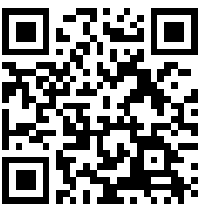

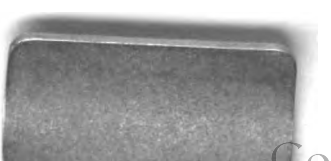

MINNESOTA
LAW REVIEW

Volume IV
1919 - 1920

Minneapolis, Minn.
Law School
University of Minnesota
1920

TABLE OF CONTENTS

ARTICLES

BOOK REVIEWS

MINNESOTA STATE BAR ASSOCIATION

TABLE OF CASES

MINNESOTA LAW REVIEW

VOL. IV DECEMBER, 1919 No. 1

IS A MOTOR VEHICLE ACCIDENT COMPENSATION ACT ADVISABLE?

THE rapidly expanding volume of motor vehicle accident litigation with its consequent burden upon the courts and its wasteful expense to litigants, suggests the necessity of devising a substitute for the cumbersome process of ordinary jury trials at common law to determine upon whom shall be placed the monetary loss resulting from the destruction of life and property in motor vehicle accidents. Already this kind of litigation has reached such proportions that almost any day one may visit the trial courts of general jurisdiction, safely predicting in advance that he will find nearly half of the judges and juries listening to diametrically opposite stories of witnesses under oath giving their versions of the incidents and causes of automobile accidents in which they are interested as friends of the litigants, often with ambulance-chasing lawyers on one side of the counsel table and still more unscrupulous lawyers for casualty insurance companies on the other side, all befogging the issues and confusing the juries until they are finally obliged to reach their verdicts on the toss of a coin within the secrecy of the jury rooms—well knowing that however they may decide, the lawyers will get more money than would have been required to pay the actual losses to the injured parties if such trials had been avoided.

These conditions, which have sprung up within a decade as a logical result of the immense increase in the number of motor vehicles and the variety of uses therefor, are analogous to the

conditions until recently existing in the domain of industry which caused the enactment of the various workmen's compensation acts; and it is suggested that the application of similar principles to the troublesome problem of motor vehicle accident losses might result in an equally satisfactory solution of the difficulty. The responsibility for suggesting such innovation must be considered as that of the writer alone, without approval or disapproval of the magazine in which this article is published. An outline of possible legislation to accomplish such purposes will be made and some legal authorities therefor will be cited.

With the exceptions as to willful negligence hereinafter mentioned, the general aim should be to eliminate entirely the question of negligence in motor vehicle accidents; to make certain and payable at all events a reasonable compensation for loss of life, limb and property in all cases, spreading the cost of such compensation over all users of motor vehicles on the public highways; and to provide a summary method of determining the amount of such losses.

This result can be accomplished through statutes providing for compulsory, minimum accident compensation insurance under a prescribed standard policy, and for determination of the extent of losses, where the parties cannot agree, by informal trial before a judge without a jury under procedure similar to present-day trials of workmen's compensation cases.

One or several legislative acts might be found desirable. But for the purposes of this article, it will be assumed that everything necessary could be included in a single act, to be known as the Motor Vehicle Accident Compensation Act. The first step should be a provision requiring all motor vehicles[1] to be registered and their owners licensed before such vehicles may be used on the public highways of this state, with the primary requirement that the applicant for such license must take out a policy of accident compensation insurance in a prescribed standard form for a term of the same duration as his license, paying the premiums therefor in advance and as a condition precedent to the issuance of a license to him to use such motor vehicle on the public high-

[1] The term "motor vehicle" has already been defined as including "all vehicles propelled by any other than muscular power, except traction engines, road rollers, fire wagons and engines, police patrol wagons, ambulances, and such vehicles as run only upon rails or tracks." G. S. Minn. 1913, Sec. 2619. See also Id. Sec. 7057.

ways.[2] It is confidently believed that the power inhering in the legislature under which present conditions have been prescribed for registering and licensing motor vehicles is ample for the further requirement of such compensation insurance. "That the state possesses plenary powers over public highways and streets is a proposition well settled."[3] It has been specifically held that the state may entirely prohibit the use of automobiles on *some* of the public highways;[4] a fortiori, the state may prohibit the use of motor vehicles on *all* public highways *unless* the general public is protected by reasonable insurance against loss resulting from the peculiar characteristics of motor vehicles. Such statutory provision, applying to motor vehicles only, would not be unconstitutional as class legislation;[5] and the fact that it applied only to citizens of this state, leaving the highways open to transients from other states without requiring such insurance from them, would not make such statutory provision invalid as denying the equal protection of the laws to our own citizens or infringing any other constitutional right.[6] If there should be any doubt about the power of the legislature to enact such law, practically the same result could be had indirectly by an elective system modeled upon that of the Minnesota workmen's compensation act, and so framed as to make it disastrous for any motor vehicle owner who did not elect to come under the statute.[7]

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[2] There is precedent for making compliance with a regulatory statute a condition precedent to the issuance of a license. See Session Laws Minnesota 1919, Chap. 510, Sec. 1.

[3] State v. Lawrence, (1914) 108 Miss. 291, 66 So. 745, quoting with approval Terre Haute v. Kersey, (1902) 159 Ind. 300, 64 N. E. 469, 95 Am. St. Rep. 298.

[4] State v. Phillips, (1910) 107 Me. 249, 78 Atl. 283; Com. v. Kingsbury, (1908) 199 Mass. 542, 85 N. E. 848, 127 Am. St. Rep. 513.

[5] Schaar v. Confroth, (1915) 128 Minn. 460, 151 N. W. 275, State v. Swagerty, (1907) 203 Mo. 517, 102 S. W. 483; In re Hoffert, (1914) 34 S. D. 271, 148 N. W. 20, 52 L. R. A. (N.S.) 949.

[6] In re Hoffert, (1914) 34 S. D. 271, 148 N. W. 20, 52 L. R. A. (N.S.) 949; Com. v. Boyd, (1905) 188 Mass. 79, 74 N. E. 255, 108 Am. St. Rep. 464; Christy v. Elliott, (1905) 216 Ill. 31, 74 N. E. 1035, 108 Am. St. Rep. 196, 1 L. R. A. (N.S.) 215. State v. Unwin, (1907) 75 N. J. L. 500, 68 Atl. 110; Ex parte Bozeman, (1913) 183 Ala. 91, 63 So. 201; Helena v. Dunlap, (1912) 102 Ark. 131, 143 S. W. 138, State v. Cobb, (1905) 113 Mo. App. 156, 87 S. W. 551.

[7] This result could be accomplished by a statutory provision leaving it *optional* with the motor vehicle owner to take out the prescribed insurance or leave it, but providing that if he elected not to carry such insurance, the license plates for display on his motor vehicle should be of a design different from that of persons who had elected to come under the act; that when sued at common law for the recovery of any damages alleged to have been caused by or arising out of the use of his motor vehicle on the public highways (except damages sustained by other motor

The second step should be a provision of law prescribing a standard form of compensation insurance policy covering motor vehicle accidents, and prohibiting the issuance of any other or different form of policy in this state.[8] Such standard compensation policy should unconditionally require payment by the insurer of all damages to the person or property of anyone not himself wilfully negligent, resulting from accidents occurring during the operation or use of the motor vehicle therein specified upon the highways of this state, excepting personal injuries to the policy holder[9] or to his employees[10] or to the driver or operator of such motor vehicle at the time of the accident[11],—with the proviso,

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vehicle owners or operators not under the act and in his own class), the defense of contributory negligence should not be available to him, Mathison v. Mpls. St. Ry. Co., (1917) 126 Minn. 286, 148 N. W. 71, that the burden of proof of non-negligence on his own part should be cast upon him in the trial of such actions, G. S. Minn. 1913, Sec. 4426 and cases there cited, that he should have no homestead or other property exemptions from the payment of such damages, G. S. Minn. 1913, Sec. 6961, Orr v. Box, (1876) 22 Minn. 485, 487, that the injured party should have a specific lien, presumptively good, on such uninsured motor vehicle from the date and hour of the accident with immediate right of possession by the sheriff or other like officer pending judgment and foreclosure, such lien to relate back from the entry of any recovering judgment to the time of the accident and to take priority over all other liens or titles whether prior in time or not, excepting liens or titles created prior to the passage of the act (G. S. Minn. 1913, Sec. 7023-7024); and containing other drastic provisions against the non-insured class, so as practically to compel them to elect to come under the terms of the act requiring standard compensation insurance. The authorities cited in this note, together with the Minnesota workmen's compensation act, furnish the precedents (at least by analogy) for such semi-compulsory election.

[8] The power of the legislature to prescribe a standard form of insurance policy and prohibit the use of any other is well established. Kollitz v. Equitable Co., (1904) 92 Minn. 234, 236, 99 N. W. 892; Wild Rice Lumber Co. v. Royal Ins. Co., (1906) 99 Minn. 190, 108 N. W. 871; Dunnell's Digest, Vol. 2, Sec. 4759 and cases there cited.

[9] The term "policy holder" is here used to designate the person usually described as the "assured" or "insured," because the use of the latter terms would not be strictly accurate in a policy where third persons were made the primary beneficiaries as suggested in this article. The policy holder himself should be excluded from the benefits of any *compulsory* clause of the policy, leaving that feature for private agreement between him and the insurer in accordance with the present practice, because to compel such benefits as to him would be in effect to compel him to insure his own life and property against loss in motor vehicle accidents, since the cost of such compulsory provision would certainly be added to the premiums of the insurer on that basis.

[10] Employees should be excluded because they are already provided for by the Minnesota Workmen's Compensation Act. Session Laws Minnesota 1913, Chap. 467 and amendments.

[11] The driver or operator of the motor vehicle should be excluded because he is in position similar to that of the policy holder and *compulsory* insurance against the consequences of his own act would not be desirable. That should be a matter for private agreement.

however, that in the event of accidental collision or other mishap involving two or more motor vehicles each covered by standard compensation policies, the damages resulting to all persons (including damages to person and property of the policy holders themselves, if not willfully negligent) shall be apportioned between and paid by the insurers in proportion to the premiums received by them upon such policies.[12] With these exceptions, the payment of damages (always limited by the maximum stated in the policy[13]) should be made as certain in all cases as

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[12] In case of accident involving two or more motor vehicles each covered by standard compensation policies, damages should be paid to all injured parties *including the policy holders themselves* because the actuaries of the insurers in *each* policy would have calculated (in fixing premiums) the probability of paying damages to all injured persons except their own policy holder, etc., which would therefore include damages to any *other* motor vehicle licensee and his employees involved in the accident. By *apportioning* such damages, each insurer is favored rather than penalized since his liability might be for *all* instead of a *part* only of the damages. Moreover, any other disposition of collision cases would result in the very litigation which it should be the purpose of this act to avoid.

[13] In order to make insurance practical, some limit of liability should be fixed as a basis for determining the cost of such insurance. Automobile accident liability policies now in use by some well known companies fix such limits *in any one accident* as follows: personal injuries or death, $10,000; property injury to persons other than the policy holder, $1,000; collision injury to policy holder, the value of his automobile—which, on the average, is probably $1,500; also *all expenses of litigation arising out of such accidents.* The limit of liability in such policies for *one* accident may, therefore, be roughly estimated at $15,000; and the same limit fixed in the standard compensation policy here suggested would probably cover the actual losses to be paid in ninety-nine cases out of a hundred. True, in the standard compensation policy the loses would be payable absolutely, while in the present private policies such losses are dependent upon negligence or other wrongful act of the policy holder; but the same thing was true as to employer's liability insurance when the change was made from the old common law liability to the present workmen's compensation act. And while it is the opinion of insurance men that the cost to employers under the workmen's compensation act is probably fifty per cent greater than under the old common law liability, yet in various other respects the workmen's compensation act has proved so beneficial that few employers would now vote for a return to the old system. And even if the cost of motor vehicle accident insurance under the standard compensation policy here suggested should also prove to be fifty per cent greater than under the now existing private policies, that additional burden upon motor vehicle owners might prove a welcome substitute for their obligations under now existing liability policies to expend unlimited time and energy in assisting the insurance companies to prove them free from negligence or to prove their unfortunate victims guilty of negligence whenever an accident happens.

As to the hundredth case of an exceptionally bad accident injuring many people and thereby rendering the limited amount fixed in the standard compensation policy inadequate to pay the damages, a statutory provision might be made whereby any of the injured parties after the remedy against the insurer had been exhausted, could petition the district court

the payment of life insurance upon death of the insured. All questions of negligence, unless willful, should be expressly eliminated.[14] The injured party should be made the primary beneficiary of the policy, with a joint and several right of action against the insurer and the policy holder for damages not exceeding the maximum stated in the policy; but in the event of collection from the policy holder separately, the latter should have a right to entry of judgment in his favor and against the insurer in the same action for the amount paid, upon filing an affidavit that he had complied with the terms of the policy.[15] Other provisions, covering details, should be incorporated in the policy.[16]

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setting forth such facts in full and asking for leave, after due notice to all parties in interest and hearing thereon, to bring suit at common law for the recovery of damages from the parties alleged to be responsible for such injuries; and upon such leave being granted by the court (but not otherwise) the uncompensated injured parties might proceed at common law without disabilities, the same as if the motor vehicle accident compensation act did not exist.

[14] Insurance against loss caused by one's own negligence is not contrary to public policy. Mpls. St. Ry. Co. v. Home Ins. Co., (1896) 64 Minn. 61, 69, 66 N. W. 132; Phoenix Ins. Co. v. Erie Transportation Co., (1886) 117 U. S. 312, 29 L. Ed. 873, 6 S. C. R. 750.

[15] Of course, such judgment could be opened by the insurer upon an order to show cause and a hearing establishing prima facie the falsity of the policy holder's affidavit for judgment, to the prejudice of the insurer; but this procedure would place the burden upon the insurer to prove to the satisfaction of the court that such judgment had been improperly entered before there could be any trial or further litigation between insurer and policy holder upon the same state of facts litigated in the action by the injured party against the policy holder, hence the volume of litigation would be reduced to a minimum without sacrificing the substantial rights of any of the parties interested.

[16] The insurer and the policy holder should be permitted, by agreement, to insert in the standard policy any reasonable provision not inconsistent with the requirements of the statute. Among such provisions might be the following: (a) clauses covering fire, burglary and theft insurance, and also insuring the policy holder against any risk of damage to person or property not covered by the standard provisions of the policy and not inconsistent therewith; (b) requiring reasonably prompt notice by the policy holder to the insurer of all accidents, and of all suits for damages at common law, and making the policy holder liable for all losses to the insurer caused by failure to give such notice, but without affecting the insurer's liability to any injured third party; (c) requiring the claimant for compensation to make reasonable proofs of loss to the insurer, in a prescribed form if practical, and allowing the insurer a reasonable time to investigate same and make payment before the claimant should have the right to bring suit; (e) providing for arbitration (if advisable in this class of insurance, which is doubtful) of losses where the parties failed to agree, by procedure similar to that prescribed in standard fire insurance policies or existing automobile insurance policies; (f) providing an exclusive method for cancellation of the policy by the insurer after due notice to the policy holder (and possibly requiring the consent of the insurance commissioner, or an order of court, after hearing); (g) providing penalties or forfeitures for fraud or attempted fraud against

All parties interested should be required to submit the determination of the amount of loss suffered, if unable to agree upon such amount, and also all other matters in dispute, to trial by the court without a jury under a summary procedure provided by the act.[17] Such provision cannot be made *absolute,* so as unconditionally to deprive the injured party of his constitutional right to a common jury trial if he has a common law cause of action. He must have his right of election to proceed either at common law or under the act. But the common law action may be so restricted and made so burdensome for him and the statutory

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the insurer by the policy holder or injured party; (h) providing for the protection of salvage, for subrogation when proper, and against changes in optional clauses of the policy by agents without authority; (i) requiring the policy holder and insurer to submit all controversies between themselves arising under the policy (including liability of the policy holder to the insurer to reimburse for losses caused by willful negligence of the policy holder) to trial by the court without a jury and under pleadings framed by order of the court in the same action, if any, which determined the loss and right of recovery of the injured party; (j) defining the words "motor vehicle," "accident" and "willful negligence" in the terms of the statute; (k) excluding from the operation of the policy railroad crossing accidents and accidents involving instrumentalities of interstate commerce, or accidents for any reason under the operation of federal laws; (l) fixing a limitation of time within which actions for compensation under the policy must be brought, unless fixed by act; etc.

[17] The section of the act governing procedure, in case of suit for compensation under the policy, should follow generally similar provisions of the workmen's compensation acts. It might be provided that the plaintiff may file a verified complaint, setting forth the names of the insurer and the policy holder, the existence of the standard policy, the time and place of the accident, and a brief description thereof showing that the policy holder's motor vehicle was involved therein, the nature and extent of the damages resulting to the plaintiff, the making of the required proofs of loss to the insurer and lapse of the statutory time without payment, and such other special facts in the particular case as might be necessary and proper for the information of the judge; that a copy of said complaint together with a summons in the usual form in civil actions be served upon the defendants; that the defendants be required within the time stated in the summons to file and serve a verified answer, specifically admitting, denying or qualifying each material allegation of the complaint (general denials being prohibited), and stating the contention of the defendant with reference to the matters in dispute, and the ultimate facts relied upon as a defense to the plaintiff's claim; that the plaintiff may serve and file a reply, if so advised, within ten days thereafter; that the case shall then be brought on for trial before the court without a jury by the usual procedure in civil actions in the court where the same is pending; that at the time of trial the judge shall hear such witnesses and receive such evidence as may be properly presented by either party, AND IN A SUMMARY MANNER decide the merits of the controversy; that such determination shall be filed in writing and shall contain a statement of facts as determined by said judge, that judgment shall be entered thereon in the same manner as in the usual court cases and with the same effect; that no appeal may be taken from such judgment, but the jurisdiction of the supreme court to review questions of law by certiorari shall remain as in other cases.

action made so easy that, in actual practice, he will nearly always elect to proceed under the statute. The act should provide that any party suffering injury to person or property in any accident giving rise to any claim or cause of action against any policy holder protected, as to such claim, by standard accident compensation insurance, will be *presumed* to have elected to come under the provisions of the act unless an action at common law be commenced or complaint therein filed by him within thirty days after the occurrence of the accident, and that after such time no action can be brought except under the statute. It should be provided further that if such injured party elects to sue at common law, he shall lose his right of action for such loss against any insurer in any standard accident compensation policy, and shall have none of the benefits of the act; that in such common law action the burden of proof shall be upon him to establish non-negligence on his own part as well as negligence or other actionable wrong by the defendant; that negligence, in connection with the accident, of his agents, servants and employees shall be imputed to him; that violation by him or his agents, servants or employees, at the time of the accident, of any statute or ordinance relating to the use of the public highways, shall constitute negligence by him as a matter of law.[18] These, and other provisions which might be suggested, would solve the problem of election of remedies by the injured party and common law actions would be extremely rare. For such has been the effect of less drastic provisions in the various workmen's compensation acts.

Other provisions of the act should be made to cover numerous details.[19] A schedule of compensation for various definable

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[18] The decisions sustaining the various workmen's compensation acts and the authorities cited in the foregoing notes appended to this article are ample to prove the power of the legislature to make the above suggested provisions in the statute.

[19] Such provisions might include: (a) placing the issuance and control of motor vehicle licenses in the office of the insurance commissioner instead of the secretary of state; (b) giving the insurance commissioner a limited control over rates for such insurance, and the same general control over the insurers as is vested by law in him with reference to insurance companies generally; (c) requiring the name and address of the insurer (or its resident agent) and of the policy holder to be filed with the insurance commissioner and also with the register of deeds where the title to the motor vehicle is registered (Session Laws Minnesota 1919, chapter 510), and providing that the same shall be there recorded in a book kept for that exclusive purpose and always open to public inspection; that such record shall also show the serial number and date of the policy and date of expiration thereof, and that a certified copy of such book entry shall be prima facie evidence in any court of the existence of such policy with

injuries is not suggested, as no reason is perceived why insurers should not pay the losses as fixed by the court in each case,—just as they are already doing indirectly under automobile accident insurance policies voluntarily made by them.

The element of willful negligence has been purposely reserved for separate discussion. The standard accident compensation insurance policy should make the insurer liable to innocent persons injured whether by the willful negligence of the policy holder or not; for it is obvious that the benefits to such injured persons should not be lessened by the wrongful acts of the policy holder. Therefore, the weakest feature of the compensation scheme suggested in this article is the danger of intentional or reckless and indifferent destruction of life, limb or property with the protection or benefits of such accident compensation insurance in view. Of course, any *intentional* act directly resulting in such injury is not *accidental*,[20] and, therefore, could not be

all the standard provisions in force within the dates specified; (d) providing that service of summons, notice or process in any action may be made upon the insurer through the insurance commissioner, or upon the resident agent of the insurer, if any, and that all proofs of loss or other notices preceding the commencement of any action may be made upon the insurance commissioner as agent of the insurer, if the claimant so elects, or upon any resident agent of the insurer in this state, by mail in the ordinary course; (e) stipulating that both the insurer and the policy holder are presumed to have consented to all the terms, conditions and requirements of the act by entering into the compensation insurance contract therein provided; (f) providing that immediately upon insolvency or bankruptcy of the insurer (of which condition, for the purposes of this act, the opinion of the insurance commissioner shall be prima facie evidence) the policy holder's motor vehicle license shall expire, and until reinsured, he shall have the same status as if he voluntarily failed to register and procure a license; (g) providing that all settlements of accident compensation claims or controversies out of court shall be presumptively fair and valid, and that any attempt to alter or modify or set aside such settlements shall be tried by the court without a jury and under the same summary procedure provided by the act for the trial of cases where no settlement was agreed upon; (h) providing that any person accepting compensation or other benefits of the act out of court, or bringing any action or proceeding in court under the act, shall be conclusively presumed to have waived his common law right of action, if any, and shall be forever barred from bringing any action or asserting any claim except under the act; (i) excluding from the operation of the act railroad crossing accidents and all accidents giving rise to claims or causes of action under federal statutes; (j) either excluding street railways from the operation of the act, or making special provision relative thereto; (k) defining the words "motor vehicle," "accident" and other terms; and so on.

[20] A legislative definition of the word "accident" is contained in Sec. 34h of the Minnesota Workmen's Compensation Act (General Laws of Minnesota 1913, Chap. 467), and with slight modification it could be adapted to the statute here suggested and made to read as follows: The word "accident" shall be construed to mean an *unexpected* or *unforeseen* event, happening suddenly and violently, with or without human fault, and producing at the time injury to the person or property of anyone.

brought within any accident compensation act. Collection of accident compensation by any person after *intentional* injury, self-inflicted or to which he was a party, would amount to obtaining money by false pretense which is statutory larceny. The relative losses to accident compensation insurers from that source would not be as great as the present losses to fire insurance companies from arson; for the acts constituting the crime could not be as easily concealed.

But the element of willful negligence without crime would still require careful attention; and effective safeguards against it should be provided. Willful negligence has been judicially defined as follows:[21]

"By willful negligence is meant not strictly negligence at all, to speak exactly, since negligence implies inadvertence and whenever there is an exercise of the will in a particular direction there is an end of inadvertence, but rather *an intentional failure to perform a manifest duty which is important to the person injured in preventing the injury, in reckless disregard of the consequences as affecting the life or property of another.*"

A legislative definition in precise language would be highly desirable in any act of the nature here suggested; and it should be provided further that violation, occurring at the time of accident, of any penal statute or ordinance relating to the use of the public highways, if a misdemeanor, shall be prima facie evidence of willful negligence on the part of the offender, and, if a gross misdemeanor or felony, that it shall be willful negligence within the meaning of the act. Such violation, if only a misdemeanor, should be proved as any other fact in a civil action, but if a gross misdemeanor or felony, then only by the record of a criminal conviction thereof in some court; and when the fact of such willful negligence was established it should be conclusively presumed to have caused or contributed to the accident. The statute should then provide that persons willfully negligent shall have no recovery themselves of any damages from any source in any accident occurring at the time of commission of the acts within the duration of the conditions constituting such willful negligence; that all other persons injured in such accidents shall have their common law right of action against the willfully negligent offenders for all damages suffered in excess of insurance benefits under the statute; that all insurers shall have a right of action against them

[21] Holwerson v. St. Louis, etc., Ry. Co., (1900) 157 Mo. 216, 57 S. W. 777, 50 L. R. A. 850.

for the recovery of all losses paid to others and all expenses incurred as a result of such accidents; that the liability in damages of such willfully negligent offenders under the act shall be absolute, notwithstanding any exemption statutes or state insolvency laws to the contrary,[22] and that all their property of whatever nature or kind shall be subject to execution and sale to satisfy such debts; and that all provisions in any standard compensation policy which otherwise would have been for the benefit of the persons willfully negligent shall be rendered inoperative by such willful negligence.

It is believed that the foregoing, and other drastic provisions which might be added, would be a sufficient deterrent against the tendency of dishonest or reckless persons to cause injuries, through willful negligence, because of the protection or benefits of such accident compensation insurance. This belief is strengthened by the fact that willful negligence in motor vehicle accidents is of necessity linked with personal danger to the offenders and is opposed to their natural instincts of self-preservation. For many years ordinary accident insurance has indemnified for personal injuries irrespective of negligence of the assured, and life insurance has compensated for suicidal death; yet both accident and life insurance have proved practical. Fire insurance also compensates for negligent fire losses, barring exceptions expressly stated. But it has never been demonstrated that either accident, life or fire insurance has made the assured more negligent than persons not insured. And with the advent of nation-wide prohibition and its consequent elimination of intoxicated persons, perhaps it may now be safely assumed that insurance losses from willfully reckless destruction of life and property, successfully concealed, would not be so great as to render impracticable the above outlined plan of insurance covering motor vehicle accidents.

If all insurance companies should decline to issue standard accident compensation policies, state insurance for the same purpose would not be impossible—particularly when modeled upon

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[22] It is possible that the federal bankruptcy act, as now existing, would not discharge a debtor from his obligation to pay a judgment against him in favor of the insurer and based upon his willful negligence. Flanders v. Mullin, (1905) 80 Vt. 124, 66 Atl. 789, 18 Am. Bank Rep. 708; Tinker v. Colwell, (1904) 193 U. S. 473, 485, 48 L. Ed. 754, 24 S. C. R. 505, 11 Am. Bank Rep. 568; U. S. ex rel. Kelly v. Peters (C. C. A. 7th Circ. 1910) 24 Am. Bank Rep. 206, 177 Fed. 885; McChristal v. Chisbee, (1906) 190 Mass. 120, 76 N. E. 511, 16 Am. Bank Rep. 838, Sec. 17 of the federal bankruptcy act.

state insurance under workmen's compensation acts already in force in many states.

The public is entitled to some protection. Much is said by motorists about the carelessness of the public, but their comments are not entirely justified. Before the advent of motor vehicles, death or serious personal injury in accidents on the public highway was a rarity; now it is a commonplace. But the people are not more careless now than then; in fact they are more careful, because more fearful. The increase in accidents is due to the danger *inherent* in the operation of motor vehicles by and among people of average human frailty. It is not preventable by any practical means yet devised. But perhaps the resulting monetary loss may be spread over the motoring class most responsible therefor, partially for their own benefit but with some corresponding benefits to the non-motoring class least responsible. It may be argued that such arrangement would place an unjust burden upon the motorists, while relieving the non-motorists of the consequences of their own negligence. The same argument was was made with reference to workmen's compensation acts; and it is even more fallacious here than there. People who motor have an *equal* right of user of the public highways with people who do not motor. But motorists as a class do not necessarily have an unrestricted right to a user of the public highways *inherently more dangerous* than the user in fact enjoyed by all other classes of people; for that is *inequality* in fact, whatever the theory. The more dangerous user enjoyed by the motoring class justifies the imposition upon it of reasonable burdens, such as the cost of accident compensation insurance for the benefit of all the people including those enjoying the less dangerous user. Negligence is a relative term, being the lack of due care under all the circumstances. Due care on the public highways today is much more burdensome to all classes than it was before the appearance of motor vehicles, or would now be in their absence. The motoring class has placed this added burden of care upon the public without bestowing any corresponding benefits. Would the expense of accident compensation insurance, placed upon the motoring class for the benefit of the public, be any more than a fair offset? For this burden of added care on the public will remain, notwithstanding the elimination of negligence in any accident compensation scheme, because the public will not sacrifice itself for the uncertain benefits of a partially adequate money compen-

sation. The motoring class has voluntarily assumed the lesser burden of accident liability insurance, which is a long step in the direction of accident compensation insurance. The writer perceives no elements of natural justice opposed to such compensation plan; and no serious legal obstacles have appeared from this little study of the subject. A motor vehicle accident compensation act seems desirable *if it can be made workable;* but can it?

The suggestion of an accident compensation act to the readers of this magazine will doubtless meet with harsh criticism, if not with ridicule. Such is the fate of any innovation among lawyers. But the world moves. Doubtless many just criticisms can be made and many improvements suggested upon the plan here outlined. It is not pretended that this article is all-comprehensive or exhaustive; it is merely suggestive. The writer has ventured a little way out upon an uncharted sea, leaving the reader to think it over and find his own way back or on.

ERNEST C. CARMAN.

MINNEAPOLIS, MINN.

AMENDMENTS AND RESERVATIONS TO THE TREATY.

THE subject involves consideration of (I) the power of organs of the United States to make reservations, (II) the legal effect of reservations and (III) the expediency of making reservations. The first is a question of constitutional law, the second of international law, and the third of policy and ethics.

I. POWERS OF THE SENATE AND PRESIDENT.

"(The President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur."[1] That the Senate has power to reject a treaty by refusing to "consent" to its ratification is clear.[2] That it can "advise" amendments or reservations,[3] or even make its "consent" conditional upon their acceptance is also established[4] though it has occasionally been questioned.[5] It is

[1] United States Constitution, Art. II, sec. 2, cl. 2.

[2] Crandall, Treaties their Making and Enforcement, 2nd ed., p. 82 notes seventeen cases of rejection of treaties by the Senate. All of these were bi-lateral treaties.

[3] Crandall, op. cit. pp. 67-72 notes eighteen instances, described as "exceptional" in which the advice of the Senate has been sought by the president prior to negotiations and half of these occurred in the administration of Washington prior to negotiation of the Jay treaty (1794) which established the precedent of Presidential independence in negotiation. Only once was advice sought by the President in person and on that occasion, a few months after the constitution went into operation, President Washington's experiences were such that an eye witness described his departure from the Senate chamber as "with sullen dignity" and "a disconsolate air." Maclay, Sketches of Debates in the First Senate of the United States, G. W. Harris, ed., p. 125; 6 J. Q. Adams, Memoires, 427. The Senate on its own initiative has sometimes advised the conclusion of treaties, which advice the President is competent to ignore, and it has claimed the right to confirm the agents negotiating the treaty, but the use of special agents acting under the president's authority alone is established in practice. Crandall, op. cit. 77; Corwin, The President's Control of Foreign Relations, pp. 58 et seq. See on the general subject, H. C. Lodge, 31 Scribners Magazine, 33. Sen. Doc. 104, 57th Cong., 1st Sess. J. W. Foster, The Practice of Diplomacy, pp. 243, et seq.

[4] Sutherland, Constitutional Power and World Affairs, p. 127; Crandall, op. cit. p. 81; Lodge, loc. cit. Of over 650 treaties signed by the United States, in about one-tenth the Senate has qualified its consent to ratification, and this includes multi-lateral treaties, such as the Supplementary Industrial Property Convention, (1891); the African Slave

also evident that the President is the final authority in ratifying as well as negotiating a treaty[6] and is under no obligation to submit a treaty, mutilated by Senate amendments or reservations to the other signatory powers.[7] Thus Presidents Roosevelt and Taft each abandoned arbitration treaties when it appeared that the Senate was prepared to insist upon essential alterations.[8] When proposed reservations are of a character nullifying the essential purpose of a treaty or unacceptable to the other signatories this would seem to be the proper course and of these facts the president who has conducted the negotiations is the most competent judge. It would hardly tend toward international good will to offer a stone when the signatories have agreed to buy bread.

As is the case with the treaty itself, the President and Senate must *each* consent to amendments, reservations or interpretations. Attempts of either to act separately have been unavailing. The Supreme Court said in reference to a joint resolution passed by a majority of the Senate, stating the purpose of the Senate in ratifying the treaty annexing the Philippines:[9]

Trade General Act, (1890); the Algeciras Convention, (1906); and the Hague Conventions, (1899, 1907). In most cases the other state or states have assented to the qualification, but "The proposed treaty is not infrequently so amended as to be unacceptable to the other power and no treaty results." Crandall, op. cit. p. 82. For instances see 5 Moore, International Law Digest, 199-201. Senate Rule XXXVII, provides for vote on amendments in committee of the whole and in session and then on "a resolution of ratification with or without amendment." "On the final question to advise and consent to the ratification in the form agreed to, the concurrence of two-thirds of the Senate present shall be necessary to determine it in the affirmative, but all other motions and questions upon a treaty shall be decided by a majority vote, except a motion to postpone indefinitely, which shall be decided by a vote of two-thirds."

[5] "The objection usually urged is that amendments are in the nature of an ultimatum and are made by those not familiar with the prior negotiations." Crandall, op. cit. p. 82. See also, Mr. Monroe, Minister to Great Britain to Sec. of State, June 3, 1804, 3 Am. St. Pap., For. Rel., 93; 5 Moore, Digest, 201.

[6] Taft, Our Chief Magistrate and his Powers, p. 106; Crandall, op. cit., pp. 81, 94.

[7] Crandall cites 13 instances in which the President refused to ratify treaties in the form approved by the Senate, op. cit. p. 97 to which may be added the two Taft Arbitration treaties of 1911. He also cites 10 instances in which the President withdrew treaties while still under Senate consideration, p. 95; 9 in which he withheld them from the Senate altogether, p. 99; and 11 in which he submitted them to the Senate with recommendation for amendments, p. 97.

[8] Crandall, op. cit. p. 98; Taft, op. cit. p. 106; Charles, Treaties, etc., 62nd Cong., 3rd Sess., Sen. Doc., No. 1063, p. 380.

[9] Fourteen Diamond Rings v. United States, (1901) 183 U. S. 176, 46 L. Ed. 138, 22 S. C. R. 59. "The power to make treaties is vested by the

"We need not consider the force and effect of a resolution of this sort. . . . The meaning of the treaty can not be controlled by subsequent explanations of some of those who may have voted to ratify it." Justice Brown, concurring said:

"It can not be regarded as part of the treaty, since it received neither the approval of the president nor the consent of the other contracting power. . . . The Senate has no right to ratify the treaty and introduce new terms into it, which shall be obligatory upon the other power, although it may refuse its ratification, or make such ratification conditional upon the adoption of amendments to the treaty."

A similar fate has met interpretations or reservations made by the President without consent of the senate, even when accepted by the other signatory. Thus explanatory notes signed by the plenipotentiaries on exchange of ratifications to the Mexican peace treaty of 1848 and the Clayton-Bulwer treaty with Great Britain of 1850 were subsequently held by the United States to be of no effect,[10] and on other occasions the president has submitted such explanatory documents to the Senate before proclaiming the treaty.[11]

II. Effect of Reservations Under International Law.

The effect of reservations and amendments to treaties, though often a matter of complexity in concrete application depends

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constitution in the President and Senate, and while this proviso was adopted by the Senate, there is no evidence that it ever received the sanction or approval of the President." N. Y. Indians v. United States, (1898) 170 U. S. 1, 42 L. Ed. 927, 18 S. C. R. 531. See also 5 Moore, Digest 210; Crandall, op. cit., p. 88.

[10] 5 Moore, Digest, 205-206; Crandall, op. cit. pp. 85, 381. Bigelow, Breaches of Anglo-American Treaties, pp. 116-149, discusses at length the effectiveness of these and other documents alleged to be explanatory of the Clayton-Bulwer treaty. Secretary Root agreed by exchange of notes with Mr. Bryce, British Ambassador, as to the meaning of Art. II of the arbitration convention of 1908. These documents were submitted to the Senate for its information but apparently not for its approval. Crandall, op. cit. p. 89.

[11] Jefferson thought it necessary to submit an interpretation offered by Napoleon of the treaty of 1801 to the Senate before exchange of ratifications. Charles Francis Adams said that the British interpretation of the Declaration of Paris, to which the United States desired to accede, would have to be submitted to the Senate. Secretary Fish declared the exchange of ratifications of a treaty with Turkey in 1874 was invalid because accompanied by an explanation of the American plenipotentiary which rendered a Senate amendment nugatory. Secretary Bayard refused to give an explanation of a Senate amendment to the treaty with Hawaii of 1884 and to authorize a protocol explaining the submarine cable convention of 1886 without Senate approval. Crandall, op. cit. pp. 86-89; 5 Moore, Digest, 207. Although protocols prolonging the time for exchange of ratifications have not always been submitted to the Senate, this has usually been done. Crandall, op. cit. pp. 89-92.

upon a single principle. "Treaties are contracts between states. To their validity it is essential . . . that consent be reciprocally and regularly given."[12] "Assent must be to the same thing in the same sense. It must comprehend the whole of the proposition, must be exactly equal to its extent and provisions and must not qualify them by any new matter."[13] This statement, made of private contracts, is believed to be equally applicable to treaties, and under it, clearly no modification can be effective as to any party which has not consented to it.

"There is," said the Supreme Court in refusing to apply an amendment to which the Indians had not consented, "something which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with a foreign power or an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background to be used by the other only when the exigency of a particular case may demand it."[14]

Various names have been given to proposals to modify treaties. An *amendment* is a proposed modification of the terms of the instrument. An *interpretation* is a proposed determination of the meaning of the terms of the instrument. A *reservation* is an amendment or interpretation stated as a condition of consent to the terms of the instrument. An amendment is a more drastic modification of a treaty than an interpretation. In fact the latter may not be a modification at all. If it is simply a statement of the meaning which a court applying international law would ascribe

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[12] Crandall, op. cit. p. 3.

[13] Bouvier, Law Dictionary, 14th ed., p. 154, tit. "Assent." There must be both "consent" and "assent." The first is defined as "An act of the will," Standard, or "a willingness that something about to be done, be done," Bouvier, tit. assent; the latter as "an act of the understanding," Standard, or "approval of something done," Bouvier, loc. cit. An interpretation not "assented" to would be as destructive of the complete agreement necessary as would an amendment not "consented" to. There must be a complete meeting of the minds. When as often happens there is not in fact reciprocal "assent" to the meaning of words or phrases, the law presumes assent to the meaning derived by application of recognized principles of interpretation. Want of mutual "consent" on the other hand renders the purported agreement, no agreement and void.

[14] N. Y. Indians v. United States, (1898) 170 U. S. 1, 42 L. Ed 927, 18 S. C. R. 531. See also Brown, J., in Fourteen Diamond Rings v. United States, (1901) 183 U. S. 176, 46 L. Ed. 138, 22 S. C. R. 59. The Senate has frequently taken the position that even interpretations, a fortiori amendments, offered by other signatory powers must be approved by it, before exchange of ratifications. Supra notes 10, 11. The Senate resolution consenting to ratification of the General Act for the Suppression of the American Slave Trade, (1890) expressly consented to the partial ratification by France. Malloy, Treaties, etc., p. 1991.

to the terms of the treaty it is from a legal standpoint entirely superfluous. A reservation may be drastic or mild, but its distinguishing feature is that it qualifies consent to the treaty.

From the standpoint of international law, the distinction between amendments and interpretations is immaterial. Neither is effective as against a non-consenting state.

The essential distinction from the standpoint of international law is whether the modification does or does not qualify consent to the treaty, i. e. whether it is or is not a reservation. If the United States' ratification is qualified by reservations, then the *treaty* will not be valid as between the United States and any signatory who does not consent to the modifications. On the other hand if the United States' ratification is not so qualified, then the *treaty* will be valid as to all ratifying powers, while any amendments or interpretations which may have been proposed, will apply only as to those signatories who consent to them.

OBLIGATION TO RATIFY.

Since consent must be by the treaty-making authority of the state, ratification by that authority, of a treaty signed by plenipotentiaries has become customary.[15] Early publicists denied the existence of any discretion in this act, unless the plenipotentiaries had exceeded their powers,[16] and where their powers are derived from the full treaty-making authority of the state, at least a moral obligation to ratify seems to be recognized today.[17] Thus in countries where treaty making is vested in the Crown, the signature of plenipotentiaries who have acted within instructions given them by the Crown should be regarded as final. The act of ratification becomes mainly formal, unless discretion is expressly reserved in the treaty itself, and the other signatory could take exception either to its refusal or to its qualification.[18]

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[15] Harley, The Obligation to Ratify Treaties, Am. J. Int. Law, July, 1919; Crandall, op. cit. 2; 5 Moore, Digest, 184 et seq.

[16] 2 Grotius, De Jure Belli ac Pacis, c. 11, sec. 12; 2 Vattel, Le Droit de Gens, c. 12, sec. 156; 2 Martens, Précis des Droit des Gens, c. 1, sec. 36.

[17] After citing 5 authorities supporting an absolute obligation to ratify, 13 for a moral obligation, 8 for no obligation at all, and the circumstances of 10 causes célèbres in which ratification was refused, Harley, loc. cit. concludes, "It would seem that the weight of opinion holds that a moral obligation to ratify exists." See also 5 Moore, Digest, 187.

[18] The United States has sometimes protested the failure of other powers to ratify treaties although, because of the constitutional need of Senate approval, maintaining its own right to refuse. A claims convention signed with Spain in 1802 was rejected by the Senate but on new evidence being presented, the Senate changed its mind. Now, however,

The same situation would exist in the United States if the President and two-thirds of the Senate had joined in instructing plenipotentiaries. "The committee, to which the treaty of July 2, 1791, with the Cherokees, had been referred, observed, in its report to the Senate, that the treaty strictly conformed to the instructions of the President based upon the advice and consent of the Senate as given August 11, 1790," consequently ratification became obligatory.[19]

Since however the early "attempts of the executive to follow out the clear intention of the framers of the Constitution in consulting the Senate prior to the opening of negotiations, have been followed only in exceptional instances"[20] and the negotiators of treaties have ordinarily acted under authority of the President alone, the Senate has asserted, and other powers have generally admitted the right under international law of the full treaty power

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Spain refused to ratify. "Were it necessary," replied Secretary Madison, "to enforce these observations by an inquiry into the right of His Catholic Majesty to withhold his ratification in this case, it would not be difficult to show that it is neither supported by the principles of public law, nor countenanced by the examples which have been cited." Madison to Yrujo, Oct. 15, 1804, Am. St. Pap., For. Rel., 2: 625. The convention was finally ratified by Spain in 1818. Almost immediately a similar controversy arose over the Florida cession treaty. Secretary Adams said, "The President considers the treaty of 22nd February last as obligatory upon the honor and good faith of Spain, not as a perfect treaty, ratification being an essential formality to that, but as a compact which Spain was bound to ratify." He then drew an analogy between an unratified treaty and a covenant to convey land, asserting that "the United States have a perfect right to do what a court of chancery would do in a transaction of similar character between individuals, namely, to compel the performance of the engagement as far as compulsion can accomplish it, and to indemnify themselves for all the damages and charges incident to the necessity of using compulsion." It should be noted that in the full powers of his plenipotentiary, the Spanish monarch had expressly promised to ratify "whatsoever may be stipulated and signed by you." 5 Moore, Digest, 189-190. In both of these cases the United States distinguished its own position, in which the recognized constitutional rights of the Senate precluded an obligation to ratify.

[19] Crandall, op. cit. p. 79. The first treaty to come before the Senate after adoption of the constitution, the consular convention with France, signed in 1788, had in substance been submitted to Congress, in which the treaty power was vested under the Articles of Confederation, in 1784 and was rejected on the ground that it did not conform to the original plan proposed by Congress, but with a promise to ratify one which did so conform. This promise was repeated in the commission to Jefferson as Minister to France, and the new treaty was signed accordingly. On his advice being asked, John Jay, who continued in charge of foreign affairs, replied that "while he apprehended that the new convention would prove more inconvenient than beneficial to the United States, the circumstances under which it had been negotiated made, in his opinion, its ratification by the Senate indispensable." The Senate immediately proceeded to ratify. Crandall, op. cit. p. 79.

[20] Crandall, op. cit. p. 70. See also supra, note 3.

of the United States to refuse or qualify[21] ratification of a treaty duly signed by the plenipotentiaries. Frequently this right is expressly reserved in the treaty,[22] but foreign states are presumed to be cognizant of the composition of the treaty power of the states with which they deal, and of the resulting incapacity of plenipotentiaries with authority derived from only part of it.[23]

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[21] Qualified ratification has sometimes been objected to, where the right of rejection is admitted. Supra, note 5. Doubtless where many states are involved a qualified ratification is undesirable. Protocol No. 24 of the Paris Congress of 1856 provided with reference to the Declaration of Paris, "On the proposition of Count Walewski, and recognizing that it is for the general interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which shall have signed it, or which shall have acceded to it, can not hereafter enter into any arrangement in regard to the application of the right of neutrals in time of war, which does not at the same time rest on the four principles which are the object of the said declaration." This was recognized as a binding obligation on the powers and as a result the United States being unwilling to accept one provision of the Declaration was excluded from the treaty, a situation which proved most disadvantageous upon the outbreak of the Civil war five years later. Naval War College, International Law Topics, 1905, p. 110. Article 65 of the proposed Declaration of London of 1909 provided: "The Provisions of the present Declaration form an indivisible whole." Upon which, the drafting committee, of which M. Renault was chairman, commented as follows: "This Article is of great importance, and is in conformity with that which was adopted in the Declaration of Paris. The rules contained in the present Declaration relate to matters of great importance and great diversity. They have not all been accepted with the same degree of eagerness by all the Delegations; some concessions have been made on one point in consideration of concessions obtained on another. The whole, all things considered, has been recognized as satisfactory. A legitimate expectation would be defeated if one Power might make reservations on a rule to which another Power attached particular importance." Ibid. 1909, p. 155. See also Harley, loc. cit.

[22] Crandall, op. cit. p. 94.

[23] "Without doubt a government should know the various phases that the project must follow at the hands of the other contractant; it is not able to raise reclamations if the treaty fails in one of these phases." Geffcken, note to Heffter, Das Europaische Völkerrecht der gegenwart, p. 201. "The maxim of the early Roman law, 'qui cum alio contrahit, vel est vel debet esse non ignarus condicienis eius,' Ulpian, Digest L. XVII, 19 applies in the making of treaties. To know the power of him with whom negotiations are conducted requires a knowledge not only of his special mandate and powers, the exhibition of which may always be demanded before the opening of the negotiations, but also of the fundamental law or constitution of the state which he professes to represent, and of any limitations which may result from an incomplete sovereignty." Crandall, op. cit. p. 2. "This question (the obligation to ratify) has no significance in regard to states, by whose form of government the engagements made by the executive with foreign powers need some further sanction." Woolsey, International Law, sec. 111. "The Government of His Britannic Majesty is well acquainted with the provision of the Constitution of the United States, by which the Senate is a component part of the treaty making power, and that the consent and advice of that branch of Congress are indispensable in the formation of treaties. According to the practice of this government, the Senate is not ordinarily

EXPRESS CONSENT.

Though the United States can not be reproached with violation of international law if it refuses to ratify or qualifies its ratification of a treaty signed by authority of the President alone, yet a qualified ratification is of no effect unless consented to by the other signatories. How may this consent be evidenced? Express consent to reservations by statement in the act of ratification or exchange of notes would of course be sufficient,[24] as would accept-

consulted in the initiatory state of a negotiation, but its consent and advice are only invoked, after a treaty is concluded, under the direction of the President, and submitted to its consideration." Mr. Clay, Sec. of State to Mr. Addington, British Minister, April 6, 1825, 5 Moore, Digest, 200. See also ibid. 5: 189, 198, 199, and supra, note 21. Though knowledge of the constitutional authorities necessary for the *conclusion* of a treaty may be presumed, knowledge of the authorities necessary for the *execution* of a treaty may not. When a treaty is concluded in the constitutional method, it is an obligation, which can not be escaped on the plea of need for legislation to execute. The legislature will sacrifice the good faith of the country and render it liable to international reclamation if it refuses to act. (Infra notes 49, 50.)

[24] The Senate advised ratification of the treaty with France of Feb. 3, 1801, provided a new article be substituted for article II. Bonaparte ratified with this modification but added a new proviso. Ratifications were exchanged at Paris, but before proclamation President Jefferson resubmitted the treaty to the Senate which accepted Bonaparte's proviso. Malloy, Treaties, etc., p. 505. After consenting to ratification of the General act for the suppression of the African Slave Trade (1890), the Senate "Resolved further, That the Senate advise and consent to the acceptance of the partial ratification of the said General Act on the part of the French Republic, and to the stipulations relative thereto, as set forth in the protocol signed at Brussels, January 2, 1892." It then made a reservation on its own behalf. The protocol of deposit of ratifications of Feb. 2, 1892, provided for in article 99, of the treaty, recites the Senate's resolution and states: "This resolution of the Senate of the United States having been preparatively and textually conveyed by the Government of His Majesty the King of the Belgians to the knowledge of all the signatory powers of the General Act, the latter, have given their assent to its insertion in the present Protocol which will remain annexed to the Protocol of January 2nd 1892." Malloy, Treaties, etc., p. 1992. In the treaty of 1911, Japan gave express assent to an "understanding" and tacit assent to an "amendment." The proclamation of President Taft reads:

"And whereas, the advice and consent of the Senate of the United States to the ratification of the said Treaty was given with the understanding 'that the treaty shall not be deemed to repeal or affect any of the provisions of the Act of Congress entitled 'An Act to regulate the Immigration of Aliens into the United States,' approved February 20th 1907;'

And whereas, the said understanding has been accepted by the Government of Japan;

And whereas, the said Treaty, as amended by the Senate of the United States, has been duly ratified on both parts, and the ratifications of the two Governments were exchanged in the City of Tokyo, on the fourth day of April, one thousand nine hundred and eleven;

Now, therefore, be it known that I, William Howard Taft, President of the United States of America, have caused the said Treaty, as amend-

ance without objection of an official note stating such reservations.[25] The power proposing reservations can presume that the terms of such a note have been consented to by all the organs constituting the treaty power of the states to whom it is sent. If in fact, it has not received such consent, there has been a violation of the constitutional law of the receiving state, but under international law the reservation would be binding. Thus interpretative agreements signed by authority of the President upon exchange of ratifications of treaties with Mexico (1848) and Great Britain (1850) though not valid under the law of the United States because of failure to submit them to the senate, were doubtless valid under international law and might have been made the basis of valid claims before an international tribunal.[26]

TACIT CONSENT TO QUALIFIED RATIFICATION.

Tacit consent to reservations is also possible. The process of concluding treaties involves three steps: signature, ratification, and exchange of ratifications. The first and last are formal ceremonies and suitable occasions for the proposal of reservations. It would appear that if such proposals are stated as conditions of consent by the proposing power, on either of these occasions, lack of protest by others could be construed as tacit consent. At the

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ed, and the said understanding to be made public, to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof. In testimony whereof, etc." Charles, Treaties, etc., p. 82. An interpretation proposed by the Senate to the treaty of 1868 with the North German Confederation was duly communicated to that government and accepted as the true interpretation of the article. It was, however, omitted in the exchange copy given by that government. This omission being noticed later, a special protocol was signed in 1871, recognizing the interpretation. Crandall, op. cit. p. 88.

