestern Ry. Co.*, (1907) 130 Wis. 543, 110 N. W. 384, 11 L.R.A. (N.S) 148. And see *Cooper v. Hayward*, (1898) 71 Minn. 374, 74 N. W. 152, 74 Am. St. Rep. 330. The instant case thus seems in accord with reason and authority.

FRAUDULENT CONVEYANCES—PARTIES IN PARI DELICTO.—The grantor conveyed his farm to his brother in order to avoid the effect of a judg-

ment in a suit pending against him. The grantee made a parol promise to reconvey; and the grantor remained in possession. Later the grantee entered and interfered with the crops; and in a suit brought by the grantor to secure possession and to cancel the deed, the court held that the legal title was in the grantee but that the grantor being in possession was entitled to retain possession. The present action is one in ejectment brought by the grantee who had been adjudged the holder of the legal title. The court refused the relief demanded on the ground that the cause was res judicata. But it proceeded to approve the holding in the former case that, although no trust resulted in favor of the grantor because of the statute of frauds, nevertheless the parties, being in pari delicto, neither can claim the aid of the court. *Iverson v. Iverson*, (Minn. 1918) 167 N. W. 483.

The statute of frauds prevents proving a trust by parol. It would seem that in every case where there is a conveyance and a mere verbal promise to reconvey there could be no trust shown. *Anderson v. Anderson*, (1900) 81 Minn. 329, 84 N. W. 112; *Wolford v. Farnham*, (1890) 44 Minn. 159, 46 N. W. 295. But in England the refusal to reconvey land on demand is held a fraud from which a trust arises by operation of law. *Haigh v. Kaye*, (1872) L. R. 7 Ch. App. Cas. 469. A number of American courts take the more logical view that no trust arises under such circumstances. The refusal to reconvey is a breach of faith, a violation of the parol trust, but it is not such fraud, as of inducement, as will raise a trust by operation of law. *Rasdall v. Rasdall*, (1859) 9 Wis. 350; *Luse v. Reed*, (1895) 63 Minn. 5, 65 N. W. 91; *Tatge v. Tatge*, (1885) 34 Minn. 272, 25 N. W. 596, 26 N. W. 121; *Marvel v. Marvel*, (1903) 70 Neb. 498, 97 N. W. 640, 113 Am. St. Rep. 792. However, if the conveyance was made with intent to defraud and the grantor remains in possession, he cannot be disturbed, according to the view of the court in the instant case. The principle that the court will help neither of two parties in pari delicto applies, and to a certain extent the grantor is in the position of a real cestui qui trust. The results of the rule as applied in the instant case are not entirely clear; the "legal possession" which the grantor retains is not nicely defined and appears likely to introduce difficulties into conveyancing and descent of real estate. There appear to be few decisions on the point but the conclusion in the instant case that the rule against relief to parties in pari delicto should apply is supported by *Kirkpatrick v. Clark*, (1890) 132 Ill. 342, 24 N. E. 71, 8 L. R. A. 511, 22 Am. St. Rep. 531, and *Harrison v. Hatcher*, (1872) 44 Ga. 638.

INJUNCTIONS—LABOR UNIONS.—Plaintiff employed in his theater an organist who was a member of the defendant union, and who furnished all the music necessary for the plaintiff's performances. The defendant had adopted a minimum rule fixing the number of musicians who should be employed in a theater, whereby any person who wished to employ any member of the union was required to employ an orchestra of at least five musicians, all to be members of the union. This rule had been suspended temporarily, during which time plaintiff had employed this one musician. Plaintiff was informed that the defendant intended to put this rule into

effect again and to enforce it strictly, whereupon he brought a bill asking that the defendant be enjoined from putting the rule in force. *Held,* that this rule was an interference with plaintiff's right to a free flow of labor, illegal and unenforceable. *Haverhill Strand Theater, Inc. v. Gillen et al.,* (Mass. 1918) 118 N. E. 671.

For a discussion of the principles involved see 2 MINNESOTA LAW REVIEW, page 524.