[25] In negotiating the treaty of 1850 with Switzerland, the American negotiator agreed that the unqualified most-favored-nation clause of article 10, should be interpreted absolutely. In 1898, Switzerland claimed, under this clause, the benefits offered to France under a reciprocity agreement of May 30, 1898. At first the United States objected that to admit the claim would be contrary to her accepted interpretation of identical most-favored-nation clauses, but "It was found upon an examination of the original correspondence that the President of the United States was advised of the same understanding and that the dispatch in which it was expressed was communicated to the Senate when the treaty was submitted for its approval," consequently customs officials were directed to admit Swiss importations at the reduced rate. 5 Moore, Digest, 284.

[26] Supra, note 10. Mexico and Great Britain respectively asserted the validity of these agreements. 5 Moore, 205; Lord Clarendon to Mr. Buchanan, May 2, 1854, Br. and For. St. Pap., 46: 267, Moore, 3: 138. The Mexican agreement is printed after the Treaty in Malloy, Treaties, etc., p. 1119.

Hague Conferences, the numerous reservations offered upon signature of the Conventions and maintained by the power upon ratification were accorded tacit consent in this manner.[27]

Where the usual process prevails, of exchanging ratifications by formal meeting of the plenipotentiaries, generally recorded in a protocol, acceptance by a plenipotentiary of a text with qualified ratification would amount to tacit consent to the reservation. Thus in reference to an explanation attached by the king of Spain to his ratification of the Florida cession treaty of 1819, the Supreme Court said:[28]

"It is too plain for argument that where one of the parties to a treaty at the time of its ratification annexes a written declaration explaining ambiguous language in the instrument or adding a new and distinct stipulation and the treaty is afterwards ratified by the other party with the declaration attached to it and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty and as binding and obligatory as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument as it stood when the ratifications were exchanged."

In multi-lateral treaties, however, this procedure has been often abandoned and provision made for deposit of ratifications at a central bureau. This was provided in the African Slave Trade, Algeciras, Hague, and other Conventions. In the present treaty article 440 provides:

"The present Treaty of which the French and English texts are both authentic, shall be ratified.

The deposit of ratifications shall be made at Paris as soon as possible.

Powers of which the seat of the Government is outside Europe, will be entitled merely to inform the Government of the French Republic through their diplomatic representative at Paris that

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[27] The Marie Glaeser, L. R. [1914] P. 218; The Appam, (1916) 243 U. S. 124, 61 L. Ed. 633, 37 S. C. R. 377, Infra Note 38. In mose cases reservations were offered at signature and affirmed at ratification though sometimes they were offered for the first time at ratification. Thus the Senate resolution advising ratification of the 1907 Hague Convention for the Pacific Settlement of International Disputes affirmed the declaration made by the American plenipotentiaries on signature and added a new reservation. Malloy, Treaties, etc., p. 2247. The reservations with statement of the method of presentment are given in full in the Carnegie Endowment for International Peace edition of the Hague Conventions and Declarations of 1899 and 1907. Presumably a reservation made at signature but not maintained at ratification is not effective.

[28] Doe v. Braden, (1853) 16 How. (U.S.) 635, 14 L. Ed. 1090. See also Crandall, p. 88.

their ratification has been given; in that case they must transmit the instrument of ratification as soon as possible.

A first procès-verbal of the deposit of ratifications will be drawn up as soon as the Treaty has been ratified by Germany on the one hand, and by three of Principal Allied and Associated Powers on the other hand.

From the date of this first procès-verbal the Treaty will come into force between the High Contracting Parties who have ratified it. For the determination of all periods of time provided for in the present Treaty this date will be the date of the coming into force of the Treaty.

In all other respects the Treaty will enter into force for each Power at the date of the deposit of its ratification.

The French Government will transmit to all the signatory Powers a certified copy of the procès-verbaux of the deposit of ratifications."

It is believed that qualified ratifications might be deposited in the method provided but if upon receipt of the procès-verbal of the deposit of such qualified ratification, any signatory objected to the reservations, the treaty would not be in effect as between those signatories. As to signatories offering no objection the reservations would be regarded as tacitly consented to, and the treaty would be in effect as from the date of deposit of ratifications. Thus it might, and if reservations were submitted materially modifying the treaty, probably would happen, that a deposit of qualified ratification by the United States would result in conclusion of the treaty with some signatories but not with others. If it were felt desirable to conclude a treaty with the latter, as would doubtless be the case were they enemy powers, new negotiations would be necessary.[29] In other words if the United

[29] The following draft of a Protocol of Jan. 2, 1892, is printed in Malloy, Treaties, etc., p. 1990, following the African Slave Trade General act of 1890:

"The undersigned, . . . met at the Ministry of Foreign Affairs at Brussels, in pursuance of Article XCIX of the General Act of July 2, 1890, and in execution of the Protocol of July 2, 1891, with a view to preparing a certificate of the deposit of the ratifications of such of the signatory powers as were unable to make such deposit at the meeting of July 2, 1891.

"His Excellency the Minister of France declared that the President of the Republic, in his ratification of the Brussels General Act had provisionally reserved, until a subsequent understanding should be reached, Articles XXI, XXII, XXIII, and XLII to LXI. The representatives . . ., acknowledged to the Minister of France the deposit of the ratifications of the President of the French Republic, as well as of the exception bearing upon Articles XXI, XXII, XXIII, and XLII to LXI.

"It is understood that the powers which have ratified the General Act in its entirety, acknowledge that they are reciprocally bound as regards all its clauses.

States attached any reservation or interpretation however mild, to her ratification as a condition thereof, Germany would have it within her power and right to object to such qualification and compel the United States to negotiate peace with her separately, or from the international standpoint continue in a state of war.[30]

It may seem strange that a power making qualified ratification should be able to throw the burden of positive action upon signatories who have already unconditionally ratified and who object to any qualification of the treaty. Practice, however, in the Algeciras, Hague and other general international conventions seems to sanction the method. Reservations, in some cases not presented at signature, have been held to have received tacit consent upon the deposit of ratifications so qualified.[31]

CONSENT TO AMENDMENTS AND INTERPRETATIONS NOT QUALIFYING RATIFICATION.

If, however, amendments or interpretations are presented and ratification is not conditioned upon their acceptance, a failure to

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"It is likewise understood that these powers shall not be bound toward those which shall have ratified it partially, save within the limits of the engagements assumed by the latter powers.

"Finally, it is understood that, as regards the powers that have partially ratified, the matters forming the subject of Articles XLII to LXI, shall continue, until a subsequent agreement is adopted to be governed by the stitpulations and arrangements now in force.

"In testimony whereof . . ."

The United States Senate resolution of ratification expressly accepted the French reservation and made another which was consented to by the powers prior to deposit of ratification. Supra note 24.

[30] Though Congress might declare peace by resolution which would be valid in municipal law, it would have no effect under international law and Germany would be entitled to regard herself as still at war. "I have yet to learn that a war in which the belligerents, as was the case with the late civil war, are persistent and determined can be said to have closed until peace is conclusively established, either by treaty when the war is foreign, or when civil by proclamation of the termination of hostilities on one side and the acceptance of such proclamation on the other." Mr. Bayard, Sec. of State to Mr. Muruaga, Spanish Minister, Dec. 3, 1886, 7 Moore, 337.

[31] A Senate reservation to the Algeciras Convention of 1906 was in the same spirit but different terms from a reservation attached to American signature of the treaty. Apparently the qualified ratification was accepted when deposited as required by article 121 of the treaty. Malloy, Treaties, etc., p. 2183. The Procès-Verbal of Deposit of Ratifications to the International Sanitary Convention of 1903 notes reservations attached to the ratifications of the United States, Great Britain, and Persia, which apparently were tacitly accepted. Ibid. p. 2129. In the First Hague Convention of 1907 a reservation in addition to that made at signature by the United States appears to have been tacitly accepted on deposit of ratifications, Ibid. p. 2247, and this was true of other Hague Conventions. See supra note 27.

object would be construed as rejection of the amendment or interpretation but acceptance of the ratification. If the United States deposited ratifications and at the same time suggested amendments or intrepretations it would be bound by treaty to all the ratifying powers, but the amendments or interpretations would be effective only as between those who expressly consented to them.[32]

If, in such circumstances, the United States acted on the basis of such amendments as to powers which had not expressly consented to them, it would be a violation of the treaty, which would become voidable at the discretion of such power. The situation would be similar to that discussed in the Charlton case. Italy refused to extradite her own citizens to the United States as she was obliged to do under the terms of the treaty. Upon Italy requesting the extradition of an American citizen from the United States, the request was granted, the Supreme Court saying:[33]

"If the attitude of Italy was as contended, a violation of the obligation of the treaty, which in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void;

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[32] See protocol with reference to African Slave Trade General Act, supra note 29. In the resolution giving consent to the treaty of 1911 with Japan portions of an exchange of notes on the so-called gentlemen's agreement limiting Japanese immigration were incorporated. This reservation, however, was not included by the President in the formal ratification, express assent having already been given by Japan. Supra note 24. Frequently Senate reservations relate to domestic matters not suitable for submission to the other power. Thus instructions to the President as to future treaty negotiations contained in the resolution consenting to ratification of the Korean treaty of 1882, Malloy, Treaties, etc., p. 340, Crandall, op. cit. p. 77 and a stipulation requiring the issue of a certificate by the President before ratification of the treaty contained in the Senate resolution consenting to ratification of the Military Service convention with Great Britain of June 3, 1918, were not included in the acts of ratification. With such matters, the other power clearly has no concern and the same would be true of reservations describing the manner in which the treaty is to be executed, e. g., it is clear that an appropriation or a declaration of war require congressional action, but this is a constitutional, not an international matter, so a Senate reservation on the subject would not be a proper subject for submission to the other signatories. Their consent to such a reservation could not increase the rights of Congress under the constitution or diminish its obligation to perform acts necessary for the execution of a treaty. See Memorandum by D. H. Miller, Oct. 25, 1919.

[33] Charlton vs. Kelly, (1913) 229 U. S. 447, 468, 57 L. Ed. 1274, 33 S. C. R. 945.

and if the United States should prefer, it might waive any breach which in its judgment had occurred and conform to its own obligations as if there had been no such breach. 7 Kent's Comm., p. 175."

Under such circumstances the United States might be a party to the treaty and act upon its amendments for years but always under sufferance of powers who protested such action.

The effect of interpretations officially declared by the United States but not as a qualification to its ratification would be somewhat different. Certainly the United States could not be accused of bad faith in acting upon such interpretations. On the other hand, signatories which had not expressly consented to such interpretations would not be estopped from asserting a different one. Future agreement or the decision of an international tribunal would be necessary to settle the matter, after which insistence by either party on a contrary interpretation would be a violation of the treaty and grounds for voidance.

CONSENT BY ACQUIESCENCE IN ADVERSE ACTION.

If, however, non-consenting powers refrained from protest and acquiesced for a long period of time in action by the United States on the basis of such amendments or interpretations, it would probably be construed as tacit consent. Practice is recognized as a source for interpreting treaties. Thus the Spanish treaty claims commission felt justified in applying article VII of the treaty with Spain of 1795, which forbade the "embargo or detention" of "vessels or effects" of subjects or citizens of the other contracting power, to detention of goods on land. The negotiators of the treaty appear to have intended application only to property at sea. No question was raised for over seventy years, after which the United States consistently maintained the broad interpretation.[34]

"Whether or not," said the court, "the clause was originally intended to embrace real estate and personal property on land as well as vessels and their cargoes, the same has been so construed by the United States, and this construction has been concurred in by Spain; and therefore the commission will adhere to such construction in making its decisions."

INTERPRETATIONS AS EVIDENCE OF MEANING OF TREATY.

Non-conditional interpretations, though not binding unless expressly consented to, or unless action under them had been

[34] General principles adopted April 28, 1903, No. 10, Special Report of Wm. E. Fuller, Washington, 1907, p. 23; Crandall, op. cit. p. 384.

acquiesced in for a long time, would be admissible as evidence of the true meaning of the treaty. The intent of the negotiators is recognized as a source for interpreting treaties, and preliminary correspondence, official interpretations and contemporary discussion are frequently introduced as evidence of this intent. This has been especially frequent in interpreting boundary treaties where the description does not correspond to geographical facts as subsequently ascertained.[35] An instance of a different kind occurred in connection with a treaty concluded by the United States with Switzerland in 1850. Contemporary correspondence evidenced an intention on the part of both parties to interpret the general most-favored-nation clause unconditionally. Thus fifty years later the United States interpreted the clause in this treaty contrary to its usual view, saying:[36]

"Both justice and honor require that the common understanding of the high contracting parties at the time of the executing of the treaty should be carried into effect."

Such material, however, is only persuasive and will not overrule the clear meaning of the text. Thus the French Prize Court held that the opinion of the drafting committee that reservists were not "persons embodied in the armed forces of the enemy" was not conclusive of the meaning of article 47 of the Declaration of London. Consequently the court justified the taking of enemy reservists from a Spanish vessel holding that in fact they were embodied in the armed forces.[37] An interpretation offered by only one signatory power would of course be of less weight than one which had been the subject of general correspondence among the signatories.

RECIPROCAL APPLICATION OF RESERVATIONS.

States which have consented to reservations whether expressly or tacitly are entitled to reciprocal application of the reservations, provided the rights of third states who are parties to the treaty but have not consented to the reservation are not involved. Thus in signing the VI Hague Convention of 1907, Germany reserved on article 3, which exempted from confiscation, enemy merchant vessels met at sea ignorant of hostilities. Although Great Britain had signed and ratified the Convention without reservation, the prize court held that a German vessel captured in

[35] Crandall, op. cit. p. 377 et seq.
[36] 5 Moore, Digest, 284; Crandall, op. cit. p. 382.
[37] The Federico, Decision du Conseil d'Etat, July 18, 1916, Hall, International Law, Higgins, ed., 1917, p. 741.

this situation could be confiscated. Germany was not entitled to the privilege which by her reservation she refused to others.[38]

RESERVATIONS ON POLITICAL QUESTIONS.

The interpretation of a treaty should undoubtedly be an international matter, that is, it should be settled by the application of established principles of international law if possible, otherwise by agreement of the parties.[39] To assure such interpretation there should be appeal to an international tribunal. The impropriety of having a party judge in his own case applies to international as well as private litigation,[40] consequently in arbi-

[38] The Marie Glaeser, L. R. [1914] P. 218. This rule was expressly stated in the Protocol of deposit of ratifications of the General Act for the Suppression of African Slave Trade, (1890), supra, note 29. The effect of a reservation was considered by the Supreme Court in the case of the Appam, (1916) 243 U. S. 124, 61 L. Ed. 633, 37 S. C. R. 377.

The United States had ratified the XIII Hague Convention of 1907, with reservation of article 23, which provided for the sequestration of prizes in neutral ports. Germany had ratified without reserving on this article, and Great Britain had not ratified at all. The Appam, a British vessel captured by Germany was sent into an American port for sequestration. The British owners sought restoration of the vessel and won. Though the treaty probably was not applicable at all, because by article 28 it was applicable only in wars where all belligerents were parties, the reservation was held to be persuasive of the attitude of the United States and to justify her in a refusal to permit sequestration of prizes. Here, so far as the reservation was effective it operated against Germany which had not reserved on that article, but had tacitly accepted the reservation of the United States. If the tables should ever be turned, Germany would be justified in refusing sequestration to American prizes. Where there is a one-sided interpretation of a treaty, not assented to but tolerated, the rule of reciprocal application does not apply. "It should moreover be observed that even though the action of the Italian Government be regarded as a breach of the treaty, the treaty is binding until abrogated, and therefore the treaty not having been abrogated, its provisions are operative against us." Charlton v. Kelly, (1913) 229 U. S. 447, 57 L. Ed. 1274, 33 S. C. R. 945.

[39] Wright, Treaties and the Constitutional Separation of Powers in the United States, 12 Am. J. Int. Law, 92.

[40] Lords Hobart, Coke, Holt and others held that to make a man judge in his own case was so contrary to natural equity that even an act of Parliament attempting to do so would be void. Dr. Bonham's Case, 8 Co. Rep. 113b, 118a; Day v. Savadge, (1610) Hob. 85, 87; City of London v. Wood, (1701) 12 Mod. 669, 687; I Thayer, Cases on Constitutional Law, 47 et seq. In Bates' Case, (1606-10) 2 Howell St. Tr. 371, Darrel's Case, (1629) 3 Howell St. Tr. 1, and others the right of the king to judge his own competence in matters of the prerogative was admitted with the result according to Anson that "all attempts to define the prerogative by rules of law were rendered nugatory." Law and Custom of the Constitution, 2nd ed. Vol. 2, p. 30. These precedents have been long since overruled and the prerogative has become subject to law. "If the court is to decide judicially in accordance with what it conceives to be the law of nations, it can not even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever

tration treaties, the interpretation of treaties has frequently been declared a justiciable question suitable for compulsory arbitration,[41] and the United States courts have held that the interpretation of treaties may always be submitted to international agreement or arbitration, individual rights to the contrary notwithstanding.[42] National courts in interpreting treaties are accustomed to apply international law and have held that interpretations of their own government are not necessarily binding if not accepted by the other party,[43] though doubtless they show a partiality to such interpretations.[44] There is however, one exception, namely where execution of the treaty is the duty of a political organ of government. In such cases national courts are obliged to follow the interpretation of the political organs of their own government.[45] Consequently if the United States reserved freedom of action in making war, withdrawing from the League, or other matter within the province of Congress or the President to execute, it would also be within their province to decide whether the reservation is binding, so far as national law is concerned, and United States courts would have to assent. An international court, on the other hand, would be competent to interpret the

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hesitation it be arrived at, must prevail over any executive order." The Zamora, L. R. [1916] 2 A. C. 77. Vattel lays it down as a principle for interpreting treaties, "Neither of the parties who have an interest in the contract or treaty may interpret it after his own mind." Op. cit. II, c. 17, sec. 265. As Bishop Hoadley said "whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law giver to all intents and purposes." Sermon preached before the king, 1717, 15th ed. p. 12; Gray, Nature and Sources of the Law, pp. 100, 120. Obligations are of little avail if the parties reserve complete liberty of interpretation.

[41] See I Hague Conventions, 1907, art. 38; Treaties concluded by United States with Great Britain and other countries, 1908, Art. 1, (Malloy, Treaties, etc. p. 814); League of Nations Covenant, Art. XIII.

[42] Lattimer v. Poteet, (1840) 14 Pet. (U.S.) 4, 14, 10 L. Ed. 328. The supply of omissions must be by international action. National courts will not sanction a cy près performance. The Amiable Isabella, (1821). 6 Wheat. (U.S.) 1, 71-73, 5 L. Ed. 191. See also Crandall, op. cit. pp. 225, 387.

[43] Wilson v. Wall, (1867) 6 Wall. (U.S.) 83, 89, 18 L. Ed. 727; N. Y. Indians v. United States, (1898) 170 U. S. 1, 42 L. Ed. 927, 18 S. C. R. 531; Castro v. De Uriarte, (1883) 16 Fed. 93; 5 Moore, Digest, 208; Baldwin, 35 Am. Law Rev. 222; Crandall, op. cit. p. 364.

[44] United States courts have always maintained the American interpretation of the most-favored-nation clause. Whitney v. Robertson, (1881) 124 U. S. 190, 31 L. Ed. 386, 8 S. C. R. 456. See also Charlton v. Kelly, (1913) 229 U. S. 447, 468, 57 L. Ed. 1274, 33 S. C. R. 945.

[45] Foster v. Neilson, (1829) 2 Pet. (U.S.) 253, 309, 71 L. Ed. 415; Doe v. Braden, (1853) 16 How. (U.S.) 635, 14 L. Ed. 1090; 5 Moore, Digest 208, 241; Crandall, op. cit. pp. 364 et seq.

effect of such a reservation on grounds of international law as would other parties to the treaty who might be affected by the American interpretation. Thus while under national law a reservation of this character would doubtless be binding even if other signatories to the treaty had not consented, such would not be the case under international law.[46]

III. Expediency of Making Reservations.

Assuming that the United States is favorable to the general policy of the treaty and that reservations are not a mere cloak for rejection, the expediency of making reservations seems to depend upon (1) the effect of the article in question upon international relations and national policy, (2) the probability of the reservation being accepted, and (3) the extent to which the United States is committed to the article. The first question is one upon which discussion has largely centered and will not be considered here.[47]

PROBABILITY OF CONSENT.

The second question is however, of primary importance for while reservations on a particular article taken by itself might seem desirable, yet should it appear that such reservation would result in exclusion of the United States from the treaty a different decision might be reached. This consideration relates only to reservations, i. e. proposals qualifying ratification, and the probability of rejection by other signatories would of course depend upon the substance rather than the form of the reservation. Numerous considerations must always be weighed in forming a judgment on question of policy, and the ones here discussed are regarded by the writer, not as necessarily conclusive, but as of great importance.

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[46] In In re Cooper, (1892) 143 U. S. 472, 502, 36 L. Ed. 232, 12 S. C. R. 453, the Supreme Court held that interpretation of the reference in a statute to "all the dominions of the United States in Behring Sea" was a political question, but before the Behring Sea arbitration court the extent of these dominions became a judicial question. 1 Moore, Digest 744, 912, et. seq. In Harold v. Arrington, (1885) 64 Tex. 232, 234, the Texas Supreme Court held that determination of the northern boundary of the state was a political question and followed the decision of the political authorities of Texas, but before the Supreme Court of the United States which exercised an international jurisdiction as between Texas and Oklahoma territory, the question became judicial. United States v. Texas, (1891) 143 U. S. 621, 36 L. Ed. 285, 12 S. C. R. 488.

[47] The writer has attempted to consider some of these effects in an article in the American Political Science Review, November, 1919.

The possibility of Germany refusing consent to reservations should be given due consideration. By the treaty she sacrifices claim to considerable sums in the hands of the Alien Property Custodian, yields valuable commercial privileges, agrees to indemnify American citizens for property seized in Germany, and makes other concessions, some of which are probably in excess of her liability under international law.[48]

It would not seem unreasonable for German statesmen to anticipate better terms in a treaty negotiated independently with the United States at a time when renewed military pressure was not to be feared.

While the Allied Powers would probably consent to bona fide interpretative reservations, they might properly hesitate before entering into a league with a state whose cooperation was not to be counted on in emergencies.[49] Some of the proposed reservations relating to the use of military force and embargoes might be construed as tending toward this effect. Certainly the discretion of Congress should not be impaired, but it should be recognized that it is a discretion to decide on the action necessary to carry out the responsibilities assumed under the treaty. No suggestion should exist of a liberty on the part of Congress or any other organ to repudiate such responsibilities.[50]

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[48] Summarized in the minority report of the Senate committee on Foreign Relations, Sept. 11, 1919, 66 Cong., 1st sess., Sen. Rep. 176, part. 2.

[49] Referring to those who "insist and profess to believe that treaties like acts of assembly, should be repealable at pleasure" Jay wrote in the Federalist, No. 64, "This idea seems to be new and peculiar to this country, but new errors, as well as new truths, often appear. These gentlemen would do well to reflect that a treaty is only another name for a bargain, and that it would be impossible to find a nation who would make any bargain with us which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it."

[50] "The government of the United States presumes that whenever a treaty has been duly concluded and ratified by the acknowledged authorities competent for that purpose, an obligation is thereby imposed upon each and every department of the government to carry it into complete effect, according to its terms, and that on the performance of this obligation consists the due observance of good faith among nations." Mr. Livingston, Sec. of State to Mr. Serurier, June 3, 1833, 2 Wharton, International Law Digest, 67. "The extent to which Congress would regard itself as bound, as a matter of good faith, to enact legislation for the purpose of carrying out treaties has been the subject of debate, from time to time, since the days of Washington. Despite these debates, and notwithstanding its power to frustrate the carrying out of treaties, Congress in a host of instances has passed the necessary legislation to give them effect; and the disposition has frequently been manifested to

Reservations definitely opposing concessions made to specific powers could hardly be expected to receive the consent of those powers. Thus Japan would be unlikely to consent to a reservation relating to her succession to former German rights in China,[51] and the British Dominions to one depriving them of votes.[52]

RESPONSIBILITIES ASSUMED BY THE UNITED STATES.

The third question relates to moral responsibilities, by which the writer understands, a responsibilitiy the specific application of which belongs to the free interpretation of the parties. A legal responsibility should be interpreted by an impartial authority external to both parties—no one should be judge in his own

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avoid any basis for the charge of bad faith through a disregard of treaty stipulations." After considering the possibility that Congress might refuse to hold itself under a moral obligation Mr. Hughes continues: "Foreign nations, however, might be expected to take the view that they were not concerned with our internal arrangements and that it was the obligation of the United States to see that the action claimed to have been agreed upon was taken. If that action was not taken, although Congress refused to act because it believed it was entitled to refuse, we should still be regarded as guilty of a breach of faith. It is a very serious matter for the treaty-making power to enter into an engagement calling for action by Congress unless there is every reason to believe that Congress will act accordingly." C. E. Hughes, Address in New York, March 26, 1919, on The Proposed Covenant for a League of Nations, International Conciliation, Special Bulletin, April, 1919, pp. 689-691. See also Wright, American Journal of Int. Law, 10: 710; 12: 93 et seq. For the general proposition that national legislation or the lack of it can not affect international obligations or liabilities see discussion in the Alabama Claims Arbitration, 4 Moore, Digest of International Arbitrations, 4101; 7 Digest, 878. See also supra note, 23.

[51] In the hearings before the Senate Committee on Foreign Relations, Aug. 22, 1919, the following colloquy took place:

"Senator Brandegee. What do you think would have been the result if we had refused to vote in favor of transferring Shantung to Japan?

Prof. E. T. Williams, expert on far eastern affairs, "Well, of course it is very difficult to say what would have happened. The Japanese delegation in Paris probably would not have signed the treaty, and Great Britain and France felt that they were bound to support Japan's claim. It would have been an impasse. What would have happened I can not say." 66th Con., 1st sess., Sen. Doc., No. 106, p. 642. It should be said that in spite of this opinion Prof. Williams was not in favor of making the concession to Japan.

[52] The Canadian minister of Justice said on July 25, 1919: "The right of Canada as a member of the league to be eligible for representation on the council under the provisions of the covenant was insisted upon by her representatives and that those provisions conferred upon her that right was clearly understood and unequivocably recognized by all concerned. A reservation in effect negativing that right would involve further change in the contract—after acceptance and signature by all parties—in regard to a matter which from the Dominion's point of view is of its essence. As such it is clearly inadmissible and not distinguishable from a refusal to ratify." Press Report July 26, 1919.

case,—but a moral responsibility is to be decided according to the conscience of the parties. For this reason on such questions opinions may properly differ.

It has been pointed out that under normal circumstances the Senate's right to refuse ratification of a treaty signed under authority of the President alone is recognized at international law. But, acting within his recognized constitutional powers, the President alone has authority to commit the United States to general lines of policy which may involve the treaty power in moral responsibilities, should its coöperation be necessary to make the policy effective. "Protocols of agreement as to the basis of future negotiation are clearly within the authority of the President" says Crandall,[53] citing agreements made with Costa Rica

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[53] Crandall, op. cit. p. 111; Willoughby, The Constitutional Law of the United States, secs. 200-202, discusses three types of executive agreements within the constitutional power of the president, as follows:

1. The term "protocol" as used in international law describes "an agreement reached between the foreign offices of two countries which has been reduced to definite written statement, but has not been ratified as a treaty by the States parties to it. How far such agreements, though not legally binding, morally bind the parties to them depends upon the particular circumstances of each case. The most common use to which protocols in this sense are put, is in fixing the general terms in which a final treaty —especially a treaty of peace—is to be negotiated. A recent example of this is the protocol of 1898 providing for the appointment of a commission to negotiate the Treaty of Peace with Spain. The constitutional authority of the President without consulting the Senate to enter into protocols of agreement as the basis for treaties to be negotiated, is beyond question, and has repeatedly been exercised without demur from the Senate. "He cites the Boxer protocol of 1901 and the protocol for the administration of San Domingan customs houses of 1905 as illustrations and refers to 2 Butler, The Treaty Making Power 371 note, for others.

2. "As the term indicates, a modus vivendi is a temporary arrangement entered into for the purpose of regulating a matter of conflicting interests, until a more definite and permanent arrangement can be obtained in treaty form. Continued and unquestioned practice supports the doctrine that these modi vivendi may be entered into by the President without consulting the Senate." For instances see I Butler 369, note.

3. "In the exercise of his power as Commander-in-Chief of the army and navy the President of the United States, from both necessity and convenience, is often called upon to enter into arrangements which are of an international character. These conventions do not require the approval of the Senate. A conspicuous example of international agreements thus entered into is the protocol signed at Pekin in 1901, to which reference has already been made. All protocols of agreement entered into for the purpose of furnishing a basis for treaties of peace, as for example, the Protocol of 1898 with Spain, come under this head. So do all conventions providing in time of war for an armistice, or the exchange of prisoners of war, etc. The President's military powers exist in time of peace as well as during war. And thus, in 1817, the President, without obtaining the advice and consent of the Senate, was able, by an exchange of diplomatic notes, to arrange with England regarding the number of vessels of war to be kept by the two powers upon the Great Lakes."

and Nicaragua in reference to future negotiations for the construction of an Isthmian canal, and agreements made with Great Britain in 1891 in reference to the conclusion of a treaty for arbitrating the Bering Sea question. The most important agreement of this character was the protocol with Spain of August 12, 1898, "Embodying the terms of a Basis for the Establishment of Peace" between the two countries.[54] It seems clear that the conclusion of armistices and preliminaries or peace are in the power of the President and constitute obligations upon the conscience of the United States.

Mr. Lansing's note of November 5, 1918, accepted by the Allies and Germany as the basis for an armistice and conclusion of peace was undoubtedly such a commitment. According to its terms:[55]

"Subject to the qualifications which follow they (the Allied Governments) declare their willingness to make peace with the Government of Germany on the terms of peace laid down in the President's address to Congress of January, 1918, and the principles of settlement enunciated in his subsequent addresses."

The Senate in the opinion of the writer is under a moral obligation to approve a treaty along the general lines indicated by the fourteen points and later addresses of the President. Rejection of the treaty on the grounds that it does not accord with these terms as understood by the parties, or amendment to make it so conform would be unobjectionable from the standpoint of international ethics, though it might be difficult to prove such disaccord inasmuch as the other parties to the agreement of November 5, 1918, have ratified the treaty. But reservation on articles which are clearly in conformity with the fourteen points can scarcely be regarded as other than a breach of faith. Of this character would be a repudiation of article X of the treaty[56] which is an almost literal reproduction of the fourteenth point,[57] of January 8, 1918, itself designed to embody the President's

[54] Malloy, Treaties, etc., p. 1688, Crandall, op. cit. p. 103, et seq.

[55] Official U. S. Bulletin, Nov. 6, 1918; 13 Am. Journ. Int. Law, Supp. 95. The "qualifications" referred to freedom of the seas and reparations. They had no reference to the 14th point.

[56] "The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League."

[57] "A general association of nations must be formed under specific covenants for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small States alike."

proposal of January 22, 1917, for a Monroe Doctrine for the World.[58]

That reservations of a kind likely to defeat the purpose of the League of Nations would in effect be a repudiation of the general responsibility for the reconstruction of world order, which the United States has assumed through words and action is generally admitted.

Thus Ex-President Taft has said:[59]

"Surely the United States fought the war to achieve a great purpose. Surely the treaty of peace is to be the embodiment and clinching of that purpose. Surely the treaty imposed upon an unwilling Germany and the other treaties imposed upon reluctant Austria, Bulgaria, and Turkey will not enforce themselves. Who must enforce them, then? The nations who fought the war. They must continue the league entered into to conduct the war and now amended and framed to maintain the peace they won."

SUMMARY.[60]

I. From the standpoint of the constitutional law of the United States, the Senate may reject the treaty or make its consent

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[58] "They (the people of the United States) can not in honor withhold the service to which they are now about to be challenged. They do not wish to withhold it. But they owe it to themselves and to the other nations of the world to state the conditions under which they will feel free to render it. That service is nothing less than this, to add their authority and their power to the authority and force of other nations to guarantee peace and justice throughout the world. . . . And in holding out the expectation that the people and Government of the United States will join the other civilized nations of the world in guaranteeing the performance of peace upon such terms as I have named I speak with the greater boldness and confidence because it is clear to every man who can think that there is in this promise no breach in either our traditions or our policy as a nation, but a fulfilment, rather, of all that we have professed or striven for. I am proposing, as it were, that the nations with one accord adopt the doctrine of President Monroe as the doctrine of the world: that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful." In his war message of April 2, 1917 the President said "I have exactly the same things in mind now that I had in mind when I addressed the Senate on the twenty-second of January last."

[59] Letter in Philadelphia Public Ledger, Aug. 27, 1919, printed in Cong. Rec., Aug. 27, 1919.

[60] A former Justice of the Supreme Court, a Senator from Minnesota, a former Secretary of State, a former President, and the American expert on international law at the Paris Conference, have considered the effect of reservations on the treaty. Their conclusions follow:

"It is manifest that attempted reservations will be ineffectual unless they qualify the act of ratification. The adoption of resolutions by the Senate setting forth its views will not affect the obligations of the Cov-

to ratification conditional upon the consent of the signatory powers to amendments, reservations, or interpretations.

II. From the standpoint of international law, neither the form nor substance of the modification is material. No amendment, reservation or interpretation of the treaty, however mild, can bind states which have not assented to it.

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enant, if it is in fact ratified without reservations which constitute part of the instrument of ratification. . . . Assuming that the reservations are made as a part of the instrument of ratification, the other parties to the Treaty will be notified accordingly. As a contract the treaty of course will bind only those who consent to it. The Nation making reservations as a part of the instrument of ratification is not bound further than it agrees to be bound. And if a reservation, as a part of the ratification, makes a material addition to, or a substantial change in the proposed treaty, other parties will not be bound unless they assent. It should be added that where a treaty is made on the part of a number of nations, they may acquiesce in a partial ratification on the part of one or more. But where there is simply a statement of the interpretation placed by the ratifying state upon ambiguous clauses in the treaty, whether or not the statement is called a reservation, the case is really not one of amendment, and acquiescence of the other parties to the treaty may readily be inferred unless express objection is made after notice has been received of the ratification statement forming a part of it. Statements, to safeguard our interests, which clarify ambiguous clauses in the Covenant by setting forth our interpretation of them, and especially when the interpretation is one which is urged by the advocates of the Covenant to induce support, can meet with no reasonable objection." Letter of Hon. C. E. Hughes, to Hon. Frederick Hale, Senator from Maine, July 24, 1919.

"No one doubts, of course, that the Senate has the power to make any reservations or amendments it sees fit and to make the ratification of the treaty conditional upon those reservations and amendments. There is also no question, in my opinion, that where the meaning of the instrument is at all in doubt the Senate may, by reservation, make a binding declaration construing the treaty. However, I wish to make perfectly clear that, in my opinion, where either an amendment or a reservation clearly changes the meaning of the treaty it will require the instrument to be resubmitted to all other signatory powers. That such acceptance may be evidenced either by a formal ratification by the other signatory powers, by exchange of notes or if not objected to by such powers, and the treaty is put into operation, such an amendment would undoubtedly be considered as having been accepted. There are cases in which such reservations do not appear to have been formally accepted by affirmative action of the other powers, but were undoubtedly tacitly accepted by putting the treaty into operation." Speech of Hon. Frank B. Kellogg, Senator from Minnesota, in the Senate, Aug. 7, 1919.

"This reservation and these expressions of understanding are in accordance with long established precedent in the making of treaties. When included in the instrument of ratification they will not require a reopening of negotiation, but if none of the other signatories expressly objects to the ratification with such limitations, the treaty stands as limited as between the United States and the other powers. If any doubts were entertained as to the effect of such action, the doubt could be readily dispelled by calling upon the four other principal powers represented in the council to state whether they do in fact object to the entrance of the United States into the league with the understandings and reservations stated in the resolution." Letter of Hon. Elihu Root to Hon. Henry C. Lodge, June 19, 1919.

Consent to reservations in the treaty may be given expressly by formal exchange of notes, or tacitly by acceptance of a formal note or of a qualified ratification. Amendments or interpretations not qualifying ratification require express consent, though subsequent practice, acquiesced in by the parties, and contemporary discussion, is admissible evidence of the true meaning of a treaty.

III. From the ethical and political standpoint the form of modification is immaterial but the substance is material. The United States in the opinion of the writer is under a moral obligation to assume responsibilities under the terms agreed upon as a basis of peace. To reject the treaty, or to amend it in a manner contrary to those terms would seem to amount to a repudiation of these responsibilities.

Signatory states, enemy as well as associated, are under no obligation, legal, moral or political to consent to amendments, reservations or interpretations of the treaty, and they are not likely to consent to modifications essentially altering its meaning or

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"Speaking generally, I wish to emphasize my conviction that the United States Senate might well ratify the present treaty, without any reservations or interpretations. I am confident that the actual operation of the treaty after ratification would bring about exactly the same result as that which would be attained by the acceptance of these interpretations and reservations, but it seems to me to be the part of statesmen to recognize the exigencies, personal, partisan and political of a situation in seeking to achieve real progress and reform." Letter of Hon. William Howard Taft to Mr. Will Hays, July 20, 1919.

"For practical purposes the difference between an amendment and a reservation is that, in case of an amendment, the ratification will not take place unless all the nations signatories to the treaty formally agree that as to all of them and their obligations the treaty is amended. A ratification with reservations is one which is conditioned on a change or a qualification or an interpretation applicable only to the obligations under the treaty of the nation making the reservation. A reservation really does not require express acquiescence by any of the other parties if they go on with the treaty without objection." (Letter of Hon. W. H. Taft, to Philadelphia Public Ledger, Nov. 10, 1919.)

"Any reservations to the treaty of peace with Germany contained in the instrument of ratification of the United States are in reality proposals to the other signatories of the treaty, and to that extent involve negotiations with those powers invited to accede to the Covenant. . . . Thus the form of each instrument of ratification of the treaty with Germany will be submitted to all the signatory powers, including Germany, for their consideration, approval and acceptance, and any one of those powers will have the right to disapprove and refuse to accept. Indeed it is obvious from the precedents that each signatory power has an interest in considering the instruments of ratification of the other powers, as its own acceptance or rejection of the treaty might depend on reservations contained in such instruments." Hon. David Hunter Miller, American expert on International Law at the Paris Conference, Memorandum, Oct. 25, 1919.

reserving special privileges for one party. Refusal of any signatory to consent to a qualified ratification by the United States would result in exclusion of the United States from the treaty as to that signatory.

Interpretative reservations designed in good faith to clarify the actual meaning of the treaty would presumably be accorded tacit consent by the other signatories of the treaty.

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INJUNCTION IN THE SUPREME COURT.

IN THE recent case of *State ex rel. Lofthus et al. v. William Langer, Attorney General,*[1] the supreme court of North Dakota, by a majority of three to two, and in the exercise of a supposed original jurisdiction removed a receiver of a private state bank who had been appointed by the State Banking Board, made an adjudication, upon proof furnished by affidavits merely, that the bank was not in fact insolvent, ordered it to be placed in the hands of another receiver to be by him, and when he saw fit, returned to its original officers and directors, and permanently enjoined the attorney general and the State Banking Board from thereafter interfering with its affairs.

The case is remarkable because in it a final injunction restraining state officers was issued upon affidavits merely. It is remarkable because the injunction was directed against the attorney general himself, although in North Dakota and in many other states it was for a long time, if not still, a mooted question whether the so-called quasi-prerogative writ of injunction could ever be issued by the supreme court, without the consent of the attorney general and it has never before been decided that it could be directed against him. It is remarkable since it furnishes the first instance in North Dakota, and perhaps in any other state, where this writ has been issued to impede and not help public officials in the performance of their duties and especially where private interests alone have been involved.

In addition to the question of the manifest impropriety of deciding a case of this nature upon affidavits alone, the controversy involves the question as to how far and over what matters the original jurisdiction of the supreme court extends.

The bank is an ordinary private state bank which was organized under the general banking laws and must not be confused with the Bank of North Dakota, which perhaps is more or less publicly owned, though the recent decision of District Judge W. L. Nuessle in the case of *State ex rel. Kositzky v. Bank of North Dakota*[2] has thrown some doubt even upon that question.

[1] (N. D. 1919) 174 N. W. —
[2] North Dakota district court.

It is true that the dominant political faction or party of the state is heavily interested in the local institution both as a borrower and as a depositor, but political parties or factions are not yet in law at any rate synonymous with the state itself, nor are their interests the interests of the sovereign people. The only concern therefore that the state as a whole can have in the affair must lie in the fact that the so-called Bank of North Dakota has had dealings with the local institution and holds among its collateral post-dated checks which were received from it and in the fact that the relator is the state bank examiner and that the receiver sought to be removed happens to be one of his deputies.

Chapter 55 of the North Dakota Session Laws of 1911 created a Department of Banking or State Banking Board and provided that the state examiner should be its secretary. This officer, if in the legal sense of the term officer he be, is at the present time the relator Lofthus. Though he has the title of bank examiner, he has no independent powers. Though under the Act of 1911 he is allowed deputies, and it is made his duty to examine the books and accounts of the various state banking institutions, he is to do so merely for the purpose of reporting to his superiors, and he has been expressly held to be an agent of the Banking Board and not an independent officer.[3] Section 3 of the statute provides that:

"The said board is hereby vested with the power and authority to appoint by its own order, receivers for insolvent corporations as defined in this article, and such receivers shall have the same power and authority, and their acts the same validity as if appointed under and by direction of a district court, but nothing herein contained shall be construed so as to take away from the courts the power to appoint receivers of such institutions at any stage of the proceedings and thus terminate the receivership ordered by the board."

Acting under these statutes and after an examination by a deputy bank examiner and a report of insolvency, the State Banking Board ordered the institution closed and placed a deputy bank examiner in charge as a receiver. This was done during the absence from the state of the chief bank examiner himself, though there is but little in this point as the examiner is merely an agent of the board. The deputy however was persona non grata to the bank and to its friends while the chief was not and the insolvency of the institution was denied. It was therefore determined to

[3] Youmans v. Hanna, (1916) 35 N. D. 479, 160 N. W. 705.

resort to the courts and either to have the receivership entirely dissolved or the bank examiner substituted in the place of his deputy.

Naturally and ordinarily the proceedings would and should have been instituted in the district court at Fargo, as not only had this court unquestioned jurisdiction in the premises, but the act under which the receiver was appointed seemed clearly to recognize the district court and the district court alone by providing that the receivers appointed by the board "shall have the power and authority and their acts shall have the same validity as if appointed under and by direction of a district court," and it is fair to assume that the courts afterwards referred to in the statute and to which resort should be had if a change of receivers was desired were courts of the same nature and jurisdiction. For some reason or other, possibly because the judge of the Fargo District had rendered an unfavorable decision in a former banking case of almost equal notoriety,[4] the chief examiner and the state bank did not desire to submit the decision to him. They therefore chose to petition the supreme court to take original jurisdiction of the case and applied for a writ of injunction which should restrain all interference with the affairs of the bank, and this both on the ground that the bank examiner had not been consulted in the premises and that the bank was not in fact insolvent.

A temporary injunction was issued and an order to show cause why this injunction should not be made permanent and the permanent injunction has now been issued. The decree, however, seems to recognize the fact that the affairs of the bank need some supervision, as it continues in charge the chief examiner who in the temporary order had been substituted for his deputy, and leaves it to him to turn the bank over to its original owners when he shall see fit to do so.

The supreme court of North Dakota therefore assumed jurisdiction not only to substitute one receiver for another, but to pass upon the solvency of the bank and the merits of the controversy, and to enjoin the attorney general and the Banking Board as a whole from interfering in the premises, and this was done on affidavits merely and against the protest of the attorney general who demanded a full hearing.

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[4] Youmans v. Hanna, (1916) 35 N. D. 479, 160 N. W. 705.

The main question, however, as we have before said is a question of jurisdiction.

The constitution of North Dakota provides that:

"Art. 4, Sec. 86. The Supreme Court, except as otherwise provided in this constitution shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general superintending control over all inferior courts under such regulations and limitations as may be prescribed by law.

"Sec. 87. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and such other original and remedial writs as may be necessary to the proper exercise of its jurisdiction, and shall have authority to hear and determine the same."

The questions at issue were: could the writs provided for in section 87, only be issued in aid of an appellate jurisdiction, for instance to require the clerk of a district court to send up the records on an appeal, or did the supreme court have an original jurisdiction outside of these matters and inherit the powers of the English Court of King's Bench as far as the common law writs of mandamus, habeas corpus, quo warranto and certiorari were concerned, and in addition the power (which the Court of King's Bench seems never to have possessed) to issue a quasi prerogative writ of injunction in chancery? If the supreme court had this power could it be exercised in any case except where the sovereignty, public rights, franchises and prerogatives of the state as a whole were concerned, and if not, did the bank controversy involve such sovereignty, public rights, franchises or prerogatives? Could the writ be issued when the law officer of the state not only disapproved but was himself the principal defendant?

The first North Dakota case upon the subject is that of *State of North Dakota v. Nelson County.*[5] In it, although the action was brought by the attorney general himself, an injunction was denied which sought to restrain the county from issuing seed grain bonds for the purpose of furnishing seed to needy farmers and this on the ground that the matter was of local interest merely. It was the intention of section 87 of the state constitution, the court said:

"To confer upon the supreme court, in the exercise of a jurisdiction vested in it, the duty of taking original cognizance only in the limited class of cases where the writs, except the writ of habeas corpus, are sought for on motion of the attorney gen-

[5] (1890) 1 N. D. 88, 45 N. W. 33.

eral as prerogative writs. Except in the case of habeas corpus leave to file and information must be obtained by the attorney general. When the information makes out a prima facie case the writ will issue only in cases publici juris, and those affecting the sovereignty of the state, its franchises or prerogatives or the liberites of its people."

These words are general, and though the application in the particular case was for a writ of injunction, they in terms and by way of dicta at any rate apply equally to the common law writs of mandamus, quo warranto, and certiorari. The language, also, is qualified and explained by the statement:

"The constitution of this state with respect to the original jurisdiction of the supreme court is substantially the same as that of the state of Wisconsin; and the interpretation given by the supreme court of that state to that part of its state constitution meets with the full approval of this court. See *Attorney General v. Railroad Companies,* 35 Wisconsin 425; *Attorney General v. City of Eau Claire,* 37 Wisconsin 400; *Wheeler v. Irrigation Company,* 9 Colo. 248, 11 Pac. Rep. 103. The case at bar affects only the local concerns of the county of Nelson, and its tax payers, and hence does not fall within the limited class of cases indicated above, and in which alone this court will assume original jurisdiction."

Thus, although there is in fact a difference between the constitutions of Wisconsin and North Dakota,—the constitution of the former state giving to the supreme court the general power to issue the writs mentioned[6] while that of North Dakota gives that court power only to issue the "writs of habeas corpus, mandamus, quo warranto, certiorari, injunction and such other original and remedial writs *as may be necessary to the proper exercise of its jurisdiction,*" and much more than that of Wisconsin would seem to limit the power to a jurisdiction already possessed,—the Wisconsin rule was stated to have been adopted in North Dakota.

As a matter of fact, however, the rule which was announced in the earlier North Dakota decisions was even more strict than that of the Wisconsin cases which had so far been decided. Though indeed in the case of *Attorney General v. Railroad Companies,*[7] Chief Justice Ryan had drawn a distinction between the chancery writ of injunction and the common law and jurisdictional writs of habeas corpus, mandamus, quo warranto and certiorari, he had none the less held that it was the intention of the

[6] See, sec. 3, art. vii.
[7] (1874) 35 Wis. 425.

framers of the constitution, as far as the supreme court was concerned, to make of the writ of injunction a quasi-prerogative and jurisdictional writ and to place it on a par with the unquestioned high prerogative and jurisdictional common law writs, and a few years later, in the case of *State ex rel. Lamb v. Cunningham,*[8] the right of a private relator to petition for the writ of injunction was fully established.

The North Dakota court on the other hand, in the earlier cases when the writ of injunction was prayed for, seemed to be of the opinion, if not positively to hold, that the sanction of the attorney general was absolutely necessary.[9] Though therefore we find in the North Dakota reports several instances where the common law writs seem to have been issued without the consent of the attorney general and even when the law officer of the state not only disapproved but appeared in person to represent the defendants,[10] we find at least one case where the writ of injunction was asked under similar circumstances its issuance was peremptorily denied.[11] Indeed it is but natural that the consent of the attorney general should at first have been deemed necessary. The writ was a high prerogative or at any rate quasi high prerogative writ. Originally and in England the prerogative was the prerogative of the throne and not of the private citizen, and the attorney general was the representative of the throne. In America, where the personal sovereign gave way to the sovereign people, the prerogative was still a sovereign or governmental prerogative, and it might well have been first contended that the law officer of the state would best know when the exercise of that prerogative was necessary and that he could be relied upon to petition for it whenever the public welfare really demanded its issuance.

The purpose of the high prerogative writs was to aid in the administration of government; and when the law and the government proceeded from the king, and in America where (as was first the case in North Dakota) there was a dominant political party entrusted with the affairs of government, it was seldom that the interests of the dominant party and of the attorney general were other than to further the governmental agencies and machinery and the workings of the established law. Occasions, however,

[8] (1892) 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 147, 35 Am. St. Rep. 27.

[9] State v. Nelson, (1890) 1 N. D. 88, 45 N. W. 33; Anderson v. Gordon, (1900) 9 N. D. 480, 83 N. W. 993.

[10] State ex rel. Fosser v. Lavik, (1900) 9 N. D. 461, 83 N. W. 914; State ex rel. Anderson v. Falley, (1900) 9 N. D. 464, 83 N. W. 913.

[11] Anderson v. Gordon, (1900) 9 N. D. 480, 83 N. W. 993.

soon arose, when the contest between the political factions became close and keen and the attorney general himself became an interested party. Such a case was presented in Wisconsin in the leading case of *State ex rel. Lamb v. Cunningham,*[12] where a democratic attorney general refused to ask for an injunction which would prohibit the sending out of election notices under a flagrantly unconstitutional statute which had so gerrymandered the state as to disfranchise thousands of republican voters, and it is but natural that the court should have then definitely stated that, even in the case of an injunction, the consent of the attorney general was not absolutely necessary to the exercise of jurisdiction and that in this respect there was no difference between injunctions and common law writs.

Never before, however, either in Wisconsin or North Dakota, has the supreme court asserted the right of not merely ignoring the wishes of the attorney general but of enjoining this officer himself from doing that which he believed his public duty demanded and especially in a case in which the relator represented private and not public rights. It is one thing indeed for the supreme court to take jurisdiction in a case where an injunction is sought against a private individual or subordinate officer to restrain him from interfering with the functioning of government and another to bring the chief law officer of the state before its bar and to prevent a state board from performing it duties. The high prerogative jurisdiction indeed was given that the administration of the government might be carried out and promoted and not that it might be prevented and delayed.

Up to the present time the supreme courts of both Wisconsin and North Dakota have steadily adhered to the rule that the writs which are authorized to be issued in the exercise of their original jurisdiction are, no matter by what name they may be called, strictly prerogative writs and that, for that reason, they can only be issued when the interests of the state as a whole and not of some mere individual or locality are concerned, no matter how interesting to all the controversy may be. They have taken jurisdiction therefore in the cases of controversies over supreme court and district court judicial offices because the people of the state as a whole are concerned in the proper administration of the civil and criminal law.[13] They have as-

[12] (1892) 83 Wis. 90, 53 N. W. 35, 17 L. R. A. 147, 35 Am. St. Rep. 27.
[13] State ex rel. Erickson v. Burr, (1907) 16 N. D. 581, 113 N. W. 705; State ex rel. Linde v. Robinson, (1916) 35 N. D. 410, 160 N. W. 512.

sumed jurisdiction in questions involving the right to the ballot and of representation upon the electoral tickets because the right to a free suffrage is one which it is the interest of all to preserve and the election of even county officers is a part of the general scheme of government.[14] They have assumed jurisdiction where general elections were sought to be called under unconstitutional laws and even where constitutional amendments were sought to be unconstitutionally initiated.[15] They have always been ready to interfere where public officers such as the state tax commissioners were sought to be hindered in or prevented from the performance of their duties.[16]

They have steadily refused to take jurisdiction in controversies involving the location of county seats,[17] for these are matters of local convenience merely; to interfere where the district court had jurisdiction in the matter of the extension of county boundaries, and even in the case of the location of election precincts which did not seem necessary to the exercise of the franchise but merely convenient.[18] They have refused to exercise jurisdiction in the case of a controversy over the office of chairman of the Democratic State Central Committee as the same was not a public office.[19] They have refused to review the action of the Board of Equalization in the case of an individual tax payer,[20] and to aid an insurance company in obtaining a permit to do business in the state.[21]

They have, in short, laid down the clear and explicit rule that in order that their original jurisdiction may be invoked it is necessary that:

"The interest of the state shall be primary and proximate, not indirect or remote; peculiar perhaps to some subdivision of the state, but affecting the state at large in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state

[14] State ex rel. Steel v. Fabrick, (1908) 17 N. D. 532, 117 N. W. 860; State ex rel. Buttz v. Lindahl, (1903) 11 N. D. 320, 91 N. W. 950; State ex rel. Fosser v. Lavik, (1900) 9 N. D. 461, 83 N. W. 914; State ex rel. Shaw v. Thompson, (1911) 21 N. D. 426, 131 N. W. 231.

[15] State ex rel. Linde v. Hall, (1916) 35 N. D. 34, 159 N. W. 281.

[16] Board of Control, State ex rel. Moore v. Archibald, (1896) 5. N. D. 359, 66 N. W. 234; State Board of Immigration, State ex rel. Baker v. Hanna, (1915) 31 N. D. 570, 154 N. W. 704.

[17] State ex rel. Walker v. McLean Co., (1903) 11 N. D. 356, 92 N. W. 385.

[18] State ex rel. Byrne v. Wilcox, (1903) 11 N. D. 329, 91 N. W. 955.

[19] State ex rel. McArthur v. McLean, (1916) 35 N. D. 203, 159 N. W. 847.

[20] Duluth Elevator Co. v. White, (1903) 11 N. D. 534, 90 N. W. 12.

[21] Homesteader v. McCombs, (1909) 24 Okla. 201, 103 Pac. 691.

in its sovereign character, this court judging of the contingency in each case for itself. For all else, although raising questions publici juris, ordinary remedies and ordinary jurisdictions are adequate, and only when for some peculiar cause these are inadequate will the original jurisdiction of this court be exercised for protection of merely private or merely legal rights."[22]

It is quite clear indeed that in the instant case the majority of the supreme court of North Dakota (and it is only fair to say that Chief Justice Christianson and Associate Justice Birdzell dissent) has performed a complete intellectual somersault. Formerly the jurisdiction of the supreme court was never exercised at the behest of a private individual, corporation or locality, unless the interests of the state as a whole were concerned, as in the contest over the office of a Judge who administered the penal and civil laws of the whole state, or as in the case of *State ex rel. Lamb v. Cunningham,* where an illegal, state-wide election was sought to be prevented, or *State ex rel. Linde v. Hall,* where an equally unconstitutional referendum was involved, and then only that the constitution might be made paramount. It was even denied in cases of the removal of county seats. Formerly it was held, or at least strongly intimated, that the consent of the attorney general was absolutely necessary and though this ruling was later modified, it was always held that the judgment of the attorney general should be given much weight and should only be overruled in matters of the gravest importance and of state-wide significance. Now the attorney general is not only not consulted but is himself enjoined and this on the relation of a private bank and of a mere agent and servant of the State Banking Board of which the attorney general is himself a member.

Formerly, too, courts of equity were loath to pass upon complicated statements of facts, and when there was any dispute as to right or to title were wont either to require the issues to be tried in a court of law and before a jury, or themselves to call in a jury for advisory purposes, or to submit the matter to referees or masters in chancery to take testimony and to report. In the instant case, however, the court decides a complicated matter of accounting on affidavits merely and, without affording an opportunity for cross-examination, sets aside the report of a bank examiner and overrules the discretion of a governmental department.

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[22] State ex rel. Steel v. Fabrick, (1908) 17 N. D. 532, 536, 117 N. W. 861; State ex rel. Linde v. Taylor, (1916) 33 N. D. 76, 156 N. W. 561; State ex rel. McArthur v. McLean, (1916) 35 N. D. 203, 159 N. W. 847.

Minnesota Law Review

Published monthly, December to June inclusive, by the Faculty and Students of the Law School, University of Minnesota.

Subscription Price, $2.50 per annum. Forty cents per number.

THE LAW SCHOOL.—After the two troubled and distracting years of the war the Law School opened for the current session with an entering class numbering 133, which is much larger than any other beginning class received since the advance of the admission requirements to one and two years of academic collegiate work in 1909 and 1910 respectively. The surprisingly large number of former students returning after discharge from military and naval service brings the membership of the second year class to 65, and that of the senior class to 54. The total registration in the Law School is 252 of whom eight are women.

To the great regret of his colleagues and of the returning students, Professor Edward S. Thurston, absent since May, 1917,

in military service, did not return to Minnesota, having resigned his professorship in order to accept a call to the Yale Law School. The breach thus made in the ranks of the Law Faculty has been closed by the election of Mr. Noel T. Dowling as professor of Law. Professor Dowling received his bachelor's degree from Vanderbilt University and his degrees of Master of Arts and Bachelor of Laws from Columbia University. Admitted to the bar in New York in 1912 he was shortly afterwards called into the Legislation Department of Columbia. For the two years prior to the outbreak of the war he served as counsel for the Federal Industrial Commission. Soon after the organization of the War Risk Insurance Bureau, in October, 1917, he was called to Washington to serve as associate counsel of that Bureau. A few weeks before the armistice he received a commission as major in the Judge Advocate General's Department, but was soon discharged in order to become Assistant Director of the Bureau of War Risk Insurance. Dean William R. Vance, after a year's service in Washington as General Counsel of the Bureau of War Risk Insurance, has resumed his duties in the Law School.

THE STUDENT EDITORIAL BOARD.—Readers of the Law Review will welcome the return to the Editorial Board of several members of the Boards of 1916-17 and 1917-18 who withdrew from the Law School to enter the service. Marcellus Countryman, Jr., Leslie H. Morse, Kenneth V. Riley and Claire I. Weikert, all valued members of the 1916-17 Board, are again on duty with the Law Review as are Henry N. Graven and Karl H. Covell of the 1917-18 Board. Leo DeMoully, who also left the 1917-18 Board to enter the military service served efficiently on last year's Board after his discharge.

THE FAILURE OF THE MINNESOTA RESIDENCE DISTRICT ACT.—An opinion of the supreme court filed October 24 denying the validity of the Minnesota Residence District Act of 1915 in so far as it authorizes condemnation of property against its use as a site for an apartment house apparently seals one avenue of progress in the general program for the improvement of city life.[1] The validity of this statute was attacked by an application for mandamus against the inspector of buildings of Minneapolis

[1] State of Minnesota ex rel. Twin City Building & Investment Co. v. Houghton, (Minn. 1919) 174 N. W. —

to compel him to issue a permit for the erection of a three-story apartment. The relator's right to the writ was conceded unless the proceedings of the common council of that city taken under authority of the Laws of 1915, c. 128, designating a certain block as a restricted residence district, prevented its exercise.[2] The court allowed the writ.

City planning by which mercantile and industrial establishments, hotels, apartments, and houses are segregated has advantages which might well have invited the co-operation of the judiciary. Mr. Justice Holt, who dissented from the majority opinion,[3] took the view that "besides preserving and enhancing values it fosters contentment, creates a wholesome civic pride, and is productive of better citizens." A counter consideration is that the sense of oppression which often results from enforcing ideals by arbitrary power may go far to offset the good that is accomplished;[4] and that this consideration arising in the mind of the court did much to induce it to its adverse ruling on the statute is indicated by its remark that "when the humble home is threatened by legislation upon aesthetic grounds, or at the instance of a particular class of citizens who would rid themselves of its presence as not suited in architecture or in other respects to their own more elaborate structures, a step will have been taken inevitably to cause discontent with the government."

Finally of course its opinion turned on the conclusion of law that condemnation against the use of one's property as a site for an apartment could confer neither upon the city nor the public a physical use of the condemned premises. While recognizing that what constitutes a public use changes from time to time, this opinion sets at naught an ingenious effort of property owners, promoters and city planners to establish restricted residential districts.

These efforts have pursued three lines. Restricted residential districts were first sought to be obtained by virtue of the police power; second, direct legislation was secured expressly authorizing cities of the first class, without making compensa-

[2] (1918) Minneapolis Council Proceedings 114.

[3] Note 1 supra State ex rel. Twin City Building & Investment Co. v. Houghton (Hallam, J. concurred in the dissenting opinion).

[4] Cf. "The Minnesota Residence District Act of 1915," by C. J. Rockwood in 1 MINNESOTA LAW REVIEW 487, 491, and "State Restrictions on Use of Property," by R. S. Wiggin in 1 MINNESOTA LAW REVIEW 135.

[5] State ex rel. Twin City Building & Investment Co. v. Houghton, (Minn. 1919) 174 N. W. —

tion, to designate districts wherein only residences might be erected; finally, and apparently after members of the bar had been interested in the matter, the precedent of the Massachusetts law,[6] providing for the exercise of the right of eminent domain in this regard was relied on and Laws 1915 Minnesota, chapter 128 was passed, only to be defeated by the finding of the court that condemnation of property against its use as a site for an apartment was not condemnation for a public use, and the right of eminent domain for such a purpose was accordingly beyond the authority of the legislature to confer or municipal corporations to exercise.

Restriction of the areas in which liquor might be sold was a suggestive precedent for the attempt to secure restricted residential districts by virtue of the police power.[7] The police power is an attribute of sovereignty and exists without reservation in the constitution.[8] Examples of the ways in which one may by legislation thereunder be restricted in the use of one's property are legion;[9] the courts of other jurisdictions had sustained restrictions against bill-boards and other outdoor advertising in several instances;[10] it had been broadly held that the police power is not limited to the regulation of matters pertaining to the public health, the public morals, or the public safety, but extends to matters involving public convenience and the general welfare or prosperity;[11] and that the question of what is within the police

[6] Mass. Acts & Resolves 1898, c. 452.

[7] In re C. H. Wilson, (1884) 32 Minn. 145, 19 N. W. 723.

[8] N. W. Tel. Exchange Co. v. Minneapolis, (1900) 81 Minn. 140, 147, 86 N. W. 69.

[9] Dunnell's Minn. Dig. & 1916 Supp. sec. 1603 et seq. especially sec. 1610.

[10] Thomas Cusack Co. v. City of Chicago, (1917) 242 U. S. 526, 61 L. Ed. 472, 37 S. C. R. 190, and note in 1 MINNESOTA LAW REVIEW 441; Whitmier & Filbrick Co. v. City of Buffalo, (1902) 118 Fed. 773; Gunning System v. City of Buffalo, (1902) 75 App. Div. 31, 77 N. Y. S. 987; State & City of Asheville v. Staples, (1911) 157 N. C. 637, 73 S. E. 112. It should be noticed that in all these cases the restrictive statute could be supported as an exercise of the police power for the protection of public morals or safety; there is a strong array of judicial opinion denying the validity of bill-board restrictions wherever the purpose of the prohibition was purely aesthetic. Commonwealth v. Boston Advertising Co., (1905) 188 Mass. 348, 74 N. E. 601, 69 L. R. A. 817, 108 Am. St. Rep. 494; Varney & Green v. Marshal of San Jose, (1909) 155 Cal. 318, 100 Pac. 867, 21 L. R. A. (N.S.) 741. Note to People ex rel. Winebrugh Adv. Co., (1909) 195 N. Y. 126, 88 N. E. 17, 21 L. R. A. (N.S.) 735, 736.

[11] Chicago, etc., Ry. v. Illinois, (1906) 200 U. S. 561, 592, 50 L. Ed. 596, 26 S. C. R. 341; Noble State Bank v. Haskell, (1911) 219 U. S. 104, 55 L. Ed. 112, 31 S. C. R. 186; Twin City Separator Co. v. Chicago, etc., Ry., (1912) 118 Minn. 491, 137 N. W. 193; Chicago, etc., Ry. v. Minneapolis, (1911) 115 Minn. 460, 133 N. W. 169.

power "is not one of abstract theory alone,"—"tradition and the habits of the community count for more than logic."[12] It was not therefore unreasonable to attempt civic improvement under this sovereign power, and the decision of our own court in *Chicago, etc., Ry. Co. v. Minneapolis*[13] gave color to the prospect of success. In that case the court had supported the taking of an easement across the right of way of the railroad for the purpose of joining Lake Calhoun with Lake of the Isles. Each was adapted for use by the public for pleasure boating, skating, and the like. This use was held to be sufficiently public to warrant the exercise of the police power. The court said "the desirability of conserving, extending, and maintaining reasonable opportunity of wholesome public recreation is continually growing in recognition because such opportunities tend to promote the general health and welfare of the people";[14] and quoted with approval the opinion[15] of the court to the effect that the police power of a state embraces regulations designed to promote the public convenience or the general property, as well as regulations for the sake of health, morals, and safety.

Believing that this language would support the creation of residential districts in that they afford the entire urban public larger open spaces, and promote civic pride and activity, the Minneapolis common council in the following year passed an ordinance prohibiting the erection or use of any apartment house exceeding two and one-half stories in height fronting or abutting on Dupont Avenue South between Mount Curve Avenue and Lincoln Avenue in the city of Minneapolis.[16] It seemed desirable however to give such ordinances the sanction of legislative authority. Accordingly the Minnesota Residence District Act of 1913[17] was secured. It provided that any city of the first class "in the exercise of the police power by ordinance" might designate, upon petition of fifty per cent of the property owners, residence districts in which "hotels, stores, factories, . . . and apartment houses" were prohibited. Under this act the city council took appropriate action limiting the areas of business

[12] Justice Holmes in Laurel Cemetery v. San Francisco, (1910) 216 U. S. 358, 366, 54 L. Ed. 515, 30 S. C. R. 301.
[13] (1911) 115 Minn. 460, 133 N. W. 169.
[14] Ibid p. 464.
[15] Chicago, etc., Ry. v. Illinois, (1905) 200 U. S. 561, 592, 50 L. Ed. 596, 26 S. C. R. 341.
[16] (1912) 38 Minneapolis Council Proceedings, 1154.
[17] G. S. Minn. 1913, sec. 1581-1585.

activity.[18] Shortly after the passage of the ordinance one Lachtman applied for a permit to erect a small one-story store building on a lot in a district restricted by petition and ordinance in Minneapolis. The application was refused and Lachtman sued out a writ of mandamus. The supreme court held the law unconstitutional in so far as it prohibited the erection of ordinary store buildings.[19] In the next year a mandamus was requested to compel the inspector of buildings to issue a permit for the erection of a four-family flat building within a residential district in Minneapolis. The court allowed the writ in a short per curiam opinion holding that there is no tenable distinction between an ordinary store and a four-family dwelling.[20] Before these cases were decided a similar law in Illinois making it unlawful to erect a store without the consent of a majority of property owners in a block used exclusively for residences was held to be outside the scope of the police power,[21] and a hasty effort was made to bring the matter within the power of eminent domain.[22]

For the sake of accurate thinking it is well to keep in mind the fundamental distinction between police power and the right of eminent domain in their respective applications to private property. In the exercise of the right of eminent domain, property, or an easement therein, is taken from the owner and applied to public use because the use or enjoyment of such property or easement therein is beneficial to the public; in the exercise of the police power the owner is denied the unrestricted use or enjoyment of his property, or his property is taken from him because his use or enjoyment of it is *injurious* to the public welfare.[23] Compensation is an invariable concomitant of the exercise of the right of eminent domain. The practical difficulties in the way of appraising the value of the property taken by an ordinance against its use as an apartment site are obvious. Generally the property is made more valuable; yet something has clearly been taken from the owner. These difficulties are avoided by invoking the

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[18] (1915) 41 Minneapolis Council Proceedings, 777.

[19] State ex rel. Lachtman v. Houghton, (1916) 134 Minn. 226, 158 N. W. 1017, L. R. A. 1917F 1050.

[20] State ex rel. Roerig v. Minneapolis, (1917) 136 Minn. 479, 162 N. W. 477.

[21] Ordinance 712½ of City of Chicago, construed in People ex rel. Friend v. Chicago, (1913) 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N.S.) 438.

[22] Minn. Laws 1915 c. 128.

[23] 1 Nichols, Eminent Domain, 2nd Ed., sec. 55.

police power, and one's sense of logic suffers less. The plain effect of our decisions, however, has been to set the matter of residential restrictions outside the scope of the police power.[24]

The general court of Massachusetts had successfully restricted the height of buildings about Copley Square in Boston by the machinery of eminent domain,[25] and had been sustained by the supreme judicial court.[26] New York had allowed condemnation of property to widen a street twenty feet on each side for the purpose of ornament and beauty only, without user of the added strips by the public;[27] and had taken quarry property along the palisades of the Hudson which was itself too rugged for public user but which as a quarry marred the beauty of the palisades.[28] In 1901 the court of appeals sustained an opinion in which it was held "proper that some regard be had for the aesthetic tastes, the comfort, health and convenience of the public."[29] The framers of the Minnesota Residence Act of 1915[30] relied largely on these decisions. But our court holds them unlike the apartment house case, both in principle and in facts. Distinguishing them the court says "no question is made of the right under proper authorization to condemn property for boulevards, or for pleasure drives or for public parks or for public baths. . . . In such cases there is a public use. In the condemnation here we see none."[31] If our court can support the Massachusetts cases on the ground that Copley Square is within the park system, for which the city may take an easement of light and air for the benefit of the public; and the New York cases on the ground that those who live and pass along Riverside Drive may by virtue of governmental authority because the drive is a parkway enjoy an unbroken view of the palisades, it is submitted

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[24] State v. Houghton, supra, note 19; State ex rel. Roerig v. Minneapolis, supra, note 20.

[25] Mass. Acts & Resolves 1898 c. 452.

[26] Attorney General v. Williams et al., (1899) 174 Mass. 476, 55 N. E. 77; cf. Attorney General v. Williams, (1901) 178 Mass. 330, 59 N. E. 812; affirmed in Williams v. Parker, (1903) 188 U. S. 491, 47 L. Ed. 559, 23 S. C. R. 440.

[27] N. Y. Laws 1899 c. 257; held valid in re City of New York, (1901) 57 App. Div. 166, 68 N. Y. S. 196, (on appeal) 167 N. Y. 624, 60 N. E. 1108.

[28] Bunyan v. Commissioners, (1915) 167 App. Div. 457, 153 N. Y. S. 622.

[29] In re City of New York, supra, note 27.

[30] Minn. Laws 1915 c. 128.

[31] State ex rel. Twin City Building and Investment Co. v. Houghton, p. 7, supra, note 1.

that their opinion leaves one possible loop-hole which ought not to be neglected. Would it not be competent for the common council, within reasonable limits, to place certain districts within the jurisdiction of the park board, thus making condemnation against use of property therein condemnation for a public use within the view of the court?

The apparent practical difficulties attending such an expedient are easily resolved in favor of this suggestion upon analysis of the essential processes. All that is required is an amendment to the Act of 1915 limiting its application, in so far as it has to do with apartment houses, to districts which, at the time of petition of the owners therein, front upon streets or boulevards which the common council has previously made parkways; and authorizing the city councils, on petition of fifty per cent of the property owners affected, to designate districts wherein no building higher than forty feet, for example, shall be erected. "No question," says the court in the instant case," is made of the right . . . to condemn property for boulevards, or for pleasure drives . . ." Accordingly, condemnation of an easement of light and air along Lake of the Isles Boulevard or any street used as a parkway would be a proper object of legislation prohibiting buildings of more than a certain height; and apartment houses may be outlawed on that ground. Let the appraisers appointed in pursuance of condemnation proceedings under the act award the owners the difference between the market value of the property with an apartment house on it and its value with a dwelling on it. The act could be simplified by providing that in other respects the condemnation proceedings should follow the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway.[32] With these changes the Act of 1915 might be brought within the principles of our court governing the condemnation of private property for public use.

REVOCABILITY OF TRUST DEPOSITS IN SAVINGS BANKS.—With the development of savings institutions, trust deposits which once were rare in the banking business have become of frequent occurrence. Contemporaneously with the enormous growth of these deposits the law governing this form of trusts has developed.

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[32] Cf. Mass. Acts & Resolves (1898) c. 452.

The common form of trust deposit is this: A deposits money in a savings bank in the name of "A in trust for B." What the rights and liabilities of A and B in relation to this fund may be, are considerations dependent upon the essential character of this form of deposit. Is the fund one which A can increase or decrease at will without exposing himself to liability to B, or is it one in which B has a right to limit A's control and disposition?

Ordinarily, where A declares unequivocally, by a clear and explicit declaration duly executed and intended to be final and binding upon him, that he holds certain property in trust for B, A is considered a trustee of the property designated for the benefit of B:[1] In such a case the law considers that it is obviously the intention of the declarant to create a trust, and equity will deem such a trust created. The early case of *Martin v. Funk*,[2] following the general law of trusts, established the doctrine that the depositing of money in trust for another constituted a complete and irrevocable trust. The cases relying upon and following this authority held that the mere fact of a deposit in the name of "A in trust for B" conclusively established an irrevocable trust at the time the deposit was made.[3] After the creation of the trust, A could only act in relation to the fund as trustee. All he had was the bare legal title, the beneficial title was in B. If the trustee withdrew the money and appropriated it to some use of his own, he, and after his death his executors, were chargeable by the cestui que trust.[4] Likewise if additions were made to the fund, a trust was imposed upon the addition.[5]

But with changing conditions it became apparent that this doctrine, in so far as it was based on the intention of the depositor, was incompatible with the common practices of depositing moneys in trust, especially when it clearly appeared that there was no intention to create a trust. The amount which any person could deposit in a savings bank had been limited by statutes of

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[1] Perry, Trusts, 5th ed., secs. 96, 104, 105; Connecticut River Savings Bank v. Albee, (1892) 64 Vt. 571, 25 Atl. 487.

[2] (1878) 75 N. Y. 134.

[3] Connecticut River Sav. Bank v. Albee, supra; the authorities are collected in 47 Am. Digest, Cent. Ed. p. 442; see also note in 1 Ann. Cas. 904.

In Bath Savings Inst. v. Hathorn, (1895) 88 Maine 122, 32 L. R. A. 377, it was held that an entry on the books of the bank showing account to be in trust for another is not conclusive of itself, but that extrinsic evidence is competent to control its effect, a trust was sustained.

[4] Marsh v. Keogh (1903) 82 App. Div. 503, 81 N. Y. S. 825.

[5] Hyde v. Kitchen, (1893) 69 Hun (N. Y.) 280, 23 N. Y. S. 573.

the different states,[6] and by by-laws of the banks, usually passed to comply with the statutes; and to evade these regulations so that deposits could be made beyond the legal maximum, as well as to evade taxes upon the excess above the legal maximum, and sometimes to place money beyond the reach of creditors, it became common for depositors to commence accounts in their own names "in trust for B." The depositors retained complete control over the trust account and used it entirely for their own benefit. To adapt the law to this new practice, it was apparently deemed necessary to modify the doctrine of *Martin v. Funk*. The latter rule was set aside by a later New York case, *In re Totten*,[7] which established the rule that a mere deposit does not create an irrevocable trust, but merely a tentative or revocable one, which becomes absolute at the time of the depositor's death if the beneficiary survives him. Massachusetts even prior to the decision of *Martin v. Funk* adopted a rule which is consonant with the modern trust deposit practices. This doctrine re-states the old rule of trust law that there must be an unequivocal declaration of the settlor's intention to create a trust, but modifies the rule of *Martin v. Funk* to this extent, that a mere deposit in trust for another is not conclusive of such an intention because the settlor may have had various purposes in mind when making this declaration.[8] The theory of the Massachusetts case was this: a mere deposit was an ambiguous act, because when there was no immediate delivery of the pass-book to consummate the transfer of legal title, the retention by the depositor of the book was consistent with two different interpretations,—either that he intended to retain control and possession for his own benefit, or that he constituted himself a trustee for the named beneficiary;

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[6] See Minn. Gen. Statutes, 1913, sec. 6388.

[7] In re Totten, (1904) 179 N. Y. 112, 71 N. E. 748, 1 Ann. Cas. 900, where the rule was announced as follows: "A deposit by one person of his own money in his own name as trustee for another, standing alone does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration such as a delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor." 179 N. Y. 112 at page 125.

The same rule is reiterated in In re Barbey, (1908) 114 N. Y. S. 725; Walsh v. Emigrant Industrial Savings Bank et al. (N. Y. 1919) 106 Misc. Rep. 628, 176 N. Y. S. 418.

[8] Brabrook v. Savings Bank, (1870) 104 Mass. 228.

and as an ambiguous act can not unequivocally set forth the depositor's intention, such a deposit can not create a trust. Logically this doctrine is unimpeachable.

A comparison of these two different lines of authority shows that the Massachusetts and New York courts have these points of agreement: (1) that a perfected trust is not created by the deposit; (2) that no such trust exists during the lifetime of the depositor unless created by some affirmative, unequivocal act showing an intention to create a trust.[9] To the latter proposition the New York court raises this exception, that though the deposit does not create an irrevocable trust, there is nevertheless a revocable or "tentative trust" which is resurrected at the settlor's death in the form of an absolute trust. The point of controversy is whether the death of the depositor before the beneficiary amounts to a declaration which clearly shows that there was an intention to create a trust. It is admitted that the death of the beneficiary before the depositor causes the so-called tentative trust to terminate.[10] It is submitted that the death of the depositor is not such an unequivocal declaration of a trust, for two reasonable inferences may be drawn from such a state of facts: first, that the depositor intended the fund to go to his personal representatives to be applied to the use of his estate as he had applied it during his life; and second, that he intended the fund to go to the beneficiary, although he had not effectually declared so. The conclusion is therefore submitted that, as no trust existed during the lifetime of the depositor, and as his death was not an effectual declaration of an intention to create a trust, the doctrine of *In re Totten* is based upon a logical misconception. There is, however, a very practical reason for this doctrine. Banks dislike to be involved in legal proceedings accompanying the administration of an estate, and in preference to the unnecessary delay and litigation arising from claims of creditors, personal representatives and contesting heirs, they would rather pay the funds to the beneficiary of the trust deposit.

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[9] Hutton v. Smith, (1902) 74 App. Div. 284, 77 N. Y. S. 523; Atkinson's Petition, (1889) 16 R. I. 413; In re Totten, supra.

Authorities are quite unanimous now in permitting extrinsic evidence of contemporaneous facts and circumstances to be admitted either to establish or disprove an alleged trust. Matter of Totten, supra; Mitten v. Clarke, (1889) 40 Fed. 15.

[10] 14 Ann. Cas. 924, note.

In Minnesota by the decision of *Walso v. Latterner,*[11] the New York rule is adopted. In the latter case, pursuant to the general practice, the printed provisions of the pass-book permitted the depositor to withdraw his deposits at any time during his life, but provided that on his death the balance on deposit should be paid to the beneficiary in the absence of written instructions making a different disposition. It is interesting to note in this connection that by statute in Minnesota it is provided:

"Whenever any deposit shall be made by any person in trust for another and no other written notice of the existence and terms of any legal and valid trust shall have been given to the bank, in case of the death of such trustee the same or any part thereof, and the dividends or interest thereon, may be paid to the person for whom the deposit was made."[12]

Undoubtedly this statute is intended to, and actually does, protect banks against the claims of the representatives of the deceased depositor, and thus enables them to avoid becoming involved in litigation. However, the existing decisions in Minnesota relating to trust deposits seem to make no mention of this statute. Any attempted construction of this statute outside of the pale of the courts would be conjectural. At present at least one question is left open. Suppose A deposits money in trust for B, and before his death bequeaths the same by will to C, of which bequest the bank has no notice. Would the "tentative trust" be revoked as is announced in the recent case of *Walsh v. Emigrant Industrial Savings Bank et al.,*[13] or may the bank safely pay the fund to B? If the bank does pay the fund to B without notice of the will, can C recover of B?

There are grounds for contending that the old doctrine of *Martin v. Funk* should prevail subject to one exception: that creditors should be allowed to satisfy their claims out of the deposit. In support thereof it is urged (1) that the deposit is an unequivocal declaration of a trust, for if any other intention be present in the depositor's mind it is one of which the law will take no notice because there is nothing from which such a collateral intention can be discerned unless it is the intention to evade the law, to which the law should give no recognition; (2) that such a doctrine will accomplish justice to all. This contention is answered in *Matter of Totten* as follows: (1) there is no

[11] (Minn. 1919) 173 N. W. 711.
[12] Minn. G. S. 1913, sec. 6390.
[13] (N. Y. 1919) 176 N. Y. S. 418.

unequivocal declaration of a trust, for courts must adapt the law to the customs of the people, and where the customary practice is to make deposits in trust without intending to create a trust, such an intention will not be deduced; and (2) no injustice will accrue to the creditors, for the fund will always be open to their claims. The logical outcome of the New York line of reasoning, which is, perhaps, most generally followed today, is that the laws and bank regulations governing the amount of any individual deposit do not accomplish their purpose, for they are evaded by the making of trust deposits. The reason for imposing those restrictions on individual deposits was predicated upon grounds of public policy, and unless a better public policy requires that deposits in trust be subject to the changing intention of the depositor, and therefore actually subject to his disposition and control during his lifetime, or at least until he asserts his intention affirmatively and unequivocally, it would seem that the courts should not have practically nullified this legislation simply to adapt the law to the customs of the people.

In summarizing, it seems that at least a part of the difficulty arises from the use of the term "tentative or revocable trust," in the face of the commonly accepted doctrine that any so called "trust" which is tentative or revocable at the whim or fancy of the declarant, there being no express reservation of a power of revocation in the writing creating the trust, is in the nature of things manifestly no trust at all. It is suggested that the term "tentative trust" as used by the New York court is simply a mis-use of words and is intended to designate the inchoate or undetermined intention of the depositor in making the deposit, and that the intention of the depositor, interpreted in the light of later or collateral circumstances, will relate back to the time of making the deposit. It must now be conceded that the majority of courts regard the mere deposit itself, without something further, as inconclusive of the intention of the depositor. The wisdom of this stand may well be questioned, in view of the fact that the courts have thereby rendered the statutory restrictions on savings bank deposits practically ineffective, but the simple remedy for this, if deemed advisable, is a statutory declaration by the legislature that a deposit of money in a savings bank in the name of the depositor in trust for another shall constitute a complete and irrevocable trust in favor of the named beneficiary. But in the absence of such a statute and under the existing state

of the law it is submitted that the proper view lies somewhere between the Massachusetts view and the New York view: that the mere deposit in trust unexplained is evidence of a probable intent to create a trust, but that the court must determine, from a consideration of all the facts and circumstances affecting the depositor's actions and dealings in regard to the deposit, whether on the whole case it was the depositor's intention to create a trust or to retain control of the fund for his own benefit. It is submitted that in cases of this type, where the facts are peculiar to each case, no inflexible rule of construction should be applied, and that neither the death of the depositor nor any other single fact should be necessarily conclusive upon the court.

POWER OF EQUITY TO COMPEL CONSOLIDATION OF ACTIONS AT LAW ARISING OUT OF THE SAME SET OF FACTS.—The question as to how far the jurisdiction of a court of equity may be extended in order to save a defendant from the expense of defending a multiplicity of actions at law becomes a question of much interest in cases where the defendant has committed an act which has resulted in a separate tort to each of numerous plaintiffs, but where the injury to each is similar in character to all the others. There has recently come before the federal courts a typical case of this character where a bill was filed to consolidate some one hundred and thirty separate actions at law brought by land owners to recover damages for the flooding of their lands caused by the bursting of the petitioner's dam. The court held that equity had jurisdiction to compel a consolidation on the ground of avoiding a multiplicity of actions.[1] In view of the fact that equity is a distinct system of jurisprudence and not simply a court for the administration of the popular notion of justice, it may be profitable to consider the extent of this jurisdiction.

There has been much writing in text books and many opinions upon the jurisdiction of a court of equity to avoid multiplicity of actions at law. It has often been said in the federal courts that there were no hard and fast limits to this jurisdiction. As was said in *Hale v. Allison*,[2] "In any case where the facts bring it within the possible jurisdiction of the court, according to the

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[1] Montgomery Light and Power Co. v. Charles et al., (1919) 258 Fed. 723.

[2] (1903) 188 U. S. 56, 23 S. C. R. 244, 250, 47 L. Ed. 380.

view taken by it in regard to such facts, the decision must depend largely upon the reasonable convenience of the remedy, its effectiveness, and the inadequacy of the remedy at law." This view assumes that there must be facts aside from the mere multitude of actions in order to give the court jurisdiction. In a note to *Southern Steel Co. v. Hopkins*,[3] the annotator declared that no other case had been found which held that an alleged tort feasor who had been sued at law for damages could invoke the aid of a court of equity to settle the cases in a single suit, merely because of multiplicity of actions or on the ground that the complainant has a common defence to all such actions. And that case was later reversed in *Southern Steel Co. v. Hopkins*,[4] where it was held that equity has no jurisdiction in such a situation.

Much of the controversy upon this subject is attributable to the treatment given it by Pomeroy in his Equity Jurisprudence. The matter was there elaborately discussed and analyzed, and it was declared that "the weight of authority is simply overwhelming that the jurisdiction may and should be exercised on behalf of a numerous body of separate claimants against a single party . . . . although there is no 'common title,' nor 'community of right,' or of 'interest in the subject-matter,' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy . . . ."[5] The decision in the instant case is based upon this position of Pomeroy, and the principle so stated is broad enough to be decisive of the case.

But the decided tendency of the courts has been to repudiate this doctrine of Pomeroy's, and to hold that a mere community of interest in the question of fact or of law involved is not enough to give equity jurisdiction. The leading case upon this question is *Tribette v. Illinois Central R. Co.*[6] Several property owners were damaged by a fire caused by the same alleged act of negligence on the part of the plaintiff. Actions were begun at law, and a bill in equity was filed to compel a consolidation of the actions. It was held that equity had no jurisdiction, the court saying,

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[3] (Ala. 1908) 20 L. R. A. (N.S.) 848, note.
[4] (1911) 174 Ala. 465, 57 So. 11.
[5] 1 Pomeroy, Equity Jurisprudence, 4th ed., sec. 269.
[6] (1892) 70 Miss. 182, 12 So. 2, 35 Am. St. Rep. 642.

"The question presented is as to the rightfulness of the suit against the defendants, on the sole ground that their several actions at law involve the same matters of fact and law, without any other community of interest between them."

The court strenuously denied the proposition laid down by Pomeroy, and distinguished the authorities cited by him. The Tribette case has since been largely followed by the courts.[7]

The cases are numerous which hold that where several plaintiffs join to seek equitable relief in the form of an injunction, they cannot in the same proceeding recover their separate damages, because they have no common interest in such damages.[8] And if a prayer in a bill in equity for money damages renders the bill multifarious, it is difficult to see by what reasoning a court of equity can take jurisdiction of a large number of actions at law where the sole relief sought is money damages.

The contrary theory is that equity will take jurisdiction to avoid a multiplicity of actions if the several plaintiffs have a common interest in the matter of law or fact to be litigated. But it is doubtful if any adjudged case in the books holds as broad a view as that. In spite of the sweeping generalization quoted above from Pomeroy, that author makes a classification of the cases where equity will take jurisdiction of actions by several plaintiffs against one defendant, which is manifestly intended to be exhaustive:[9] 1. Suits brought to establish separate claims, where these claims, though separate, all arise from a common title, and there is a common right or common interest in the subject-matter; 2. Suits by individual proprietors of separate tracts of land to restrain and abate a private nuisance, or continuous trespass; 3. Suits by numerous judgment creditors in certain cases; 4. Suits by landowners to restrain illegal assessments; and 5. Suits by numerous taxpayers to set aside an illegal tax, or illegal proceeding tending to increase taxes. It is plain that the facts of the *Montgomery Light and Power Co.* case do

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[7] Southern Steel Co. v. Hopkins, (1911) 174 Ala. 465, 57 So. 11; Cumberland Telephone and Telegraph Co. v. Williamson, (1910) 101 Miss. 1, 57 So. 559; Vandalia R. Co. v. McAninch, (1909) 43 Ind. App. 221; 1 Beach, Injunctions, sec. 543. See also Bliss, Code Pleadings, sec. 76; Marselis et al. v. Morris Canal and Banking Co., (1830) 1 N. J. Eq. 31.

[8] Grant v. Schmidt, (1875) 22 Minn. 1; Nahte v. Hansen, (1908) 106 Minn. 365, 119 N. W. 55; Brady v. Weeks, (1848) 3 Barb. (N. Y.) 157; Murray v. Hay, (1845) 1 Barb. (N. Y.) 59, 43 Am. Dec. 773; Palmer v. Waddell, (1879) 22 Kan. 352.

[9] 1 Pomeroy, Equity Jurisprudence, 4th ed., sec. 273.

not lie within any of these cases put by the author as covering the possible range of the jurisdiction of a court of equity, and every case of this general type cited in support of the above decision is readily referable to one or other of these classes.

It is submitted that the sole fact that the several actions at law involve the same matters of fact and law, standing alone, is not sufficient community of interest to enable equity to take jurisdiction to compel consolidation, and thereby deprive each plaintiff of his right to have his cause tried and his damages assessed in a separate action.

RECENT CASES

CONSTITUTIONAL LAW—POLICE POWER—GENERAL WELFARE—WISDOM OF STATUTE.—Suit of taxpayers to enjoin state officials from paying out public funds and issuing bonds under North Dakota constitutional amendments and statute authorizing expenditure of public funds and bond issues to engage in various enterprises, including public ownership of terminal elevators, mills and packing houses. Plaintiffs contended these constitutional amendments and statutes should be declared null and void on the ground that the payments to be made and the bonds to be issued under them were for private, as distinguished from public, purposes, and would create debts which could be paid only by taxes upon property of citizens of the state in violation of the 14th amendment. *Held*, that these acts of the state do not constitute a violation of such amendment. *Scott v. Frazier*, (D.C. N.D. 1919) 258 Fed. 669.

The 14th amendment provides that no state shall deprive a person of property without due process of law. Hence there is an inherent limitation on the power of every public corporation to incur indebtedness or levy a tax, that the funds must be used for a public purpose. *Sharpless v. Mayor*, (1853) 21 Pa. St. 147, 169. Justice Folger in the well known case of *Weismer v. Village of Douglas*, (1876) 64 N. Y. 91, has described a public purpose as follows: "It may be conceded that this is a public purpose from which will follow some benefit or convenience to the public, whether to the whole commonwealth or a prescribed community. In this latter case, however, the benefit or convenience must be direct and immediate from the purpose and not collateral, remote or consequential. It must be a benefit or convenience which each citizen of the community affected may lay his own hand to in his own right and take unto his own use at his own option upon the same reasonable terms and conditions as any other citizen thereof. He may not be made to depend for it on the spontaneous action of others or to receive it in uncertain degree or manner, or round-about way or hampered with discriminating distinctions or conditions." The principle is undisputed but the difficulty lies in its application. The exercise of the police power, maintenance of government, public education, and the construction of public buildings are plainly

governmental functions. And it is clearly beyond the power of government to appropriate public funds for the use and benefit of private parties. But between these two classes are many acts whose exact nature is difficult of determination.

The term public purpose has been expanded until it is well settled that the construction and operation of public lighting systems is within the police power of a municipal corporation. *New Orleans v. Clark,* (1877) 95 U. S. 644, 24 L. Ed. 521. Likewise it has been established that the grant of aid to a railway corporation is for a public purpose and legitimate, unless the state has prohibited such action by its constitution. *Supervisors of Pine Grove Township v. Talcott,* (1873) 19 Wall. (U.S.) 666, 22 L. Ed. 227. As to just how far a public corporation may go in engaging in business enterprises is a matter of conflict varying with different periods and with different jurisdictions. Until recently it was held that no authority could be given a municipality to engage in the business of supplying its inhabitants with the necessities of life if the nature of the business was such that it might be and usually was carried on by private enterprise unaided by the state. See note, 31 L. R. A. (N.S.) 116. Thus the use of funds for a municipal ice plant has been held not to be for a public purpose in Louisiana and Wisconsin, *Union Ice and Coal Co. v. Ruston,* (1914) 135 La. 898, 66 So. 262, L. R. A. 1915B 859, Ann. Cas. 1916C 1274; *State ex rel. Miller v. Thompson,* (1912) 149 Wis. 488, 137 N. W. 20, 43 L. R. A. (N.S.) 339, Ann. Cas. 1913C 774, while in Georgia such action was upheld. *Holton v. Camilla,* (1910) 134 Ga. 561, 68 S. E. 472, 31 L. R. A. (N.S.) 116. The business of selling fuel was held to be a private enterprise and taxes to support it unconstitutional. *Loan Ass'n. v. Topeka,* (1874) 20 Wall. (U.S.) 655, 22 L. Ed. 455; *State ex rel. Garth v. Switzler,* (1898) 143 Mo. 287, 45 S. W. 245. On the other hand the use of public funds for the establishment of fuel yards has been held to be for a public purpose, *Laughlin v. City of Portland,* (1914) 111 Me. 486, 90 Atl. 318, and also the establishment of a natural gas plant and distribution of the product for heating purposes. *State of Ohio v. Toledo,* (1891) 48 Ohio St. 112, 26 N. E. 1061. In the case of *Jones v. City of Portland,* (1917) 245 U. S. 217, 62 L. Ed. 252, 38 S. C. R. 112, L. R. A. 1918C 765, Ann. Cas. 1918E 660, the U. S. Supreme Court in upholding the Maine decision, permitting the establishment of a wood and coal yard, quotes with approval the language of the lower court that "it is simply to enable the citizen to be supplied with something which is a necessity in its absolute sense, to the enjoyment of life and health, which could otherwise be obtained with great difficulty, and at times perhaps not at all, and whose absence would endanger the community as a whole," and that the purpose is not direct profit nor indirect gain that many result to purchasers from reduction in price through government competition. The erection and operation of sugar mills was held to be a private and not a public enterprise. *Dodge v. Mission Township, Shawnee Co.,* (1901) 107 Fed. 827, 46 C. C. A. 661, 54 L. R. A. 242, and in the Kansas state court it was held that appropriation of money for an oil refinery was illegal. *State ex rel. Coleman v. Kelley,* (1905) 71 Kan. 811, 81 Pac. 450, 70 L. R. A. 450, 6 Ann. Cas. 298. Nor is the use of funds for a motion

picture house for a public purpose. *State ex rel. Toledo v. Lynch,* (1913) 88 Ohio St. 71, 102 N. E. 670, 48 L. R. A. (N.S.) 720, Ann. Cas. 1914D 949. South Carolina held a state warehouse system for storing lint cotton was of a public nature on the ground that it gave protection not only to cotton growers but to people generally for it prevented "forced sales" at low prices when the markets were controlled by speculators. *State ex rel. Lyon v. McCowan,* (1912) 92 S. C. 81, 75 S. E. 392. Minnesota has held that the state has no power to authorize an elevator or warehouse constructed with public funds, on the ground that it is not a proper governmental function. *Rippe v. Becker,* (1894) 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857.

There seems to be no established criterion by which enterprises which are for a public purpose may be determined. As Judge Cooley said in *People ex rel. The Detroit, etc., R. Co. v. Salem,* (1870) 20 Mich. 452, 4 Am. Rep. 400: "But when we examine the power to tax with a view to ascertain the purpose for which burdens may be imposed on the public, we perceive at once that necessity is not a governing consideration and that in many cases it has little or nothing to do with the questions presented. Certain objects must of necessity be provided for by this power, but in regard to innumerable other objects for which the state imposes taxes upon its citizens the question is always one of mere policy." Courts universally agree, however, that the wisdom or expediency of any questioned action is not a matter for judicial decision.

The question of what is a deprivation of property without due process of law under the 14th amendment has to a large degree been determined by custom and usage, and this has changed from time to time depending upon local conditions. Thus the industry carried on by mills in frontier districts has been held to have a public character. *Burlington v. Beasley,* (1876) 94 U. S. 310, 24 L. Ed. 161. And while it is well settled that the legislature can not make a public use by so declaring, *Brown v. Gerald,* (1905) 100 Me. 351, 61 Atl. 785; *Lawton v. Steele,* (1893) 152 U. S. 133, 38 L. Ed. 385, 14 S. C. R. 499, the federal court in the instant case calls attention to the rapid extension of state authority into fields that were formerly regarded as private, and indicates that this will be necessary as long as the evils which afflict society are constantly changing. The decision if sustained would seem to let down the bars to public action in all essential enterprises which have formerly been regarded as private. However, it may be doubted whether the federal courts will declare any of these acts unconstitutional for it has been repeatedly pointed out that the presumption of constitutionality is applied with exceptional force in favor of laws passed in exercise of the power of taxation. *Union Lime Co. v. Chicago, etc., R. Co.,* (1914) 233 U. S. 211, 58 L. Ed. 924, 34 S. C. R. 522. "To justify the courts in declaring a tax void the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable. . . . " Cooley, Taxation, 3rd Ed. 185. The federal courts have paid great respect to the decisions of the state court in determining whether or not the tax was for a public purpose. *Jones v. City of Portland,* supra. While federal courts have held invalid certain gratuities given to private manufacturing concerns, *City of Parks-*

burg v. Brown, (1882) 106 U. S. 487, 27 L. Ed. 238, 1 S. C. R. 442; *Cole v. LaGrange,* (1884) 113 U. S. 1, 28 L. Ed. 896, 5 S. C. R. 416, the U. S. Supreme Court has proved extremely liberal and has never held invalid the use of public funds to establish and maintain an industry owned by a state or municipality. But there is no apparent harmony among the state courts upon such matters. The instant case may be correct but if so it represents the extreme view of what a public corporation may do in the line of private enterprise and may be the forerunner of startling innovations in the same direction.

CRIMINAL LAW—CONSPIRACY—LIABILITY FOR ASSAULT BY ONE CONSPIRATOR.—Defendants, colored men, while engaged in gambling, were raided by officers of the law. A woman was placed at the door to give warning. All the gamblers were taken and after the arrests it was discovered that one officer had been hit over the head with a frying pan. *Held,* the jury having found that there was a preconceived design to avoid arrest, all are guilty of the assault. *State v. Lesene,* (S.C. 1919) 100 S. E. 62.

Where several combine to commit an offense and an assault is committed by one to effect his escape, the others are not liable unless privy to fact thereto. Clark & Marshall, Law of Crimes, Par. 189; *People v. Knapp,* (1872) 26 Mich. 112. For although the coming together was unlawful, if one of his sole volition and outside of the main purpose, does a criminal act, he only is liable. *Frank v. State,* (1855) 27 Ala. 37; *State v. Lucas,* (1880) 55 Iowa 321, 7 N. W. 583. To hold all the conspirators liable the act must be in pursuance of the original plan and result from the confederacy. *Ruloff v. People,* (1871) 45 N. Y. 213; *United States v. Gilbert,* (1834) 2 Sumn. (U.S. C.C.) 19, Fed. Cases 15204; *Butler v. People,* (1888) 125 Ill. 641; *United States v. Lancaster,* (1891) 44 Fed. 896, 10 L. R. A. 333.

The instant case agrees with those cited herein that it is a matter of fact for the jury whether the act committed was done in furtherance of the preconceived plan and it being so decided all the conspirators are guilty of the crime. But one may question whether, as a matter of fact, an assault by one of the conspirators is an act done in the furtherance of a preconceived plan to avoid arrest.

DEEDS—CONDITIONS AND RESTRICTIONS—RESTRAINT OF ALIENATION—"AFRICAN, CHINESE, OR JAPANESE."—Plaintiff conveyed the land in question to Pauline Kasanofska on November 12, 1910, by a deed duly recorded, which by its granting and habendum clauses created an estate in fee simple absolute in the grantee. The deed by its terms, however, provided that the grantee, her heirs and assigns, should not convey to any person of African, Chinese, or Japanese descent prior to January 1, 1925, and in case such conveyance should be made, title should revert to the grantor, the plaintiff. Defendant claims title under Pauline Kasanofska. Plaintiff alleges condition broken, and seeks a judicial order for a reconveyance as provided by statute. *Held,* that the condition was void, as being in

restraint of alienation. *Title Guarantee and Trust Co. v. Garrott,* (Cal. 1919) 183 Pac. 470.

It is perfectly clear that a restraint upon alienation which is unlimited in time, in a deed conveying a fee, is void. Beyond this point the authorities are in conflict. There are two possible cases outside this class: First, a restraint which applies to a limited class of possible grantees, and which is effective for a limited time; secondly, a restraint which is of general application, but effective for a limited time. The instant case is within the first class. Obviously the larger restraint of the second class would by the same reasoning be held void.

There are two points of view from which courts approach this question, the one logical, and the other grounded upon public policy. Both are noticed and to some extent relied upon by the California court. See p. 472. The first proposition is that "when full title is given, any attempted restraint upon alienation must be void, because unable to co-exist with it, and repugnant to it." *Wieting v. Billinger et al.,* (1888) 50 Hun (N.Y.) 324, 3 N. Y. S. 361. The other view holds such restraints valid if reasonable, that is, not embracing an unreasonably large class, or contemplating an unreasonably long period of time. The latter view is the settled law of Kentucky. *Lawson v. Lightfoot,* (1905) 27 Ken. Law Rep. 217, 84 S. W. 739. Here the restraint was total as to persons. But the great weight of authority is to the effect that a total restraint, for no matter how limited a period is void. *De Peyster v. Michael,* (1852) 6 N. Y. 467; *Mandlebaum v. McDonell,* (1874) 29 Mich. 78, 18 Am. Rep. 61; *Latimer v. Waddell et al.,* (1896) 119 N. C. 370, 26 S. E. 122, 3 L. R. A. (N.S.) 668, with note.