JUDGMENTS—FOREIGN JUDGMENT BY CONFESSION—DEFENSES—FULL FAITH AND CREDIT.—Plaintiff obtained in Illinois a judgment by confession under warrants of attorney against defendant on two promissory notes. The warrants subjoined to each note authorized any attorney of any court of record to appear for defendant and confess judgment without process. No process was served. The cognovit of the attorney stipulated that no bill in equity should be filed to interfere with the enforcement of the judgment. Plaintiff brought action on the judgment in Minnesota. The defenses set up were want of jurisdiction of the Illinois court, no consideration for the notes and fraud in obtaining them. *Held,* that the stipulation in the cognovit was unauthorized by the warrants and until the exemplified record of the judgment is corrected in the court which rendered it no action can be maintained in Minnesota; that the judgment is entitled in Minnesota only to the faith and credit to which it is entitled in Illinois and that therefore a meritorious defense may be shown in Minnesota. *Gundlach v. Park,* (Minn. 1918) 165 N. W. 969; on reargument, 167 N. W. 302.

A judgment by confession has the same force and effect as other judgments. *Van Norman v. Gordon,* (1899) 172 Mass. 576, 53 N. E. 267, 70 Am. St. Rep. 304, 44 L. R. A. 840; Braddee v. Brownfield, (1835) 4 Watts (Pa.) 474. It has been held that judgment by confession cannot be entered without service of process on the defendant. *Farquar v. Dehaven,* (1912) 70 W. Va. 738, 75 N. E. 65, Ann. Cas. 1914A 640, 40 L. R. A. (N.S.) 956. But other jurisdictions by reason of statutory regulations hold that such service is unnecessary. *Thompson v. Foster,* (1845) 6 Ark. 208; *Matthews v. Thompson,* (1827) 3 Oh. 272; and see *Teel v. Yost,* (1891) 128 N. Y. 387, 28 N. E. 353, 13 L. R. A. 796. The place of entering the judgment by confession is not restricted to the jurisdiction in which the person authorizing it resides or the authority is given unless the warrant so restricts it. *Piric v. Stern,* (1897) 97 Wis. 150, 72 N. W. 370, 65 Am. St. Rep. 103. The statutory requirements must be strictly complied with. *Mason v. Ward,* (1907) 80 Vt. 290, 67 Atl. 820, 130 Am. St. Rep. 987. And the authority given by the warrant must be strictly followed. *Manufacturers etc., Bank v. St. John,* (1843) 5 Hill (N.Y.) 497; *Spence v. Ermine,* (1889) 46 O. St. 433. The general rule that collateral attack on a judgment will not be allowed applies to judgments by confession. *Ogle v. Baker,* (1891) 137 Pa. St. 378, 120 Atl. 998, 21 Am. St. Rep. 886. A judgment by confession will be recognized in another state although in that state such a judgment cannot be entered. *Crim v. Crim,* (1901) 162 Mo. 544, 63 S. W. 489, 85 Am. St. Rep. 521, 54 L. R. A. 502; and see *Cuykendall v.Doe,* (1906) 129 Ia. 453, 105 N. W. 698, 113 Am. St. Rep. 472, 3 L. R. A.