When we turn to cases of a partial restraint for a limited time, there are few cases precisely parallel to the present one. In Missouri, however, in a case almost exactly in point, the contrary conclusion was reached. There the restraint was upon any grant to negroes within twenty-five years. It was upheld as valid. *Koehler v. Rowland,* (1918) 275 Mo. 573, 205 S. W. 217. A case almost like *Koehler v. Rowland* was decided in Louisiana in 1915, where the restraint was held to be valid. *Queensborough Land Co. v. Cazeau,* (1915) 136 La. 724, 67 So. 641, L. R. A. 1916B 1201, Ann. Cas. 1916D 1248 and note.

The validity of partial restraints upon alienation in Minnesota seems to be an open question. *Morse v. Blood,* (1897) 68 Minn. 442, 71 N. W. 682, decided that a restraint upon alienation in a will, inhibiting a grant to relatives of either the testator or the devisee, was against public policy and void. The court seems to lean to the view that the test is the reasonableness of the restraint, but the facts were peculiar, and the case throws little light upon the question raised by the instant case.

Two possible tests of validity are suggested by Gray in Restraints on the Alienation of Property, 2nd ed., sec 43:—(1) That a condition is bad if alienation is only allowed to particular individuals or a particular class, but good if it only attempts to forbid alienation to a particular person or class. (2) That a condition is bad only when "it takes away the whole power of alienation substantially." *In re Macleay,* (1875) L.

R. 20 Eq. 186. The California case, and the American decisions generally, seem to apply a more stringent test than either of these.

EQUITY—GROUNDS FOR RELIEF—MULTIPLICITY OF SUITS.—Some one hundred and thirty landowners brought actions at law against the complainant to recover damages done by the flooding of their lands. This was alleged to have been caused by the negligence of the complainant in the maintenance of a dam. This bill in equity was brought to have these actions consolidated and determined in one action. The damage was all caused on one occasion at the time of an unusual flood. *Held*, that equity has jurisdiction on the ground of avoiding a multiplicity of actions. The court examined the facts, decided that there was no actionable negligence, and dismissed the actions. *Montgomery Light and Power Co. v. Charles, et al.*, (1919) 258 Fed. 723.

For the principles involved, see NOTES, p. 62.

GIFTS INTER VIVOS—SYMBOLICAL DELIVERY OF CORPORATE STOCK.—Donor delivered to his wife on her birthday a paper reciting: "I give this day to my wife, Sara K. Cohn as a present for her birthday, 500 shares of American Sumatra Tobacco Company common stock. Leopold Cohn". At the time of this delivery donor owned 7,213 shares of this stock which was in the name of A. Cohn & Co., and deposited in a safe deposit box in New York. The firm had been dissolved one month prior thereto. The donor stated at the time that he would give the stock when he got possession. *Held*, the delivery of the paper constituted a valid gift inter vivos by symbolical delivery. *In re Cohn's Will*, (N. Y. 1919) 176 N. Y. S. 225.

To effectuate a valid gift inter vivos three elements are essential. First, there must be an intention to give. *Gannon v. McGuire*, (1899) 160 N. Y. 476, 55 N. E. 7. Second, a delivery of the intended gift. *McWillie v. Van Vacter*, (1858) 35 Miss. 428, 72 Am. Dec. 127. Third, an acceptance by the donee of the gift. *Gannon v. McGuire*, supra. Acceptance is presumed where the gift is beneficial to the donee. *Holmes v. McDonald*, (1899) 119 Mich. 563, 78 N. W. 647. However, mere intention to give without delivery is unavailing. *Walsh's Appeal*, (1888) 122 Pa. St. 177. And, likewise, delivery unless accompanied by an intention to give is insufficient. *Harris Banking Co. v. Miller*, (1905) 190 Mo. 640, 89 S. W. 629, 1 L. R. A. (N.S.) 790. A sufficient delivery is interpreted by the majority of the courts to be an absolute, complete, and immediate transfer of the possession so far as the donor can make it. There must be a surrender of dominion and control over the gift by the donor to the donee. *Beaver v. Beaver*, (1889) 117 N. Y. 421, 22 N. E. 940; *Gannon v. McGuire*, supra; *Opitz v. Karel*, (1903) 118 Wis. 527, 95 N. W. 948. See note 3, 12 R. C. L. 933 for authorities. Such a delivery must also manifest an intention on the part of the donor to divest himself of title and possession and to create title and vest possession in the donee. *Gannon v. McGuire*, supra. But where the nature of the subject, or the circumstances of the gift, prevent or excuse an actual manual delivery, there must be a constructive or symbolical delivery to prove title. *Beaver v.*

Beaver, supra. Accordingly, it is generally held that the delivery of the written instrument representing a chose in action, such as bond, note, or certificate of stock, by a transfer of the bond, note, or certificate of stock to the donee, constitutes a valid gift inter vivos. Thus the delivery of an insurance policy was held to be a gift of the policy. *Opitz v. Karel,* supra.

In the case of corporate stock distinctions have crept into the law by reason of the requirement of corporate by-laws that transfer of corporate stock be entered on the company books. It is generally accepted that a delivery of shares of corporate stock to donee when accompanied by a transfer on the corporate books to the name of the donee constitutes a good gift. *Adams v. Brackett,* (1842) 5 Metc. (Mass.) 280. Where there has been no such transfer the majority of the American courts hold that the gift may be complete nevertheless. *Reed v. Copeland,* (1883) 50 Conn. 472, 47 Am. Rep. 663; *Richmond First National Bank v. Holland,* (1901) 99 Va. 495, 39 S. E. 126. But a minority follow the English courts' holding that the gift is invalid. *Baltimore Retort Co. v. Mali,* (1886) 65 Md. 93; *Lambert v. Overton,* (1864), 11 L. T. R. (N.S.) 503, 13 Wkly. Rep. 227. Gifts of chattels by writing have been accomplished by delivery of deeds of assignment and held good as gifts inter vivos. *Matson v. Abbey,* (1894) 70 Hun. (N. Y.) 475, 24 N. Y. S. 284, affirmed, 141 N. Y. 179, 36 N. E. 11. Gifts of corporate stock and similar choses in action have been attempted, as in the instant case, by a delivery of a written assignment. Where donor was in her last illness, and corporate stock was incapable of delivery at the time because it was in possession of a third party, the delivery of an assignment was held to be a gift. *McGavic v. Cossum,* (1902) 72 App. Div. 35, 76 N. Y. S. 305. Where the stock was, at the time of delivery of the assignment to the donee, in the latter's possession, the gift was held consummate. *In re Mills Estate,* (1916) 158 N. Y. S. 1100, affirmed, 219 N. Y. 642, 114 N. E. 1072. Other courts, and also a New York court, have decided that neither the delivery of a written assignment of corporate stock, nor its transfer on the books of the corporation, is singly effectual to perfect the gift, where the donor retains the certificate, unless he constitutes himself trustee for the donee. See note 49, 20 Cyc, 1203; *Jackson v. Twenty-third St. Railway Co.,* (1882) 88 N. Y. 520; *Allen-West Commission Co. v. Grumbles,* (1904) 129 Fed. 287. In the latter case the court upon the authority of *Lehr v. Jones,* (1902) 74 App. Div. 54, 77 N. Y. S. 213, and *Wadd v. Hazelton,* (1893) 137 N. Y. 215, 33 N. E. 143, holds that where the subject of the gift is a chose in action such as a bond, mortgage or certificate of stock, the delivery of the most effectual means of reducing the chose in action to possession or use, that is, by a delivery of the chose in action itself, if present and capable of delivery, is indispensable to the completion of the gift. With this rule the holding in *McGavic v. Cossum* can be harmonized, for in that case the stock was incapable of delivery. In the instant case the donor retained the stock, exercised dominion over it and was in a position to deliver it. On the basis of authority the decision would seem to be wrong. The retention of the certificate would seem to indicate the donor's intent to control the stock. In the case of *Allen-West Commission Co. v. Grumbles,* supra, the donor

became insolvent four years after the assignment in regular form to the wife; during the interim the donor had retained the stock. If in the instant case the donor had become insolvent, or had refused to deliver the stock, would the court have upheld the gift? If in the prior case the donor had not become insolvent, would the court have denied the gift? Should it make any difference if the insolvency occurred one day or four years after the assignment? The dividing line between authorities is difficult to draw; it would seem to be this: that where the creditors of the donor would be prejudiced by holding a gift valid, the court is inclined to look upon the transaction as one made with fraudulent intent and deny the validity of the alleged gift; but where no fraud would result by so holding a gift valid, some courts, especially the New York courts, would incline to uphold its validity. The reason underlying the many authorities requiring an irrevocable transfer of title, is to prevent fraud. Therefore the best evidence is delivery of the certificate of stock itself, for the retention of the certificate by the donor opens wide the field for fraud.

HUSBAND AND WIFE—JOINT BANK ACCOUNT—PRESUMPTION OF GIFT—JOINT TENANCY.—John H. Capstick deposited money in the complainant trust company in the name of "John H. Capstick or Ella F. Capstick." His declared purpose was to make the fund available to Ella's use and to have it pass on his death to her by right of survivorship. She claimed as survivor upon his death. In an interpleader by the trust company, *Held,* that the word *or* did not create a joint tenancy because not a present gift. Hence the right of survivorship failed although contrary to the intention of the donor. *Morristown Trust Co. v. Capstick,* (N. J. 1919) 106 Atl. 391.

Joint bank accounts are sometimes used to create the right of survivorship in order that the survivor may be provided with funds while the decedent's estate is being probated. They are also used to evade inheritance taxes and to do away with the formalities of making a will. The right of survivorship has been sustained on several different theories, that of joint tenancy being common. But in cases where the money deposited belonged to one of the parties, in order that the deposit be pronounced a joint tenancy it is obvious that it must first satisfy the requirements of a gift or a trust. *Norway Savings Bank v. Merriam,* (1895) 88 Me. 146, 33 Atl. 840; *Staples v. Berry,* (1912) 110 Me. 32, 85 Atl. 303; *Barstow v. Tetlow,* (1916) 115 Me. 96, 97 Atl. 829; *De Puy v. Stevens,* (1899) 37 App. Div. 289, 55 N. Y. S. 810.

In some cases, as in the instant case, it is held that there is no joint tenancy where the requirements of a gift are not satisfied. *Meyers v. Albert,* (1913) 76 Wash. 218, 135 Pac. 1003; *Springfield Sav. Inst. v. Copeland,* (1894) 160 Mass. 380, 35 N. E. 1132, 39 Am. St. Rep. 489. Other cases sustain a joint tenancy if there is a valid trust. *Booth v. Oakland Sav. Bank,* (1898) 122 Cal. 19, 54 Pac. 370; *Hoboken Sav. Bank v. Schwoon,* (1901) 62 N. J. Eq. 503, 50 Atl. 490. But where the intent was to make a gift and the gift failed for want of delivery or other reasons, the deposit cannot be sustained as a trust because the one intent

negatives the other. *Richards v. Delbridge*, (1874) L. R. 18 Eq. 11; *Norway Savings Bank v. Merriam*, supra. Joint tenancies are not favored in the law because of the incident of survivorship, 7 R. C. L. 813; 3 MINNESOTA LAW REVIEW 348. Yet there are cases in which the right of survivorship is sustained without a joint tenancy; as, for example, on the theory that the intention of the donor shall govern, *Metropolitan Sav. Bank v. Murphy*, (1896) 82 Md. 314, 33 Atl. 640, 51 Am. St. Rep. 473, 31 L. R. A. 454; and on the theory that the bank is under a contract liability to the survivor of the two depositors, *Deal's Admr. v. Merchant's and Mech. Sav. Bank*, (1917) 120 Va. 297, 91 S. E. 135, L. R. A. 1917C 548; and on the theory of a novation, *Chippendale v. North Adams Sav. Bank*, (1916) 222 Mass. 499, 111 N. E. 371. Some states have statutes which confer the right of survivorship on joint depositors without regard for the formalities of a joint tenancy. *G. S. Minn.* 1913, Sec. 6390; *C. L. Mich.* 1915, Sec. 8040; *In Re Reed's Estate*, (1915) 89 Misc. 632, 154 N. Y. S. 247.

The court in the instant case lays stress on the language used and in dicta states that if the word "and" had been used in place of the word "or", an intent to make a gift would be presumed. But in some of the cases it makes little difference which word is used. *Kelly v. Beers*, (1909) 194 N. Y. 49, 128 Am. St. Rep. 543, 86 N. E. 985; *Attorney General v. Clark*, (1915) 222 Mass. 291, 110 N. E. 299.

MASTER AND SERVANT—AUTOMOBILE RIDE—LIABILITY OF HUSBAND OR PARENT FOR NEGLIGENCE OF WIFE OR CHILD—PLEASURE RIDE.—Several girls asked son for a pleasure ride in father's automobile, and, upon being referred to father, asked him if son could give them a "joy ride." He consented; the plaintiff was injured through the son's negligent driving, and brought action against the father. *Held*, that the defendant was not liable since he had no interest in the pleasure ride, the son under such circumstances not being the father's agent. *Legenbauer v. Exposito*, (N. Y. 1919) 176 N. Y. S. 42.

The mere relation of parent and child imposes upon the parent no liability for the torts of the child committed without his knowledge or authority, and although the parent when he authorizes his child to act as his agent or servant is liable for the torts committed in the course of the employment. Such liability does not grow out of the relation of parent and child, but out of the relation of master and servant or principal and agent, and must be based on rules of negligence. 29 Cyc. 1665. Where the minor son was driving a pleasure car for the pleasure of himself, his sister, and a guest of the family, the father was held liable for the son's negligence, since the son, in entertaining the family guest, was on the business of the father. *McNeal v. McKain*, (1912) 33 Okla. 449, 126 Pac. 742, 41 L. R. A. (N.S.) 775, and note. And where a car bought both for business and pleasure was being driven by a minor son in which were all the members of the family except the father and mother, the father was held liable. *Denison v. McNorton*, (1916) 228 Fed. Rep. 401. In this case the court makes a material point of the fact that all the members of the family except the parents were present.

But when we come to a situation similar to the instant case where the minor son is the only member of the family present on the pleasure ride there is a division of opinion as to whether or not he is then engaged in the parent's business so as to make the parent liable. The instant case, holding that he is not engaged in the father's business, is supported by *Doran v. Thomsen,* (1908) 76 N. J. L. 754, 71 Atl. 296, 19 L. R. A. (N.S.) 335, 131 Am. St. Rep. 677; *Maher v. Benedict,* (1908) 123 App. Div. 579, 108 N. Y. S. 228; *Parker v. Wilson,* (1912) 179 Ala. 361, 60 So. 150. Nor did fact that in *Parker v. Wilson,* supra, son procured attendance of his father who was a physician, and that defendant gave his services for intestate's relief, amount to an adoption of his son's act by defendant so as to make him liable therefor. But the following cases reach a conclusion contrary to the instant case on similar facts. *Daily v. Maxwell,* (1910) 152 Mo. App. 415, 133 S. W. 351; *Birch v. Abercrombie,* (1913) 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N.S.) 59, and note; *Griffin v. Russell,* (1915) 144 Ga. 275, 87 S. E. 10, L. R. A. 1916F 216, Ann. Cases 1917D 994. These cases go upon the theory that the car is a pleasure vehicle and when used for the pleasure of one of the minor children of the owner, it is being used for one of the purposes for which kept, and so is on the business of the owner. *Daily v. Maxwell,* supra. This view finds support in *Kayser v. Van Nest,* (1914) 125 Minn. 277, 146 N. W. 1091, 51 L. R. A. (N.S.) 970, and *Johnson v. Evans,* (1919) 141 Minn. 356, 170 N. W. 220, the latter under circumstances practically identical with the instant case. In *Kayser v. Van Nest,* supra, where a car purchased for pleasure was being driven by daughter for pleasure of herself and friends, the lower court held as a matter of law that the parent was not liable. The supreme court held that the question should have gone to the jury for the defendant might properly make it an element of his business to provide pleasures for his family, and as daughter had authority to operate it for such purposes it was at least a question for the jury whether she was acting as his servant.

In a recent Minnesota case, *Plasch v. Fass,* (Minn. 1919) 174 N. W. 438 this doctrine has been extended so as to hold the husband liable for the negligent driving of his wife, notwithstanding G. S. 1913, Sec. 7146, which declares the husband not liable for his wife's torts; for, said the court, that statute merely abolished the rule of the common law in such cases, and was not intended to include torts committed by the wife while acting as the husband's agent. The trend of the most recent decisions seems to be toward the second view.

MUNICIPAL CORPORATIONS—SALE OF WATER—IMPLIED WARRANTY.—The plaintiff became ill by drinking the water supplied for domestic purposes for compensation by the defendant, a municipal corporation. He stated as his cause of action a breach of the implied warranty of the purity of the water by the defendant. *Held,* that a municipal corporation supplying water for domestic purposes for compensation impliedly warrants the purity of the water supplied by it. *Canavan v. City of Mechanicville,* (N. Y. 1919) 177 N. Y. S. 808.

The general rule is that a municipal corporation engaged in supplying water to its inhabitants for compensation acts in a private and not a governmental capacity and is subject to the same liabilities in the operation and maintenance thereof as if it were a private undertaking. *Lynch v. City of Springfield,* (1899) 174 Mass. 430, 54 N. E. 871; *Selz-Schwab & Co. v. City of Chicago,* (1903) 202 Ill. 545, 67 N. E. 386; *Piper v. Madison,* (1909) 140 Wis. 311, 122 N. W. 730, 25 L. R. A. (N.S.) 239, 133 Am. St. Rep. 1078. Therefore, when impurities in the water have been caused by the negligence of the municipal corporation, it has been held liable for the injuries resulting therefrom. *Keever v. City of Mankato,* (1910) 113 Minn. 55, 129 N. W. 158, 33 L. R. A. (N.S.) 339. But it has been almost universally held that a municipal corporation is not a guarantor of the absolute purity of the water supplied by it, but is only required to exercise reasonable diligence to keep it pure. *Milnes v. Huddersfield,* (1886) L. R. 11 App. Cas. 511, 56 L. J. Q. B. (N.S.) 1, 55 L. T. (N.S.) 617; *Green v. Ashland Water Co.,* (1898) 101 Wis. 258, 77 N. W. 722, 43 L. R. A. 117; Dillon, Municipal Corporations, 5th. Ed., Sec. 1316; Gould on Waters, 3rd. Ed., p. 497. The instant case however, contra to the weight of authority, holds the municipal corporation as absolute insurer of the purity of the water. The court cited three cases, one English case and two New York cases. The English case was *Milnes v. Huddersfield,* supra, which denied the contention that a municipal corporation is an insurer of the purity of the water supplied by it. The two New York cases were *Danaher v. The City of Brooklyn,* (1890) 119 N. Y. 241, 23 N. E. 745, 7 L. R. A. 592, which held that the city was not liable for sickness caused by impurities in the water of a public well maintained by it for the gratuitous use of the inhabitants; and *Oakes Mfg. Co. v. City of New York,* (1912) 206 N. Y. 221, 99 N. E. 540, 42 L. R. A. (N.S.) 286, which held the city not liable for damage caused by the unsuitability of the water supplied by it for the peculiar industrial needs of the plaintiff. Thus, as far as authority goes the case would seem to be clearly wrong.

The court, however, suggests another basis for its decision: that water supplied for domestic purposes is similar to an article of food offered for sale for immediate human consumption and there is an implied warranty as to its wholesomeness. The general rule established by the weight of authority in England and the United States is that accompanying all retail sales of food for immediate consumption there is an implied warranty that the same is fit for human consumption, the necessity of the rule generally being based on public policy. *Frost v. Aylesbury Dairy Co.,* [1905] 1 K. B. 608; *Race v. Krum,* (1918) 222 N. Y. 410, 118 N. E. 853; *Wiedeman v. Keller,* (1918) 171 Ill. 93, 49 N. E. 210; 35 Cyc. 407; see 3 MINNESOTA LAW REVIEW 285. The analogy between the supplying of water and the sale of food is further strengthened by the fact that the authorities seem well agreed that the supplying of water is a sale of a commodity and not merely the rendering of a service. *Jersey City v. Town of Harrison,* (1904) 71 N. J. L. 69, 58 Atl. 100; *Jolly v. Monaco Borough,* (1907) 216 Pa. St. 345. 65 Atl. 509; Williston, Sales of Goods, Sec. 63. Whatever may be the legal character

of the act of supplying water for domestic purposes, whether it be in the nature of a service or the sale of goods, it certainly is an article furnished for immediate human consumption. So, if public policy requires that the retailer of food be held impliedly to warrant the purity of the foods sold by him, it would not seem too far-fetched to hold a municipal corporation, supplying water for a profit, to the same degree of liability; for impure water seems to be a more frequent cause of danger to health than impure food. On this ground the decision in the instant case may perhaps be justified.

RAILROADS—FEDERAL CONTROL—PARTIES—VALIDITY OF ORDER OF DIRECTOR GENERAL.—The Federal Railroad Control Act, March 21, 1918, 10 (U. S. Comp. St. 1918, 3115-¾j), authorizes actions to be brought against carriers as provided by law. Order No. 50 issued by the Director General of Railroads, William G. McAdoo, October 28, 1918, required that all actions which, but for federal control, might have been brought against the carrier company, shall be brought against the director general and not otherwise. In an action against the Northern Pacific R. R. Co., the defendant moved that the director general of railroads be substituted as defendant and that the action be dismissed as to the defendant company. The district court granted the motion, plaintiff appealed. *Held,* the order No. 50 of the director general, being contrary to the rights under the statute, was beyond the power of the director general and was void. *Lavalle v. Northern Pacific R. R. Co.,* (Minn. 1919) 172 N. W. 918. Accord, *Franke v. Chicago & N. W. R. Co.,* (Wis. 1919) 173 N. W. 701; *Gowan v. McAdoo,* (Minn. 1919) 173 N. W. 440 and 443. Contra, *Castle v. Southern R. R. Co.,* (S. C. 1919) 99 S. E. 846.

This latter court concluded that the director general had power to make his general order No. 50 on the grounds that the statutory provision in regard to suits against the railroads was intended to be temporary and in force only until a further order of the President or his representative. This court relied upon the recent decision rendered by the Supreme Court of the United States in the case of *Northern Pacific R. R. Co. v. State of North Dakota,* (1919) 249 U. S. —, 39 S. C. R. 502, 63 L. Ed.—. In this case a congressional act authorized the President to fix railroad rates; it was held that the authorization applied to intrastate as well as inter-state rates. Here the order of the director general was in accord with the statutory authority, so there was no conflict in that regard and the case was not in point.

As to the decision in the instant case, it is well established that Congress can delegate to administrative officials power to make regulations to carry out a statute, but the power so conferred must be exercised within the powers delegated and cannot be extended to amending or adding to the requirements of the statute itself. *U. S. v. Antikamnia Chemical Co.,* (1911) 37 App. D. C. 343; *St. Charles State Bank v. Wingfield,* (1915) 36 S. D. 493, 155 N. W. 776. Also such power to promulgate administrative rules is never deemed to extend to the making of rules to subvert the statute. *Williamson v. U. S.* (1908) 207 U. S. 425, 28 S. C. R. 163, 52 L. Ed. 278; *St. Louis Independent Packing Co. v. Houston,* (1914) 215 Fed.

553, 132 C. C. A. 65, (rev'g 204 Fed. 120). It may well be argued that the federal control act, having been passed after the statute giving the President the power to take over the railroads and controlling them, acted as a limitation on the powers previously delegated. The Minnesota court is quite emphatic in its decision, stating that, "if the act of Congress and the order of the director general are in conflict the act of Congress must prevail."

It is not yet definitely determined just how relief may be obtained under the federal control of railroads. A recent case in New York holds that, as regards the liability of the carrier, the Act of March 21, 1918, in so far as it authorized judgments against carrier corporations for the default or liabilities of the government, violates the federal constitution providing against the deprival of property without due process of law. The court in dicta stated that the order No. 50 of the director general was made so that the government could ultimately pay these damages and advised that, "the plaintiff might have asked for the substitution of the director general as provided in the order." The case held that the plaintiff could not recover from the railroad. *Schumacher v. Pennsylvania R. Co.*, (1919) 106 Misc. Rep. 564, 175 N. Y. S. 84. In a recent federal decision it was held that the director general could not be substituted as defendant, with added dicta that if the action was pressed against the railroad there could be no recovery, on the grounds stated in *Schumacher v. Pennsylvania R. Co.*, supra. *Hatcher & Snyder v. Atchison, etc., R. Co.*, (1919) 258 Fed. 952. However, in other federal cases it has been definitely held that the action cannot be brought against the railroad, but can be brought against the director general according to his order, on the ground that by the act of congress and the proclamations of the President the director general is authorized to promulgate general and special orders for the control and management of the railroads, which have the force and effect of law and are of paramount authority; and by these acts Congress has consented that suits may be brought against the director general. *Dahn v. McAdoo*, (1919) 256 Fed. 549; and that, "The order of the director general does not contravene the acts of Congress. It is authorized by the proclamation of the President and directs a procedure that is in strict accordance with the actual facts and the rules of legal liability." *Mardis v. Hines*, (1919) 258 Fed. 945. It would seem that if the decisions in the instant Minnesota and Wisconsin cases are correct, there could be no recovery against anyone for such causes of action. The recent decisions in the federal courts provide a solution of the problem and can be summed up in the following quotation: "Liabilities due to operation by the agencies having possession by virtue of the acts creating and authorizing federal control are not liabilities of the railroad companies that have been ousted from such possession and control, . . . suits cannot be brought against such companies and prosecuted to judgment against them, and . . . such claimants are limited to a right of action against the federal control agency and to such sources of payment as are provided by the federal control act." *Haubert v. Baltimore & O. R. Co. et al.*, (1919) 259 Fed. 361.

RELEASE—JOINT TORT-FEASORS—CONCURRENT TORT-FEASORS.—Plaintiff having sustained an injury necessitating an X-ray examination brought action against a physician for injury caused by an X-ray burn, after he had released the man whose tort caused the original injury. *Held*, that the effect of a release depends on the extent of the claim made; that if damages were recovered for the entire injury once, it was a bar to the second action. *Wheat v. Carter*, (N. H. 1919), 106 Atl. 602.

The decision in the principal case is in line with the authorities which hold that a party can recover but once for the same injury, whether the person from whom satisfaction came was or was not liable. *Leddy v. Barney*, (1885) 139 Mass. 397, 2 N. E. 107; *Hartigan v. Dickson*, (1900) 81 Minn. 284, 83 N. W. 1091; *Seither v. Philadelphia Traction Co.*, (1889) 125 Pa. 397, 4 L. R. A. 54, 11 Am. St. Rep. 905, 17 Atl. 338. In other jurisdictions, however, it is held that a release for a consideration, of one not shown to be a joint wrongdoer, will not operate to discharge others who are responsible. *Western Tube Co. v. Zang*, (1899) 85 Ill. App. 63; *Atlantic Dock Co. v. New York*, (1873) 53 N. Y. 64. For such payment must be regarded as a gratuity. *Pickwick v. Mc Cauliff*, (1906) 193 Mass. 70, 78 N. E. 730. The release of, or satisfaction by, one joint tort-feasor is a bar to an action against another. 1 MINNESOTA LAW REVIEW 278. This doctrine is applied by the court in the principal case to what it recognizes as concurrent torts. The wrong of the first tort-feasor and that of the physician did not occur contemporaneously, but were in fact successive. In *Martin v. Cunningham*, (1916) 93 Wash. 517, 161 Pac. 355, the employer to whom the release had been given was held responsible for the result of the malpractice of the physician; but on similar facts some courts hold that the employer is not responsible for the errors of the physician, if he uses care to hire a competent one. *Galveston, etc., Ry. Co. v. Scott*, (1898) 18 Tex. Civ. App. 321, 44 S. W. 589. Where "any portion of the damages to the plaintiff have been increased or aggravated by the negligence of the physician, or by the fault of the plaintiff himself, then the damages that have been shown to be occasioned to the plaintiff by the defendant in the first instance is all that the defendant would be responsible for", recognizing that the malpractice is a separate tort. *Secord v. St. Paul, etc., Ry. Co.*, (1883) 18 Fed. 221, 5 McCrary 515. Minnesota would seem to follow the principal case although there has been no decision in point in this jurisdiction. *Hartigan v. Dickson*, supra. The physician's negligence is a separate and distinct violation of the plaintiff's right, arising subsequently to the original injury. So it would seem that a full compensation paid by the first wrongdoer should be regarded as releasing him, but not as barring the action against the physician, unless it clearly appeared that the sum paid was intended to cover both wrongs.

MINNESOTA LAW REVIEW

VOL. IV JANUARY, 1920 No. 2

COURT-MARTIAL JURISDICTION OVER NON-MILITARY PERSONS UNDER THE ARTICLES OF WAR.*

ON THE first of February, 1918, the military authorities apprehended at Nogales, Arizona, a young man travelling under the name of Lathar Witcke, whose real name was Pablo Waberski. He had just crossed the border with two companions, who were, contrary to his belief, secret agents of the American and British Governments respectively. To them he had confided the fact that he was a German spy and was re-entering this country for the purpose of destroying property of military value as well as for the purpose of obtaining information for transmission to the enemy. He was traveling as a Russian but was in fact a subject of the Kaiser. He had on his person a cipher message in the German consular code signed by Von Eckhardt, the German Ambassador to Mexico. Was he triable by a military tribunal or must he be turned over to the civil authorities and be given a trial by jury? The judge advocate general had no difficulty in determining that a military tribunal had jurisdiction. Waberski was accordingly tried for violation of the 82nd Article of War,

*I desire at the outset to acknowledge my great indebtedness for much of the material used in the preparation of this paper to Major George S. Hornblower of the New York City Bar. Major Hornblower served during the war both in the Intelligence Branch of the General Staff, and later, in the Division of Constitutional and International Law of the Judge Advocate General's Office. He purposed to write for the MINNESOTA LAW REVIEW a discussion of the interpretation and constitutionality of the eighty-second article of war. Before leaving the service, he prepared a memorandum containing the data which he had collected as to the legislative and administrative history of that article, besides much other valuable material. This he turned over to me and I have used with his permission. Unfortunately, press of business has compelled Major Hornblower to abandon his purpose to write the article which he planned.

was found guilty and sentenced to death.[1] It was most strenuously urged by civilian officials high in authority, that Waberski's offense was triable only in the civil courts, and that the president ought not confirm the sentence. On the mistaken supposition that he was a Russian national, it was argued that he was entitled to a jury trial under the constitution. Before the controversy was settled, he most conveniently died a natural death in prison.

Although Waberski was in fact an alien enemy and, therefore, clearly without the protection of the constitutional guaranties,[2] his case served to raise sharply the questions of the proper interpretation and the constitutionality of those provisions of the articles of war which purport to subject non-military persons to trial by courts-martial. The ninety-fourth article provides that any person who, while in the military service, is guilty of any offense denounced therein and is thereafter discharged or dismissed from the service shall continue to be liable to trial and sentence by a court-martial in the same manner, and to the same extent as if he had not been so discharged or dismissed. The second article makes subject to military law all persons under sentence adjudged by courts-martial; all persons admitted into the Regular Army, Soldiers' Home at Washington, D. C.;[3] and 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. The eighty-first article authorizes trial by court-martial of any person who relieves the enemy with arms, ammunition, supplies, money or other thing, or who knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy. And the eighty-second article subjects to trial and sentence by court-martial 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. To what extent, if at all, may these provisions be properly and constitutionally applied to persons having no military status?[4]

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[1] C. M. No. 119966.

[2] DeLacey v. United States, (1918) 249 Fed. 625, L. R. A. 1918F 1011.

[3] A similar provision as to inmates of other soldiers' homes is found in U. S. Rev. Stat. sec. 4835.

[4] This paper does not deal with the law of military occupation of hostile or conquered territory, commonly called military government,

An understanding of the nature and character of the court-martial is a prerequisite to an intelligent consideration of this question. First, it must be remembered that our court-martial system is older than the constitution. Whether its remote predecessor was the Court of the High Constable and Earl Marshal, from which developed the Court of Chivalry, it is not important here to determine, for the Court of Chivalry had ceased to function before 1689.[5] And certain it is that since the passage of the first Mutiny Act in that year, the English courts-martial have owed their existence to parliamentary authorization. The English system was recognized in this country before the Revolution. All of our military codes, beginning with that of June 30, 1775, and including the present articles of war, have provided for courts-martial.[6] Second, let it be understood that the court-martial is a court in the truest sense of the word. Much confusion has resulted from the failure of writers upon miltary law and of the military authorities to realize this.[7] It is true that courts-martial are not a part of the judicial system of the United States provided for in article 3 of the constitution.[8] But nothing is better settled than that section 1 of that article does not exhaust the power of Congress to create courts.[9] Authority for the establishment by

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wherein the entire civilian population is under military control. Neither does it discuss martial law, as to which, see the opposing views of Dean Henry W. Ballantine, Unconstitutional Claims of Military Authorities, 5 Journal American Institute of Criminal Law and Criminology 718, and Col. George S. Wallace, The Need, Propriety and Basis of Martial Law, with a Review of the Authorities, 8 Journal American Institute of Criminal Law and Criminology 167, 406. Nor is the question, when a man called or drafted into the military service takes on a military status, considered. As to this, see Franke v. Murray, (1918) 248 Fed. 865, 160 C. C. A. 623, L. R. A. 1918E 1015; Houston v. Moore, (1820) 5 Wheat. (U.S.) 1, 5 L. Ed. 19; Martin v. Mott, (1827) 12 Wheat. (U.S.) 19, L. Ed. 537.

[5] 1 Winthrop, Military Law, 1st ed. 1886 46-51.

[6] The British Articles of War of 1765; the Massachusetts Articles of April 5, 1775; the American Articles of June 30, 1775; the Additional Articles of November 7, 1775; the American Articles of 1776, 1806 and 1874 are printed in 2 Winthrop (op. cit.) Appendix 40-125. The existing articles, so far as pertinent to this discussion, are found in 39 Stat. 650-670.

[7] See, for example, 1 Winthrop, 51-53, where Colonel Winthrop asserts that courts-martial "are in fact simply *instrumentalities of the executive power*, provided by Congress for the president as commander-in-chief, to aid him in properly commanding the army and navy and enforcing discipline therein, and utilized under his orders or those of his authorized military representatives."

[8] Dynes v. Hoover, (1857) 20 How. (U.S.) 65, 15 L. Ed. 838; Kurtz v. Moffitt, (1885) 115 U. S. 487, 500, 29 L. Ed. 458, 6 S. C. R. 148. See note 20 L. R. A. (N.S.) 413.

[9] American Insurance Co. v. Canter, (1828) 1 Pet. (U.S.) 511, 7 L. Ed. 242; McAllister v. United States, (1891) 141 U. S. 174, 35 L. Ed. 693,

Congress of courts in and for the territories is found, not in article 3, but in the "general right of sovereignty which exists in the government over territories," or in "the clause which enables Congress to make all needful rules and regulations respecting territory belonging to the United States."[10] In like manner, authority for the creation of courts-martial is to be found in the eighth section of article 1 of the constitution, which empowers Congress, among other things, to provide for the common defense and general welfare, to declare war, to raise and support armies, to make rules for the government and regulation of the land and naval forces, to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, and to make all laws necessary and proper for carrying into execution the foregoing powers. As no one could successfully contend that a territorial court is not, in truth and in fact, a court, so no one could successfully maintain that a court-martial is not a court. Indeed, the tribunal of last resort has expressly held otherwise. It has declared that the proceedings of a court-martial are from their inception judicial, that "the trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law."[11] Within the limits of its jurisdiction, its judgments "rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals, including as well the lowest as the highest, under the circumstances."[12] And it is a court of the United States to the extent that a person tried and convicted or acquitted therein cannot be again tried for the same offense by any other court deriving its authority and jurisdiction from the United States.[13] But it is a court of special and limited

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11 S. C. R. 949; United States v. Coe, (1894) 155 U. S. 76, 39 L. Ed. 76, 15 S. C. R. 16.

[10] United States v. Coe, (1894) 155 U. S. 76, 85, 39 L. Ed. 76, 15 S. C. R. 16; constitution of United States, Art. 4, sec. 3. And in the exercise of this authority Congress may place such courts under the supervisory power of the Supreme Court. United States v. Coe, *supra*, at page 86.

[11] Runkle v. United States, (1887) 122 U. S. 543, 558, 30 L. Ed. 1167, 7 S. C. R. 1141.

[12] Ex parte Reed, (1879) 100 U. S. 13, 23, 25 L. Ed. 538; Johnson v. Sayre, (1895) 158 U. S. 109, 39 L. Ed. 914, 15 S. C. R. 773; Swaim v. United States, (1897) 165 U. S. 553, 41 L. Ed. 823, 17 S. C. R. 448.

[13] Grafton v. United States, (1907) 206 U. S. 333, 51 L. Ed. 1084, 27 S. C. R. 749.

jurisdiction;[14] and the power of Congress to confer jurisdiction upon it is in some respects restricted by the constitution.[15]

The effect of the history and character of the tribunal and of the constitutional limitations upon the power of Congress to clothe it with jurisdiction can be considered to better advantage in the discussion of the separate provisions.

Offenders against the 94th Article of War. As a general rule military jurisdiction over a person begins with his entry into the military service and ceases upon his separation therefrom. For an offense committed while in the service, he cannot, in the absence of express statutory authority, be tried after discharge or dismissal,[16] unless prior thereto he has been arrested or served with charges.[17] And this is true even though his offense was not discovered until after his separation from the service.[18] Nor will his later re-entry into the service revive the right to try him.[19] The 94th article, however, is not susceptible of two interpretations; it clearly and specifically confers upon courts-martial jurisdiction to try former officers and soldiers, who have become civilians, for certain offenses committed by them while in the service. If this jurisdiction cannot be exercised, it must be because the grant thereof is unconstitutional.

And so it has been asserted to be by Col. Winthrop, by far the most painstaking and scholarly American writer upon military law. His argument, in brief, is that it cannot be justified under the power of Congress to make rules for the regulation and government of the land forces, because discharged officers and soldiers are no part of such forces, and that to hold them to be such for the purpose of subjecting them to trial is to disregard the true signification of the term, land forces, as accepted from the time of the adoption of the constitution to the present.[20] There can hardly be a serious question that such discharged officers and soldiers do not belong to the land forces. But can

[14] Dynes v. Hoover, (1857) 20 How. (U.S.) 65, 15 L. Ed. 838; Runkle v. United States, (1887) 122 U. S. 543, 30 L. Ed. 1167, 7 S. C. R. 1141.

[15] Constitution of United States, Art. 1, sec. 9; Art. 3 secs. 1, 2, 3; amendments 2, 3, 4, 5, 6, 8, 9, 10.

[16] Dig. Ops. J. A. G. 1912, 514; VIII I 1; Ops. J. A. G. 250.419 Aug. 15, 1919.

[17] 1 Winthrop Military Law 1 ed. 1886 107.

[18] Dig. Ops. J. A. G. 1912, 514 VIII I 1 a.

[19] Ibid, 515 VIII I 1 b. In this connection it should be noted that an honorable discharge terminates only the enlistment to which it relates. The same is true of the now obsolete discharge without honor. A dishonorable discharge, however, completely separates the soldier from the service. Ibid, 515 VIII I 1 C.

[20] 1 Winthrop, Military Law 1st ed. 1886 128-131.

it be reasonably contended that the grant of power to provide for the regulation and government of the land forces does not include the power to continue military jurisdiction over a discharged member thereof with respect to offenses committed by him while he was such member? It is submitted that a reasonable interpretation of the granting clause requires a negative answer. And this conclusion is fortified by the language of the fifth amendment. The test therein prescribed of the power to dispense with presentment or indictment is not the status of the accused but the source of the case. Cases arising in the land or naval forces are expressly excepted from the operation of that clause requiring presentment or indictment for capital or otherwise infamous crimes. And by judicial construction such cases are excepted from that requirement of the sixth amendment which makes necessary a trial by jury in all criminal prosecutions.[21] In other words, the excepting clause in the fifth amendment authorizes trial by a military tribunal of all cases arising in the land forces. It has been argued that a case does not arise until charges have been prepared, but this fanciful and technical contention has not prevailed.

The provision in question has been upon our statute books and has been enforced by our military authorities for over half a century.[22] Its constitutionality has been sustained in opinions of the judge advocate general.[23] And the corresponding section in the Naval Code was upheld as against a claim of unconstitutionality in an elaborate opinion by Judge Sawyer of the United States district court for the district of California,[24] in which, after referring to the case of *Ex parte Milligan*,[25] he said:

"Mr. Justice Davis, in the opinion of the court, quotes from the clause of the constitution, 'except in cases arising in the land and naval forces,' and then in the very next sentence, in alluding to this class of cases, says: 'In pursuance of the power conferred by the constitution, Congress declared the kinds of trial, and the manner in which they shall be conducted for offenses committed while the party is in the military or naval service,' thus manifestly using the phrase, 'offenses committed while the party is in

[21] Ex parte Milligan, (1866) 4 Wall. (U.S.) 2, 123, 138, 18 L. Ed. 281.
[22] 1 Winthrop, Military Law (1 ed. 1886) 1020, note 4, in which Col. Winthrop cites cases decided in 1864, 1865, 1866, 1867, 1869, 1871; Dig. Ops. J. A. G. 1912, 139 LX E 1 in which cases are cited decided in 1870, 1883, 1896, 1899, 1905, 1909.
[23] Ibid, 140 LX E 3 and footnote No. 1.
[24] Ex parte Bogart, (1873) 2 Sawy. (U.S.C.C.) 396, Fed. Cas. No. 1596.
[25] Ex parte Milligan, (1866) 4 Wall. (U.S.) 2, 123, 138, 18 L. Ed. 281.

the military service,' as entirely synonymous with and equivalent to, the phrase, 'cases arising in the land and naval forces.' . . . There is, certainly, no express limitation of the power of Congress to authorize a trial by court-martial, for military and naval offenses committed while the offender is in actual service, after his connection with the service has ceased. If the limitation exists, it must be implied from a strained and unnatural construction to be given to the clause, 'cases arising in the land and naval forces.'"

It, therefore, seems clear that the ninety-fourth article may properly and constitutionally be applied to dismissed officers and discharged soldiers.

Persons under sentence adjudged by courts-martial. Section 1361 of the Revised Statutes of the United States, a part of the enactment which authorized the establishment of military prisons at Rock Island and Fort Leavenworth, provided that all prisoners confined therein undergoing sentences of courts-martial should be liable to trial and punishment by courts-martial, under the rules and articles of war, for offenses committed during confinement. Section 5 of the Act of June 18, 1898,[26] made soldiers sentenced by courts-martial to dishonorable discharge and confinement amenable to the articles of war and other laws relating to the administration of military justice, until discharged from such confinement. Subdivision (e) of the present second article subjects to military law all persons under sentence adjudged by courts-martial. Obviously the present provision is broader than either of its predecessors and than both of them combined. Section 1361 applied only to persons confined in the designated military prisons.[27] These persons might include (1) officers sentenced to confinement without dismissal and soldiers sentenced to confinement without dishonorable discharge,[28] (2) soldiers sentenced to confinement and dishonorable discharge, where the execution of that portion of the sentence imposing dishonorable discharge is suspended, (3) officers sentenced to dismissal and confinement, and soldiers sentenced to dishonorable discharge and confinement, the portion of the sentence adjudging dismissal or dishonorable discharge being immediately executed, and (4)

[26] 30 Stat. 484.

[27] It was held not to apply to the military prison at Alcatraz Island, California. 1 Winthrop (op. cit.) 110.

[28] While it is conceivable that an officer might be sentenced to confinement without dismissal, it is believed that such a case would never occur except through inadvertance. Suspension of sentence of dismissal is unknown in the service.

civilians properly sentenced to confinement by courts-martial. Section 5 of the Act of June 18, 1898, applied only to soldiers sentenced to dishonorable discharge and confinement. Under its terms, however, the place of confinement was immaterial: it might be any military prison or a penitentiary. The existing statute includes all the foregoing classes and, in addition, officers sentenced to dismissal and confinement in a penitentiary, and civilians sentenced to confinement in a penitentiary.

There can be no question of the validity of the provision as applied to officers and soldiers whose sentences do not include dismissal or dishonorable discharge, or as applied to soldiers under suspended sentences of dishonorable discharge. They are part of the land forces. Their cases arise in the land forces. And they have a full military status not only at the time of the commission of the offense but also at the time of the trial.

As applied to officers and soldiers whose sentences, so far as concerns dismissal and dishonorable discharge, have been executed, and who are confined in a military prison, its validity has been questioned. These men, it has been said, have been completely separated from the service, and offenses thereafter committed by them cannot be regarded as constituting cases arising in the land forces.[29] To this objection two authoritative answers have been made. First, a military prison is as much under military control as the guardhouse of a military unit, and its inmates as thoroughly subject to military surveillance and discipline; it is in the sole charge of officers and enlisted men of the army; it is a military institution and is as really a part of the military establishment as is a fort or an arsenal. Second, the statute, by necessary implication, limits the power of the court-martial in imposing sentence and prevents it from completely separating the accused from the service. The accused, notwithstanding the sentence, retains his military status for the purposes of discipline and punishment.[30] Furthermore, under the terms of another

[29] 1 Winthrop (op. cit.) 110, 128. This was the contention of counsel for the prisoner in the cases cited in the following note.

[30] Ex parte Wildman, (1876) Fed. Cas. No. 17653a; In re Craig, (1895) 70 Fed. 969; 16 Ops. Atty. Gen'l. 292. See also Carter v. McClaughry, (1902) 183 U. S. 365, 46 L. Ed. 236, 22 S. C. R. 181. In the Craig case, p. 971, it was said: "A discharge executed under these circumstances and for such a purpose cannot be said to have had the effect of severing his connection with the army, and of freeing him forthwith from all the restraints of military law. The discharge was no doubt operative to deprive him of pay and allowances, but so long as he was held in custody under the sentence of a court-martial, for the purpose of enforcing discipline and

enactment, he is eligible for restoration to duty to complete the unexpired portion of his enlistment period.[81] This second answer seems conclusive. These men were once members of the land forces in good and regular standing. They are still such members, but no longer in good standing: they are now deprived of certain of their former rights, privileges and immunities, and are subject to certain new burdens. But their military status endures.

The same is true with reference to officers and soldiers sentenced to dismissal or dishonorable discharge and to confinement in a penitentiary. The place of confinement does not affect their status. And so long as they are members of the land forces, they remain subject to trial by military courts for offenses against the rules and articles of war. The fact that such offenses occur in a penitentiary or other place outside the control of the military authorities is immaterial. Jurisdiction in this class of case may be predicated solely upon the status of the offender.[82]

But this line of reasoning will not sustain the exercise of military jurisdiction over civilians sentenced by courts-martial to confinement.[83] If they are to be tried by courts-martial for offenses committed during confinement, it must be because of the exclusive military control over them and over the place of their confinement. They have never had a military status. As before stated, the military prison is a part of the military establishment. It is an institution necessary for the regulation and government of the military forces. Its inmates are under military discipline

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punishing him for desertion, he remained subject to military law, which prevailed in the prison where he was confined, and subject also to the jurisdiction of a court-martial for all violations of such law committed while he was so held."

[81] Act of March 4, 1915, Ch. 143, sec. 2, 38 Stat. 1084, 1085. The same is true if confinement is in a penitentiary. 38 Stat. 1074.

[82] Manual for Courts-Martial, par. 37. See also 1 Winthrop (op. cit.) 95-98. In Carter v. McClaughry, (1902) 183 U. S. 365, 46 L. Ed. 236, 22 S. C. R. 181, the prisoner was confined in a penitentiary. The decision was that the portion of the sentence imposing confinement was not rendered illegal by the fact that the confinement was to be served after the portion of the sentence imposing dismissal had taken effect. In dealing with the question, the court said on page 383:

"Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.

"He was a military prisoner, though he had ceased to be a soldier; and for offenses committed during his confinement he was liable to trial and punishment by court-martial under the rules and articles of war. Rev. Stat. sec. 1361."

[83] No case has been found upon this precise point, nor any discussion by any text-writer.

and control. They are necessarily treated as an integral part of the establishment. Offenses committed by civilians properly incarcerated therein constitute cases arising in the land forces, just as really as offenses committed by retainers to the camp. The basis of jurisdiction here is not the status of the offender, but the dominion of the military over him and over the place of the commission of the offense. But offenses committed by civilians confined in penitentiaries cannot reasonably be designated cases arising in the land forces upon any theory. Such civilians have no military status; they are not under military control; they form no part of the military establishment.

It is, therefore, submitted that the provision here in question may properly be applied to officers and soldiers under sentence of dismissal or dishonorable discharge and to confinement, wherever confined, but that it cannot be constitutionally applied to civilians whose sentence to confinement is to be executed in a penitentiary or other institution under civilian control.

Persons admitted into the Regular Army Soldiers' Home at Washington, D. C. Subdivision (f) of the second article of war re-enacts section 4824 of the Revised Statutes of the United States, which subjects the inmates of the Soldiers' Home at Washington to the rules and articles of war. Section 4835, which makes the same provision with reference to inmates of the National Home for Disabled Volunteers, is nowhere included in the present articles of war, although it is not repealed thereby. The validity of these sections has not been tested in the civil courts for the very good reason that no attempt has been made to enforce section 4824 and only one attempt to apply section 4835.[34] In the published opinions of the attorney general, both sections have been referred to, without any intimation as to their validity or invalidity,[35] and section 4835 has been mentioned arguendo by the federal courts, apparently upon the assumption of its entire validity.[36] It has been asserted, however, that the attorney general has held section 4835 to be unconstitutional;[37] and the

[34] 1 Winthrop (op. cit.) 110, 127, 128.

[35] 16 Ops. Atty. Gen'l. 13.

[36] In re Kelly, (1896) 71 Fed. 545, 553, 19 C. C. A. 25; Ohio v. Thomas, (1899) 173 U. S. 276, 281, 43 L. Ed. 699, 19 S. C. R. 453. See, however, United States v. Murphy, (1881) 9 Fed. 26, where it was held that clothing issued to an inmate of the National Home for Disabled Volunteers at Dayton, Ohio, was not issued to be used in the military service of the United States.

[37] General E. H. Crowder, on page 48 of Appendix to Senate Document, Report 229, 63rd Congress, 2d Session, is reported as testifying as follows:

judge advocate general has unequivocally declared both sections void and unenforceable, on the ground that the inmates of these homes are pure civilians, and cannot be regarded as part of the land forces.[38]

These rulings must apply with equal force to the existing provision. With the administrative officials assuming this attitude, there is no likelihood that an authoritative ruling from a civil court will be sought. And this is unfortunate, for though the judge advocate general's opinion seems supported by the weightier reason, yet in view of the nature of the institution, and the complete control over it by the military authorities,[39] the statute does not seem so palpably unconstitutional as to justify mere administrative officers in refusing to enforce it.

Retainers to the Camp and Persons accompanying or serving with the Armies of the United States. Article 32 of the articles of war of June 30, 1775, subjected to the "articles, rules and regulations of the Continental army" "all sutlers and retainers to a camp and all persons whatsoever serving with the continental army in the field." Article 23 of section XIII of the articles of war of September 20, 1776, made all "sutlers and retainers to a camp and all persons whatsoever serving with the armies of the United States in the field" subject "to orders, according to the rules and discipline of war."[40] This was re-enacted as the 60th

"Existing legislation, held by the Attorney General and by the Judge Advocate General to be clearly unconstitutional, provides that inmates of the volunteer soldiers' homes are to be subject to the Articles of War. The statute has, so far as I can inform myself, never received any execution. While I have not included this, I have not undertaken to repeal the law by making any reference to the sections of the Revised Statutes conferring this extraordinary jurisdiction, in the repealing clause which will be found at the end of the project."

This testimony was given May 14, 1912, upon the hearing before the Committee on Military Affairs, House of Representatives, 62d Congress, 2d session on H. R. 23628, being a project for the revision of the Articles of War. It seems strange that General Crowder omitted to mention the decisions of the Judge Advocate General with respect to section 4824 Revised Statutes.

[38] Dig. Ops. J. A. G. 1912, p. 1010, I A.; ibid p. 1012, II.

[39] See Ohio v. Thomas, (1899) 173 U. S. 276, 43 L. Ed. 699, 19 S. C. R. 453.

[40] This adopts the language of Article 23 of Section XIV of the British Articles of War of 1765. The provision was a part of the British articles from 1744 to 1828. In this connection it must be remembered that the British Articles of War were not parliamentary enactments. Parliament enacted the Mutiny Act; the Crown promulgated the Articles of War. Clode says that these civilians could not have been tried by court-martial "because they were neither designated in the (Mutiny) Act nor were they Officers or Soldiers." Charles M. Clode, Military and Martial Law (1874) 94.

article of the Code of April 10, 1806. The same provision, omitting reference to sutlers, was embodied in the 63rd article of the enactment of June 22, 1874. The settled construction of these articles was that they subjected the civilians designated not only to military control and orders but also to the jurisdiction of courts-martial.[41] Their application, however, was strictly limited to the time of war.[42] Consequently, the second article of the existing code, in making amenable to military law in time of war, all retainers to the camp and all persons serving with the army in the field, merely gave legislative sanction to then existing practice. But it did not stop there; it put in the same class (1) persons accompanying the armies in the field in the United States in time of war, and (2) retainers to the camp, and all persons accompanying or serving with the armies without the territorial jurisdiction of the United States both in time of war and in time of peace.

Retainers to the camp, it has been held, include officers' servants, sutlers, employees of sutlers, newspaper correspondents and other camp followers not in the employ of the government.[43] Persons serving with the army consist of civilians employed by the government, such as teamsters, watchmen, inspectors, interpreters, guides, contract surgeons,[44] nurses, ambulance drivers, and employees of the quartermaster, engineer and ordnance departments, including employees on troop trains and transports.[45] The phrase, persons accompanying the army, was intended to cover civilians "who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith."[46] It has

[41] Dig. Ops. J. A. G. 1912, 152 LXIII D; 1 Winthrop (op. cit.) 117.

[42] Dig. Ops. J. A. G. 1912, 151 LXIII B; 1 Winthrop (op. cit.) 121.

[43] 1 Winthrop (op. cit.) 118; Comparative Print showing S 3191, Senate Committee Print, 64th Congress, 1st Session (1916) 6.

[44] Contract surgeons and members of the Army Nurse Corps are now part of the Army. Secs. 2 and 10 of Act of June 3, 1916 (39 Stat. 166, 171): Ops. J. A. G. 211, Nov. 27, 1918.

[45] 1 Winthrop (op. cit.) 119; Dig. Ops. J. A. G. 1912, 151 LXIII A; C. M. Nos. 110574; 113740; 113099; 110866; 116446; 115774; 108605; 110496; 118055; 117909-117915; 118120. For example, the conductor and engineer of a military train running from Alexandria to Manassas, were held by Judge Advocate General Holt to be triable by court-martial. Ops. J. A. G. R, 7, 116. (1864). Ex parte Falls, (1918) 251 Fed. 415; Ex parte Jochen, (1919) 257 Fed. 200; Hines v. Mikell, (1919) 259 Fed. 28, overruling ex parte Mikell, (1918) 253 Fed. 817.

[46] Comparative Print showing S 3191, Senate Committee Print, 64th Congress, 1st Session (1916) 6. Gen. E. H. Crowder, testifying before the Committee on Military Affairs of the House of Representatives, on May 14, 1912, said: "The words 'accompanying or' are new and are intended to cover attachés who accompany the Army but who do not necessarily

been used as the authority for exercising military jurisdiction over a passenger on an army transport, who volunteered to stand watch and thereafter refused to continue the work,[47] over employees of independent contractors,[48] and over employees of the Young Men's Christian Association.[49] The United States district court for the district of Massachusetts, however, has expressly denied its application to an employee of a contractor for construction work at a camp where soldiers were undergoing intensive training for immediate active service on the fighting front, although this employee did practically all his work within the camp and had his quarters within the camp.[50] After pointing out that such a person cannot be classified as a retainer, the court said:

"Persons 'accompanying or serving with . . . armies in the field' are those who, though not enlisted, do work required in maintenance, supply or transportation of the army. The work that Weitz was doing was not of that character. . . . There is, I think, a clear distinction between work done in the erection or maintenance of a camp of semi-permanent character, and work having a direct relation to the transport, maintenance or supply of an army in the field. Both sorts of work are necessary to the army, but only persons engaged in the latter sort are amenable to military law and punishment. To hold otherwise would be to subject to military law a very large body of civilian employes, never directly coming in contact with military authority and not heretofore generally supposed to be subject thereto."

It is respectfully submitted that this reasoning will not bear analysis. The court entirely ignores the word, "accompanying" in the statute. Its earlier quotation from General Davis, it fails to note, has to do with the statute before this word was inserted. To make the character of work done by a person, who performs his duty in the camp and who has his quarters therein, the test of whether that person is accompanying the army is to disregard the obvious meaning of unambiguous language. And to say that to interpret the article as it reads will be to make amenable to military law persons not heretofore generally believed to be subject thereto, is merely to say that Congress in interpolating

serve with the field Army. The phrase includes also newspaper correspondents; we have been trying them in every war we have had for divulging military secrets and nonconformity with regulations and like offenses." See p. 48 of Report referred to in Note 37, *supra*.

[47] C. M. No. 107168; Ex parte Gerlach, (1917) 247 Fed. 616.

[48] C. M. No. 115772; 117642; Ops. J. A. G. 250401 Dec. 11, 1918.

[49] C. M. No. 118327; 118333; 119135.

[50] Ex parte Weitz, (1919) 256 Fed. 58.

a new word into the statute intended to have that word given some effect. Furthermore, it is difficult to see how any line can be drawn, for the purposes of jurisdiction, between the employees who transport provisions and place them in a storehouse and the employees who build the storehouse; or between the men who build mere temporary shelters for soldiers and those who build semi-permanent barracks, or between the chauffeur who transports soldiers and supplies for them and the chauffeur who transports employees of the quartermaster's corps who look after and check up those supplies. The character of the work done is not the test. The test is whether the civilian in question is really accompanying the army in the field or without the territorial jurisdiction of the United States.

"In the field," as used in the articles of war, appears not to have been judicially interpreted until very recently.[51] By the administrative officials of the government it was formerly construed narrowly as equivalent to "in the theatre of war"[52] or, at least, as connoting military operations with a view to the enemy,[53] although it was distinctly held that it was not limited to the zone of immediate operations against the enemy and that the entire army as mobilized in the Civil War might well be considered as in the field.[54] This interpretation gave some plausibility to the contention that troops in the United States during the late war could not be considered in the field, because the battle front was "three thousand miles away, separated by an immense ocean from the United States, with peace within all the territorial limits of the United States."[55] It was urged that the field denoted "the area of actual conflict with an enemy," or an area occupied by troops that "sustain such a relation to the combatant troops in the actual field of battle, as that constructively they are part and parcel of the field operations."[56] These arguments overlooked several important facts: (1) That subdivision (d) of the second article of war substantially enlarged the scope of military jurisdiction as previously conferred by the sixty-third article of the Code of 1874, and the sixtieth article of the

[51] Sargent v. Town of Ludlow, (1870) 42 Vt. 726, defines the phrase as applied to a bounty statute.

[52] Dig. Ops. J. A. G. 1912, 151, LXIII A, B, C; 1 Winthrop (op. cit.) 121.

[53] 14 Ops. Atty. Gen. 22.

[54] Ops. J. A. G. R. 12. 376 (1865).

[55] See Ex parte Mikell, (1918) 253 Fed. 817.

[56] See Ex parte Jochen, (1919) 257 Fed. 200.

Code of 1806; (2) that these administrative rulings were made under these earlier articles and with reference to such conditions as prevailed in the Civil War and Indian wars, where the theatres of operations were comparatively limited; (3) that the existing provision was enacted in the presence of a world war and after the term "in the field" had been recognized as having a much broader meaning, both in departmental regulations and in Congressional legislation.[57] Moreover, when occasion for the application of this provision arose, the United States had already been transformed "into a vast manoeuvre field with concentration, mobilization and training camps and quarters scattered broadcast."[58] Many civilians were necessarily attached to the army and commingled with its officers and men; and every consideration of policy demanded that they be subjected to the same control and jurisdiction. It was, therefore, to be anticipated that the military authorities would emphasize those of the earlier rulings which looked toward a broader construction of the term, "in the field," and by a rephrasing of old definitions reach results in consonance with the requirements of existing conditions. Thus, when the judge advocate general was called upon to determine whether a civilian serving at a National Army cantonment was serving with the army in the field, it was not unexpected to find him holding:

"This cantonment was established for the period of the war and will, no doubt, be abolished when the war is over. It is one of the places where soldiers stop on their way toward the battle line; the troops there are, in fact, reserves to those serving at the front; they are in process of movement towards the enemy, and their stay is indefinite; in the field does not mean on the actual battle front. The theatre of war will be considered the territory of all belligerent countries. The battle front is constantly shifting; the troops sent to the front to-day may defend our coast to-morrow. The reason of this rule must determine its construction. Civilians in time of war serving with troops must be subject to military discipline. They cannot be allowed to embarrass the military commanders. The military establishment would be hindered just as much by unlawful acts of civilian employees at this cantonment as would be the case were this a camp stationed somewhere behind the lines in France."[59]

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[57] Act of Feb. 27, 1893, 27 Stat. 480; Army Regulations, par. 183 et seq.

[58] Ex parte Jochen, (1919) 257 Fed. 200.

[59] C. M. No. 117,909.

This reasoning was, in a later case, substantially adopted by the United States circuit court of appeals (4th Circuit).[60] The court referred to statutes and regulations which recognized the distinction between service in the field and service at a permanent station, and between service in the field and service in the theatre of operations. It then held that when troops leave their permanent station or post and move in the direction of the enemy or to an intermediate point where they may stop temporarily for training, they are in the field. The men who, as soldiers, entered a National Army cantonment were said to be taking "the first step which was to lead to the firing line" and to be as much in the field as "those who were encamped in the fields of Flanders awaiting orders to enter the engagement."

Upon somewhat similar grounds, the judge advocate general held the army transport service to constitute a portion of the lines of communication of the army between the battle front and the reserves, and service therein to be service in the field.[61] In these rulings he was sustained by the United States district courts for the southern district of New York[62] and for the district of New Jersey.[63] Both courts agreed that:

"The words, 'in the field,' do not refer to land only, but to any place on land or water, apart from permanent cantonments and fortifications, where military operations are being conducted."

This definition seems to effectuate the legislative intent as evidenced by the use of the term in prior and later statutes,[64] is in accord with the modern administrative interpretation as expressed in departmental orders and regulations[65] and in the opinions of the judge advocate general, and, it is submitted, provides a reasonable and workable construction of the statute.

"Without the territorial jurisdiction of the United States" has reference primarily to those places beyond the limits of the territory over which the United States exercises dominion as an independent sovereign power. Since the jurisdiction of each sovereign within its own territory is absolute and exclusive, no state can exercise jurisdiction within the limits of another with-

[60] Hines v. Mikell, (1919) 259 Fed. 28, overruling Ex parte Mikell, (1918) 253 Fed. 817. A vigorous opinion to the same effect, especially considering and disapproving Ex parte Mikell, is found in Ex parte Jochen, (1919) 257 Fed. 200.

[61] C. M. 107168; 114012.

[62] Ex parte Gerlach, (1917) 247 Fed. 616.

[63] Ex parte Falls, (1918) 251 Fed. 415.

[64] See note 57 *supra*, and Act of April 16, 1918, 40 Stat. 530.

[65] See note 57 *supra* and General Orders 6 and 53, W. D. 1918.

out the consent of the latter.[66] When, however, a sovereign, by invitation or license, allows troops of a foreign state to enter, remain in, or pass through his dominions, he thereby cedes a portion of his territorial jurisdiction. Usually such cession is made by convention, but it may be implied from the license or invitation.[67] Where it includes jurisdiction over civilians attached to or accompanying the army, some provision must be made for their government and discipline. Prior to the passage of the present article, no such provision was contained in the articles of war, and this clause was inserted to cure that defect.[68] The words, however, are also apt to denote the non-territorial jurisdiction exercised by the nation over its public vessels on the high seas and over private vessels covered by its flag. Thus they might well apply to civilians on army transports whether owned or merely chartered by the government.[69] Under the statute as drawn, it is believed that the jurisdiction must be exercised or must at least attach prior to the return of the civilian to the territorial jurisdiction of the United States. Upon such return his position is analogous to that of a discharged soldier or of a civilian after the restoration of peace, who has served with the army in the field during war. For offenses committed prior to discharge such soldier cannot be tried by court-martial, for offenses committed during war such civilian cannot be tried by court-martial, unless arrested or served with charges therefor prior to discharge or restoration of peace respectively.[70] In like manner the civilian accompanying the army abroad will, upon reentry into the United States, pass beyond the jurisdiction of

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[66] See Hall, Int. Law (6 ed. 1909) 101.

[67] Ibid. 196: 2 Moore Dig. Int. Law 559, sec. 251; Schooner Exchange v. McFaddon, (1812) 7 Cranch (U.S.) 116, 136, 139.

[68] In the Comparative Print referred to in note 43 *supra*, which was prepared in the office of the Judge Advocate General, it is said on p. 6:

"The existing articles are further defective in that they do not permit the disciplining of these three classes of camp followers in places to which the civil jurisdiction of the United States does not extend, and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances—as, for example, where our forces accompanied by such camp followers are permitted peaceful transit through Canadian, Mexican, or other foreign territory, or where such forces so accompanied are engaged in the nonhostile occupation of foreign territory, as was the case during the intervention of 1906-07 in Cuba."

[69] Ex parte Gerlach, (1917) 247 Fed. 616; 1 Hall Int. Law (6 ed.) 161.

[70] 1 Winthrop (op. cit.) 122; Dig. Ops. J. A. G. 1912, 151 LXIII B1; Notes 16, 17, 18 *supra*.

the military courts unless he has, prior thereto, been arrested or served with charges.

Although the provision subjecting to military law these civilians, accompanying the field army as retainers or serving therewith, has been repeatedly enforced since its adoption in 1775, its constitutionality seems never to have been questioned prior to the late war. Constitutional authority for its enactment is found in section 8 of article 1 of the constitution, and in the excepting clause of the fifth amendment. Cases arising in the land forces may be tried by courts-martial. Offenses committed by such civilians under such circumstances constitute cases arising in the land forces. If these civilians are not part of the land forces, "a due consideration for the *morale* and discipline of the troops, and for the security of the government against the consequences of unauthorized dealing and communication with the enemy"[71] requires that they be subjected to the same control and jurisdiction as the troops themselves. Prior to the adoption of the constitution they were thus subjected; they have ever since been thus subjected, and it must be assumed, in the absence of clear language to the contrary, that the framers of the constitution did not intend to derogate from the established jurisdiction of the military courts in this respect. It is, therefore, believed that the recent decisions upholding the constitutionality of the provision are entirely sound.[72]

The clause making these persons amenable to military law when without the territorial jurisdiction of the United States is, where the offense occurs and the trial is had either in the territory of a foreign sovereign or upon the high seas, unquestionably constitutional. The constitutional guaranties with reference to indictment, presentment, and trial by jury have no extra-territorial effect.[73] They are operative only in territory incorporated into the United States.[74] The United States Supreme Court has used the following pertinent language:

"By the constitution a government is ordained and established 'for the United States of America,' and not for countries outside their limits. The guaranties it affords against accusation of capi-

[71] 1 Winthrop (op. cit.) 118.

[72] Ex parte Gerlach, (1917) 247 Fed. 616; Ex parte Falls, (1918) 251 Fed. 415; Ex parte Jochen, (1919) 257 Fed. 200.

[73] In re Ross, (1891) 140 U. S. 453, 35 L. Ed. 581, 11 S. C. R. 897.

[74] Hawaii v. Mankichi, (1903) 190 U. S. 197, 47 L. Ed. 1016, 23 S. C. R. 787; Dorr v. United States, (1904) 195 U. S. 138, 49 L. Ed. 128, 24 S. C. R. 808.

tal or other infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial of alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad. *Cook v. United States,* 138 U. S. 157, 181. The constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be upon such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States."[75]

Where, however, the accused is returned to the United States, before the jurisdiction of the military tribunal has attached by arrest or service of charges, the constitutional provisions are doubtless applicable. In such event justification for trial by court-martial would have to be based upon the ground that the case arose in the land forces. If an offense committed by a civilian confined in a military prison, if an offense committed by a civilian attached to the army in the field, constitutes a case arising in the land forces, the same, it is submitted, must be true of an offense committed by a civilian accompanying or serving with the army abroad or on the high seas.[76] A fortiori, military jurisdiction may constitutionally be asserted in cases where the accused has been arrested or served with charges prior to his return to this country.

Whosoever relieves the enemy with arms, ammunition, supplies, money or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly.

Notwithstanding this unrestricted language, it has been suggested that its application must be limited to members of the military establishment.

[75] In re Ross, (1891) 140 U. S. 453, 464-5, 35 L. Ed. 581, 11 S. C. R. 897. In this case Ross was tried by a consular court in Japan, without a jury, for a murder alleged to have been committed on board an American vessel in Japanese waters. The language quoted, therefore, was part of the ratio decidendi of the case.

[76] See pp. 87-92, *supra.* As pointed out above the statute would probably not be interpreted as covering a case where jurisdiction had not been initiated prior to return to this country.

"The sounder construction," it has been said, "would seem to be that as the articles of war are a code enacted for the government of the military establishment, they relate only to persons belonging to that establishment unless a different intent should be expressed or otherwise made manifest. No such intent is so expressed or made manifest."[77] This contention is obviously unsound. Its premise is based upon an unduly narrow interpretation of the enacting clauses of the various military codes; but granting its premise, its conclusion is erroneous. It ignores the legislative history of the article and disregards the construction administratively accepted and applied for at least a century. It is supported by no opinion of the judge advocate general, of the attorney general or of the courts.

The articles of 1775 were introduced by a resolution that they "be attended to and observed by such forces as are or may hereafter be raised;" those of 1806 were enacted to be "the rules and articles by which the armies of the United States shall be governed." The language of the Code of 1874 was similar. The existing articles, it is declared, "shall at all times and in all places govern the armies of the United States." A reasonable construction of the foregoing language in each case, it is submitted, does not prevent the application of the articles to civilians coming into contact with the army in cases arising in the land forces. No military code would be complete without making provision for such cases. Rules authorizing the exercise of military jurisdiction over civilians under such circumstances are no less rules for the government of the military establishment than are those regulating the internal affairs of the army. Relieving, corresponding with, and giving intelligence to the enemy must be prevented largely by the military.

"The power to repress the communication of intelligence to the enemy," said Judge Advocate General Holt,[78] "has found a prominent place in the military codes of all warlike nations. Without the authority to visit upon this class of offenses sum-

[77] Davis, Military Law (3ed.) 417. This language is repeated in footnote 7, Dig. Ops. J. A. G. 1912, 128. The statement is also made that the application of the article to civilians may be justified only under martial law. Except in so far as this statement is based upon the authority of General Davis, it is entitled to no greater weight than its inherent reasonableness commands. It is the mere opinion of the compiler of the digest, who, so far as is known, has achieved no recognition as an authority upon military law.

[78] Case of William T. Smithson, Ops. J. A. G. R 5, 291, November 13, 1863.

mary and severe punishments, the war making power would be greatly enfeebled if not absolutely paralyzed. . . . To confine the exercise of this authority to those actually in the military service would be absolutely to defeat its object, since those who convey intelligence to the enemy are not to be found among officers and soldiers who are offering up their lives for the government, but among demoralized and disloyal classes outside the army. If such cannot be promptly and unsparingly punished, there can be no successful prosecution of hostilities."

Therefore, even were the enacting clause and the article in question to be considered alone, the more reasonable construction would not confine their operation to military persons.

But they must not be considered alone. The language of the article or articles dealing with these offenses must be interpreted in the light of the language of the other punitive provisions. In the existing code most of the other punitive articles are made applicable expressly to officers, soldiers, or persons subject to military law, as defined in the second and twelfth articles.[79] In the Code of 1874 most of the acts denounced are made punishable when committed by any officer or soldier. The article therein preceding the provisions here involved is applicable to "any person belonging to the armies of the United States." Substantially the same thing is true in the articles of 1806 and those of 1776. The inference is irresistible that Congress used this unrestricted language, "whosoever," advisedly, and therefore made manifest its intent to have it apply to civilians.

This conclusion is fortified by the legislative history of the article. The twenty-seventh and twenty-eighth articles of the first American military code denounced substantially the same offenses as the present eighty-first article; but their application was restricted to members of the continental army. By a resolution of November 7, 1775,[80] all persons holding a treacherous correspondence with, or giving intelligence to, the enemy were made punishable by general court-martial. Articles eighteen and nineteen of section thirteen of the Code of 1776, copying the language of articles eighteen and nineteen of section fourteen of the British

[79] The British Articles of War of 1765; the Massachusetts Articles of April 5, 1775; the American Articles of June 30, 1775; the Additional Articles of November 7, 1775; the American Articles of 1776, 1806 and 1874 are printed in 2 Winthrop (op. cit.) Appendix 40-125. The existing articles, so far as pertinent to this discussion, are found in 39 Stat. 650-670.

[80] 2 Winthrop (op. cit.) Appendix 76. Compare the provisions of the Naval Code retaining the restrictive language. 2 Stat. 46, 47.

articles of 1765, gave courts-martial jurisdiction to punish the offenses covered by the twenty-seventh and twenty-eighth articles of the previous code, by whomsoever committed. Under the terms of a resolution of October 8, 1777,[81] any person guilty of giving aid or intelligence to the enemy was to be considered an enemy and traitor to the United States and to be punished by death or such other punishment as a court-martial might think proper. A resolution of February 27, 1778,[82] directed against the taking or conveying of any loyal citizen to any place within the power of the enemy, provided that:

"Whatever inhabitant of these states shall, by giving intelligence, acting as a guide, or in any other manner whatsoever, aid the enemy in the perpetration thereof, . . . shall suffer death by the judgment of a court martial, as a traitor, assassin, and spy, if the offense be committed within seventy miles of the headquarters of the grand or other armies of these states where a general officer commands."

The act of September 29, 1789,[83] continued the previously existing articles of war in force until the end of the next session of Congress. Section 13 of the Act of April 30, 1790,[84] subjected the army to the existing rules and articles of war, "as far as same may be applicable to the Constitution of the United States." From time to time various other statutes[85] to the same effect were enacted until the articles of 1806 became operative. Articles fifty-six and fifty-seven thereof were essentially a reenactment of articles eighteen and nineteen of section thirteen of the Code of 1776. They continued in force until incorporated into the Code of 1874 as articles forty-five and forty-six thereof, which were, with slight changes, consolidated into the present eighty-first article.

The foregoing makes it clear beyond dispute that the present provision and all its predecessors, beginning with November, 1775, were intended to be operative against civilians. The original articles were restricted to members of the army, but this limitation was removed in less than six months. And it has never been restored. As an original question of statutory construction, therefore, it is submitted, the article can not reasonably be held

[81] 2 Journals of Congress 281.
[82] 2 Journals of Congress 459.
[83] 1 Stat. 95, 96.
[84] 1 Stat. 119, 121.
[85] 1 Stat. 223; 242; 430 at 432; 483 at 486; 552; 558; 604; 725; 2 Stat. 132 at 134.

to be confined in its application to members of the military forces. And in practice, it has never been so confined. On May 19 and 20, 1777, a court martial of which Stephen Moylan was president tried a civilian, one John Brown, alias John Lee, for violation of the nineteenth article of the thirteenth section of the Code of 1776, found him guilty, and sentenced him to death, but recommended him to General Schuyler as an object of mercy. The General laid the proceedings before Congress, which ordered them referred to the board of war.[86] The military orders for the Army of West Lake Champlain, issued in 1813, published articles fifty-six and fifty-seven of the Code of 1806, with the warning that they were as applicable to civilians as to soldiers.[87] During the Civil War the judge advocate general interpreted them as applying to civilians. This construction was approved by the secretary of war and promulgated in orders of the War Department.[88] And numerous trials of civilians occurred pursuant thereto.[89] In 1871 the attorney general held that civilians captured by the military forces, while engaged in supplying ammunition to hostile Indians, were triable by court-martial.[90] And in

[86] 2 Journals of Congress 135. The trial of Joshua Hett Smith under the resolution of February 27, 1778, for aiding and assisting Benedict Arnold "in a combination with the enemy, to take, kill and seize such of the loyal citizens or soldiers of the United States as were in garrison at West Point and its dependencies" should also be noted here. Smith, a lawyer, made a strong argument against the jurisdiction of the court-martial to try him, a civilian, as being contrary to the several constitutions of the states and in "violation of the right of trial by jury, one of the principal reasons assigned by Congress for their separation from Great Britain in the Declaration of Independence, as well as allowing the military an extent of power incompatible with free Government." He was tried but found not guilty. 2 Chandler Am. Crim. Trials.

[87] 1 Winthrop (op. cit.) 124. Col. Winthrop also mentions the trial of R. C. Ambrister by order of General Jackson in 1818, as an example of the prosecution of a civilian by court-martial for giving aid to the enemy. This entire proceeding, however, was so wholly irregular that it cannot be regarded as a precedent for any proposition, save that an arbitrary military commander may, under peculiar circumstances, have a civilian put to death and escape the consequences of his illegal act. Col. Winthrop, regarding the proceeding as a trial by court-martial, says with reference to General Jackson's disapproving the final sentence and ordering the first sentence of the court executed: "For such an order and its execution a military commander would *now* be held indictable for murder." 1 Winthrop (op. cit.) 657. For an attempted defense of General Jackson's conduct on the theory that Jackson had conquered the whole of West Florida, although no war had been declared against Spain, that as military commander of conquered territory he had the right to execute persons accused of aiding in uncivilized warfare, and that the so-called court was merely an advisory body to the General, see Birkheimer, Military Government and Martial Law, 3 ed. 1914, 351-354.

[88] 1 Winthrop (op. cit.) 125.

[89] Id. 125, note 6.

[90] 13 Ops. Atty. Gen. 472.

no opinion of the judge advocate, of the attorney general or of a court has any expression been found from which it might reasonably be deduced that members of the military establishment alone are amenable to military trial for violation of this provision.

Certainly if the ordinary rules of statutory construction are to be applied and effect is to be given to the manifest intention of Congress, members of the military establishment are not the only persons subject to trial by court-martial for violation of the eighty-first article of war. But does it follow that it is unrestricted in its operation both as to the person of the offender and as to the locus of the offense? So construed will it not be objectionable on constitutional grounds? Article III of the constitution vests the judicial power of the United States in one Supreme Court and such inferior courts as Congress may ordain and establish. It provides that the trial of all crimes, except in cases of impeachment, shall be by jury; it defines treason as consisting in levying war against the United States, or in adhering to their enemies, giving them aid and comfort, and prohibits conviction of treason except upon the testimony of two witnesses or on confession in open court. The fifth amendment forbids holding any person to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger. And the sixth amendment requires the trial of the accused in all criminal prosecutions to be by an impartial jury. Do these constitutional guaranties not protect the civilian from such trial by court martial?

It has been vigorously and ably argued that they do not, for three reasons. First, that the practice of subjecting civilians to the jurisdiction of military tribunals for the trial of these offenses is older than the constitution and impliedly sanctioned by it: second, that the authority of Congress so to provide is inherent in its war-making power: third, that all such offenses constitute cases arising in the land and naval forces.

The first reason was forcibly put by Judge Advocate General Holt in the Smithson case.[91]

"The history of the 57th article of war [now embodied in the 81st] will go far to show the conviction which has obtained from

[91] See Note 78, supra. In this case a civilian was tried by court-martial for giving intelligence to the enemy by means of a letter. The letter was sent from Washington, which was then fortified, and in reality in the theatre of operations.

the foundation of the government, of the necessity of summarily and severely punishing, by military courts, this class of offenders, and the acquiescence in such proceedings as in harmony with the constitution. At the outset of the revolution, as is learned from the correspondence of this period, so strong a popular prejudice existed against the military, that the establishment of a military code—now known as the articles of war—was an extremely difficult and almost odious task. . . . The article of war, now known as the 57th, but which was the 28th of the code adopted by Congress on the 30th of June, 1775, was restricted to persons 'belonging to the Continental Army.' This restriction was probably the fruit of the prejudice referred to. It was soon discovered, however, that thus restricted the article would be in effect a brutum fulmen, since the offenders against whom its penalties were directed, were not within, but without the military service. Accordingly in November following, the same Congress threw off this restriction and enacted that *'all persons* convicted of holding a treacherous correspondence with or giving intelligence to the enemy shall suffer death, or such other punishment as a general court-martial shall think proper.' This article of war thus enlarged was in full force on the ratification of the federal constitution, and on the adoption of the amendment, which is claimed in the defense to be invaded by this trial. It continued to be the law of the service until 1806, when it was substantially reaffirmed by Congress, and adopted as it now exists, the word 'whosoever' having been substituted for 'all persons.' The feature of the article now assailed thus appears to be older than the constitution, to have been in force when that instrument came into existence, and to have been readopted a few years thereafter by a Congress, in which were in all probability many who must be ranked among the founders of the republic, and who were doubtless intimately acquainted with the spirit and import of this and other provisions of the constitution. This action may well be accepted as virtually a contemporaneous exposition of this clause of the fundamental law, which added to the usage in the service, that has constantly prevailed, must be regarded as precluding the government from opening a question thus long closed. The power now contested has been exercised without doubt as to its constitutionality through all the wars in which the republic has been engaged; and involved as we are, in civil commotions, and grappling with a gigantic rebellion, whose emissaries are found everywhere in our midst, and hanging about our military camps, such a power could not be surrendered without culpable disregard of the highest considerations connected with the public safety."

In the same opinion General Holt maintained that authority of Congress to enact the legislation was to be found in its power to declare war, to raise and support armies and to make all laws necessary and proper for carrying this power into execution.

As shown above,[92] he asserted that the power to repress the communication of intelligence to the enemy has found a prominent place in the military codes of all war-like nations. He pointed out that this provision in our law was taken from the articles of Great Britain, which "in their turn were but a translation of the Roman Code, which had inspired a discipline that achieved the conquest of the world." He declared that unless military tribunals could promptly and severely punish such civilian offenders, there could be no successful prosecution of hostilities, and continued:

"The 57th article of war is by its very terms confined to a period of war; in peace it is necessarily inoperative. The military experience of the world shows that its adoption was both a 'proper and necessary' measure for making effective the war-making power which certainly carries with it the right to render by all means customary among civilized nations the prosecution of hostilities successful."[93]

He also insisted that such offenses, even when committed by civilians, constitute cases arising in the land and naval forces. In this connection he said:

"In a period of hostilities relieving the enemy with money, victuals or ammunition, or knowingly harboring and protecting him, or holding a correspondence with or giving intelligence to such enemy is a crime which may be held within the meaning of the constitution to 'arise in the land or naval forces,' since it directly connects itself with the operation and safety of those forces, whose overthrow and destruction it seeks. This is especially true when, as in case of the prisoner, the correspondence is held or intelligence given from the midst of our military camps, whose shelter he was enjoying, and with whose plans and preparations for movements, he had every opportunity of acquainting himself. This view of the constitutionality of these articles of war (56 and 57) has uniformly prevailed. Benet (311) and O'Brien treat as clear the right to try by military courts certain classes of persons not belonging to the army. The latter author at page 147 remarks with much force on the necessity of such a power as resulting from the nature of the offenses and urgency with which the public safety demands their prompt and immediate punishment."

[92] Ex parte Milligan, (1866) 4 Wall. (U.S.) 2, 123, 138, 18 L. Ed. 281.

[93] The reasoning of the minority in Ex parte Milligan, (1866) 4 Wall. (U.S.) 2, 139, would lead to the same result: "Congress has the power not only a raise and support armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of the war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief."

These contentions, so powerfully and persuasively put, are not, however, unanswerable. The historical argument, it is submitted, ignores several controlling considerations. True it is that the legislation in question is older than the constitution. But it is likewise true that most of the acts which it denounces were then regarded both legislatively[94] and judicially[95] as constituting treason. General Holt himself,[96] like other authorities upon military law, so characterizes them.[97] Before the adoption of the constitution, a military tribunal might well be invested with authority to try accusations of treason. But since its adoption, it could not be seriously argued that one accused of treason against the United States may be lawfully tried other than in a court organized under article III thereof,[98] except in cases arising in the land and naval forces. Similarly, constitutional guaranties aside, presentment or indictment and trial by jury might in many cases be properly dispensed with by appropriate legislation. The fact that Congress reenacted the article without substantial change after the adoption of the constitution does not necessarily imply that it intended it to be interpreted exactly as before, without respect to constitutional restrictions. The legislation may still have a wide field of operation within the limits defined by the constitution. Moreover, it was not expressly reenacted until more than fifteen years after the constitution became effective; and it does not appear that the constitutionality of its unrestricted application to civilians was ever discussed or even considered by Congress.

That the war power of Congress furnishes authority for subjecting all persons to trial by military tribunals for all acts which obstruct the successful prosecution of hostilities, regardless of the status of the offender, is based upon the theory that those provisions conferring upon Congress the power to declare and carry on war are in time of war supreme, and that all other provisions in anywise limiting them are pro tanto suspended. This assumes that

[94] See resolutions of October 8, 1777, and February 27, 1778, 2 Journals of Congress 281; ibid 459.

[95] Respublica v. Carlisle, (1778) 1 Dallas (U.S.) 33, 1 L. Ed. 26.

[96] In the Smithson case, he said:

"Proceedings in the ordinary criminal courts, by indictment and jury trial, would have no terror for such traitors."

[97] 1 Winthrop (op. cit.) 898, citing Samuel and O'Brien.

[98] "One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress, and composed of judges appointed during good behavior." Ex parte Milligan, (1866) 4 Wall. (U.S.) 2, 122.

the constitutional guaranties of individual rights contemplate only peace-time conditions. The language in which they are framed, negatives any such assumption. Certainly the constitutional definition of treason presupposes war conditions. And it would be most unnatural to assume that the fifth amendment, with its express exception of cases arising in the land and naval forces, anticipates perpetual peace. This theory that the constitution is in fact a peace-time document, was expressly repudiated by the majority opinion in the Milligan case:[99]

"These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. . . .

" . . . Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the constitution has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its authority."

The assertion that every offense of this character constitutes a case arising in the land or naval forces "since it directly connects itself with the operation and safety of those forces" almost carries its own refutation. Every act of treason would, by this reasoning, be punishable by court-martial, and the third section of article III of the constitution would have no field of operation.

It is, therefore, believed that the operation of the eighty-first article of war cannot be confined to members of the military establishment, on the one hand, and cannot, on the other, be extended so as to cover all civilians under all conditions. In

[99] Id. 119, 121.

what cases, then, may the article be properly applied to civilians? In those cases expressly authorized by the constitution, namely, cases arising in the land or naval forces. An offense may constitute a case arising in the land forces, even though the offender never had a military status. Military status is not the exclusive test. Certainly, civilian retainers to the camp and civilians accompanying or serving with the army in the field or beyond the territorial jurisdiction of the United States would be triable by court-martial for violations of this article. An offense committed in the field of operations or in the theatre of war would seem, by reasonable construction, to constitute a case arising in the land forces.[100] And it is submitted that the same is true whenever the offense is committed in any place subject to the actual control and jurisdiction of the military forces. Properly construed, therefore, the word "whosoever," as used in the eighty-first article of war should be held to include not only members of the military establishment and those civilians properly subject to military law under the second article of war, but also those civilians whose offenses occur in the theatre of war, in the theatre of operations or in any place over which the military forces have actual control and jurisdiction.

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.

It was not until August, 1776, that the Continental Congress enacted any legislation dealing with spies.[101] On June 24, 1776,

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[100] 1 Winthrop (op. cit.) 126; Manual for Courts Martial, paragraph 431. It is believed that in most cases where the military authorities have exercised this jurisdiction over civilians, the offense occurred in a place subject to military control, as in the Smithson case, or in the theatre of operations. Col. Winthrop says the article applies to acts "committed in the theatre of war or within the scope of martial law." As stated before, this paper does not deal with military jurisdiction over civilians by virtue of so-called martial law. For an able discussion of the effect of the constitutional guaranties upon the power of Congress to subject civilians to trial by military courts in time of war in territory not otherwise under military control, in which the view of the majority in the Milligan case is disapproved, see Henry J. Fletcher, The Civilian and the War Power, 2 Minn. L. Rev. 110. Paragraph 431 of the Manual of Courts-Martial seems to restrict the application of the article to offenses committed in the theatre of operations.

[101] Neither the British Articles of War of 1765, nor the Massachusetts Articles of 1775, nor the American Articles of 1775, contained any provision as to spies. The common law of war was doubtless adequate to take care of the usual cases. Even after the passage of legislation expressly

it had, after considering a report of the Committee on Spies, adopted a resolution, recommending that the legislatures of the several colonies pass laws for the punishment of acts denounced as treasonable, committed by persons declared to owe allegiance, as follows:

"*Resolved,* That all persons abiding within any of the United Colonies and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colonies; and that all persons passing through, visiting, or making a temporary stay in any of the said colonies being entitled to the protection of the laws during the time of such passage, visitation or temporary stay, owe, during the same, allegiance thereto;

"That all persons, members of, or owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the said colonies within the same, or be adherent to the King of Great Britain, or other enemies of the said colonies, or any of them, within the same, giving to him or them, aid or comfort, are guilty of treason against such colonies."[102]

On August 21, it passed the following resolution and ordered it printed "at the end of the rules and articles of war":

"RESOLVED, That all persons, not members of, nor owing allegiance to, any of the United States of America, as described in a resolution of Congress of the 24th of June last, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or of any of them, shall suffer death, according to the law and usage of nations, by sentence of a court-martial, or such other punishment as such court-martial shall direct."[103]

This was the only enactment directly touching the subject during the Revolutionary period.[104] It was probably kept alive, by the various acts which continued in force the rules and articles affecting the army,[105] until the passage of the Act of April 10, 1806.[106] Section 1 of that Act contained a code of one hundred and one articles of war; and section 2 replaced the resolution of August 21, 1776, by providing:

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authorizing trial of spies by court-martial, the legislation was in some instances disregarded and the common law of war applied, as, for example, in the case of Major André. General Henry W. Halleck, Military Espionage, 5 Am. Journal of International Law 590, 599. General Davis' statement that a court-martial had no jurisdiction to try André disregards the resolution of August 21, 1776. Id. 597.

[102] 1 Journals of Congress 385.

[103] Id. 450.

[104] The resolution of February 27, 1778, (2 Journals of Congress 459) though condemning the offender as a traitor, assassin and spy, had nothing to do with the military offense of spying.

[105] See notes 83, 84, 85 *supra.*

[106] 2 Stat. 359.

"Section 2. *And be it further enacted,* That in time of war, all persons not citizens of, or owing allegiance to, the United States of America, who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court martial."

And so the law remained until 1862.

Under it, however, the military courts had no jurisdiction over citizens or persons owing allegiance to the United States.[107] This made the provision entirely inadequate to meet the conditions created by the Civil War, wherein practically the entire civilian population of the seceding states and almost all the personnel of their armed forces were citizens. Accordingly, in January, 1862, it was proposed to amend it so as to read:

"That in time of war *or rebellion against the supreme authority of the United States,* all persons who shall be found lurking *or acting* as spies in or about the fortifications, encampments, posts, *quarters, or headquarters* of the armies of the United States, or any of them, shall suffer death by sentence of a general court-martial."

The Chairman of the Senate Committee on Military Affairs explained to the Senate that the change was necessary to make the law applicable to existing conditions:

"We recognize these persons as citizens of the United States, and hence we have no power to punish a South Carolinian for lurking around our camps as a spy, while we have a right to punish an Englishman. This bill applies to all persons hostile to the Government; if we are going to carry on the war, we need the change."

Senator Harris moved an amendment to the amendment to make it clear that "lurking" meant "lurking as a spy." When the bill had been reframed to meet this suggestion, Senator Collamer argued that it violated the constitutional right of trial by jury, but said that it would be unobjectionable if confined in its operation to those parts of the country declared by the president to be in a state of insurrection. Senator Hale answered the constitutional objection by saying that the fifth amendment excepted cases arising in the land and naval forces, and not persons employed therein. An amendment embodying Senator Collamer's sugges-

[107] Elijah Clarke's Case, Maltby on Courts-Martial, 35 (1813); Smith v. Shaw, (1814) 12 Johns (N.Y.) 257. Col. Winthrop seems to imply that even soldiers of the enemy, if citizens, were not punishable under this provision. 1 Winthrop (op. cit.) 1100. If this is true, they were still punishable under the common law of war.

tion was, however, adopted; and the bill as amended passed both Senate and House and became a law on February 13, 1862.[108]

A year later, when the Conscription Bill, which had already passed the Senate, was before the House, Mr. Olin of New York moved to amend it by adding a new section, as follows:

"Section 38. And be it further enacted, That all persons who in time of war or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the Armies of the United States, or elsewhere, shall be triable by a general court-martial or military commission and shall, upon conviction suffer death."

The amendment was adopted without debate, on February 25, 1863, and the bill passed as amended.[109] When the amended bill was before the Senate three days later, Senator Bayard moved to strike from section 38 the words, "or elsewhere," on the grounds that they made the section obscure and unconstitutional. He argued that the whole section was unnecessary because spies of the enemy may be punished with death by military tribunals under the laws of war; and that this section as framed might be used to try citizens by courts-martial for treason "which, by the Constitution of the United States, you are bound to try by jury, and by a jury alone."[110] His motion was rejected. Thereafter, Senator Bayard announced his intention to vote against the amendment. Senator Davis declared that he would vote for it because he thought that the section in question merely stated the existing law of war. He believed the term "elsewhere" to be mischievous, but to be of "no legal effect whatever in the law." The amendment of the House was concurred in by a vote of 35 to 6; and the amended bill became a law on March 3, 1863.[111] This section 38, of course, superseded the corresponding provision in the Act of February 13, 1862. It was incorporated without change in section 1343 of the Revised Statutes, and remained in force until March 1, 1917, when section three of the Act of August 29, 1916, went into effect. This Act, for the first time,

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[108] 12 Stat. 339, 340. The debate in the Senate is found in 57 Congressional Globe part 1, pp. 387-388, 411, 445. There was no debate in the House on this subject, though there was considerable discussion of other features of the bill. 57 Congressional Globe, part 1, pp. 549, 555, 557, 622, 719, 723.

[109] 55 Congressional Globe, pt. 2, pp. 1291-1293.

[110] Senator Bayard's argument was earnest and vigorous, but lacking in clearness upon the constitutional question.

[111] 12 Stat. 731, 737. The debate in the Senate is found in 55 Congressional Globe, part 2, 1560-1561.

makes the provision against spies an article of war. The present eighty-second article of war is substantially the former section 1343, Revised Statutes, except that it seems to make trial of spies by court-martial mandatory instead of permissive, by substituting "shall be tried" for "shall be triable."[112]

From the foregoing it is perfectly obvious that Congress intended from the first to subject civilians as well as soldiers to the jurisdiction of military tribunals for trial of the offense of spying. The distinction taken in the earlier legislation is between those owing allegiance and those not owing allegiance, and not between soldiers and civilians. And the military authorities are clear to the effect that a civilian may be tried for spying by court-martial. The recorded instances of trials of spies by military courts during the Revolution and the War of 1812 are few, but they include cases of civilians as well as of military men.[113] And

[112] It is very doubtful whether this change was advisedly made. In the Comparative Print showing S 3191, Senate Committee Print, 64th Congress, 1st Session, prepared in the office of the Judge Advocate General for the purpose of showing the changes in then existing law which would be effected by the new article, it is said on page 48:

"The proposed article is an almost literal incorporation of this section of the Revised Statutes, the only change being in the substitution of the phrase 'in time of war, or of rebellion against the supreme authority of the United States' by the phrase 'in time of war,' which latter phrase covers every state of hostility to which the article is applicable."

And General Crowder, in testifying before the House Committee on Military Affairs on May 25, 1912, said:

"That Article 82 is section 1343 of the Revised Statutes incorporated without any change whatever." See Senate Report 229—63rd Congress, 2d Session, to accompany S 1032, Appendix pp. 93-94.

In this connection attention should be called to the Espionage Act of June 15, 1917 (40 Stat. 217), which denounces most of the offenses covered by the 81st and 82nd articles of war. Section 7 particularly saves the jurisdiction of general courts-martial and military commissions. The Espionage Act clearly contemplates a jury trial. It seems hardly possible that the jurisdiction of a court-martial would be held exclusive where the acts of accused constitute a violation both of the Espionage Act and of the 82d article of war.

[113] The cases of Major André, Lieutenant Palmer, and Thomas O. Shanks are cited by Col. Winthrop. 1 Winthrop (op. cit.) 1104-1106. The following from Principles and Acts of the Revolution, by Hezekiah Niles, page 140, is an interesting record of the trial of two civilians for spying. Incidentally, it shows General Sullivan's disregard of the principle forbidding double jeopardy.

"COURT MARTIAL

"Held at Providence, Rhode Island,

July 24, 1778.

"*From the Providence (R. I.) Patriot.*—A friend has handed us the following extract from the orderly book of general Sullivan in command here during the revolution, as being connected with a case somewhat analogous to one which occurred in the Seminole war. We have omitted names for obvious reasons.

there can be no doubt that civilians were thus tried during the Civil War.[114]

The really difficult question is, how far may the article be constitutionally applied to civilians. The contention that its unrestricted application is sanctioned under the war-making power of Congress is based upon exactly the same grounds and is to be met in precisely the same way as in the case of the eighty-first article. The appeal to history as compelling an interpretation of the constitution authorizing "military tribunals to exercise such jurisdiction and pursue such procedure as at the framing of the constitution were characteristic of military law"[115] is ineffective to justify the unlimited operation of the provision for two reasons: First, although the common law of war permitted military tribunals to exercise jurisdiction over civilians apprehended as spies, our legislation from June 24, 1776, to February, 1862, regarded spying by persons owing allegiance as triable by the civil courts and not by our military tribunals. Second, during the same period it considered such offense as constituting treason; and when the framers of the constitution provided for the trial of accusations of treason by a court organized under article III thereof, they manifested the intention of restricting the juris-

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'Headquarters, Providence,
July 24, 1778.

'The sentence of the court martial whereof Colonel E—— was president, against M. A. and D. C. the general totally disapproves as illegal and absurd. The clearest evidence having appeared to the court, that the said A. was employed by the enemy, repeatedly, to come on the main as a spy, and that he enticed men to go on to Rhode Island, to enlist in the enemy's service, and his confessions from day to day being so different as to prove him not only a spy, but to be a person in whom the least confidence cannot be placed; the court having found him guilty of all this, nothing could be more absurd than to sentence him to be whipped one-hundred lashes, and afterwards to be taken into a service which he has long been endeavoring in the most malicious and secret manner to injure! The man who is found guilty of acting as a spy, can have but one judgment by all the laws of war, which is to suffer death; and the sentence of a man to be whipped when found guilty of this crime, is as absurd as for the common law courts to order a man to be set in stocks for wilful murder. The same absurdity appearing in the judgment against D. C. for the same reasons, (the general) disapproves them both, dissolves the court, and orders another court to sit for the trial of those persons, to-morrow morning, at 9 o'clock. The adjutant general to lodge a crime against A. for acting as a spy, and for enticing men to enlist into the enemy's service, and against C. for acting as a spy.'

"At the subsequent court, A. was found guilty as before, and sentenced to be hung, which sentence the general approved and executed."

[114] Dig. Ops. J. A. G. 1912 1057 I C 3d; 1 Winthrop (op. cit.) 1100-1101.

[115] See following note.

diction of military courts over this offense when committed by persons owing allegiance.

But, it has been very persuasively urged, the spy is not proceeded against as for a violation of any law, and the constitutional provisions regarding crimes and offenses are not applicable. The spy is destroyed simply as a menace to the army. This argument has been most effectively put by Colonel Eugene Wambaugh, thus:[116]

"The principles underlying the doctrine regarding spies are, so far as important for the present purpose, only two. One is that spying is not illegal (Heffter, par. 250: Bonfils, par. 1102), and the other is that spying is dangerous to military operations. (Bonfils, par. 1102). Spying certainly is not illegal from the point of view of either civilian law or military law, unless, indeed, there be a statute forbidding it. At common law spying cannot be punished in either a state or a federal court. Even in a court-martial, spying is not, in the strict sense, punishable. This is proven by the fact that if the spy escapes from within the military lines and is later captured, he cannot be punished for his past spying (Hague Regulations, Art. 31). The truth, then, is that spying, unless made a statutory crime, is not a crime at all, and that though through a military tribunal a spy can be sentenced to death, the sentence is really not punitive but is simply part of a system meant to protect the troops against danger. (Bonfils, par. 1102). Just as a sharpshooter outside the lines is to be shot, though certainly he is no criminal, so the spy within the lines is to be shot as merely a matter of protection; and the intervention of the court-martial in the latter case is requisite merely because there must be some artistic method of determining that the person in question really comes within the dangerous class. Neither the sharpshooter nor the spy is a criminal. Each of them is killed. The spy is treated in a leisurely way because there is no great necessity for haste and because there is great necessity to ascertain the facts (Bonfils, par. 1104; Hague Regulations Art. 30). The key to the whole matter of spies, let it be repeated, is that the spy is a danger—a danger to the forces.