(N.S.) 449. A valid judgment by confession is entitled in another state to the faith and credit to which it is entitled in the state in which it was rendered. *Kingman v. Paulson*, (1891) 126 Ind. 507, 26 N. E. 393, 22 Am. St. Rep. 611. See *Mills v. Duryee*, (1813) 7 Cranch (U.S.) 481, 3 L. Ed. 311; *Hampton v. McConnel*, (1818) 3 Wheat. (U.S.) 234, 4 L. Ed. 378. Personal service upon the defendant is not necessary to the validity of such a judgment. *Hazel v. Jacobs*, (1910) 78 N. J. Eq. 459, 75 Atl. 903, 2 Ann. Cas. 260, 27 L. R. A. (N.S.) 1066. That the defendant is outside of the jurisdiction is immaterial. *Kitchen v. Bellefontaine Nat. Bank*, (1894) 53 Kan. 242, 36 Pac. 344, 42 Am. St. Rep. 282. Since in the instant case the stipulation that no bill in equity should be filed to interfere with the enforcement of the judgment was ineffectual because unauthorized, and since that portion of the judgment which purported to give effect to it was severable from the remainder, it would seem that portion of the judgment ought to have been merely disregarded. The court also held that the jurisdiction of the subject matter by the Illinois court could be challenged by an inquiry as to whether there was consideration for the notes. The court said if the notes were without consideration there was no debt due and if no debt then no jurisdiction. If this reasoning is sound the very judgment to recover a debt will always involve the question of jurisdiction and will always be subject to attack on that ground. The court cites Illinois cases to show the faith and credit given to judgments by confession in Illinois. But the cases, except *Cooper v. Tiler*, (1868) 46 Ill. 462, 95 Am. Dec. 442, are cases to open or vacate the judgment. And direct attack can be made only in the court which rendered the judgment. 1 Black, Judgments, 2nd ed., Sec. 297; 23 Cyc. 891. Apparently the court is refusing to apply as liberal rules to foreign judgments by confession as to ordinary foreign judgments. In the original opinion, the court seems to adopt the following propositions: (1) a judgment by confession in which the cognovit exceeds the attorney's authority is wholly void, and not merely void as to the excess; (2) a judgment by confession in Illinois being authorized only in case of a debt bona fide due, proof of want of consideration shows that the court was without jurisdiction and the judgment void; (3) a foreign judgment, void for either of these reasons, is not entitled to full faith and credit. On rehearing, the court reaffirms the first and third, but says nothing about the second point, which may possibly be thought the weakest. That a judgment can be collaterally attacked for want of consideration is a rather surprising doctrine. The court in the original opinion also applied the rule that a judgment of a sister state is entitled only to that degree of faith and credit which it receives in the courts of the home state; from which it is made to follow that because a judgment by confession may be attacked directly in Illinois, it may be attacked collaterally in Minnesota. This point was not raised again on rehearing.

LANDLORD AND TENANT—LEASE—AGREEMENT TO REDUCE RENT—CONSIDERATION.—A landlord and tenant during the pendency of a lease agreed to reduce the rent. Rent was paid and accepted at the reduced rate for two years when the tenant vacated because the premises had become untenantable. The landlord sued for all the rent according to the original lease.

Held, the defendant is not liable. After the agreement had been fully executed the question of consideration became immaterial. *Bracket Co. v. Lofgren*, (Minn. 1918) 167 N. W. 274.

The general rule is that an agreement that part of a liquidated debt shall be a satisfaction of the whole is void unless made on some new consideration. *Sage v. Valentine*, (1876) 23 Minn. 102; *Marion v. Heimbach*, (1895) 62 Minn. 214, 64 N. W. 386; *Foster County State Bank v. Lammers*, (1912) 117 Minn. 94, 134 N. W. 501; *Goldsborough v. Gable*, (1892) 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294. In *Wharton v. Anderson*, (1881) 28 Minn. 301, 9 N. W. 860, the court said: "A gratuitous parol promise by a lessor to accept for rent, from a lessee in possession of the leased premises under a lease for a term of years, a less sum than the lessee covenants by the lease to pay, cannot be enforced, and the lessor may, notwithstanding such promise, insist upon the payment of the amount so covenanted to be paid." In *Ten Eyck v. Sleeper*, (1896) 65 Minn. 413, 67 N. W. 1026, Justice Mitchell, in holding that the new parol agreement to reduce rent was valid, said that the continued use and occupancy of the premises by the defendant for the hotel business, to which he was not bound under the lease, was good consideration for the new agreement. In *Sigler v. Sigler*, (1916) 98 Kan. 524, 158 Pac. 864, the court said that the modern tendency is to enlarge the number of exceptions to the rule that payment of a lesser sum, accepted in full discharge, will not bar the action to recover the balance unless made on new consideration and that any possible benefit or detriment should be seized on as consideration for the new agreement. The general rule has been rejected in at least two states. *Clayton v. Clark*, (1896) 74 Miss. 499, 21 So. 565, 22 So. 189, 60 Am. St. Rep. 521, 37 L. R. A. 771; *Frye v. Hubbell*, (1907) 74 N. H. 358, 68 Atl. 325. But there is a distinction between an agreement to satisfy an accrued and liquidated debt by payment of a less sum and a parol agreement to modify an executory written agreement before breach; the latter requires no new consideration. *Bowman v. Wright*, (1902) 65 Neb. 661, 91 N. W. 580. Some cases agree with the instant case in holding that when the lower rent has been paid and accepted there can be no recovery of the full rent for the period for which it was reduced. *McKenzie v. Harrison*, (1890) 120 N. Y. 260, 24 N. E. 458, 17 Am. St. Rep. 638, 8 L. R. A. 257; and see 1 Tiffany, Landlord and Tenant, Sec. 173f.