"As it has been necessary to say that, independently of statute, spying is not a crime, it seems worth while to guard against possible misunderstanding. If a spy is a citizen, he probably is both

[116] In a memorandum opinion re the Waberski-Witcke case. Colonel Wambaugh, who in civil life is Langdell Professor of Law at Harvard, was the chief of the Division of Constitutional and International Law in the office of the Judge Advocate General from October, 1917, to July, 1919. The quotation indicated by note 115 is from the same opinion. The opinion referred to in note 118 was drafted by Colonel Wambaugh. As he is a recognized authority on questions of constitutional and international law, these opinions are entitled to great weight; and it is with great deference that the remarks in the text with reference to them are submitted.

a spy and a traitor (Heffter, par. 250); and treason is a crime. Also, spying, whether treasonable or not, is at the present time a federal crime under the Espionage Act of June 15, 1917. Thus it happens that a spy may actually be a criminal; but, whether the spy be a criminal or not, his spying is from the military point of view an act which, though brave, and possibly in a sense deserving high honor, is so dangerous to the forces as to carry with it the penalty of death. This is not the only place in the law where a lawful act carries with it a risk which one is tempted to miscall a punishment. The carrying of contraband of war is not a crime, and the attempt to break a blockade is not a crime, but in each of these instances a risk is run; and the case of a spy belongs to the same class of acts which though lawful carry with them a danger to a belligerent country and conversely a danger to the person performing the acts. It will be found valuable from time to time to recall that the jurisdiction of the court-martial over the spy does not depend at all upon the fact—if in the particular instance it be a fact—that the spy is a criminal."

This was written and must be construed, with reference to the facts in the Waberski case—wherein it was admitted that the accused owed no allegiance to the United States, even if he were not an alien enemy. So construed, and buttressed, as it was, by the historical argument, it is almost, if not quite, unanswerable. If attempted to be applied, however, to a case where the accused owes allegiance, its reasoning is not convincing, nor can it be fortified by the argument from history. The position of the spy of the enemy, so far as wrongdoing is concerned, is analagous to that of the sharpshooter. The latter is shot down without the lines; the former by the common law of war, may be summarily put to death if captured within the lines. Neither one is a criminal. But a person owing allegiance, who is guilty of spying, is not like the sharpshooter. He commits the crime of treason. To say that this may be overlooked and his act considered merely as a menace to military success, is to disregard distinctions established in the legislative history of the subject and to confer jurisdiction upon military tribunals by the subterfuge of changed phraseology.

If the civilian owing allegiance is to be subjected to trial by court-martial for spying, it must be because his case arises in the land or naval forces. Here, as under the eighty-first article, the test as to whether the case so arises is not exclusively the status of the offender. The place of the offense is equally important. And whenever that place is in the theatre of operations or any other area subject to the actual control and dominion of the military

forces, the case should be regarded as arising in the land forces. And to such a case the eighty-second article of war may constitutionally be applied even as against an accused owing allegiance to the United States. Since, then, the article makes no distinction as to persons and since it cannot be constitutionally applied without limitations to persons owing allegiance to this country, it is submitted that the word "elsewhere," as used therein, must be interpreted as meaning "in the zone of operations or any other place under the actual control or dominion of the military forces."

Two theories have been advanced, by the application of either or both of which all cases of spying would, under this construction of the article, be triable by court-martial. The first narrows the definition of spying so as to make it cover only the case of a person who, "acting clandestinely or on false pretenses," "obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party." Whatever offense occurs outside the zone of operations is, by this definition, not spying, and therefore is without the scope of the eighty-second article. The other expands the signification of the term, zone of operations, so as to make it include the entire area of a belligerent country. It is impossible to confine the zone of operations to the battle front or the area of combat, for certainly the service of supply is quite as necessary and important a part of military operations as is the actual fighting force. And under modern conditions when a nation is at war, the service of supply includes all the sources of production not only of strictly war-like materials, such as arms and ammunition, but also of food, clothing and other necessaries for waging modern warfare. It, therefore, covers most of the belligerent country. Furthermore, with modern means of transportation by water, land, and air and modern means of communication with and without wires, where the whole nation, except the members of its armies, are thus engaged in supplying and maintaining those armies, information with reference to these activities is of almost, if not quite, as much military value to the enemy as is intelligence concerning the actual disposition of troops. Under such circumstances, the zone of operations in truth and in fact comprehends the entire country. The former theory is expressed in article 29 of the Hague Convention of 1907, No. IV; but, assuming the formerly accepted definition of zone of operations,

it has not been approved by our military authorities.[117] The second theory has been adopted and announced in an opinion of the judge advocate general.[118] It has not received the sanction of the attorney general, nor has it ever been tested in the courts. It is doubtless contrary to the dicta of the majority justices in the Milligan case, for certainly the state of Indiana, under the conditions disclosed by the record in that case, was quite as much within the zone of operations at the time of Milligan's nefarious acts, as was, for example, the state of Minnesota or the state of Montana, during the recently ended war. The time may come, and may not be far distant, when this theory and none other will fit the facts, and necessity will compel its adoption. But it is believed that the term, reasonably construed in the light of present day conditions, should be confined to that area which comprehends the theatre of actual hostilities, the lines of communication, and the reserves and service of supply under actual military control, and that it cannot properly be enlarged to cover the farms, factories and workshops under exclusively civilian control, even though engaged in the production of supplies to be used ultimately by the army. With the term, zone of operations, thus understood, the eighty-second article of war may properly and constitutionally be applied not only to those civilians who are properly subject to military law under the second article, but also to those whose offenses are committed in the zone of operations, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States or in or about any other place which is under the actual control or dominion of the military forces.

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[117] Opinion of J. A. G. May 31, 1918, to the Chief of Military Intelligence Branch, Executive Division, General Staff. See also 1 Winthrop (op. cit.) 1100.

[118] Dig. Ops. J. A. G. April 1918, 14.

*[During the war, Professor Morgan held the rank of Lieutenant-Colonel, Judge Advocate; he was Chairman of the General Board of Review and Acting Chairman of the Special Clemency Board, having been Chief of General Administration Division, of the War Risk Insurance Division and of the War Laws Division respectively.—Ed.]

REPRESENTATION ON THE COUNCIL OF THE LEAGUE OF NATIONS.

WITH the cessation of fighting in Europe came a renewal of the political struggle at home. The war had appealed to the conscience of the people and awakened a deeper national consciousness.[1] The novelty of an international issue lent zest to the fray. The traditional policy of the United States was challenged; its isolation was at stake.[2] For better or for worse the United States has become a world power and she is now called upon to take her part in the establishment of a new world order.[3] The project for a league of nations is in truth the great fruition of the war. The public generally realize the need for such an organization,[4] yet such is the strength of tradition that they cannot fail to look upon it with certain misgivings.

The course of the negotiations at Paris has accentuated the suspicion of the public. Rumors came floating over the water of political intrigues and imperialistic designs of some of the allied powers. A portion of the nation has become alarmed; the honor and independence of the United States are apparently in danger. Criticism of the League has sprung up from every conceivable quarter. The opposition is made up of the most heterogeneous elements, constituting a veritable cave of the Adullamites.[5] Radicals and reactionaries, socialists and imperialists, nationalists and internationalists, have all joined in the general hue and cry. To the socialist the League is a capitalistic plot; to the nationalist a surrender of American sovereignty; to the imperialist, an improper interference in Pan-American affairs; to the internationalist, a violation of the fourteen articles of faith.

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[1] McLaughlin, America and Britain, p. 53.

[2] Latané, From Isolation to Leadership.

[3] Beer, The English-speaking Peoples, Ch. VIII.

[4] The overwhelming majority in the Senate in favor of some form of a league of nations is the best evidence on this point.

[5] It is interesting to see Senators Penrose, Sherman and Reed in the same political camp with La Follette, Berger and Debs. It is equally interesting to find the New York Sun, the Hearst papers and the Nation supporting the same cause. It is doubtful if these irreconcilable elements could agree on any other issue.

The much abused pro-Germans have been suddenly transformed into the most vigorous exponents of pure Americanism. The staunchest "Little Americans" have come forward as the ardent champions of Chinese rights.[6] To cap the climax, the friends of Irish freedom, by a splendid tour de force, have succeeded in combining an imperious demand for American intervention in Ireland with an equally emphatic protest against European interference in American affairs.

The covenant, it must be admitted, is peculiarly open to criticism as well as praise. It is a very human document. It is neither entirely bad nor good; and in that very fact lies both its weakness and its strength. It reflects alike the pettiness and the nobility, the selfishness and the aspirations of the society of nations. In short, it represents a compromise between the nations' fear and jealousy of one another and their faith in humanity.

In the Senate, the critics of the League are split into three factions. The "mild reservationists" support the general principles of the League most heartily, but desire to place a few saving or qualifying reservations upon certain obscure or objectionable clauses. The so-called revisionists or "strong reservationists" likewise accept the League in theory but they demand material modifications of its terms in fact. If these reservations or amendments are not made, they are seemingly prepared to defeat the whole plan of a concert of nations.[7] And, lastly, there are "the bitter enders," a small group of ultra-nationalists who cling to the old Washingtonian principles of non-intervention in European affairs[8] and denounce the whole conception of an international organization as inimical to American interests and independence. The opposition, it will be observed, has little in common. Upon one matter only are they agreed, namely, that the rights and privileges of the United States must be adequately protected. In the popular catch-word of the day, the covenant must be Americanized.

The covenant has been subjected to a whole series of attacks on the ground of its un-American character, but probably none of these attacks has stirred up the same intensity of feeling as

[6] Senators Johnson and Poindexter, for example, have been most conspicuous in their advocacy of China's case.

[7] Senate Report, No. 176, 66th Congress, First Session. Congressional Record, 66th Congress, First Session, Vol. 58, p. 5426.

[8] Washington's Farewell Address. Messages and Papers of the Presidents, vol. I, p. 222.

the question of the basis of representation. The British colonies have been granted separate representation in the League. The principle of voting equality has apparently been violated in the interests of one nation. The majority of the opposition are firmly resolved that the British Empire shall not possess a greater voting power in the League than the United States; and this sentiment is strongly reflected out of doors. The privileged position of the British Empire rankles in the minds of the general public. It violates alike the sense of national pride and of international justice. The United States has not been accustomed to taking a secondary place to any other nation, and least of all to Great Britain. Here, then, is a splendid fighting issue, and the opposition has not failed to take full advantage of it.

The supporters of the League have been greatly embarrassed by this issue. It has taken them at a serious disadvantage. They had hoped to debate the general principles of the League, but instead of that the discussion has gone off almost entirely upon a few doubtful clauses. It is always exceedingly difficult to appeal to idealism in the face of national prejudice and in this case the appeal was made all the more difficult by reason of the apparent attempt on the part of the president to belittle his opponents and dodge the specific issues by glowing generalities. It was only natural that he should seek to divert the attack to more favorable fighting ground, but the attempt at diversion turned out to be a poor piece of political tactics. It served only to arouse the suspicion of the public. The president seemingly had something to conceal. Had he been outplayed by Lloyd George at the Peace Conference? Had he sacrificed, as was charged, the interests of the United States in order to secure English support for his own pet project? When the president awoke at last to the seriousness of these questions, he again made the mistake of failing to take the public fully into his confidence by meeting the objections of the opposition fairly and squarely. The public demanded a complete statement of the facts, but they succeeded only in obtaining an ex parte interpretation of the treaty. The United States, according to the Democratic spokesmen, had nothing to fear.[9] The opposition had stirred up a mare's nest. The one vote of the United States was equal to the six votes of the British Empire. The real power of the League was lodged in the

[9] See speeches of the President on his western tour. Congressional Record, 66th Congress, First Session, Volume 58, page 6320.

Council, of which the United States was a permanent member. In this body the votes of all the states were equal. The assembly, on the other hand, was a mere debating society, a plenary conference of the nations with no substantial functions. The British Empire was welcome to its six votes in the assembly inasmuch as no decisive action could be taken in any case without the consent of the United States. In other words, the United States always had an effective veto in reserve.

The public has been much perplexed by this confusion of tongues. The views of the various factions are apparently irreconcilable. The nation has sought for an authoritative interpretation of the treaty, yet none was to be found. The secrets of the inner council at Paris have been well kept. The constitution of the League was manifestly a compromise, yet the occasion for many of these concessions was known only to a small circle of men, and the latter for good diplomatic reasons, sometimes refused to furnish the necessary information upon which alone an intelligent public opinion could be formed. Among these compromises was the question of British representation in the League. The British colonies, it was known, had claimed separate representation and the British government had strongly supported their contention. The American delegates had demurred at first, but at last gave way.[10] The public at home now demanded some explanation of this change of front.

To quiet these demands, the president held an open conference with the Foreign Relations Committee of the Senate in which he freely discussed some of the more controversial sections of the treaty.[11] But the president's explanations, as might have been expected, were not entirely satisfactory to the opposition. They did not and could not meet all the actual and problematical objections to the League. Some of these explanations, moreover, were obviously faulty, if not strained. He was a special pleader and as such his views were open to suspicion. Some of his opponents did not hesitate to challenge the correctness of his interpretations and to compare them with the corresponding declarations of foreign statesmen, ofttimes to the disadvantage of the president's frankness and diplomatic skill.[12] Notwithstanding these criti-

[10] Speech of Sir Robert Borden quoted in Congressional Record, p. 7793.

[11] Ibid, 4271.

[12] Senators Lodge, Borah, Johnson and Reed have been especially unsparing in their criticisms.

cisms, the net results of the conference were favorable to the treaty. The president did not succeed in winning his opponents over to his views, but he did manage to remove some of their objections. The political situation, moreover, was clarified and what was more important, the public were afforded a more comprehensive survey of the working operations and achievements of the peace conference. A final and complete interpretation of the League of Nations was still lacking. But time alone could furnish an authoritative interpretation. The true meaning of the covenant could not be derived solely and exclusively from a minute discussion of its terms. It is safe to predict that its true construction will be found only in the future working operations of the League.

The constitution of the League[18] provides for the creation of a council and a general assembly. Unfortunately the draftsmanship of the covenant upon this matter is far from satisfactory. The method of organizing these two bodies is fairly distinct, but strange to say no clear cut distinction is drawn between the powers of the council and of the assembly. The express powers of the council are more specifically enumerated than those of the assembly, but both organs of the League are given a general roving authorization to deal "with any matter within the sphere of action of the League or affecting the peace of the world. By article 4,

"The Council shall consist of Representatives of the Principal Allied and Associated Powers, together with Representatives of four other Members of the League. These four Members of the League shall be selected by the Assembly from time to time in its discretion. Until the appointment of the Representatives of the four Members of the League first selected by the Assembly, Representatives of Belgium, Brazil, Spain and Greece shall be members of the Council.

"With the approval of the majority of the Assembly, the Council may name additional Members of the League whose Representatives shall always be members of the Council; the Council with like approval may increase the number of Members of the League to be selected by the Assembly for representation on the Council.

"The Council shall meet from time to time as occasion may require, and at least once a year, at the Seat of the League, or at such other place as may be decided upon.

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[18] Copies of the covenant of the League of Nations may be found in convenient form in International Conciliation, September, 1919, No. 142; Duggan, The League of Nations, p. 328; Morrow, The Society of Free States, p. 198; Congressional Record, Ibid. pp. 3359-3562.

"The Council may deal at its meetings with any matter within the sphere of action of the League or affecting the peace of the world.

"Any Member of the League not represented in the Council shall be invited to send a Representative to sit as a member at any meeting of the Council during the consideration of matters specially affecting the interests of that Member of the League.

"At meetings of the Council, each Member of the League represented on the Council shall have one vote, and may have not more than one Representative."

This organization was doubtless based upon the experience of the Peace Conference. There is every reason to believe that the five greater powers expected that the Council would play the same part in the League that it did in the Peace Conference. The general open sessions of the conference at Paris proved a sorry failure from the very outset. The conference threatened to develop into a discordant debating society. It was only when the greater powers formed themselves into a small select council that the peace negotiations made satisfactory progress. And even this greater council of ten proved too unwieldy in operation and it was soon found necessary to hand over its more difficult tasks to a small inner council of five consisting of the chief representatives of the five great powers. In short, the legal theory of the natural equality of states had to give way to the actual political hegemony of the more powerful nations. From time to time the general body of delegates were called together but the conference had ceased to be an independent deliberative assembly. It had lost all power of initiative and had become a mere ratifying body. The delegates of the smaller states realized their weakness and were fain to kick against the pricks, but their protests were useless. The conference was as helpless as the former German Reichstag in the presence of the Bundesrath. It could criticize but could not control the policy of the small group of "elder statesmen."

The constitution of the League is well calculated to maintain this ascendency. The five greater powers have generously reserved for themselves five of the nine places on the council and the permanent seats at that. The remaining states must needs rest content with the position of representatives of the minority shareholders on the international board of directors. They have not even been allowed a free hand in the selection of their own representatives but have been obliged to share that right with the greater states. In other words, "the big five" not only choose

their own delegates, but participate in the selection of their colleagues on the council. By this device they hoped to exercise a powerful if not determinant influence over the policy of that body, since there was little doubt but that they could control the votes of some of the weaker or dependent states in the assembly. The United States and Great Britain are in a particularly favorable position in this respect by reason of their intimate economic and political relations with the sister states of Latin America and of the self-governing dominions respectively.

The original selection of the minority members of the council furnishes an excellent illustration of the influence of the greater powers. The latter have had more than a sentimental interest in the provisional appointments of Belgium and Greece. They knew that they could count with reasonable certainty upon the general support of these two states. The war had brought about a close identification of the interests of the two smaller nations with the policy of their political allies and more particularly of France and Great Britain. Belgium and Greece had indeed deserved well of the Allies by reason of their splendid sacrifices during the war. But if military service or sacrifice was to be the main reason for selection, then Serbia rather than Greece should have been rewarded with a seat in the council. Unfortunately for Serbia, however, her policy and geographical situation brought her into conflict with her more powerful neighbor across the Adriatic. She was naturally a high-spirited state and she had independent aims of her own. The greater powers feared that she might turn out to be an obstreperous youngster at the council table and they accordingly preferred the claims of a rival Balkan state. The same political influences may also be seen in the choice of Brazil to represent the Latin American states. At a critical moment in the battle between German and American diplomacy in South America, she threw the whole of her influence on the side of the United States and the Allies. It was only natural in the circumstances that her claims to representation should have been favored over those of her neutral neighbors, Argentine and Chili. In short, it must be admitted that the choice of the minor representatives was governed by the political interests of the larger states rather than by a desire to reflect the diversified views of the smaller nations themselves.

A lively controversy has arisen over the eligibility of the British colonies to membership in the council. The names of

five of these colonies are to be found among the list of the original members of the League. Their independent status in the assembly is unquestioned. In the conference with the Foreign Relations Committee of the Senate, President Wilson declared,[14] however, that the colonies were not entitled to separate and distinct representation on the council. The unity of the British Empire was alone recognized in the organization of that body.

"In making up the constitution of the council, it was provided to speak with technical accuracy, that the five principal allied or associated governments should each have one representative in the League; and in the opening paragraph of the treaty itself, those powers are enumerated, and among others is the British empire. The empire of Great Britain I think is the technical term. Therefore their unity is established by their representation in the council."

But this interpretation of the covenant has been sharply challenged not only by the American opponents of the League but likewise by the British colonies and with good reason. The question had already been raised at the Paris conference. To avoid any possible misconception upon this point, Sir Robert Borden, the Canadian premier, had taken the precaution to secure from the three leading powers a formal written recognition of Canada's claim to equal rights of representation.

"The question having been raised as to the meaning of article 4 of the League of Nations covenant, we have been requested by Sir Robert Borden to state whether we concur in his view that upon the true construction of the first and second paragraphs of that article, representatives of the self-governing dominions of the British Empire may be selected or named as members of the council. We have no hesitancy in expressing our entire concurrence in this view. If there were any doubt, it would be entirely removed by the fact that the articles are not subject to a narrow or technical construction."

This document was signed by Clemenceau, Lloyd George and President Wilson.[15] With this assurance in his pocket, Sir Robert was able to return home in triumph. His mission was accomplished. He had merited well of his country, for he had captured the golden fleece. The independent status of the self-governing colonies was apparently assured. They had been admitted as full-fledged members into the League of Nations.

Not long after the whole question came under review in the

[14] Congressional Record, Ibid, p. 4285.
[15] Quoted from the Congressional Record, Ibid. p. 7793.

Canadian parliament. In laying the treaty of peace before the House of Commons for ratification, the Premier declared:[16]

"I hope the House will realize that the recognition and status accorded to the British dominions at the Peace conference were not won without constant effort and firm insistence. In all these efforts the dominions had the strong and unwavering support of the British prime minister and his colleagues. The constitutional structure of the British Empire is imperfectly understood by other nations, even by a nation so closely allied to us in kinship, in language and in the character of its institutions as the United States of America. Such lack of comprehension need excite no surprise, because the association between the mother country and the great self-governing dominions has been for years in a condition of development and that development is not yet complete.

"The future relationship of the nations of the empire must be determined in accordance with the will of the mother country and of each dominion at a constitutional conference to be summoned in the not distant future. Undoubtedly it will be based upon equality of nationhood. Each nation must preserve unimpaired its absolute autonomy but it must likewise have its voice as to those external relations which involve the issue of peace or of war. So that the Britannic commonwealth is in itself a community or league of nations which was founded in Paris on the 28th of last June.

"On behalf of my country, I stood firmly on this solid ground, that in this the greatest of all wars, in which the world's liberty, the world's justice, in short the world's future destiny was at stake, Canada had lead the democracies of both the American continents; her resolve had given inspiration, her sacrifices had been conspicuous; her effort was unabated to the end. The same indomitable spirit which made her capable of that effort and sacrifice made her equally incapable of accepting at the Peace conference, in the League of Nations or elsewhere, a status inferior to that accorded to nations less advanced in their development, less amply endowed in wealth, resources and population, no more complete in their sovereignty and far less conspicuous in their sacrifice."

The Republicans in the Senate were quick to seize upon the conflicting views of the president and the Canadian premier. They rolled the Borden letter as a sweet morsel under the tongue. Needless to say, they became the vigorous protagonists of the Borden interpretation. It afforded an excellent ground of attack upon the ineptitude of the president's diplomacy. The covenant, they pointed out,[17] made no distinction between the status of the British Empire in the assembly and in the council. The British

[16] Ibid p. 7943.
[17] See speech of Senator Lodge, Ibid, p. 7944.

colonies were not admitted into the League as dependent territories, but on the basis of equality as high contracting parties and as such were entitled to claim all the rights and privileges of membership, including representation on the council. There was a manifest inconsistency in attempting to treat the British Empire as a unit in relation to the council but as a group of associated states in the assembly. If the independent status of the colonies was recognized as members of the assembly, it must needs be conceded in principle in the case of the council. The empire could not be unified and divided according to the pleasure of the president. The covenant did not provide for any system of contracting in and out for the British colonies. The Borden letter was conclusive upon that point. The president could not now withhold the right which he had so thoughtlessly conceded to the British delegation. The president's interpretation was in the nature of an afterthought but unfortunately it had come too late. He had sacrificed the prestige and interests of the United States by the liberality of his concessions. He must now pay the penalty for his own shortsightedness.

Senator Williams, one of the ablest champions of the League, took up the cudgels on behalf of the administration.[18] The only effect of the Borden letter, according to the Senator, was to authorize the appointment of a colonial delegate as the sole representative of the British empire on the council. In other words an implied right was converted into express authorization. It gratified the amour propre of the colonies without in any way enlarging their political rights. The British Empire still remained a unit.

"A South African would be eligible for a place upon the council, a Canadian would be eligible, but the agreement in the treaty says in so many words that the so-called empire of Great Britain should have one representative on the council and it says only one, and the naming of the whole includes its parts and therefore the parts of Great Britain all taken together can have but one vote on the council, but that one may come from any part of the British Empire."

But this construction is manifestly strained. It makes the "triple guaranty" absolutely meaningless. The colonial delegates were not raising a constitutional but an international issue. As British subjects they were legally qualified to act as imperial representatives and several of them had already served in that

[18] Ibid p. 6355.

capacity at the peace conference. The fifth member of the British delegation was usually selected from the various colonial representatives by a system of rotation. No international sanction was required to authorize the appointment of one or even of a solid delegation of colonials to represent the empire at large. The mode of choosing the imperial delegates did not concern any outside nation. It was a purely domestic matter to be determined by the mother country and the colonies themselves. The colonies had already secured an independent constitutional status. What they were now seeking, however, was an international recognition of that constitutional fact. The covenant, they believed, conceded their claim to a separate national status. The declarations of the three chief executives merely confirmed that right.

But there are still further difficulties with the Williams interpretation. The covenant recognizes a clear distinction between the British Empire and the self-governing colonies in the case of the assembly. The matter is not so clear in the case of the council. The British Empire is expressly named as one of the permanent members of that body, but nothing is said in respect to the status of the dominions. From the fact that the self-governing colonies have their own representatives in the assembly and participate in the selection of additional members of the council, one might naturally infer that they in turn would be entitled to seek the suffrage of their fellow members for a seat or seats in the council. In modern democracies the usual presumption is that the right of suffrage carries with it the right of election to public office save in the case of special age or residence qualifications for office holding. The presumption in this case is strengthened by the president's admission that "upon a true construction of paragraphs 1 and 2 of article 4 of the covenant the self-governing colonies may be selected or named as members of the council." By the second paragraph of the above article provision is made for the enlargement of the council, both by the naming of additional permanent members of the League and by an increase in the number of selected members. The word "additional" is especially significant in this connection. Additional to what? Why, additional to those states which are already expressly represented in the council, including of course the British Empire. The self-governing dominions were not advancing a claim to an alternate or substitute membership on the council as Senator Williams infers, but were demanding the right to

separate additional representation in their own names and on their own account. In other words according to the Borden letter the dominions are eligible to representation on the council, irrespective of the question as to whether they are or are not already represented in that body as parts of the British Empire. From this standpoint the discussion of their relation to the British Empire is entirely beside the question. The mere fact, for example, that a Canadian rather than an Englishman is chosen as the British or imperial representative on the council will not preclude the Canadian government from seeking an independent seat on the council in its own right.

It will be observed, moreover, that the colonial right to representation is stated in the alternative, viz. "to be selected or named." The covenant makes a distinction between choosing the permanent and the elected or rotatory members of the council. The former are named, the latter are selected. The Borden letter recognizes the right of the colonies to gain admission to the council by either of these methods. According to this interpretation, therefore, Canada and the other self-governing colonies may become entitled to permanent representation in the council alongside of the five greater powers, though this eventuality seems most unlikely. And even though for the sake of argument it be admitted that the dominions are included in the British empire for purposes of representation as permanent members of the council, that would not debar them from seeking admittance into the council as selected members. It is very evident from the Borden letter that they were not considered part of the British Empire in respect to the selection of the representative members of the council. The empire in the all-inclusive sense of Senator Williams, certainly has no claim to independent representation as a selected or rotatory member. It could not be a permanent and selected member of the council at one and the same time without violating the provision of the covenant against plural representation. But this inhibition could not be applied to the British dominions without violating the express right of the colonies under the Borden letter "to be selected." As the dominions are granted the right to be selected, it must be a right in their own names, since the British Empire is already represented as a permanent member. It stands to reason, therefore, that the self-governing colonies are intended to possess an independent status in respect to the council as to the assembly. In a word, they are in the

empire but not of the empire as members of the league. There is, moreover, no essential incompatibility in principle, however much there may be in effect, in the naming of the British Empire as an original member of the league on permanent appointment and the subsequent selection by the assembly of one of the self-governing dominions as a representative of the general body of states. To deny to the British colonies the right of representation on the council would not only reduce them to a position of legal inferiority in the league but would also correspondingly restrict the freedom of the states in choosing their representatives for the council. There is no evidence whatever in the covenant that the members of the League, whether states or self-governing dominions, intended to adopt any such discriminatory or self-denying ordinance.

Senator McCumber of North Dakota has worked out a different interpretation of this provision.[19] He would exclude the original members of the League from the right of nomination or election to the council, and would reserve that privilege exclusively for the states which are subsequently admitted into the League. "Additional" means, according to the honorable senator, in addition to the present members of the League. The following clause in respect to the increase in the number of members embodies the same idea:

"The purpose of providing that only additional members of the League could have a right to representation in the council, as is well known, was that Germany and Russia might in time become members of the League and be given a permanent representation upon the council. That was its purpose and by the very terms of the provision it excludes the present members of the League from selecting representatives to become either permanent or temporary members of the council; and that, therefore, excludes all these British dominions which are at present members of the League of Nations, from ever becoming members of the council, unless there is an amendment made to the very constitution of the League itself."

This interpretation, it is submitted, is open to many objections; it violates both the letter and spirit of the covenant. The initial difficulty with the senator's interpretation is that he attempts to draw a hard and fast line between members of the League and members of the council. "The League members," he declares, "are not members of the council." This is undoubtedly true of the majority of the League members, but not of all.

[19] Ibid p. 7948.

All the states represented in the council, it should be remembered, are also original members of the League. There is no gulf fixed between these two bodies. A more serious objection arises from the fact that the honorable senator wrests the second paragraph entirely out of its context. Article 4 must be construed as a whole; it cannot be dissected clause by clause irrespective of the context or the subject matter. This article deals with the organization of the League; it is not concerned with the question of admitting new members into the League. The word "additional" must be construed in the light of the purpose of the whole paragraph and not as a separate proposition. The senator has likewise disregarded the qualifying clauses which refer directly back to the organization of the council. In the second clause, for example, the council is not authorized simply to increase the membership of the League but rather "to increase the number of members of the League to be selected by the assembly for representation on the council." In other words, the clause relates to the membership of the council and not to the membership in the League in general. But a more fundamental difficulty with this interpretation is that it defeats the very purpose of the League. The original members of the League are directly concerned in the organization of the council and the selection of representatives for that body. It is unreasonable to suppose that they deliberately intended to discriminate against themselves in favor of subsequent members of the League. The Paris conference can scarcely be accused of attempting to place Germany and her associates in a more favored position than the allied and neutral states; yet that is the inevitable result of the McCumber interpretation. Few of the so-called original states would consent to join the League in such circumstances. It would pay the neutral nations to hold off until a later time and then seek admission upon more favorable terms as states duly qualified for membership in the council. And lastly, it may be pointed out, the McCumber explanation fails to meet the colonial contention in respect to separate representation.

The British dominions have been keenly interested in the course of the controversy in the United States. The attitude of the president and of the Senate on the question of colonial representation has been a sorry disappointment to them. They had looked to the president for sympathy and support. He was the foremost champion of the rights of small nations. Were they

not also struggling for the right of self-determination? Was this principle to be applied only to the continent of Europe? The Canadians have been particularly sensitive about their newly acquired status. They were much perturbed over Mr. Taft's proposed revision of the covenant to exclude the colonials from representation on the council.[20] The Minister of Justice, Hon. C. J. Doherty, was most outspoken in his vindication of the rights of the dominions against American attacks.[21]

"If what Mr. Taft is said to suggest were adopted," he said, it would absolutely exclude Canada from distinct representation on the council for all time, since the British Empire as a whole, as one of the principal allied and associated powers, is at all times represented.

"The right of Canada as a member of the League to be eligible for representation on the council under the provisions of the covenant was insisted upon by her representatives and that those provisions conferred upon her that right was clearly understood and unequivocally recognized by all concerned.

"A reservation in effect negativing that right would involve further change in the contract—after acceptance and signature by all parties,—in regard to a matter which from the Dominion's point of view is of its essence. As such it is clearly inadmissable and not distinguishable from a refusal to ratify."

The president's apparent change of front aroused even more resentment in certain quarters. He was accused of truckling to anti-British sentiment and was charged with a flagrant breach of faith. In Parliament the opposition attempted to turn the situation to their own political advantage. Some of the Liberal leaders did not hesitate to assert that the government had been buncoed and was trying to palm off on the House a spurious nationalism. The government was manifestly chagrined at the turn of affairs. Its fight for national recognition at Paris was ridiculed and what was even more humiliating, the evidence of its victory was called in question. The production of the Clémenceau, etc., letter failed to silence the opposition. The latter refused to accept that document at its full face value and appealed to American criticism in support of their contention. The government, however, stood fast upon its own interpretation of the covenant and refused to yield one iota of its nationalistic contentions. The self-governing colonies, Sir Robert Borden maintained, had become parties to the treaty and the terms of the

[20] Post p. 143.

[21] The Toronto Globe, September 9, 1919.

document made no distinction between them and the other signatory members. They were recognized at Paris as separate and distinct political entities, and as such were entitled to have their own representatives on the council. If this right were denied, he sadly admitted, Canada would have but a slight interest in the League of Nations. He felt certain, however, that the sacrifices of the self-governing dominions would not pass unrequited.

The Honorable A. L. Sifton, Minister of Customs and one of the Canadian delegates at Paris, expressed similar sentiments in respect to Canadian representation on the international labor conference.[22]

The Canadian delegates have felt the more confident of their position since they could count upon the support of Lloyd George and the other colonial representatives. Canada was not alone in her contention, as the other dominions were prepared to back her up. The evidence of this soon came to hand. The question of the status of the Dominions was also raised in the South African parliament, and met with a similar response.

"It was incorrect," General Smuts declared,[23] "to say that in the League the British Empire was a unit. The empire was a group but South Africa had exactly the same rights and voice as the United Kingdom. Though the United Kingdom was a permanent member of the central council, South Africa could be elected to that council."

It is clear, therefore, that in the minds of the colonial delegates the status of the Dominions was fixed at Paris for the purpose of the covenant, as that of sovereign and independent states

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[22] "I found that so far as that convention was concerned the gentleman who drafted it thoroughly agreed with the leader of the opposition—they thought that the delegates of the British Government could better look after the labor interests of the Dominion of Canada than we could; and it contained a special clause to the effect that the self-governing dominions should only have certain representation upon that governing body, and under no circumstances could there be any other. So far as I was concerned, Mr. Speaker, although I would have been willing to sacrifice many things in connection with the matter, I said that that was not in the interests of the Dominion of Canada, and that the fight would be kept up until the last minute before I would ever consent to a document of that kind under which the labor men of Canada, who were so proud of their international union, would have to go to the city of Washington on a footing inferior to that of the negroes of Liberia. I kept up the fight, and Sir Robert Borden kept up the fight and made it stronger, perhaps, and finally, only the day before the peace treaty was signed, those clauses were struck out and the Dominion received exactly the same recognition in regard to that International Labor Convention that was accorded to any of the thirty-two allied and associated powers."

[23] Quoted from Congressional Record, p. 7794.

with all the rights and duties, the powers and obligations that appertain to full membership in the League.

But while the colonial contention upon this question is probably correct, it is safe to predict that the self-governing colonies will have little opportunity to assert their rights. There is a material difference in fact between the possession of a legal right and the actual exercise of the same. In this case the political factors of the problem cannot be left out of consideration. The self-governing dominions are in much the same position as the Latin American states in the matter of political recognition. They are all alike eligible to membership in the council, but their chances of being named or selected in the near future are extremely remote. The membership of the council, as we have seen, may be increased in two ways. First, the council with the approval of a majority of the assembly may name additional permanent members of the council. Thanks to this provision, the council will be able to retain a large measure of control over its own personnel. The position of the five greater powers is well safeguarded since no addition can be made to their number without their consent. For all practical purposes the council has been created a closed corporation and may continue to retain that character. As a co-öpted body there is always the danger that it may develop the exclusive spirit of a medieval guild. It has the greatest piece of political patronage in the world at its disposal; namely, nomination to a seat in the council. It has the power of reward and punishment; the lowly may be exalted and the mighty brought down from their high estate. In short, it holds the keys to the world's dominion. The council, we may be sure, will exercise its power of nomination with great moderation. The greater nations have a selfish interest in maintaining their special privileges since every addition to the permanent members will have a tendency to lower the prestige and impair the ascendancy of the original members. It is little wonder, in the circumstances, that the German delegates at Paris protested most strongly against their exclusion from the seats of the mighty. The door of admission had apparently been barred and bolted against them and their allies.

In brief, we may then conclude that the permanent members of the council constitute an oligarchy within the council itself. They not only determine their own membership but, as we shall see, exercise a determining influence over the selection of the

representative members of the council. The assembly plays but a minor role. It has the privilege of approving the nominations of the council. The initiative manifestly lies with the council. The latter decides upon its nominees in advance; the assembly merely acts as a ratifying convention. For this purpose a majority only of the assembly is necessary. The greater powers should not find it difficult to muster the required number of votes in the assembly to nominate their candidates.

The second method of enlarging the council is by an increase in the number of representative members. The combined action of the council and assembly is again necessary. The covenant provides that the council with the approval of a majority of the assembly "may increase the number of members of the League to be selected by the assembly for representation on the council." In other words, the council with the approval of the assembly, determines upon the number of states to be added to the council as represenative members. The assembly then proceeds to select the designated number of new members. All members of the League, including the members of the council, are entitled to participate in the election. By article five "except where otherwise expressly provided in this convenant or by the terms of the present treaty decisions at any meeting of the assembly or of the council shall require the agreement of all the members of the League represented at the meeting." The unanimous vote of the council is therefore required for any addition to the number of representative members of that body. Such additions, in all probability, will be few and far between, in view of the natural opposition of the big five to any policy which would increase the influence of the representative members of the council at their expense. In short, the permanent members dominate the council and the latter in turn control the policy of the assembly.

Several of the senators, Mr. Shields[24] in particular, have advanced the argument that in the election of the four representative members of the council, a unanimous vote of the assembly is not required. An election, it is contended, is not a decision within the terms of article five, but rather a matter of procedure for which a majority vote only is required. "I can hardly think," said the honorable senator from Tennessee, "that anyone would say that the election of a member of the council would be a 'decision.' A decision implies the passing upon a dispute where

[24] Ibid p. 7944.

there is a controverted point, such as courts decide. It implies that the council is then sitting as a judicial body, while the matter of an election is one of procedure. Therefore I think that a majority can elect."

The language of the covenant in this as in other instances unfortunately is not well chosen. The word "decision," it must be admitted, does not aptly describe the function of election, though the act of electing does involve a decision. It is evident from the context, however, that the word is not used in a narrow juristic sense but is intended to have a broad application to all matters of business on which a final determination is reached. The clause reads "Decisions at any meeting of the assembly or of the council shall require the agreement of all the members of the League represented at this meeting." This is not the technical language of the court room, but rather the common phraseology of a general assembly. Moreover, the proposed permanent court of international justice is expected to handle all questions of a strictly legal character. Its judgments will be decisions in the technical sense of the word, as interpreted by Senator Shields. The assembly, on the other hand, will deal with a great variety of subjects ranging all the way from the election of members of the council to the determination of any matter affecting the peace of the world. In dealing with these matters it will act in a political rather than in a judicial capacity. Only a comprehensive word would suffice to describe these varied functions. The qualifying phrase "at any meeting" further emphasizes the non-judicial character of these "decisions." If the council or assembly were in truth judicial bodies, it might be reasonable to assume that a majority vote would be sufficient to determine a matter in controversy. But as the questions at issue are almost exclusively of a political nature, involving the special rights and privileges of the several nations, the presumption, it is submitted, is the other way. Political questions are apt to touch closely upon national sovereignty. As a general rule states do not willingly surrender any of their sovereign powers. In the case of the North Atlantic fisheries arbitration, the court laid down that such surrender could not be assumed by mere implication. Express language is necessary to effect any change in the status of a nation or of its territory. The same rule of construction, it is submitted, must be applied in the present instance. The principle of unanimity is a corollary of the doctrine

of national sovereignty. The legal rights of the states in the League are unimpaired save in so far as they are expressly limited by the terms of the covenant. The rule of unanimity runs throughout the covenant: it is one of the characteristic features of that document. The fact that a few express exceptions have been made to the principle strengthens the presumption that the rule was not to be departed from in other instances. Expressio unius est exclusio alterius. And in the case of these exceptions it may be observed, a majority vote in the assembly is usually coupled with a provision for unanimity in the council.

But the question remains: Can the method of voting be properly described as a matter of procedure? This latter phrase has a distinct technical significance in most if not all legislative bodies. It relates to the various stages of the law-making process, or to the mode in which the business of Parliament is conducted. It has nothing whatever to do with the constitutional right of voting. It is reasonable to suppose that both the makers and draftsmen of the covenant intended to use the term in its ordinary parliamentary sense. In the United States, for example, the constitution expressly determines the size of the quorum for doing business.[25] The matter is not left to the free determination of the Houses according to their own rules of procedure. Similar provisions are to be found in the constitutions of most modern states.[26] It has likewise been held in the House of Representatives that the speaker could not be deprived of his right to vote by a standing rule of the House.[27] In truth, the right to vote in the council or assembly, as in other legislative bodies, is a substantive right, explicitly recognized in the covenant itself; it is not a mere stage in the process of legislation. A right which the covenant has expressly conferred cannot be withdrawn or modified under the guise of a rule of procedure.

The Shields interpretation, moreover, runs counter to the generally accepted construction of other clauses of the covenant. If the method of voting is a matter of procedure, the council is likewise free to make its nominations by a majority vote only. No senator, however, has yet ventured to lay down that principle in respect to the council. The rule of unanimity in the council is too clearly expressed in article 4 to afford an opportunity

[25] United States Constitution, Article 1, Section 5.
[26] Australia, Austria, Belgium, Germany, Hungary, etc.
[27] Constitutional Manual and Digest, Rules and Practice, House of Representatives, Section 59, p. 19.

for question upon that point. But if the principle of unanimity be conceded in the case of the council, it is difficult to see how it can be denied in the case of the assembly. The covenant makes no distinction between matters of procedure in the two bodies. The covenant, on the other hand, does recognize a distinction between the assembly and a majority of the assembly. For example, by paragraph one of article four, the four permanent members of the League are to be "selected by the assembly;" by paragraph two of the same article the council "with the approval of a *majority* of the assembly may name additional members of the League, whose representatives shall always be members of the council." In short, the covenant admits a few special exceptions to the rule of unanimity in the case of the assembly, but in the absence of such express limitations, the general rule prevails. It seems safe to conclude, therefore, that when the words "the assembly" are used without qualification, they mean, according to article four, "agreement of all members of the League represented at the meeting" and not simply a majority of that body.

As the states whose representatives are members of the council are also members of the assembly, they have an equal voice with their colleagues in the selection of representative members of the council. A unanimous vote of all members represented at the meeting is necessary for an election. The members of the council, it will thus be seen, have a double veto, first in respect to the increase in the number of members of the council, and second, in the matter of the selection of representative members of that body. The doctrine of national sovereignty is here carried to the furthest extreme. The objection of a single member of the council can defeat an almost unanimous vote of the whole assembly. A more effective veto could scarcely be devised. This is indeed a tremendous power to lodge in the hands of a single state. Here is a mighty weapon of conservatism. The future safety and happiness of the world may be left to the mercy of a selfish or refractory state. The sad experience of the Polish diet immediately comes to mind. It is sincerely to be hoped that the new international veto may not prove as disastrous in practice as did the individual veto of that unfortunate state. But notwithstanding the danger of deadlock, it is extremely doubtful if the powers would consent at present to sacrifice any of their freedom of action in the interest of world union. The nations still hold fast to the theory of national sovereignty.

But while unanimity is the general rule of the council, there are a few exceptions to the general principle. By paragraph two of article five:

"All matters of procedure at meetings of the assembly or of the council including the appointment of committees to investigate particular matters, shall be regulated by the assembly or by the council and may be decided by a majority of the members of the League represented at the meeting."

The question of the appointment of investigating committees may prove of considerable significance in the history of the council. It is probable that the council may find it advisable to follow the precedent of the Peace Conference, namely of referring difficult questions to a small inner junta for examination. The reports of these committees cannot fail to have an important influence upon the decisions of the council as a whole. These reports will be in the nature of recommendations or provisional findings only which the members of the council will be free to accept or reject at their pleasure, but since the committees alone are in possession of the facts, the remaining members of the council must be largely dependent upon these reports for their decisions. As the selection of the committee is made by a majority vote, it might therefore be possible to promote or block the policy of a particular state by manipulating the personnel of the committee. This is a danger which is inevitable in any system of election. Combinations for political purposes are always possible, but there is no more reason to believe that the other powers would prefer to intrigue against the United States than against one another. As a matter of fact, the United States would seem to be in the most favorable position in this respect, inasmuch as she alone enjoys comparative freedom from the traditional rivalries of the European states. Her chance of election to one of these committees would be enhanced by the fact that she would be a neutral outsider with no national interest in the matter in controversy.

A more important exception to the rule arises in case of the failure of the council to bring about a settlement of a dispute between members of the League. By article 15:

"If there should arise between members of the League any dispute likely to lead to a rupture, which is not submitted to arbitration in accordance with article 13, the members of the League agree that they will submit the matter to the council. . . . The council shall endeavor to effect a settlement of the dispute, and if such efforts are successful, a statement shall be

made public giving such facts and explanations regarding the dispute and the terms of settlement thereof as the council may deem appropriate.

"If the dispute is not thus settled, the council either unanimously or by a majority vote shall make and publish a report containing a statement of the facts of the dispute and the recommendations which are deemed just and proper in regard thereto."

The class of cases coming up under this provision will be almost exclusively of a political character. The council promises to be kept very busy indeed. All the ancient and modern controversies of Europe may now obtain a hearing. From their very nature, these cases cannot well be referred to a court of arbitration. The council as a political body must deal with them as best it can. Its proceedings, it is safe to predict, will be governed by diplomatic considerations rather than by the strict principles of arbitral justice. It would be almost hopeless to look for unanimity of action in all such cases and the covenant very wisely dispenses with this requirement. The primary purpose in such proceedings is to lay the facts of the controversy before the League and enable the world to form a more intelligent judgment on the merits of the case. Even a majority report could not fail to exert a powerful influence on public opinion throughout the world. The organization and actual workings of the council in such circumstances become a matter of great significance. It would be fatal for the council to fall under the undue influence of one or more great states. The very purpose of the League would be defeated if its sources of information were subject to political manipulation for national purposes. To offset this danger the covenant provides that "any member of the League represented on the council may make public a statement of the facts of the dispute and of its conclusions regarding the same." This provision should afford a sufficient guaranty of publicity and safeguard the rights of individual members. The minority cannot complain that they have not had a proper opportunity to lay their case before the League. The report of a majority of the council, it need scarcely be added, does not bind the minority in any way. The effect of the report is purely political and educational. The minority are still free to act as they see fit. The covenant expressly lays down,

"If the council fails to reach a report which is unanimously agreed to by the members thereof, other than the representatives of one or more of the parties to the dispute, the members of the League reserve to themselves the right to take such action

as they shall consider necessary for the maintenance of right and justice."

A different situation is presented when "a report by the council is unanimously agreed to by the members thereof other than the representatives of one or more of the parties to the dispute." In this case "the members of the League agree that they will not go to war with any party to the dispute which complies with the recommendations of the report." No positive action is demanded of members of the League in such cases, but a distinct limitation is placed upon their freedom of action. They are at liberty to come to the support of the successful plaintiff but not of the vanquished party. The purpose of the provision is of course to prevent an appeal to arms on the part of the defeated nation and its friends. The fact that all the members of the council save the interested party or parties concur in the decision, raises a strong presumption in favor of the fairness of the hearing and the justice of the conclusions.

The opponents of the League have been quick to detect possible dangers for the United States in article 15 when taken in conjunction with the provisions in respect to representation on the council. It is legally possible, as we have seen, though most improbable, that the British Empire may have six representatives on the council. But this danger, under ordinary circumstances, is more apparent than real, inasmuch as the action of the council must be unanimous to be binding. The veto power of the several states affords general protection to national rights and interests, but this safeguard does not extend to cases arising under article 15. In such cases unanimity is no longer required. The vote or votes of the parties to the dispute for the moment become immaterial. A decision may be reached without their assent; for all practical purposes they lose their right to veto. In other words, the principle of unanimity is set aside in favor of a modified application of the ancient common law rule that a man ought not to be judge in his own case. But however admirable this rule may be in theory, it is none the less true that it does involve the sacrifice of a measure of national sovereignty. A case may easily arise where the vital interests of a nation may be at stake and yet for all practical purposes that state would have to accept the judgment of its peers on pain of being read out of the League of Nations. True, it could protest, but in the face of article 15 it could scarcely hope to secure a reversal of the

decision. The situation, as has been indicated, would be rendered even more difficult by the presence of one or more representatives of the British dominions upon the council. The superior voting power of the British Empire might then prove decisive. Suppose, for example, that the United States should become involved in a controversy with Great Britain. The two interested nations would practically though not actually be excluded from the controversy, but the representatives of the British dominions would still continue to serve as judges on the case. A decision in such circumstances would seemingly work a positive injustice to this country.

"So disproportionate," says an able critic,[28] "is the weight of the British voting bloc in the aggregate that it is difficult to believe that with all the margin thus permitted for manipulating, bargaining and group dealing, that Britain will fail to elect for herself at least one more of the four assembly elected representatives upon the council. This contingency, left open rather too invitingly, would result in leaving America out-voted by Britain two to one on the council and six to one on the assembly."

To the ardent nationalist it looks as though England would always hold an extra card or two up her sleeve to be used in case of necessity against her opponents.

The friends of the administration have experienced much difficulty in meeting this attack. A loophole has apparently been found in their defense since the veto power is no longer effective. There is still, however, the pragmatic argument to fall back upon. No constitution, it is claimed, could guard against all possible contingencies. The covenant should be judged not as a model but as a working instrument of government. Foreign nations are not as entirely selfish or wicked as they are represented to be. Some credit at least should be given to the honor and good faith of the British dominions. The other nations are equally affected by the special British privileges, but they are not alarmed at the prospect of being outvoted or left out of the Council. They have as much to fear from British domination as the United States, yet they have raised no objection to the separate representation of the self-governing dominions. They believed that they were quite capable of looking after their own interest and that there was little danger of an abuse of power. In truth, the cry of British imperialism was a false alarm. The

[28] Wm. J. McNally in the Minneapolis Morning Tribune, October 13, 1919.

British dominions, in fact, would never find a seat in the council. The veto power could still be used to block the election of colonial delegates to that body. It was ridiculous to suppose that the United States would be a party to its own undoing by voting for British colonial representatives. If this government did such a foolish thing, it would have itself to blame for the results and not the covenant. And even if by some strange mischance a Canadian or Australian were elected to the council, this ought not to be regarded as a dire calamity since the colonials were the closest and most natural allies of this country in peace as in war. In any case it was bad politics to stir up enmity against friendly sister states.

The substantial truth of this argument will scarcely be gainsaid save by politicians of tail-twisting proclivities. Nevertheless, this defense is by no means satisfactory. It fails to meet the immediate points at issue. The American public have too much confidence in the strength and ability of this country to be alarmed at the specter of British domination. Actual political power, not voting strength, they know will be decisive in the end. But they do object to the principle of differential treatment and to the bungling diplomacy which permitted such manifest ambiguities and inequalities to worm their way into the covenant. This sense of irritation has been admirably expressed by the above critic:[29]

"A survey of these inequalities and discrepancies—all real though varying somewhat from innocuousness to seriousness—leaves one primarily with a sense of irritation lodged against the ineptitude and incompetence of our diplomatic representation at Paris. Those affairs should have been straightened out in Paris, not in Washington. Adjustment at this late date, and under these peculiar circumstances, is peculiarly difficult. The general situation is now awkward. Reservations and interpretations that, had they been demanded in Paris, would have seemed only the part of common prudence and a detail of daily diplomatic routine, at present cannot be inserted by the Senate without a certain apparent ungraciousness and an appearance, even, of chauvinism.

"Ambiguity on so elementary a point, for example, as Britain's right to sit as a judge upon disputes to which she was a party, only thoughtlessness or carelessness too wanton for description would excuse. How Mr. Wilson ever could have been so naive as to have accepted the vote of India as the vote of a self-governing dominion, too, has excited much wonderment.

[29] Ibid.

Why, again, Mr. Wilson went out of his way to insist explicitly and in a written statement that Britain might, if she could persuade the assembly to elect them, have four more representatives on the council in addition to the one she has at present, is another of those mysteries that only a student who treats the international mind as the denationalized mind can comprehend. However, the situation does exist, and the question now is as to the best remedial method left open to the Senate."

Various amendments and reservations have been proposed to meet these criticisms. One of the most important of these reservations has been offered by ex-president Taft. The Taft reservation reads as follows:

"The Senate advises and consents to the treaty with the understanding and reservation as part of the instrument of ratification, that under Article 1 of the covenant of the League of Nations no self-governing dominion or colony of the British Empire, of France, of Italy, of Japan, of the United States or of any other nation whose representative is always a member of the council, can have a representative on the council, and with the further understanding and reservation that the exclusion of the parties to the dispute in Article 15 from the council or assembly, when hearing such dispute, includes both the mother country and her self-governing dominions or colonies, members of the league, when either such mother country or dominion or colony is a party to the dispute."

This reservation is intended to serve a double purpose. By the first clause the self-governing colonies are denied separate representation in the council. To this provision, as we have seen, the British dominions have entered a strong protest. The second clause would exclude both the mother country and the colonies from participating in any hearing in the council or assembly in which either one or the other was a party to the dispute. The inclusion of the council in this provision would seem to be an unnecessary precaution in case of the adoption of the first clause.

The debate in the Senate brought forth a number of more or less conflicting proposals. Of these suggested modifications the Johnson amendment recommended by the majority report of the Foreign Relations Committee is probably the best known. The amendment runs as follows:

"Provided that when any member of the League has or possesses self-governing dominions or colonies or parts of empire which are also members of the League, the United States shall have votes in the assembly or council of the League numerically equal to the aggregate vote of such member of the League and

its self-governing dominions and colonies and parts of the empire in the council or assembly in the League."

Although this provision expressly covers the case of the council as well as the assembly, the debate upon its adoption has gone off almost exclusively upon the question of plural representation of the British Empire in the assembly. For this reason it seems best to postpone the consideration of this amendment until the organization of the assembly comes under discussion. The general purpose of the amendment, it need only be stated, met with the approval of a majority of the Senate, but serious objections were raised both to the form of the provision and to the principal of an amendment. The mild reservationists accordingly joined forces with the administration Democrats in defeating the amendments on the ground that all modifications of the covenant should take the form of reservations rather than of amendments.[80] The Moses amendment likewise need not here concern us, inasmuch as it relates only to disputes which are referred to the assembly and not to the council, a rather surprising omission.[81]

Senator McCumber gave notice of certain reservations by way of compromise.[82] The first of these reservations deals with the vote of the dominions where neither the principal country nor a dominion is a party to the dispute.

"The United States reserves the right, upon the submission of any dispute to the council or the assembly, to object to any member and its self-governing dominions, dependencies, or possessions having in the aggregate more than one vote; and in case such objection is made the United States assumes no obligation to be bound by any election, finding, or decision in which

[80] This amendment was defeated October 27, 1919, by a vote of 38 to 40. Congressional Record, Ibid p. 8004.

[81] The Moses amendment reads: "Whenever the case referred to the assembly involves a dispute between one member of the League and another member whose self-governing dominions or colonies or parts of empire are also represented in the assembly, neither the disputant members nor any of their said dominions, colonies or parts of empire shall have a vote upon any phase of the question."

This was defeated by 36 to 47, Congressional Record, Ibid p. 8148.

Senator Shields proposed the following amendment to the amendment: Provided that when imperial and federal governments and their self-governing dominions, colonies or states are members of the League as originally organized or hereafter admitted, the empire or federal government and the dominions, colonies or states shall collectively have only one membership, one delegate and one vote in the council and only three delegates and one vote in the assembly."

This resolution was likewise voted down 32 to 49, Congressional Record, Ibid p. 8147.

[82] Ibid p. 7885.

such member and its said dominions, dependencies, and possessions have in the aggregate cast more than one vote."

The second covers the case where the mother country or dominion is a party to the disputes:

"That the United States understands and construes the words 'dispute between members' and the words 'dispute between parties' in article 15 to mean that a dispute with a self-governing dominion, colony, or dependency represented in the assembly is a dispute with the dominant or principal member represented therein, and that a dispute with such dominant or principal member is a dispute with all of its self-governing dominions, colonies, or dependencies; and that the exclusion of the parties to the dispute provided in the last paragraph of said article will cover not only the dominant or principal member, but also its dominions, colonies, and dependencies."

Neither of these provisions, it will be observed, raises the general question of the right of the colonies to separate representation on the council. Herein they differ from the Taft reservation. The first resolution seems to imply that they may be eligible to membership in the council. The objection is directed solely against the principle of plural voting. And even this objection is not absolute; it leaves the United States free to accept or reject any election, finding or decision in which the colonies participate along with the mother country. This resolution was doubtless intended to apply primarily to disputes before the assembly, but as the council might possibly be involved, it was included by way of precaution. The honorable member did not succeed, however, in getting this resolution formally before the Senate.

The second was subsequently re-drafted on presentation to the Senate to read as follows:[33]

"That the United States understands and so construes the provisions of the covenant of the League of Nations that when the case referred to the council or the assembly involves a dispute between one member of the league and another member whose self-governing dominions, colonies, or parts of empire are also represented in the body to which the case is referred, or involves a dispute between one member and any such dominion, colony, or part of empire, both the disputant members, including the dominion or principal country and all its said dominions, colonies, and parts of empire, are to be excluded from voting upon any phase of the dispute."

This reservation, it will be observed, covered both disputes with the mother country and with its self-governing dominions

[33] Ibid p. 9218.

and possessions. It did not deal, however, with disputes between states other than the British Empire. In such cases the empire was still free to cast its six votes.

Senator Johnson was quick to point out this vital defect and accordingly introduced a substitute reservation to put the United States upon an equality with Great Britain in voting strength:[84]

"The Senate of the United States advises and consents to the ratification of said treaty with the following reservations and conditions, anything in the covenant of the league of nations and the treaty to the contrary notwithstanding:

"When any member of the league has or possesses self-governing dominions or colonies or parts of empire which are also members of the league, the United States shall have representatives in the council and assembly and in any labor conference or organization under the league or treaty numerically equal to the aggregate number of representatives of such member of the league and its self-governing dominions and colonies and parts of empire in such council and assembly of the league and labor conference or organization under the league or treaty; and such representatives of the United States shall have the same powers and rights as the representatives of said member and its self-governing dominions or colonies or parts of empire; and upon all matters whatsoever, except where a party to a dispute, the United States shall have votes in the council and assembly and in any labor conference or organization under the league or treaty numerically equal to the aggregate vote to which any such member of the league and its self-governing dominions and colonies and parts of empire are entitled.

"Whenever a case referred to the council or assembly involves a dispute between the United States and another member of the league whose self-governing dominions or colonies or parts of empire are also represented in the council or assembly, or between the United States, and any dominion, colony, or part of any other member of the league, neither the disputant members nor any of their said dominions, colonies, or parts of empire shall have a vote upon any phase of the question.

"Whenever the United States is a party to a dispute which is referred to the council or assembly, and can not, because a party, vote upon such dispute, any other member of the council or assembly having self-governing dominions or colonies or parts of empire also members, upon such dispute to which the United States is a party or upon any phase of the question shall have and cast for itself and its self-governing dominions and colonies and parts of empire, all together, but one vote."

[84] Ibid p. 9219.

But a strange fatality pursued the efforts of the Senator from California. This reservation unfortunately was as badly drafted as his former amendment. In attempting to remedy one injustice, he merely succeeded in creating another. The United States was not only granted a preferential position in the League over France, Italy and the less favored nations, but also over the British Empire as well. By the last paragraph, as Senator Townsend pointed out,[35] "the United States would have a preference over the most favored nation in the league under certain circumstances, that is, where the United States is a party and Great Britain is not, Great Britain has but one vote, but reversing it, if Great Britain is a party and the United States is not, then the United States may have six votes." To obviate this difficulty Senator Johnson agreed to divide his resolution by omitting the last paragraph for the moment, in the hope that he might be able to secure a clearcut decision upon the general principle of the equality of the two branches of the Anglo-Saxon race. But this deletion did not satisfy the pro-leaguers. The resolution was still objectionable. It amounted in their judgment to a real amendment of the treaty, inasmuch as it laid down a new basis of representation which operated to the serious disadvantage of all the other nations save Great Britain. The adoption of the proposed system of voting, it was pointed out, did not remedy the existing injustice. On the contrary, it would merely offend the European states and would result in all probability in the defeat of the league of nations. This argument apparently carried conviction to a majority of the members, for the reservation was rejected by a close vote of 43 to 46. In view of this defeat Senator Johnson withdrew the last part of his reservation.

The way was now clear for the Lenroot amendment to the McCumber reservation. This amendment, which had the support of the mild reservationists, ran as follows:[36]

"The United States assumes no obligation to be bound by any election, decision, report or finding of the council or assembly in which any member of the league and its self-governing dominions, colonies or parts of empire, in the aggregate have cast more than one vote, and assumes no obligation to be bound by any decision, report, or finding of the council or assembly arising out of any dispute between the United States and any

[35] Ibid p. 9225.
[36] Ibid p. 9226.

member of the league if such member, or any self-governing dominion, colony, empire, or part of empire united with it politically has voted."

This reservation, it will be observed, does not call in question the right of the British dominions to separate representation on the council and assembly, nor does it seek to place the United States in the same position as the British Empire in the matter of voting power. The effect of the reservation according to the Wisconsin senator "is simply that if the British Empire desires to have the United States bound by any action taken, it will refrain from casting in a particular instance more than one vote." The empire would still be free to poll its full quota of votes if it saw fit, but in that case the United States would not be bound unless "it expressly assumed the obligation later on."

Although the resolution fell far short of the demands of the bitter-enders, it served nevertheless to protect the interests of the United States in all cases where the league had power to bind this country. The resolution, as Senator Hale clearly pointed out,[37] "applies to every act in the covenant where Great Britain and its colonies in the aggregate have cast more than one vote." It takes care of paragraph 2 of article 1 and makes void, as far as the United States is concerned, any election of new members where Great Britain and her colonies have in the aggregate more than one vote.

"In the same way it takes care of the procedure at the meetings of the assembly. It takes care of paragraph 6 of article 15 and of paragraph 10 of article 15 and not only of the case where we have a dispute with Great Britain, but of the two other cases above referred to under this article where we have a dispute with a country other than Great Britain or where a dispute arises in which neither we nor Great Britain are concerned. It renders void, so far as we are concerned, any action taken under the provisions of these paragraphs where Great Britain and her colonies have in the aggregate cast more than one vote."

This reservation, however, did not meet with the entire approval of Senator McCumber.[38]

"The objection and the only objection that I can urge to it is this: that it allows the United States to go into the conference, permit the matter to be tried out, take part in it and when it is finally decided, then the United States can say it will not be bound by it."

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[37] Ibid p. 7885.
[38] Ibid p. 9228.

To meet this objection he proposed to add the following words to the Lenroot reservation:

"Unless upon the submission of the matter to the council or assembly for decision, report or finding the United States consents that the said dominions, colonies or parts of empire may each have the right to cast a separate vote upon the said election, decision, report or finding."

In other words, it would be incumbent on the United States when it submitted a matter to the council or assembly to state in advance whether it would or would not be bound by the determination. It must make that declaration at the time of submission and not wait until the matter had been decided. The sole purpose of the amendment was to place the United States in a more "honorable position" in its relations with the sister states in the league. The amendment, however, did not meet with favor from the members and was overwhelmingly defeated by 3 votes to 86.

The Senate thereupon proceeded to vote upon the Lenroot reservation, which was carried by a good majority, 55 to 38.[89] All the Republicans, with the exception of Senator McCumber, lined up in support of the reservation, together with a handful of the intransigent Democrats. The vote showed, however, that the administration Democrats could command more than one-third of the votes necessary to defeat the ratification of the covenant with the Lodge reservations. A deadlock in the Senate was already in sight unless one or the other party was ready to give way.

There are, we may then conclude, certain theoretical and practical objections to the organization of the council. It is legally possible for the United States to be placed at a serious disadvantage in case of a controversy with Great Britain or her colonies. Various proposals, as we have seen, have been submitted to meet this difficulty. Of these proposals it is submitted the Lenroot reservation is the one best calculated to serve the purpose. It would not involve the reopening of the negotiations as would be necessary in case of the adoption of the Johnson amendment nor need it offend the sensibilities of England and the British colonies. The legitimate aspirations of the latter to a distinct international status would be recognized, while the United States would be assured of complete freedom of action in case her interests were prejudicially affected by the multiple vote of the British Empire.

[89] Ibid p. 9229.

With this safeguard it is submitted the United States would have little to fear on the score of representation in entering the league. The adoption of this or a similar reservation would serve to safeguard the rights of this country both constitutionally and internationally. In truth, much of the criticism of the League has been based upon the rather illiberal assumption that foreign states cannot be trusted and that they are potentially, if not actually, banded together in a conspiracy against the liberty and independence of the United States. But this is rather a sweeping indictment to bring against not one nation only, but the world at large. Even though it be admitted that the British colonies will be naturaly predisposed to favor the mother country in case of a controversy between Great Britain and the United States, there is no reason to believe that the other members of the Council will be governed by similar predilections or prejudices. The United States must indeed have a bad case to present if she cannot find at least one member of the council to uphold her contention. Other nations are as jealous of their sovereignty as is the United States, yet they have not feared to pledge themselves to submit their disputes to the judgment of their fellow members on the council. They have apparently much more faith in world democracy than has the Senate of the United States. But American fears and suspicions, it is submitted, are not justified by the experience of the United States in the great world war. They are largely a survival of the old spirit of provincialism.

The United States on the other hand, has much to gain by entering the League as a full-fledged member. She has come out of the war a dominant world power. Her political influence on the council cannot be measured in terms of a legal veto. That influence is as powerful as the nation itself. This country can be the determining factor in peace as it was in war. It can assume a natural and commanding leadership in the world's affairs. As one of the greater allied states, it has been granted a privileged position in the League. It holds a permanent place in the council with an effective veto over both the election and policies of the assembly. In truth, the interests of the larger states have been well preserved. It is the smaller states in the assembly who have cause for complaint. They had looked forward to the organization of an international conference in which they would play an equal part with the greater nations. Had not the war been fought to vindicate the principles of international law and

safeguard the rights and independence of smaller countries? There was no principle of the law of nations more clearly established by courts and publicists than that of the legal equality of states.[40] Yet the "big five" have not hesitated to cast aside that tenet and set up their own political ascendancy in place thereof. The covenant of the League gave legal sanction to that policy. It transformed a political fact into a legal principle, and from that fact the United States stands to gain more than any other nation save the British Empire.

By way of compensation the covenant promises to safeguard the political and territorial rights of the smaller states against the aggression of their more powerful neighbors. The war brought home to the little nations the precariousness of their position. Their independence lay at the mercy of any aggrandizing state. They were unable to protect themselves and could not count upon the assistance of the sister nations. No matter how careful they might be to preserve a strict impartiality, they were in danger of being drawn into the war against their will. They were the unfortunate victims of the retaliatory measures of all the belligerents. And even when they succeeded in maintaining strict neutrality, they found that neutrality was little better than war itself. They were caught in the war's monster tentacles and could not get free. Peace was their only hope of salvation, but peace, a permanent peace, could only be attained through the united action of all free states. The freedom and independence of all nations must needs be placed under the protection of a collective guaranty. This guaranty, however, could not be secured without a sacrifice. The smaller states were called upon to surrender the principle of equality in order to gain the greater boon of independence. They could not justly claim equal rights with the larger nations when they were not prepared to assume equal responsibilities. The price was a heavy one to pay, but it was worth the sacrifice.

The organization of the council has also proved disappointing to the democratic doctrinaires. They have long denounced the secret diplomacy and autocratic powers of the chancelleries of Europe. They have clamored for a popular participation in world diplomacy but the Paris conference has given them instead a league of state executives. The "big five" in their judgment have set up a new oligarchy. The permanent council of world

[40] The Antelope, (1825) 10 Wheat. (U.S.) 66, 122, 6 L. Ed. 268.

powers has been substituted for the defunct concert of Europe. The aspirations of the people for popular control of international relations have not yet been fulfilled. The spirit of European diplomacy is unchanged; the old political leaders with the same old policies are still in control. The world has not profited by the terrible lessons of the war. The peace conference has repeated the mistakes of the Holy Alliance. The forces of imperialism have again triumphed over the principles of democracy and international justice. The council of the League has been their particular bête noire. In its organization they have seen combined all the worst features of international politics,—secrecy, autocracy and imperialism. The assembly which should have been the heart of the League, has been sacrificed to the interests of a few great states. The governments of the larger nations are adequately represented on the council but the League has provided no proper organ through which the wishes of the people at large can find proper expression.

Probably the simplest reply to these criticisms is that they are directed against the world at large rather than against the League. The statesmen at Paris did not set out to reorganize society on new political principles according to the demands of the international socialists and their radical friends. On the contrary, they were concerned with the problems only which arose immediately out of the war and the peace settlement. In general they accepted the world as they found it and proceeded to draft the future constitution of the League of nations upon the basis of the existing world order. The covenant in fact is a thoroughly democratic instrument inasmuch as it reflects the political ideals and institutions of the day. The council is endowed with more important functions than the assembly for good and sufficient reasons. By reason of its size and composition it is a stronger and more effective body. What the world most needed was an administrative organ endowed with sufficient power to settle international controversies. The council was created to serve that purpose. It is essentially an administrative body. In all modern states the executive has grown in power at the expense of the legislature. The council of the League merely reflects that tendency. The assembly, on the other hand, was designed to be primarily a deliberative body—an open forum for the world. "It furnishes a highly important opportunity for every member to bring its own grievances through its own spokesman and compel

a hearing by the other members."[41] It is doubtful however, if the assembly will ever develop into a real federal parliament. The world is not yet ready to set up a great super state with a parliamentary organization. The assembly is at best but an international congress or a body of instructed delegates without an inherent legislative authority of its own. The Hague conferences have already demonstrated the weakness of such international bodies. It was necessary to concentrate power in order to secure political and administrative results. The assembly received no substantial powers because the larger nations would not consent to enter into a league in which they might be outvoted by a combination of small and petty states. In conferring exceptional powers upon the council the covenant merely recognized the hegemony of the five great states. That hegemony was unquestionable in fact however objectionable it might be in theory or practice. In short, the constitution of the League was made to correspond to the existing political facts. Power and responsibility were concentrated in the hands of the five great states which won the war.

The same factor is equally in evidence in respect to the governmental character of the League. The council is made up of official delegates, not of popularly elected representatives, because it is the governments of the several states which are responsible for the direction of foreign affairs. That responsibility cannot be divided. Confusion if not disaster would inevitably result if the national executives were compelled to share their authority with an independent group of elected diplomats at Geneva. There cannot be two foreign offices or two foreign policies at the same time. The governments at Washington, Paris, London, etc., must control the whole foreign situation since they alone are responsible for the execution of the decisions of the League by their respective states. The fact that these governments owe their position to popular election furnishes the best proof of their true representative character. The electorate has the ultimate power in its own hands if it desires to use it. If the policy of the government or its representatives at Geneva is not approved by Parliament or the electorate at home, the government may be defeated and a new executive set up in its place with a new program and a different group of representatives.

[41] Article by Professor Albert Bushnell Hart. New York Times, Oct. 26, 1919.

In short, the democracy of the country can select its own agents and dictate its own foreign policies. The truth of the matter is that the ultra-radical opponents of the covenant are not so much opposed to the organization of the league abroad as to the actual operations of the government at home. They object to the constitution of the League for the same reasons that they object to the national constitution. In short, their opposition to the League is primarily of a constitutional rather than of an international character.

The objections to the privileged position of the British Empire in the League rest upon a different foundation. These objections are both national and international in character; they go to the very heart of the League's organization. The national status which has been accorded to the British dominions must be judged by the same test that has been applied to other provisions of the covenant, namely, Does it accord with the actual political facts? Up to the present we have been concerned primarily with the legal aspects of the question of colonial representation on the council. The way is now clear for the consideration of the more important question of the moral and political justification of the exceptional position of the British dominions. The discussion of this topic, however, must be reserved for future treatment in connection with the organization of the assembly.

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Minnesota Law Review

Published monthly, December to June inclusive, by the Faculty and Students of the Law School, University of Minnesota.

Subscription Price, $2.50 per annum. Forty cents per number.

MUNICIPAL CORPORATIONS—CONTRACTS—INVALID BONDS—QUASI CONTRACT LIABILITIES TO HOLDERS.—The liability of a municipality for invalid bonds and contract obligations is affected by a variety of considerations. The rule of ultra vires is applied more strictly to public than to private corporations because of the difficulty of preventing unfairness and advantage in the execution of public contracts even with vigilant watchfulness.[1] If a void contract may be practically enforced upon the basis of

[1] Pullman Palace Car Co. v. Central Transportation Co., (1897) 171 U. S. 138, 43 L. Ed. 108, 18 S. C. R. 808; Seymour v. Chicago, etc., Life Co., (1893) 54 Minn. 147, 55 N. W. 907; Hague v. City of Philadelphia, (1865) 48 Pa. St. 527.

quasi contract the value of constitutional and statutory safeguards of taxpayers would be questionable. And it should also be recognized that the courts are more likely to invoke the doctrine of estoppel to protect bonds than mere contract obligations, for the former are treated as commercial paper and it is desired to have them pass about freely.[2]

In cases where the invalidity arises merely from an irregular exercise of a lawful power to issue bonds or incur obligations, the irregularity may be cured by recitals so that the city is estopped to assert the invalidity of the obligations.[3] If the bonds are void but the money obtained from their sale was used for a proper purpose, a recovery in an action for money had and received is generally allowed.[4] Or if the obligation was incurred under an invalid contract, which, however, was within the power of the municipality to make and which has been executed so that the corporation has enjoyed the benefit of it, an implied assumpsit arises and the city is estopped to deny the validity of the contract.[5]

Some states hold that where a contract is void because a mandatory statutory requirement has not been followed in its formation, the city is nevertheless liable for the reasonable value of the work done or of the materials furnished.[6] Thus where a contract was illegal and void for want of compliance with statutory requirements in that the council was not authorized to borrow money without submitting the question to the voters for approval and for the further reason that the president of the village council, who as such participated in the transaction, was also a managing officer of plaintiff bank and prohibited by law

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[2] See note L. R. A. 1915A 916.

[3] Aurora v. Gates, (1913) 125 C. C. A. 329, 208 Fed. 101, L. R. A. 1915A 911; See note L. R. A. 1915A 916; First Nat. Bank of Red Oak v. Emmetsburg, (1912) 157 Ia. 555, 138 N. W. 451.

[4] Gilman v. Fernald, (1905) 72 C. C. A. 675, 141 Fed. 941; Abbott, Public Securities, Sec. 380.

[5] Argenti v. City of San Francisco, (1860) 60 Cal. 256; Butts County v. Jackson Banking Co., (1908) 129 Ga. 801, 60 S. E. 149; See note L. R. A. 1915A 904. In Laird Norton Yards v. City of Rochester, (1912) 117 Minn. 114, 134 N. W. 644, a contract to supply the city with coal was invalid owing to informalities, but recovery was allowed upon a quantum valebat for coal received and consumed by the city.

[6] Chicago v. McKechney, (1903) 205 Ill. 372, 68 N. E. 954; State ex rel. Morris v. Clark, (1912) 116 Minn. 500, 134 N. W. 129; Luther v. Wheeler, (1905) 73 S. C. 83, 52 S. E. 874, 4 L. R. A. (N.S.) 746, 6 Ann. Cas. 754. In the latter case money was loaned to the city to build public building when the officials believed in good faith there would be sufficient tax money collected to pay for it but this proved not to be the case. Held that the city derived the benefit of the loan and was liable for money had and received.

from entering into a contract where his bank was interested, the Minnesota court allowed recovery for money had and received.[7] It was held that, in the absence of any fraudulent intent to evade the law, justice and common honesty required the city, which had received money for a legitimate municipal purpose, should pay for it. The court considered the argument that to permit recovery in such cases would result for all practical purposes in upholding the invalid contract and enable the city to do indirectly what it could not do directly, but preferred to follow the liberal rule of ultra vires. Such a result it is submitted, substantially nullifies constitutional and statutory safeguards thrown about the expenditure of municipal funds. Apparently, so long as the purpose is permissible and no fraud is shown, statutory requirements may be ignored and still recovery will be allowed on quasi contract. Were this principle to be generally accepted in respect to the contracts of great cities it would seem to present startling opportunities for the manipulation of public contracts. Many courts on the other hand adopt the strict rule of ultra vires and hold that no implied liability can arise from benefits received under a contract illegal because mandatory requirements of the statute have not been followed.[8] This is based upon the idea that limitations imposed upon cities by charters and by the state statutes and constitution must be upheld.

In cases in which the contract is ultra vires, because beyond the power of the city to make the obligations arising therefrom, it is invalid and no ratification or estoppel can create an obligation.[9] The city may not be estopped to deny its power to enter such a contract. Under these conditions when the obligations arise on negotiable bonds they are void even in the hands of bona fide holders.[10] As stated in *Anthony v. Jasper County*,[11] purchasers of municipal bonds "are charged with notice of the laws of the state granting power to make the bonds they find on the market. . . . If the power exists in the municipality, the bona

[7] First Nat. Bank v. Village of Goodhue, (1913) 120 Minn. 362, 139 N. W. 599.

[8] Hackettstown v. Schwackhammer, (1874) 37 N. J. L. 91; Floyd County v. Owego Bridge Co., (1911) 143 Ky. 693, 137 S. W. 237; Detroit v. Michigan Paving Co., (1877) 36 Mich. 335; 5 McQuillin, Municipal Corporations, Sec. 2353.

[9] Brenham v. German Bank, (1891) 144 U. S. 173, 36 L. Ed. 390, 12 S. C. R. 559; 2 Dillon, Municipal Corporations, 5th Ed. Sec. 791.

[10] Merchants' Bank v. Bergen County, (1885) 115 U. S. 384, 29 L. Ed. 430, 6 S. C. R. 88.

[11] (1879) 101 U. S. 693, 697, 25 L. Ed. 1005.

fide holder is protected against mere irregularities in the manner of its execution, but if there is a want of power, no legal liability can be created." Thus the Minnesota court has held that no action can be maintained on an executed contract for street improvements when the city had no power to make such a contract until the adjacent proprietors were ordered to make street improvements and were in default.[12] The great majority of courts hold that lack of legal authority, either statutory or constitutional, and unconditional statutory or constitutional prohibition, or an action under an unconstitutional statute, creates an invalidity in municipal bonds or contracts which can not be cured.[13]

And by a preponderance of authority if the bonds issued or the contracts made, are void because of lack of power, the city can not be held to pay for benefits received, for it may not be bound impliedly where it could not be bound directly.[14] This is qualified, however, to the extent that if the money or property can be traced or identified it may be recovered even though the contract with the city was wholly void.[15] A few jurisdictions hold that money spent under a contract ultra vires because unauthorized may be recovered on implied contract if the money was spent for the benefit of the public.[16]

The rule applied by the majority of the courts seems harsh and unjust in many cases but the courts are to carry into effect the laws and not to justify their violation. As pointed out in *Fountain v. City of San Francisco*,[17] it is better that individuals should suffer than that entire communities should be deprived of protection given against infractions of the law. To permit ratification or estoppel to validate the contracts would be to make statutory or constitutional restrictions a mere nullity, while a

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[12] Newbery v. Fox, (1887) 37 Minn. 141, 33 N. W. 333.

[13] Dixon County v. Field, (1884) 111 U. S. 83, 28 L. Ed. 360, 4 S. C. R. 315; 5 McQuillin, Municipal Corporations, Sec. 2351.

[14] Swanson v. City of Ottumwa, (1906) 131 Ia. 540, 106 N. W. 9, 5 L. R. A. (N.S.) 860; Cawker v. Central Bitulithic Paving Co., (1909) 140 Wis. 25, 121 N. W. 888; Litchfield v. Ballou, (1884) 114 U. S. 190, 29 L. Ed. 132, 5 S. C. R. 820; Note 27 L. R. A. (N.S.) 1109, 1124.

[15] Salt Creek Tp. v. King Iron Bridge & Mfg. Co., (1893) 51 Kan. 520, 33 Pac. 303.

[16] State ex rel. Lancaster, (1886) 20 Neb. 419, 30 N. W. 538; Bluthenthal v. Town of Headland, (1901) 132 Ala. 249, 31 So. 87, 90 Am. St. Rep. 904: This case holds, however, no recovery on implied assumpsit if the contract is prohibited by statutory or charter provisions.

[17] (1905) 1 Cal. App. Rep. 461, 82 Pac. 637.

recovery allowed on quantum meruit or implied assumpsit would lead to the same result.

But this majority rule was departed from in a recent case in Kentucky,[18] the court stating that where the reason for the doctrine ceased its application should also cease. In that case the law under which the bonds were issued was declared unconstitutional, but the holder was permitted to recover for money had and received upon the theory that the city had obtained a sum of money without any consideration whatever and it could not be said to place a burden on the taxpayers to rectify their mistake. No attempt was made to locate and identify the money which the city had received for the bonds for it had already been expended to pay for the unauthorized street improvements and hence the practical result was to enforce the obligation arising from a contract beyond the power of the city to make.

With respect to bonds or obligations incurred in excess of the constitutional or statutory debt limit, the courts are practically unanimous that such obligations are illegal and there can be no recovery.[19] There are, however, two minor qualifications of this rule. A bond for a debt in excess of the limit may be validated by an express recital that the debt limit has not been exceeded.[20] And in case the bonds do not show on their face the total amount of the issue so as to indicate that the limit has been exceeded, recovery may be permitted on the bond.[21]

If materials have been furnished the city under an illegal contract, because it violates the restrictions on municipal indebtedness, and the materials have become a part of other municipal property, every form of legal action is barred and the courts will not aid the vendor to recover the property sold and delivered, even though the purported contract is in the form of a conditional sale.[22] As stated in *McGillvray v. Joint School Dist.*:[23]

"He who deals with officers of a public corporation must take notice of the limits placed by law upon the powers of those agents of the taxpayers. If he becomes a party, however inno-

[18] City of Henderson v. Redman, (Ky. 1919) 214 S. W. 808.
[19] Millerstown v. Frederick, (1886) 114 Pa. St. 435, 7 Atl. 156; 5 McQuillin, Municipal Corporations, Sec. 2352.
[20] Lake County v. Graham, (1888) 130 U. S. 674, 32 L. Ed. 1065, 9 S. C. R. 654.
[21] Gunnison County Com'rs. v. Rollins, (1899) 173 U. S. 255, 43 L. Ed. 689, 19 S. C. R. 390.
[22] Fairbanks Morse & Co. v. City of Geary, (Okla. 1916) 157 Pac. 720.
[23] (1901) 112 Wis. 354, 88 N. W. 310.

cently, to an attempt to impose on the latter forbidden burdens, he must expect to fail."

Constitutional limitations upon the creation of municipal indebtedness are mandatory restrictions enacted for the purpose of curbing the taxing power and restraining excessive expenditures and it is well settled that equity in applying relief must not accomplish indirectly what the law does not permit directly. Hence no equitable relief is possible unless the property itself can be segregated and restored without injury to the city and its property.[24]

RECENT CASES.

MUNICIPAL CORPORATIONS—RATIFICATION OF MUNICIPAL AND PUBLIC CONTRACTS.—City charter provided that action by the city council creating any liability of the city shall require a four-fifths vote of the members. The motion was made and carried by the city council, only three of the five members being present, that the mayor and recorder enter into a contract with the Cement Tile Company to furnish exhaust steam to that company for three years at thirty dollars per month. The mayor and recorder entered into the contract. Trial court instructed jury as a matter of law, that "by performing the contract and receiving the benefits therefrom for more than a year without objection, the city must be held to have ratified the contract." *Held,* the contract was not ratified, for though mere acquiescence of the proper municipal body after knowledge of the facts may be sufficient, yet here evidence of ratification was insufficient particularly as there was no evidence from which the court could infer knowledge on the part of the two absent members of the terms of the contract. *Tracy Cement Tile Co. v. City of Tracy,* (Minn. 1919).

It is a general rule that a contract which a municipal or public corporation had no power to make cannot be ratified, provided it be ultra vires in the strict or primary sense defined by Jaggard, J., in *Bell v. Kirkland,* (1907) 102 Minn. 213, 113 N. W. 271. *Andrews v. School District,* (1887) 37 Minn. 96, 33 N. W. 217; *Marsh v. Fulton County,* (1870) 10 Wall. (U.S.) 676, 19 L. Ed. 1040; 2 Dillon, Municipal Corporations, 5th ed., par. 797. But such a corporation may ratify and thus validate the unauthorized contracts of its agents or officers, which are within the scope of the corporate powers, but with respect to which there has been some irregularity or defect in the actual exercise of the power, 2 Dillon Municipal Corporations 5th ed., par. 797; 28 Cyc 675. But when there is a mandatory requirement, by constitution or statute, ratification cannot be made except by compliance with such requirement. L. R. A. 1915A, note 1023 at 1027. Thus if the statute requires that the contract be in

[24] Bartleson v. International School Dst. No. 5, (N. D. 1919) 174 N. W. 76.

writing, *Leland v. School District,* (1899) 77 Minn. 469, 80 N. W. 354, or that it be authorized by ordinance, *Paul v. Seattle,* (1905) 40 Wash. 294, 82 Pac. 607, or by resolution, *Nash v. City of St. Paul,* (1876) 23 Minn. 132, or only at a meeting called in a specific manner, *Currie v. School District,* (1886) 35 Minn. 163, 27 N. W. 922, or that there be a preliminary estimate, *City of Plattsmouth v. Murphy,* (1905) 74 Neb. 749, 105 N. W. 293, there could be no ratification without compliance. But in the absence of such mandatory requirements, when the contract is within the corporate powers but irregularly authorized, action by the proper municipal or public body recognizing the contract, if with knowledge of the material facts of the contract by the body as such, and clearly indicating intention to accept the contract, constitutes sufficient ratification. *Schmidt v. County of Stearns,* (1883) 34 Minn. 112, 24 N. W. 358; *Peterson v. County of Koochiching,* (1916) 133 Minn. 343, 158 N. W. 605; *Cunningham v. Umatilla County,* (1910) 57 Ore. 517, 112 Pac. 437, 37 L. R. A. (N.S.) 1051. And, by the weight of authority, acquiescence of the proper municipal or public body in such a contract, after knowledge of the material facts of the contract in like manner, constitutes sufficient ratification, see L. R. A. 1915A 1023, note at 1033; 19 R. C. L. 1075; 28 Cyc. 677; as where an attorney conducts litigation for city with full knowledge and acquiescence of the city council, *Town of Bruce v. Dickey,* (1886) 116 Ill. 527, 6 N. E. 435, or a teacher performs services for school district under similar circumstances, *Athearn v. Independent District of Millersburg,* (1871) 33 Ia. 105, or where contract is reported to proper body and acquiesced in without vote. *Ettor v. Tacoma,* (1915) 77 Wash. 267, 137 Pac. 820. Cases in seeming conflict with these propositions, cited in the instant case, are of non-compliance with statutory requirements which the courts construe as mandatory, and hence ratification is insufficient as noted supra. See instant case and *Caxton Co. v. School District,* (1904) 120 Wis. 374, 98 N. W. 231; *Zottman v. San Francisco,* (1862) 20 Cal. 96, 81 Am. Dec. 96; *Taylor v. District Township of Wayne,* (1868) 25 Ia. 447; *Mulligan v. Lexington,* (1907) 126 Mo. App. 715. Yet some courts state in dicta that the ratification must be by direct, unequivocal, corporate acts. *Murphy v. City of Albina,* (1892) 22 Ore. 106, 29 A. S. R. 578; *Baltimore v. Reynolds,* (1862) 20 Md. 1, 83 Am. Dec. 535. It is clear the acts done by unauthorized officers cannot amount to implied ratification. *Andrews v. School District,* supra; *Niland v. Bowron* (1908) 193 N. Y. 180, 85 N. E. 1012. Knowledge of the material facts of the contract claimed to be ratified by the authorizing body is indispensable for any ratification. *Tracy Cement Tile Co. v. City of Tracy,* supra; 19 R. C. L. 1075 and cases cited; L. R. A. 1915A note supra, at 1034. It follows that the authorizing body must act as a body and cannot be bound by individual acts or knowledge brought home to individual members. *Texarkana v. Friedell,* (1907) 82 Ark. 531, 102 S. W. 374; *Murphy v. City of Albina,* supra.

To summarize: The problem is one of principal and agent. Where the authorization of the contract is irregular it amounts to no authorization. When a public officers enters into the contract, it cannot be binding upon the public corporation unless within the officer's express authority.

But the body having the power of original authorization of a contract not ultra vires, but which it has authorized in an irregular manner, may ratify it. And, except in case of mandatory requirements for authorization by statute or constitution, its acts or acquiescence may constitute implied ratification. But in this case the conduct should imply recognition and acceptance of the contract, and must be with full knowledge of the material facts. This knowledge must be brought home to the assembled body when a number of members sufficient to have originally authorized the contract are present. The instant case is, therefore, in harmony with principle and authority.

SLANDER—REPETITION BY THIRD PARTIES—DAMAGES.—Plaintiff in suing the defendant for slander sought to recover for the damage caused by the repetition of the slander by third parties. *Held,* that such damage was not the natural and probable consequence of the utterance of the original slander. *Maytag v. Cummins,* (C. C. A. 8th Cir. 1919) 260 Fed. 74.

The courts seem well agreed on the general rule of torts that a tort-feasor is liable only for the natural and probable consequences of his act, and that wrongful acts by independent third parties are not regarded by the law as being such natural and probable consequences of his wrong. *Marqueze v. Sontheimer,* (1882) 59 Miss. 430, 441; *Alexander v. Town of New Castle,* (1888) 115 Ind. 51, 17 N. E. 200. See 36 A. S. R. 843, note. Since a repetition of a slander is a distinct and independent tort, 17 R. C. L. 319, the majority of the courts, with which the instant case is in line, apply this same general rule to slander, and hold that the repetition of a slander by third parties is not the natural and probable consequence of the utterance of the original slander. *Olmsted v. Brown,* (1852) 12 Barb. (N. Y.) 657; *Elmer v. Fessenden,* (1890) 151 Mass. 359, 24 N. E. 208, 5 L. R. A. 724; *Mills v. Flynn,* (1912) 157 Iowa 477, 137 N. W. 1082. A minority refuse to apply this rule of torts to slander, but hold that repetition by third parties is the natural and probable consequence of the original slander. *Davis v. Starrett,* (1903) 97 Me. 568, 55 Atl. 516; *Fitzgerald v. Young,* (1911) 89 Neb. 693, 132 N. W. 1087; *Southwestern Telegraph & Telephone Co.,* (Tex. Civ. App. 1916) 183 S. W. 421. The Minnesota court in *Zier v. Hofflin,* (1885) 33 Minn. 66, 21 N. W. 862, 53 Am. Rep. 9, held the original tort-feasor liable for the damage caused by the repetition of his libel, and used language broad enough to lead one to believe that the result would be no different in the case of slander.

The instant case attempted to explain and distinguish the conflicting cases upon a supposed difference between the republication and repetition of a libel and of a slander, but the cases do not seem to bear out this distinction. Both the majority and the minority cited supra, apply the same rule to libel as to slander. *Burt v. Advertiser Newspaper Co.,* (1891) 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *Elms v. Crane,* (Maine 1919) 107 Atl. 852.

The apparent hardship of the majority rule seems only to arise where the words are not actionable per se, and special damage is the basis of the action. For where the words are actionable per se the law presumes general damage, and the jury determines the amount of the general dam-

age from the circumstances. Odgers, Libel and Slander, 1st Am. Ed., 152; Newell, Slander and Libel, 3rd Ed., 432. This hardship still seems to exist even under minority rule, for the minority cases, supra, have gone no further than to admit evidence of repetitions as an element of damage, in cases where the words are actionable per se, with strong intimations in *the Southwestern Telegraph & Telephone Co.* case, supra, that it is confined to that class of cases. Hence, the difference between the majority and minority rule would seem to be, that in cases where the words are actionable per se and general damage is presumed, the minority hold that evidence of repetitions is admissable as showing what that general damage is, while the majority hold that it is not. Indeed, it might be further suggested that since both lines of cases presume that the plaintiff is damaged generally, they are both really giving damages for repetitions, and the only difference between the two lines of cases is that one allows specific testimony as to the repetitions, and the other does not.

BOOK REVIEWS

JUSTICE AND THE POOR. By Reginald Heber Smith. New York. Bulletin Thirteen of the Carnegie Foundation for the Advancement of Teaching. 1919. PP. xiv. 271.

No law book published in recent years could be read by all members of the legal profession with greater profit than this Bulletin with the unalluring title of Justice and the Poor, prepared by Reginald Heber Smith, and published by the Carnegie Foundation for the Advancement of Teaching. The reason for its publication is set forth in an interesting preface by Henry S. Pritchett, President of the Foundation. In this preface is found the following excellent statement of the reason why the Bulletin should be read with interest by members of the bar:

"This report, prepared with great care and stated in moderate terms, deserves at the hands of the members of the bar serious and sympathetic attention. If those who officially represent the law do not bend their energies and give their best thought to make the administration of justice fair, prompt, and accessible to the humblest citizen, to what group in the body politic may we turn with any hope that this matter will be dealt with wisely and justly?"

A more bluntly stated reason why it should be read by all members of the profession is found in the fact that in no other field of the law is there so much ignorance and consequently so little of interest. Yet the demonstration given in this book that changed conditions incident to our rapid development from a pastoral to an industrial people have to a great extent "put justice out of reach of the poor"—to quote from Elihu Root's "foreword"—should give pause to every lawyer, and, indeed, to every socially-minded citizen.

The very title of the book is apt to excite prejudice in the minds of the legal profession, especially at this time when every thoughtful man is a bit nervous about any kind of unsettling criticism of any of our institutions. But in this instance such a prejudice may be dismissed, for the author, who is a member of the Boston Bar, with many years of experience as counsel of the Boston Legal Aid Society, makes it very clear that he takes no stock in the radical criticism of the substantive law and of

the courts as unjustly favoring the rich and the fortunate at the expense of the poor and unfortunate. He rather confines his criticism to the rules of procedure and economic conditions which make it practically impossible for the poor claimant to bring his small cause before the court, in effect depriving him of judicial remedy for the wrong done him. He analyzes the obstacles in the way of the poor man's effective access to the courts under the three heads of delay, court costs and fees, and the expense of counsel. He then discusses the uncertain effort made to remove the first two of these obstacles by the gradual establishment of small claims courts, boards of conciliation and arbitration, domestic relations courts, and administrative tribunals, such as commissions for administering Workmans' Compensation Acts. As a means of securing counsel for poor litigants whose petty claims can seldom sustain the economic burden of even reasonable counsel fees, he discusses the "public defender" and the legal aid bureaus, regarding the functions of these two agencies as similar in nature, if not properly the same.

It is in treating the origin, development and functions of the legal aid bureau that the author has rendered his greatest service to the public and to the legal profession. The reader is surprised to find with what absorbing interest the history of this lowly and almost unknown phase of professional activity develops. Under the author's hands it ceases to be merely an unpleasantly necessary device for relieving the busy lawyer of his charity clients, or the half resented legal adjunct of some charitable association, or, at most, an additional public office established in the interest of political on-hangers and meddlesome social uplifters. The astonished reader begins to see it as an important part of the great effort society is making, with groping hands outstretched, to make good under the complex social and economic guaranty of the twentieth century, the splendid guaranty of the thirteenth century Magna Charta, "To no one will we refuse or delay right or justice." Through the glass he holds to our eyes we cannot but see that it is a necessary duty of society to provide agencies for remedial justice available to the man who has no money for court costs and counsel fees, and no time to await the slow progress of ordinary judicial process, and that it will be suicidal not to do so. He shows that it is because of a half conscious appreciation of this fact that the office of "public defender" has been established at Los Angeles and Portland, Oregon, and publicly supported legal aid bureaus have been set up in no fewer than eight American cities, while public spirited citizens are maintaining similar agences in thirty-three other cities. The reader closes the book with the convicton that an enlightened public will provide remedial justice for the poor on the same basis as it provides sanitation, hospital service, and police protection. At this point it is well to record more definitely than does the author, that in the Minneapolis Court of Conciliation causes not involving more than fifty dollars may be adjudicated absolutely without money and without price.

Any public-spirited lawyer who fails to read "Justice and the Poor" does himself a wrong.

W. R. VANCE.

UNIVERSITY OF MINNESOTA.

MINNESOTA LAW REVIEW

VOL. IV FEBRUARY, 1920 NO. 3

THE CONSTITUTIONS OF THE UNITED STATES AND CANADA.

A COMPARISON.

AN American in Canada,[1] a Canadian in the United States feels himself at home; the language is the same, the intonation not very different, the religion the same, business is conducted in the same way, social customs are similar and no one can detect any outward difference in the law except such a difference as can be seen between the laws of the several states or the several provinces.

And yet the courts of Canada are almost wholly relieved of a class of case which flourishes in the United States, with a tropical profusion which now and then clogs and almost threatens to smother any others—a class of case arising out of constitutional limitations.

The reason of this difference is of course historical; no people can get away from their history[2] any more than from their geography. When the thirteen colonies determined to form themselves into a new nation, they cut the painter which bound them to the mother country, and in a measure broke away from English tradition. England had through a course of evolution framed for herself a form of government which answered her needs fairly well: the theory that the rulers, the executive servants of

[1] I refer to English speaking Canada and Canadians; some parts of the province of Quebec and a few French Canadians are in different case.

[2] Henry Ford is said to consider history as nonsense and its study unnecessary and harmful—perhaps that is so in manufacturing automobiles, but automobiles and laws are not quite the same.

the king, must do the bidding of the people had been established by the revolutions of 1648 and 1688, and the rights of all classes were reasonably well defined and protected.

Most of this working theory and practice was traditional and customary—true there were the great stars, Magna Carta, the habeas corpus act, the bill of rights, but most of the English constitution was unwritten and there was none of it which could not be destroyed by parliament.

When the new nation came to be formed on this continent, all this was lost—it was a matter of necessity that a form of government should be devised, and as there were many colonies to be parties to the scheme, it was a practical necessity that everything possible should be in writing. Hence the American "constitution:" and the example was followed in the several states.

This brought about the little known less remembered but extremely important difference between the meaning and connotation of the words "constitution," "constitutional" in English and American[3] usage. The constitution in America is a document to be read by all men, litera scripta quae manet, binding in law upon all, to be interpreted by the courts.

"A written document containing so many words and letters which authoritatively and without appeal dictates what shall and what shall not be done."[4]

In England, the "constitution" was the totality of principles more or less vaguely and generally stated, upon which it was thought the land should be governed. These principles were not binding in law: the Parliament could violate, could change or reverse them at will. So, too, in American usage anything which is "unconstitutional" is illegal however wise and right it may be: in England to say that anything is "unconstitutional" is to say that it is legal but wrong and inadvisable.[5]

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[3] I use the word "American" in the usual sense of the word in the United States: Canadians sometimes used rather to resent the monopolization of the appellation American by the citizens of the United States, but that feeling is now practically extinct. We are not nor do we wish to be called Americans, though we are American: most of us are more than content to be simply Canadians.

[4] See my work "The Constitution of Canada," The Dodge Lectures, Yale University, 1917, Yale University Press, New Haven, Conn., p. 52.

[5] These are of course general statements, substantially accurate but not to be subjected to microscopical analysis as the "constitution" of the United States and those of the several states not uncommonly are. Perhaps I may be pardoned for transcribing here what I said in Yale:

"In the ultimate analysis the difference arises from the fact that the fathers of this union of states knew how to write: and that having the

Canada never had a violent separation from the old land; she retained British connection as she retained the British flag. The separate provinces of which the Dominion of Canada was formed in 1867 had before that time obtained responsible government substantially as in England, i. e. the ministers of the Crown were responsible to the representatives in Parliament elected by the people.[6] These Provinces had all retained the constitutional theories as well as the nomenclature of England.

A union of all the British North American Colonies had been long thought of and had been recommended by many; but it was not until after the middle of the 19th Century that the matter became practical politics. In 1864 two conferences were held by the delegates from most of these provinces and there was drawn up a scheme of union.[7] One of the resolutions stated that the people of the provinces which were to unite "desire to follow the model of the British constitution so far as our circumstances will permit."[8]

The other resolutions contained the frame work of a written constitution pro tanto; but it was not elaborate or complete;

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power, they had that desire to reduce their views to a written form which characterises the philosopher.

"In the mother country, the philosophic students of the problems of politics also gave written expression from time to time to their views—but these students differed from those philosophers in that they had no power to cause their writing to be adopted as a binding document. No more profound studies have ever been made in the theory of government and concerning the balance of function of its various departments than those of Englishmen—but Englishmen could give them only as speculations, they had not the power to have their theories adopted by the nation at large.

"The fathers of this nation, when they had drawn from English and other sources what they conceived to be the true principles upon which government should be carried on, went further and formulated their theories in a document framed with much skill; and they had the fortune to have that document declared binding not only upon the nation as it then existed, but also upon the nation—speaking generally—as it was to be to the end of time."

[6] This evolution from a system of government not very unlike that of the thirteen colonies before the revolution of 1776-1783 was due in some measure to legislation of the Imperial Parliament, more to the instructions given to the governors by the home administration, and in the ultimate analysis, practically all to the increasing democracy of the people of the provinces themselves.

I do not give an account of this process of evolution—a short outline will be found in my Dodge Lectures, see note 4 above.

[7] A short account of these conferences will be found in my Dodge Lectures, pp. 29 sqq.

[8] See "Some Origins of the British North America Act," 1867, my paper read before the Royal Society of Canada, May, 1917, Trans. R. S. Can. 1917, pp. 71, sqq.

it did not purport to exhaust the rules of government but left much to tradition and established practice.

In theory the king is supreme over the colonies: he alone has the power to make and unmake, divide and unite them—this power he exercises with his Parliament, the Imperial Parliament at Westminster. And in law that Parliament of which the king is a part may legislate for all the British world.[9]

Accordingly a number of colonial statesmen were sent to London to formulate an act of Parliament and obtain its passing;[10] and the well-known "British North America Act 1867"[11] was the result. The preamble of that act reads as follows:—

"Whereas the provinces of Canada,[12] Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution[13] similar in principle to that of the United Kingdom."