WORKMEN'S COMPENSATION—TIME TO FILE CLAIMS—STATUTES—CONSTRUCTION.—Plaintiff was injured slightly in October, 1915, but the seriousness of the injury did not become apparent until the following August. Claim for compensation was made in October, 1916. The Michigan statute requires that the claim for compensation be made within six months after the occurrence of the injury. *Held*, that the time begins to run when the actual accident happens, regardless of when the extent of the injuries is ascertained. *Cooke v. Holland Furnace Co. et al.* (Mich. 1918) 166 N. W. 1013.

The date on which the accident occurred has generally been held the date of the injury and where the seriousness of the accident did not become apparent until later than the period for giving notice of the injury

or making claim for compensation, the employee has lost all rights under the act. *In Re Carroll,* (1916) 225 Mass. 203, 114 N. E. 285. But very recently, attempts have been made to remedy this apparent hardship upon employees who disregard a slight injury which later develops serious consequences by statutory definitions of injury and accident. The Indiana court has made a distinction between accident and injury, the statute using the latter term, and holds that the injury occurs when the serious condition develops. *Hornbrook-Price Co. v. Stewart,* (Ind. 1918) 118 N. E. 315. The Nebraska Workmen's Compensation Act defines the injury as occurring when the diseased condition culminates. *Simon v. H. J. Cathroe Co.,* (Neb. 1917) 162 N. W. 633. Following this definition, the Nebraska court in an insurance case, held that the insured who was required to give notice of the injury immediately after it occurred "was not required to give notice of the injury so long as there was no evidence that the injury existed." *Midland Glass & Paint Co. v. Ocean Accident & Guarantee Co.,* (Neb. 1918) 167 N. W. 211.

Where there are provisions in the statute both for giving notice and making claim for compensation within specified times, with exceptions for failure to make one for mistake or inability or other reasons, the courts hold that these exceptions apply only to the one designated, and as to the one not so excepted the requirement of notice is mandatory. *Milwaukee v. Miller,* (1913) 154 Wis. 652, 144 N. W. 188, L. R. A. 1916A 1, Ann. Cas. 1915B 847; *Smith v. Solway Process Co.,* (1917) 100 Kan. 40, 163 Pac. 645; *In Re Murphy,* (1917) 226 Mass. 60, 115 N. E. 40; *Fidelity & Casualty Co. of New York v. Industrial Accident Commission of State of California,* (Cal. 1918) 170 Pac. 1112; *Bushnell v. Industrial Board,* (1916) 276 Ill. 262, 114 N. E. 496; *Manuel Fell's Case,* (1917) 226 Mass. 380, 115 N. E. 430. In Minnesota, Sec. 8213, G. S. 1913, gives the requirements as to notice. No claim for compensation need be made under this statute, and where the employer has knowledge of the injury no notice need be given. *State ex rel. Duluth Diamond Drilling Co. v. District Court,* (1915) 129 Minn. 423, 152 N. W. 838. Nor is written notice necessary where the employer has actual notice of the accident. *State ex rel. City of Northfield v. District Court,* (1915) 131 Minn. 352, 155 N. W. 103. But where the employer does not have knowledge of the accident and he receives no notice within the 90-day period, the statute seems to defeat all right of the employee to come within its provisions. It will depend upon the interpretation our court gives to the expression "occurrence of the injury."