This constitution was not to be precisely the same as that of the United Kingdom—had it been so, much of the act would have been omitted. Carrying out the principles arrived at at the conference in Quebec in 1864, specific provision was made

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[9] I have more than once been asked by an American who did not understand the real independence of Canada, "What would happen if the British Parliament were to pass legislation for Canada which Canadians did not approve of?" My answer has always been "What would happen if one illiterate full blooded negro were to be elected President of the United States?" Both are perfectly legal; both unthinkable.

[10] In form the British North American Act of 1867 is an exercise of power by the Imperial Parliament: in fact it is the legalizing of an agreement entered into by the colonies concerned. This is often overlooked and the form mistaken for the substance. The British North America Act was the production of colonial statesmen, the only change made or suggested by imperial statesmen being a change of the name from the "Kingdom" of Canada to the "Dominion" of Canada out of regard to the supposed sensibilities of the United States! For reasons not germane to the present purpose, I think that the change did harm to the Empire at large.

[11] Great Britain Pub. Gen. Stat. 30 Vic. cap. 3.

[12] The "Government of Quebec" formed by the Royal Proclamation of 1763 after the conquest of Canada and enlarged by the Quebec act of 1774 was in 1791-1792 divided into two provinces, Upper Canada and Lower Canada: these two provinces were united into one called "Canada" by the Union Act of 1840, 3, 4 Vic. c. 35 (Imp.) and it was this province of Canada composed of Upper Canada or Canada West (now Ontario) and Lower Canada or Canada East (now Quebec) which desired to unite with Nova Scotia and New Brunswick in one Dominion.

Nova Scotia may be considered as beginning her provincial life in 1749. The extent of the province was not very accurately defined but it included what is now New Brunswick and considerable more territory: in 1784 New Brunswick became a separate province and in 1820 Cape Breton theretofore separate was united with Nova Scotia.

[13] With a small "c"—not a "Constitution."

in the act for many matters—accordingly we stand between Britain and the United States—we inherit the traditional rules of England and at the same time we have, authoritatively laid down in writing, much by which we are bound. The British North America Act and the amendments to it are legally binding like the constitutions of the United States and the separate states; no Canadian Parliament or provincial legislature can lawfully transgress these, and any attempt to do so would be restrained by the courts on the complaint of one injured. But at the same time a large sphere is left uncontrolled by the written law—and in that sphere, Parliament and legislature are wholly uncontrolled—they have the traditional rules, but they may legally disregard these rules—the courts there have no power, the electorate must judge of the propriety of acts in that sphere and reward or punish accordingly.[14]

Moreover, a large part of the British North America Act gives rise to no litigation. The preamble contains this statement:

"It is expedient not only that the constitution of the legislative authority in the Dominion be provided for but also that the nature of the executive government therein be declared."

Much of the Act is concerned with the executive and that part does not give rise to litigation at all; the same is true of the formalities to be observed in legislating.

The portions of the act which have given rise to litigation are chiefly sections 91 and 92 which give the legislative powers

[14] It is in part due to the double code of rules that some Canadians, amongst them members of the Bar, are apt to use the words "constitution," "constitutional," "unconstitutional" in the American sense—to a certain extent the influence of American usage is felt. The practice is perhaps increasing: it is sometimes found in Parliament—even so great a master of the English tongue and of constitutional law and practice as the late Sir Wilfrid Laurier has been known to offend in this regard. The accurate speaker uses the terms intra vires and ultra vires for the American "constitutional" and "unconstitutional."

In Bell v. Burlington, (1915) 34 Ont. Law Rep. 619, 9 O. W. N. 44, 182 counsel argued before a divisional court of which I was a member that his clients were not liable to pay taxes because by reason of a change in the boundaries of the municipality they had not had an opportunity to vote for the members of the town council which imposed the taxation, and "taxation without representation is unconstitutional." In giving judgment I said: "That this maxim is profoundly true may certainly be admitted, but we must carefully distinguish between the meaning of the word 'unconstitutional' in the British and in American usage." I pointed out that the maxim used the word in the former sense, and that if it were found that the taxation imposed was legally within the powers of the council it would be upheld as valid—intra vires although unconstitutional.

of the Parliament of the Dominion and of the legislatures of the provinces respectively.[15] A very considerable amount of private litigation even under these sections is prevented by references by the governments of the Dominion and the provinces as to the legality of legislation or proposed legislation.

In the Dominion, a statute[16] provides for a reference to the Supreme Court of Canada by the governor-in-council (i. e. the government) of important questions of law or fact touching the interpretation of the British North America Act, the powers of the Parliament of Canada, the legislatures of the provinces or the governments.

Before dealing with the sections already mentioned, it will be well to give a somewhat general outline of our system. An intelligent foreigner from reading the constitution of the United States could form a fairly accurate conception[17] of the methods

[15] The Dominion of Canada was originally constituted of four provinces, Ontario (formerly Upper Canada or Canada West) Quebec (formerly Lower Canada or Canada East),—Nova Scotia and New Brunswick—these were the provinces whose powers were defined in the act.

In 1870 the new province of Manitoba was created by the Dominion Parliament; in 1871 British Columbia was admitted as a province; in 1873, Prince Edward Island; in 1905 the new provinces of Alberta and Saskatchewan were created by the Dominion Parliament—so that now there are nine provinces in the Dominion, all with substantially the same powers. There is also the Yukon Territory as well as a vast unorganized extent of territory toward the North.

[16] Canada Rev. Stat. 1906, cap. 139 sec. 60 which reads as follows:

"60. Important questions of law or fact touching—

(a) the interpretation of The British North America Acts, 1867 to 1886; or,

(b) the constitutionality or interpretation of any Dominion or provincial cial legislation; or,

(c) the appellate jurisdiction as to educational matters, by The British North America Act, 1867, or by any other Act or law vested in the Governor in Council; or,

(d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be executed; or,

(e) any other matter, whether or not in the opinion of the court ejusdem generis with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;

may be referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question."

The right of the Dominion to pass legislation of this kind, referring to the Supreme Court the question of the validity of a statute or a proposed statute has been approved by the Supreme Court itself and by the Judicial Committee of the Privy Council. In re References by the Governor-General etc. (1910) 43 Can. S. C. R. 536; on appeal [1912] A. C. 571. Some of the provinces have similar legislation, e. g. Ontario, Rev. Stat. 1914 c. 85; Manitoba, Rev. Stat. 1913 c. 38.

[17] There are some exceptions e. g. the electoral college was theoretically to be composed of a number of gentlemen of high standing who should

of government, etc., in the United States, but that is not the case in the government, etc., of Canada—the act must be read in the light of constitutional history and practice, and anyone ignorant of these who should take the Act at its face value and read it literally would go grievously astray.

Section 9 provides that the executive government and authority in and over Canada is to continue and be vested in the queen (now of course the king) and the appointment of a governor-general is provided for to carry on the government in the name of the queen(king). This once expressed a reality—the king was once an actual ruler and his personality was of importance—but now the sovereign does not meddle with administration or policy; his ministers responsible to the representatives of the people in parliament decide all such matters. If their course does not please the House of Commons, they are voted out of power and new ministers are put in their place.[18]

The Governor-General is in much the same case in Canada—he in theory carries on the government in the king's name—in fact the government is carried on by the ministers. He is

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be elected by the people to exercise their judgment in selecting a president—and that is how the document sounds—everyone knows that the personnel of this college is of not the slightest importance but that the members are a mere conduit pipe to convey the thoroughly understood wishes of the voters. If after the election in 1916 every elector in the college believed Mr. Taft to be the best man for the presidential office not a vote would have been diverted from Wilson and Hughes even if they had been both considered utterly unfit.

[18] The last royal veto of a bill which had passed Parliament was that of the triennial bill reducing the term of Parliament to three years by the sour but able Dutchman, William III, in 1693; the bill was passed again in 1694 and this time it received the royal assent.

William III had a greater interest in continental affairs than in English politics but from time to time he exercised his royal prerogative with vigor. Anne gave her ministers some trouble but she was easily managed through her personal friends; George I knew no English and took no interest in his insular kingdom preferring that of Hanover on the Continent; George II did not interfere to any noticeable extent; George III was a king in fact as well as in name, he made and unmade ministries. took part in elections, he ruled England with the result of the loss of America; George IV was not so conscientious as his father but almost equally troublesome—his life of selfishness and debauchery disgusted his subjects and had his successor been like him it is not unlikely the fate of the monarchy would have been sealed, but William IV the sailor king placed himself in the hands of his ministry and the ascension to the throne of the girl queen Victoria and her sensible conduct practically ended republican sentiment in Britain. Edward VII was and George V is a model of constitutionalism; and it is certain that there is no place in the throne for the meddler in politics or the open debauchee.

It is a common but true saying that the king reigns but does not rule, the president rules but does not reign.

appointed by his majesty i. e. by the imperial administration.[19] The governor-general in council i. e. the Dominion administration appoints the lieutenant-governor of each province—that officer has the same functions and (want of) authority in the province which the governor-general has in the Dominion.

It will be seen, then, that the governor-general and lieutenant governors have no kind of analogy with the president of the United States—wholly different persons in Canada stand in that relation, i. e., the prime ministers.

The Dominion has two houses of Parliament, the Senate (the members of which are nominated by the government and sit for life) and the House of Commons (the members of which are elected by the people). There are two political parties[20] and the party lines are drawn very strictly: each has its chosen leader and the leader[21] of the party which is dominant in the House of Commons is the prime minister. The prime minister selects his colleagues all of whom must be members of Parliament and they collectively form the administration or government, and are responsible for administration and legislation. The same remarks apply in the provinces.

There is much closer analogy between the prime minister and the president than between the governor and the president.

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[19] But care is taken that no one is appointed not approved of by the Canadian Administration.

[20] That is in normal times—the war has made strange bed-fellows—there is at this time a union government composed of conservatives and liberals in nearly equal numbers, and there is also a liberal party, composed of those who followed the late Sir Wilfrid Laurier in his opposition to conscription and a few others. Normally, however, there are the two parties, conservative and liberal; third parties make their appearance from time to time, like the "grangers," the "equal rights party," etc., but so far they have not prospered. At the present time a new third party has emerged in Ontario, the "united farmers;" time will show how successful it will be. Then the returned soldiers may form a party or may possibly act like the G. A. R., in swelling one or other of the existing parties.

[In writing this note I followed the wise method "never prophesy unless you know." Since the note was written the United Farmers Organization has captured the Province of Ontario and has now a government in power.]

[21] While the prime minister must like all other ministers of the crown be a member of Parliament, it is not necessary that he should be in the House of Commons; he may be a Senator as were Sir John J. C. Abbott, (Premier, June, 1891-December, 1892) and Sir Mackenzie Bowell (Premier, December, 1894-April, 1896); the other six prime ministers, Sir John Alexander Macdonald (July 11th, 1867-November 7, 1873, and October 17, 1878-June, 1891), Honorable Alexander Mackenzie (November 7, 1873-October 17, 1878), Sir John S. D. Thompson, (December, 1892-April, 1896), Sir Charles Tupper, Bart. (April, 1896-July, 1896), Sir Wilfrid Laurier (July, 1896-October, 1911) and Sir Robert Laird Borden, (October, 1911, still in office) all belonged to the popular House.

But the term of office is not fixed: so soon as the prime minister loses the confidence of the popular House, he must give way to another—unless he can obtain the approval of the electorate. If defeated in a test vote in the House, he may call a new election—if the majority of those returned to the House support him, he remains in office, if not, he must retire and the leader of the opposite party comes in.[22]

All the members of the administration being in one or other of the Houses of Parliament, they explain and defend their conduct in office and the measures advanced by the government.

The Senate is of little importance compared with the House of Commons: it has no part in determining what political party shall hold the reins of power: it checks, alters and sometimes defeats proposed legislation but otherwise is of little significance.[23]

In all but two of the provinces, there is only one House, and that is wholly elective.[24]

AMENDMENTS

There is no power given to the Dominion to amend its own "constitution." The reason for this is historical. Lower Canada, now Quebec, was and is largely populated by French-speak-

[22] Sometimes a new prime minister takes the place of the old by an arrangement in the party itself, e. g. Sir John J. C. Abbott became prime minister in 1891 on the death of Sir John A. Macdonald. He retired in 1894 in favour of Sir John S. D. Thompson; on Sir John Thompson's death in 1896, he was succeeded by Sir Mackenzie Bowell, who retired in 1896 in favour of Sir Charles Tupper. Sir Charles failed to carry the country on the general election of 1896 and had to retire, being succeeded by Sir Wilfrid Laurier of the other party "the leader of the opposition."

Sir John Macdonald was in office 19 years: Sir Charles Tupper 3 months.

In Ontario, Sir Oliver Mowat was prime minister for nearly 24 years: Hon. Edward Blake for 10 months.

[23] The extraordinary difference in the relative power and importance of the Senate of the United States and the Senate of Canada calls for a separate treatise by itself. I do not here enter into the enquiry as to the causes of this difference.

[24] The two provinces with two houses are Quebec and Nova Scotia; Ontario came into Federation with only one House (1867); so did British Columbia (1871); New Brunswick abolished her "upper house" or Legislative Council by the Act of 1891 effective in 1892; Prince Edward Island did the same in 1893; Manitoba formed as a province with two Houses got rid of her Legislative Council in 1876; Saskatchewan and Alberta were created with but one House. "No province with only one chamber has ever desired two; while at least one of those with two (i. e., Nova Scotia) has groaned under the imposition. Nor has there been found crudity or want of thought more in the unicameral than in the bicameral Provinces." "The constitution of Canada, etc.," p. 103.

ing, Roman Catholic people of French descent: the other three provinces by English-speaking, generally Protestant and of English, Scottish or Irish descent. The French Canadian from the very beginning has been tenacious of his language and religion and not less so of his law and institutions. The law of French Canada is based upon the coutume de Paris and ultimately upon the civil law of Rome, that of English-speaking Canada upon the common law of England. From the time of the conquest, the French Canadian was jealous of English interference, of English influence, and was ever on his guard against English meddling with his affairs.

The British North America Act, being the production of French Canadians and English-speaking Canadians, represented their agreement with each other—an agreement which left French Canada to manage her own affairs: and the French Canadians would never have agreed to a provision authorizing a change in the agreement without their consent: they knew of course, that they were largely outnumbered by the English-speaking who were not always sympathetic with the French view. Accordingly there is no provision for amending the constitution of the Dominion.

What is done when it is desired to amend the constitution is simple—an address to the king passes both Houses of Parliament asking for an Act in the form presented—that is sent to Westminster and an Act is passed as of course.[25]

There being no need to consult French sensibilities in the provinces other than Quebec and the French being overwhelmingly powerful in Quebec itself, there was no need of protecting the provinces from constitutional amendment and consequently the provinces are given the power to amend their constitutions "except as regards the office of the lieutenant-governor. This exception would not on its face appear to lead to litigation: but a very important decision is based upon it.

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[25] The act being a compact, no such address is transmitted unless the Houses of Parliament are unanimous (or practically so); no amendment of the act asked for has been refused or even debated, no amendment has ever been made unless it was asked for by Canada—it is our business and that of no one else, English or otherwise.

It is from paying attention to the form and not to the substance that certain critics have made strictures on my account of affairs Canadian—strictures which would be called silly were they not due to ignorance. Amendments to our constitution are in fact made by ourselves; we seek Imperial legislation to give them legal validity.

In 1916, the Legislature of Manitoba passed an act[26] authorizing any number of electors not less than eight per centum of the voters at the previous general election to petition the legislature for the passage of any proposed law: the speaker was on being satisfied of the sufficiency of the signatures to lay the proposed law before the House and if the House refused or omitted to pass it, it was to be submitted to a vote of the electors: if it secured a majority of the votes, it became law. There was also a provision for referring a law to a vote with similar results. The validity of this legislation was referred under the authority of a provincial act[27] similar to the Dominion statute above mentioned[28] to the Manitoba court of king's bench—the chief justice gave a pro forma judgment affirming the validity of the act but the court of appeal reversed this decision by a unanimous judgment.[29] An appeal was taken to the Judicial Committee of the Privy Council at Westminster and that board affirmed the decision of the Manitoba court of appeal.[30] Their lordships of the privy council thought "that the language of the Act cannot be construed otherwise than as intended seriously to affect the position of the lieutenant-governor as an integral part of the legislature and to detract from rights which are important in the legal theory of that position"—the legal theory being that the lieutenant-governor directly represents the sovereign in the province and that when he "gives to or withholds his assent from a bill . . . it is in contemplation of law the sovereign that so gives or withholds assent."

It is to be noticed that this decision is based upon the express exception of the act. It has long been held that both the Dominion and the provincial legislative bodies are supreme in the classes of cases given to their jurisdiction—they have original jurisdiction, they are not simply delegates of the Imperial Parliament, but may themselves delegate their powers or any part

[26] Man., 1916, 6 Geo. V. c. 59.
[27] Man., Rev. Stat., 1913, c. 38.
[28] See note 16, supra.
[29] Chief Justice Mathers, C. J. K. B., presided in the Court of King's Bench; in the court of appeal were (the late) Chief Justice Howell, C. J. M., and Richards, Perdue, Cameron and Haggart, JJ. A. 1916 27 Man. Rep. 1.
[30] [1919] A. C. 935, 35 Times Law Rep. 630. Lord Haldane, Lord Buckmaster (both ex-Lord-Chancellors) Lord Dunedin, Lord Shaw of Dunfermline and Lord Scott-Dickson constituted the board.
This decision is in line with expressions of opinion by the late Sir John A. Boyd, Chancellor of Ontario, in Attorney-General of Canada v. Attorney General of Ontario, (1890) 20 Ont. Law Rep. 222, 247.

of them.[31] The learning on the power of a state legislature to delegate its powers is fairly well collected in Cooley's Constitutional Limitations[32] and I do not pursue the enquiry.

The power given to the provinces to amend their constitution has had results which seem strange and even alarming to an American e. g. the legislatures of New Brunswick, Prince Edward Island and Manitoba abolished the second chamber,[33] that of Ontario elected for four years extended their term to six,[34] that of Alberta has made twelve of its members, members of the succeeding House without nomination or election,[35] the Dominion has taken away the right to vote from those of enemy birth naturalized before 1902.[36]

While the Parliament or legislature can extend its own life, the government of the Dominion or province can have an election at any time.

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[31] The Queen v. Burah, (1878) 3 A. C. 889, 905; Hodge v. The Queen, (1883) 9 A. C. 117, 53 L. J., P. C. 1, 50 L. T. 301; Russell v. The Queen, (1882) 7 A. C. 829, 835, 51 L. J., P. C. 77, 46 L. T. 889; Fredericton v. The Queen, (1880) 3 Can. S. C. R. 505, 530; Rex v. Carlisle, (1903) 6 Ont. Law Rep. 718, 722.

[32] Cooley, Constitutional Limitations, 7th ed., pp. 163 sqq., and cases cited in notes.

[33] See note 15.

[34] Having first by the statute (1917) 7 Geo. V. c. 27, s. 9, rendered it unnecessary to have an election to fill a vacancy in the legislature caused by death of a member during the war, they in 1918 proceeded to enact (1918) 8 Geo. V. c. 4, that the legislature need not be dissolved until a year had elapsed and a session of the legislature held after the return of the Canadian forces overseas. There was one member who objected to this as "unconstitutional" (in our sense) although there was no doubt of its legal validity.

The Ontario Legislature acted as did the Imperial Parliament elected for three years under (1694) 6 W. & M. c. 2, which in 1716 extended its own life to seven years by the act 1, Geo. I, St. 2, c. 38, the well-known Septennial Act upon the "constitutionality" of which much was said on both sides.

During the war, the Imperial Parliament has several times extended its own life.

[35] Alberta Stat. 1917 c. 38. I know of no precedent for this proceeding. The twelve members had enlisted for overseas service and were considered unable to take part in any election until after the close of the war.

[36] The statement is general and not strictly accurate. The statute may be looked at for particulars. See the War Time Elections Act, 7-8 Geo. V, c. 39, and my discussion of it in "The Constitutional Review," Vol. 2, April and July 1918, pp. 71 sqq. 157 sqq. The right to deprive any class of citizens of a vote was expressly affirmed in the Judicial Committee of the Privy Council in Cunningham v. Tomey Homma [1903] A. C. 151 and Parliament approved the principle: "The rights of British subjects in Canada are rights given under the law of Canada; the law of Canada must be dictated by the needs of the hour for the safety of Canada," inter arma silent leges; and as Sir Wilfrid Laurier said: "If the Germans win the war nothing else on God's earth matters." The celebrated fifteenth amendment furnishes the American rule.

Of course in the United States, the time of elections and the life of the legislature are fixed by the constitutions and cannot be changed: while disfranchisement exists only as a punishment for crime or as a consequence thereof.[37]

NEW PROVINCES

The British North America Act did not contain an express power to create new provinces. Nevertheless in 1869-70 the Dominion Parliament provided for the formation of a new province, Manitoba, out of part of the newly acquired Hudson Bay Territory: it was not quite clear that this legislation was valid and an address was presented from both Houses of Parliament to her majesty and an act was obtained confirming the Canadian legislation and giving the power expressly to create new provinces.[38] Article IV, section 3 of the constitution of the United States provides for new states, etc.

DISALLOWANCE OF LEGISLATION

While the Dominion has plenary power to legislate upon the classes of subjects allotted to it, it is not to be forgotten that it is a part of the far-flung British Empire: the Dominion Parliament may be supposed to have Canada only in view, and its legislation might by possibility imperil or injuriously affect the interests, even the peace and security of the Empire at large. Accordingly when a bill is passed by both Houses of Parliament and presented to the governor general for signature, he has the power instead of assenting to it at once in the name of the king, to withhold that assent or reserve it for the signification of the king's pleasure, i. e. for the opinion of the home ministry. There has been no instance of assent being withheld—if it should be, a crisis would arise—nor has any bill been reserved. But even if assented to (which is the invariable practice) the king through

[37] Of course these are the merest common places; Black, Constitutional Law, 3rd ed. pp. 672 sqq. and cases there cited may be referred to. See the 14th constl. amendment.

[38] The original acts are 32, 33 Vic. c. 3, (Can.) and 33 Vic. c. 3 (Can.), the address is referred to in 206 Hansard (3rd series) p. 1171, the Imperial Act is (1871) 34 Vic. c. 28 (Imp.). It was under this legislation that the Provinces of Alberta and Saskatchewan were formed by the Dominion in 1905 by (1905) 4, 5, Edw. VII, cc. 3 and 42 (Dom.).

The power to create new states and the method pursued are fully set out in Black, Constitutional Law, 3rd ed., 281, sqq. See the constitution, art. IV, sec. 3.

the home administration may within two years of its receipt disallow it—this has been done with only one bill and that rather at the instance of the Canadian administration.[39]

So, too, provincial legislation may be disallowed by the Dominion administration within one year: the practice of the Dominion government has not been uniform but of recent years the power of disallowance has not been exercised except where the legislation is ultra vires the province. That the legal power exists in every case is, however, undoubted, and the exercise of the power has at least twice been the battle ground of the political parties, and may be again—when it will be for the electorate to judge whether the power was rightly exercised in the interests of Canada.

Of course, there is nothing like this in the United States: the states are wholly separate and independent: and they cannot be controlled in their legislation by the central government.[40]

DIVISION OF SUBJECTS OF LEGISLATION

Sections 91 and 92[41] of the British North America Act enumerate the classes of subjects of legislation allotted to the

[39] In May, 1873, a bill authorizing the examination of witnesses on oath before Parliamentary Committees in certain cases received the assent of the governor-general; the Canadian minister of justice expressed doubts of its legality and the Law Officers at Westminster advised that the Bill was ultra vires the Dominion, i.e., "unconstitutional" in the American sense and it was disallowed on that ground.

[40] Rather to the embarrassment of the United States in some well-known cases. California seems to have been particularly recalcitrant.

The course pursued if the home administration considers an act of the Canadian Parliament objectionable is to communicate with the Canadian Government explaining fully the objectionable features. After the matter has been considered, the Canadian Parliament at its next session heals the defects. There are to be no more quarrels between the home government and colonial parliaments, one Bunker Hill was enough.

[41] Sections 91 and 92 read as follows:

"91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say: 1. The Public Debt or Property; 2. The regulation of Trade and Commerce; 3. The raising of money by any mode or system of Taxation; 4. The borrowing of money on the public credit; 5. Postal Service; 6. The Census and Statistics; 7. Militia, Military and Naval Service and Defence; 8. The fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada; 9. Beacons, Buoys,

Dominion and the provinces respectively—the Dominion being allotted "all matters not coming within the classes of subjects by this act assigned exclusively to the legislatures of the provinces." So that the unenumerated matters go to the Dominion.

Lighthouses and Sable Island; 10. Navigation and Shipping; 11. Quarantine and the establishment and maintenance of Marine Hospitals; 12. Sea coast and inland Fisheries; 13. Ferries between a Province and any British or foreign country or between two Provinces; 14. Currency and Coinage; 15. Banking, incorporation of banks, and the issue of paper money; 16. Savings' Banks; 17. Weights and Measures; 18. Bills of Exchange and Promissory Notes; 19. Interest; 20. Legal tender; 21. Bankruptcy and Insolvency; 22. Patents of invention and discovery; 23. Copyrights; 24. Indians, and lands reserved for the Indians; 25. Naturalization and Aliens; 26. Marriage and Divorce; 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters; 28. The Establishment, Maintenance, and Management of Penitentiaries; 29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned "exclusively to the legislatures of the provinces."

EXCLUSIVE POWERS OF PROVINCIAL LEGISLATURES.

"92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say: 1. The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant Governor; 2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes; 3. The borrowing of money on the sole credit of the Province; 4. The establishment and tenure of Provincial offices and the appointment and payment of Provincial officers; 5. The management and sale of the Public Lands belonging to the Province and of the timber and wood thereon; 6. The establishment, maintenance, and management of public and reformatory prisons in and for the Province; 7. The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals; 8. Shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for Provincial, local, or municipal purposes; 10. Local works and undertakings other than such as are of the following classes: a. Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the Province with any other or others of the Provinces or extending beyond the limits of the Province; b. Lines of steam ships between the Province and any British or foreign country; c. Such works as, although wholly situate within the Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the Provinces; 11. The incorporation of companies with Provincial objects; 12. The solemnization of marriage in the Province; 13. Property and civil rights in the Province; 14. The administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts; 15. The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section; 16. Generally all matters of a merely local or private nature in the Province."

In the United States anything not expressly or impliedly given to the central authority remains in the states, by the tenth constitutional amendment.

It cannot be too carefully borne in mind that the powers of the Dominion and provinces are within the limits prescribed by the act as plenary and ample as the Imperial Parliament possessed and could bestow.[42]

The legislative power is to be exercised not directly by the people but by Parliament and legislature, in other words, there is to be representative government. This in itself would have been sufficient to decide the initiative and referendum case from Manitoba already referred to, and the principle was in fact much relied on especially in the Manitoba court. That the people were considered to be represented by those whom they had elected to represent them was well illustrated at the time the British North America Act was under consideration in the Imperial Parliament. The legislature of Nova Scotia had approved the scheme of union but a strong agitation sprang up headed by very influential leaders, and a very numerously signed petition was sent from the province to Westminster against the proposed act. It was, however, considered that the attitude of the province must be gathered from the action of the legislature rather than from that of the people or some of them and the petition was wholly ineffective.[43]

As has already been indicated this does not prevent the legislative bodies from giving large powers to boards, councils, etc. For more than a century we have had some kind of municipal system, for three quarters of a century a somewhat extensive one —the province divided into cities, towns, villages, counties, townships, each of these municipalities has its council elected by the people and having very large powers of legislation in matters closely affecting the inhabitants of the municipality. So, too, boards of commissioners have been formed which validly enacted regulations in the nature of by-laws of a local character for the good government of taverns, the sale of liquor, etc.[44]

[42] I do not here discuss the vexed question of extraterritoriality but confine my remarks to legislation in and for Canada, the rights and duties in Canada of those in Canada. Those interested in the question of the extraterritorial powers of Dominion and Province may consult Lefroy's "Canada's Federal System." Toronto, 1913, pp. 105, 106, 185 and other works on the Canadian constitution.

[43] See the debates in 185 Hansard (3rd Series).

[44] See the discussion of such matters in Hodge v. The Queen, (1883) 9 A. C. 117, 53 L. J., P. C. 1, and cases cited in argument and decision.

As was to be expected it was sometimes found impossible to draw a clear line of demarcation in the act between the subjects allotted to Dominion and those allotted to province: an examination of the sections will at once make manifest that many subjects are from one point of view in one class, from another in another. This has been the cause of considerable litigation—I shall mention a few instances only.

By section 91(26) the Dominion legislates on "Marriage and divorce;" by section 92(12), the province on "The Solemnization of marriage within the province." Under the former, the Dominion in 1882 repealed all laws prohibiting marriage with a deceased wife's sister,[45] under the latter the Province of Ontario in 1907 authorized the high court to adjudge that a valid marriage had not been entered into if a party under 18 had not obtained the consent required by the Marriage Act.[46]

For many years much irritation was felt in Protestant circles at the practice of the Quebec courts declaring to be illegal, marriages in that province (usually between Catholic and Protestant) which were not in accordance with the ecclesiastical and canon law of the Church of Rome. Legislation was proposed in the Dominion Parliament to correct this practice and protect the innocent spouse; but before passing the bill it was thought wise to ask the Supreme Court of Canada whether such a statute could be validly enacted. The Supreme Court held that the proposed bill was ultra vires the Dominion, and this was sustained in the Judicial Committee.[47]

Section 91(8) gives the Dominion power over "the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada," and it was long thought that the provinces could not give power to municipalities to tax Dominion-paid salaries, nothwithstanding section 92(8) where-

[45] By the statute (1882) 45 Vic., c. 42 (Dom.). Before that act the law (at least in Ontario) was that such a marriage could be declared illegal if attacked in the lifetime of the parties but not after the death of either. Re Murray Canal: Lawson v. Powers, (1884), 6 Ont. Rep. 685; Hodgins v. McNeil, (1862), 9 Gr. Ch. R. (U. C.) 305.

[46] By the statute (1907) 7 Edw. VII, c. 23, s. 8, (quorum pars magna fui). We have no divorce court in Ontario; the statute has been declared valid by judgments of the supreme court of Ontario but it has not yet been considered in the Supreme Court of Canada or the Judicial Committee of the Privy Council.

[47] In re Marriage Laws, (1912) 46 Can. S. C. R. 132, affirmed [1912] A. C. 880. I give but the barest outline of the case: those interested may consult the reports which furnish entertaining reading useful for the constitutional lawyer.

by the province is given power over "municipal institutions in the province." But this view of the law received its deathblow in the Supreme Court of Canada in 1908 and now judges and civil servants of the Dominion generally are taxable like ordinary mortals.[48]

Section 91(15) gives the Dominion "banking, etc.:" but nevertheless the province under section 92(2) "direct taxation within the province in order to the raising of a revenue for provincial purposes" can tax banks doing business in the province.[49] By reason of the restriction to "direct taxation" however, the province cannot impose a tax of ten cents on each exhibit produced in court [50] or impose a fee of twelve dollars in stamps upon filing a jury notice[51] or compel an insurance company to put a stamp on every policy, renewal and receipt. All taxation which might from some point of view be considered indirect does not, however, fall within the prohibition—brewers and distillers may be compelled to pay a license fee, medical men to pay a fee on being registered, mortgagees to stamp mortgages, the registrar to pay to the county a proportion of the fees received for registering deeds, etc., although they contend with more or less

[48] The former view was based upon such cases as Leprohon v. City of Ottawa, (1877-8) 40 Up. Can. Q. B., 478, 2 Ont. Ap. Rep. 522; Exp. William, (1898) 34 New Bruns. 530; Desjardins v. Cité de Quebec, (1900) 18 Que. Sup. Ct. 434; Exp. Burke, (1896) 34 New Bruns. 200; all these were over-ruled by Abbott v. City of St. John, (1908) 40 Can. S. C. R. 597, 38 New Bruns. 421. In my own court we recently held that the salary of a judge is taxable by the city in which he lives, reversing the judgment of the county court. City of Toronto v. Morson, (1917) 40 Ont. Law Rep. 227.

[49] Bank of Toronto v. Lambe, (1887) 12 A. C. 586, 56 L. J., P. C. 87, 57 L. T. 377.

[50] Attorney-General of Quebec v. Reed, (1883) 10 A. C. 141, 54 L. J., P. C. 12, 52 L. T. 393, 33 W. R. 618. The prothonotary of the superior court at Montreal refused to file a promissory note (upon which Reed, the plaintiff, based his action) without the ten cent stamp required by the legislation of the Province of Quebec, 43, 44, Vic. c. 9 (Que.); the plaintiff took out a rule to compel him to do so. The attorney-general of the province intervened to support the prothonotary. Mr. Justice MacKay held that the legislation was ultra vires; the court of queen's bench in appeal (Monk, Ramsey, Tessier and Cross, J. J.; Dorion, C. J. dissenting) reversed this decision but it in its turn was reversed by the supreme court of Canada whose reversal was sustained by the Judicial Committee of the Privy Council. Loranger v. Reed, (1882) 26 Low. Can. Jurist 331, Reed v. Mosseau, (1883) 8 Can. S. C. R. 408; Attorney-General for Quebec v. Reed, (1884) 10 A. C. 141, 54 L. J., P. C. 12, 52 L. T. 393, 33 W. R. 618, 3 Cartwright Const. Cas. 190.

[51] Plummer Wagon Co. v. Wilson, (1886) 3 Man. Rep. 68. But there is no interference with the long established fees in Ontario for such purposes. The insurance case is Attorney-General for Quebec v. Queen Insurance Company, (1878) 3 A. C. 1090, 38 L. T. 897.

justice that they may be able to shift the burden to the shoulders of others.[52]

There is no such limitation to the power of taxation given to the Dominion by section 91(3) "the raising of money by any mode or system of taxation."

The provisions of the constitution of the United States as to taxation are of course well known to every American lawyer—the question of direct and indirect taxation has come up more than once.[53] There is no such provision as to direct taxation by either Dominion or province as is contained in the constitution, article 1, section 9, that it must be "in proportion to the census or enumeration."

Nor is there any prohibition against a tax or duty on articles exported.[54]

The Dominon authorizes the governor in council by proclamation to impose an export duty on nickel or copper matte or ore, crude or partially manufactured, lead, silver, pig lead, etc.[55]

Our province of Ontario has gone even further and absolutely forbids the export of logs, etc., cut on public lands altogether, requiring their manufacture in Canada into boards, deals, pulp, paper, etc., and the Dominion forbids the exportation of wild turkey, quail, etc., under penalty of fine and seizure of the game.[56]

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[52] Brewers and Distillers—Brewers and Malsters' Association of Ontario v. Attorney General for Ontario [1897] A. C. 231, 66 L. J., P. C. 34, 76 L. T. 61; Rex v. Niederstadt, (1905) 11 Brit. Col. Rep. 347. Medical men, Le College de Medecins v. Bingham, (1888) 16 Rev. Leg. 283 (Quebec). Mortgagees—In re Yorkshire Guarantee and Securities Corporation, Limited, (1895) 4 Brit. Col. Rep. 258. The Registrar of Deeds—County of Hastings v. Ponton (1880) 5 Ont. App. 543.

Some of these cases can be and have been supported on the strength of section 92 (9) "shop, saloon, tavern . . . and other licenses in order to the raising of a revenue for provincial, local or municipal purposes."

[53] Constitution of the United States, art. 1, sec. 2, "representatives and direct taxes shall be apportioned . . ." Sec. 8 "The Congress shall have power to levy and collect taxes, duties, imports and excises . . ." Sec. 9. "No capitation or other direct tax, shall be laid unless in proportion to the census or enumeration . . ." In Springer v. United States (1880) 102 U. S. 586, 26 L. Ed. 253, it was considered that "direct taxes" within the meaning of the constitution are only capitation taxes and taxes on real estate, but the meaning was extended in Pollock v. Farmers' Loan & Trust Co., (1894) 157 U. S. 429, 39 L. Ed. 759 15 S. C. R. 673, s. c. (1895) 158 U. S. 601, 39 L. Ed. 1108, 15 S. C. R. 912 (rehearing by the full court) to include taxes on the rent or income of real estate, and also taxes on personal property or on the income of personal property. Such direct taxes to be valid must be apportioned as provided for in art. 1, secs. 2, 9.

[54] U. S. constitution, art. 1, section 9.

[55] See Can. Rev. Stat. 1906 c. 50.

[56] See Ont. Rev. Stat. 1914 c. 29.

Returning from this digression, section 92(10), a, excludes from provincial jurisdiction " . . railways . . extending beyond the limits of the province" and therefore that subject is for the Dominion and no province or municipality under provincial authorization can validly legislate affecting the construction or operation of a railroad of this character; but that does not prevent section 92 (13) being fully effective. The province or a provincial municipality could not compel a railway company to erect proper fences on their railway on penalty of being responsible for all cattle killed on the line or compel the company to make its ditches of any prescribed construction but it can compel the keeping of the ditches open and the removal of obstructions which would cause inundation of the adjoining lands[57] and the workmen's compensation for injuries act of the province applies for the protection of workmen on the railway.[58]

There are indeed instances where there is almost or quite insuperable difficulty in separating the jurisdictions so that they actually overlap or interlace—in such cases neither legislation is ipso facto, ultra vires, either will be intra vires unless and until interfered with by the other, and where there are legislation by both Dominion and province, the provincial legislation must give way.[59]

Leaving this branch of the subject—it is next to be observed that our legislators are not prohibited from passing ex post facto laws as is the case in the United States.[60]

Nor is there any prohibition like that in the constitution forbidding the states to pass any "law impairing the obligation of contracts."[61] When "contract" was interpreted as including a charter to a university, the decision in the *Dartmouth College* Case[62] was inevitable—the old Province of Upper Canada and that of Canada destroyed the Charter of King's College, Toronto, and changed its whole character—took away the rights of

[57] The fence case is Madden v. Nelson & Fort Sheppard R. Co., [1899] A. C. 626, 68 L. J., P. C. 148, 81 L. T. 276; the ditch case, Canadian Pacific R. W. Co. v. Notre Dame de Bonsecours Parish, [1899] A. C. 367, 68 L. J., P. C. 54, 80 L. T. 434.

[58] Canada Southern Ry. Co. c. Jackson, (1890) 17 Can. S. C. R. 316.

[59] Grand Trunk R. W. Co. v. Attorney-General of Canada, [1907] A. C. 67, 69, 76 L. J., P. C. 23, 95 L. T. 631, 23 T. L. R. 40; City of Montreal v. Montreal Street R. W. Co., [1912] A. C. 333, 81 L. J., P. C. 145; Rex v. Hill, (1907) 15 Ont. Law Rep. 406.

[60] U. S. constitution art 1. secs. 9, 10.

[61] Ibid., art. 1, sec. 10.

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

the Church of England and made a new University of Toronto wholly nonsectarian. New Brunswick acted in much the same way with its provincial university and there can be no doubt of the power still existing.

PROPERTY AND CIVIL RIGHTS

Much of the above and much of the difference between the law of the United States and ours derive from the power given to the provinces by section 92(13) over "property and civil rights in the province." In the absence of such limitations as are contained in the constitution of the United States, such as has been mentioned and the last clause of the fifth constitutional amendment directing "nor shall private property be taken for public use without just compensation," our provincial legislatures have the undoubted power to take private property for public use or even for any use whatever public or private and without compensation.

The leading case is one in which on the assumption that a certain mining company had not done the work required to entitle them to a certain mining location, the minister had granted it to another company and the legislature passed an act vesting the location in this company. I held assuming that the first named company had acquired the right to location, the legislature had the power to take it away and give it to another: and that view of the law was sustained by all the courts.[63]

Mill privilege owners are given the right to expropriate land above and below their mill to increase their water power: in most if not all cases, compensation is directed to to be paid but

[63] Florence v. Cobalt, (1908) 18 Ont. Law Rep. 275. I used these words: "If it be that the plaintiff acquired any rights . . . the legislature had the power to take them away. The prohibition 'Thou shalt not steal' has no legal force upon the sovereign body."

I would not have it understood that the action of the government and legislature was dishonest. The government satisfied itself by careful enquiry and satisfied the legislature that the plaintiff company was asserting a wrongful claim; although I decided the case on the hypothesis that the plaintiff had acquired a right to the property, I did not decide that it had. The prime minister in the house when the case was under appeal declared that if the appeal court should decide that the plaintiff company had any right, it would be amply compensated by the province for its loss. The court of appeal and the Judicial Committee both decided that the plaintiff company had no right whatever. If any government should be guilty of dishonesty, it could not succeed at the next election, even if it should be able to carry the House; we are reasonably honest as peoples go.

such a direction is in no way essential to the validity of the statute.

Then the provisions of a trust deed or a will can be changed by a provincial legislature.[64]

A provincial legislature can and a state legislature cannot put a retro-active interpretation upon the words of its own statute different from that already given to the words by a court of competent jurisdiction.[65]

Our legislatures may go still further and prohibit an action in the courts altogether; they may direct the courts to stay their hand in any action already brought or to be brought.[66]

That a provincial legislature can confiscate private property within the province is wholly beyond question: but its jurisdiction in that regard is not extra territorial. In 1909 Alberta guaranteed certain bonds of a railway company, the money to be raised by the sale of the bonds to be deposited in a bank in the province and paid out to the company from time to time as the road was built. The bonds were sold in England, the company defaulted in the interest, the road was not completed, but some $6,000,000 of the proceeds of the bonds lay in the Royal Bank at Edmonton, Alberta, to the credit of a special account of the

[64] The leading case is the Goodhue Will Case, re Goodhue, (1872) 19 Gr. Ch. (Ont.) 366; 1 Cartwright Const. Cases 360. Goodhue had left a will which directed the residuary estate to accumulate during the life of his widow—the children of any child who should die in her lifetime to take the parent's share at her death. The children of Goodhue executed a deed providing that each should have his share at once, and the legislature validated this deed. The court held that this legislation was intra vires as being on "property and civil rights." There is a rule of the legislature that before such a private bill is passed, it is to be submitted to two justices of the supreme court who report as to its legal effect and its advisability, but this is a domestic rule and its observance is in no way essential to the validity of the legislation. Such legislation takes place almost every year, sometimes to disentangle or explain a complicated, inconsistent will or settlement, sometimes for the advantage of beneficiaries in relieving them of burdensome and unreasonable restrictions, sometimes for public reasons. It is a jurisdiction that should be and is exercised with extreme care; but there is no "constitutional limitation" preventing its exercise in any case.

For the American doctrine in such cases see Hillyard v. Miller, (1849) 10 Pa. St. 326; Shonk v. Brown, (1869) 61 Pa. St. 327; Alters' Appeal, (1871) 67 Pa. St. 341, 5 Am. Rep. 433, and like cases.

[65] Greenough v. Greenough, (1849) 11 Pa. St. 489, 51 Am. Dec. 567.

[66] In Smith v. London, (1909) 20 Ont. Law Rep. at p. 142, I said: "The legislature has said that this action shall be stayed. My duty is loyally to obey the order of the legislature and it is stayed accordingly."

For the American practice see such cases as State v. Adams, (1869) 44 Mo. 570.

Then we have a number of indemnity statutes which prevent actions being brought at all.

treasurer of the province and the company. A new government coming in, the legislature passed an Act declaring, inter alia, that the $6,000,000 and interest was the property of the province free and clear of any claim by the company. The bank refused to pay the money. The trial court and the supreme court of Alberta held the legislation valid but this decision was reversed in the Judicial Committee of the Privy Council on the ground that the purchasers of the bonds were to be paid at Montreal outside the province of Alberta, that their civil right to be paid had its locus there and that the legislation interfered with rights outside the province.[67]

This is a convenient place to say a word of the jury: as is well known the seventh constitutional amendment gives the right to a trial by jury in suits at common law where the value in controversy exceeds twenty dollars.

In our province beginning with 1868 there has been a progressive movement against compulsory jury trials in civil cases so that at present there are only a few classes of cases (such as libel, slander, etc.) in which a jury trial is as of right; in all other cases the judge may strike out the jury and try the case himself.[68]

I do not think it is necessary further to pursue this subject; it may be said that to determine whether any legislation is or is not intra vires, we should examine the list of subjects of legislation allotted to the legislating body, and if the legislation is upon any of these subject it is valid.

It has been said:

"In matters within its jurisdiction, the legislature has the same powers as Parliament, and 'the power . . . of Parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons within any bounds . . . It has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws concerning matters of all possible denominations:' Blackstone's Commentaries, Book 1, p. 160. Within the jurisdiction given to the legislature of the province no power can interfere with the Legislature, except, of course, the Dominion authorities, whose interference may occasion disallowance.

[67] The King v. Royal Bank, (1912) 4 Alberta Law Rep. 249; Royal Bank of Canada v. The King [1913] A. C. 283; 82 L. J., P. C. 33, 108 L. T. 129, 29 T. L. R. 239, 9 Dom. Law Rep. 337. In the notes to the last named report will be found a convenient collection of cases which may be consulted with interest and profit.

[68] See address delivered before the Judicial Section of the American Bar Association at Boston, September 3, 1919.

"In short, the Legislature within its jurisdiction can do everything that is not naturally impossible, and is restrained by no rule human or divine."[69]

But there is one thing a legislature cannot do—it cannot tie its own hands or the hands of a future legislature—it cannot by anticipation control the actions of a future legislature or its own —it cannot legally bind itself to any course of action.[70]

Perhaps sufficient has been said to show differences in the American system and ours, but after all is it not an illustration of the saying:

"It is not so much the form of a constitution as the spirit in which government is carried on, not so much the law as the men who administer it, which count?

"In your land as in mine the government and legislators respond pretty well to public sentiment—a little more quickly a little more slowly—both lands get the government they deserve. At odd times the courts will with you check for a while useful legislation, but it gets enacted at last some way or another. A lawyer trained in the interpretation of constitutions—the 'Philadelphia lawyer' of proverbial note—can see much difference between 'tweedledum and tweedledee.' And a method can always be found without giving the court or the constitution too cruel a jolt for giving the people what they really demand and insist upon."

In Canada nobody is at all afraid that his property will be taken from him; it never is, in the ordinary case. Our people are honest as peoples go, and would not for a moment support a government which did actually steal—a new government would be voted into power and the wrong righted, but we will not submit to have our great public works delayed by cranks or the litigious. An American feels himself at home at once in Canada, a Canadian crossing the border does not feel that he is entering a foreign or a strange land—neither can notice any difference in the law any more than in the language or in the habits of the people. Once he escapes the custom-house either feels himself a native—unless he is a fool either by nature or through misplaced or spurious patriotism.

Indeed, we are in all but the accident of political allegiance, one people. True the Union Jack and Old Glory have the col-

[69] Language of my own in Florence v. Cobalt, (1908) 18 Ont. Law Rep. at p. 279.

[70] Language of my own in Smith v. London, (1909) 20 Ont. Law Rep. at p. 142.

The legislature had enacted that the section should be "forever stayed." I refused to stay the action perpetually but made the order that no proceedings should be taken in the action unless and until the legislation should in some way be got rid of.

ours red, white and blue differently arranged—but they are the same red, white and blue.

Of precious blood its red is dyed,
The white is honor's sign;
Through weal or ruth its blue is truth,
Its might the power divine.

As we are of the same blood, our aims are the same, justice to all under the law, good will to all men, peace and righteousness. With these aims in common we are working and shall work out our destiny side by side and in much the same way, an example and a blessing to humanity.[71]

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[71] I make no apology for once more repeating what I said to the Iowa Bar Association in June, 1912, already repeated at Yale in 1917.

THE INTERNATIONAL STATUS OF THE BRITISH DOMINIONS WITH RESPECT TO THE LEAGUE OF NATIONS*

BY ARTICLE I of the covenant "The original members of the League of Nations shall be those of the signatories which are named in the annex to this covenant and also such of those other states named in the annex as shall accede without reservation to this covenant."[1] Among the original signatories named in the annex are: The British Empire, Canada, Australia, South Africa, New Zealand and India. By article III the assembly "shall consist of representatives of the members of the League. . . . At meetings of the assembly each member of the League shall have one vote and may not have more than three representatives."

The provision for British representation is perhaps the most striking feature in the constitution of the assembly. The United Kingdom, strange to say, loses its identity as an international state and in so doing forfeits its right to distinct representation.[2] It is absorbed in the British Empire and secures representation as a part of that empire. India and the self-governing colonies, on the other hand, are accorded a privileged position in the League. They are given separate representation in their own names and are furthermore represented through the British Empire. Their international status, like their constitutional, is indeed a most anomalous one. They are suspended like Mohammed's coffin, between heaven and earth. They have achieved the miraculous in their constitutions, since they have combined the attributes of nationality with the status of dependency. In short, they defy all scientific classifications according to the recognized forms of modern states. They stand in a distinct category of their own; they are both states and colonies at one and the same time.

*[This article, though complete in itself, is a continuation of the subject discussed by the same author, Representation on the Council of the League of Nations, 4 MINNESOTA LAW REVIEW 147. Ed.]

[1] Treaty of Peace with Germany, International Conciliation, No. 142, Sept. 1919.

[2] The League of Nations and the British Commonwealth, The Round Table, No. 35, p. 479. June, 1919.

The explanation of this political anomaly must be sought in the constitutional development and organization of the British dominions.

The gradual transformation of the colonies from mere possessions into autonomous nations has largely escaped the attention of the outside world. The process at first was essentially constitutional in character, but lately it has taken on certain international aspects. At the time of the grant of responsible government to the colonies about the middle of the nineteenth century, certain subjects were reserved for the exclusive determination of the imperial government and parliament. Among these questions were imperial fiscal policy and foreign relations.[3] The reservation of the treaty making power was regarded as essential to the maintenance of the unity of the empire. A treaty concluded by the crown on the advice of the imperial ministry was automatically binding on all the oversea possessions in the absence of express language to the contrary.

The colonies soon found, however, that this power seriously limited their rights of self-government, particularly in respect to fiscal matters, about which they were especially sensitive. They accordingly protested to the Colonial Office against this restriction and after considerable discussion the British government agreed that for the future, commercial treaties should not be automatically extended to the colonies but that the latter should have the option of adhering to such treaties within a specified period of time.[4] Not long after the colonies went one step further and claimed the right of separate withdrawal from imperial treaties. The British government again gave way and in compliance with the colonial demand adopted the policy of inserting an express provision in its commercial agreements safeguarding the independent rights of the dominions to withdraw upon due notice.[5] According to present constitutional practice, therefore, the British

[3] In his celebrated report, Lord Durham expressly reserved "the regulation of foreign relations and of trade, etc.," to the mother country. Lewis, The Government of Dependencies, Introduction by C. P. Lewis, p. xxxi.

[4] Keith, Responsible Government in the Dominions, vol. III, p. 1109; Ewart, The Kingdom of Canada, p. 13; Canada, Sess. Pap., 1892, no. 24, p. 7.

[5] Ibid. The imperial conference of 1911 adopted a resolution "that his majesty's government be requested to open negotiations with the several foreign governments having commercial treaties which apply to the overseas Dominions with a view to securing liberty for any of those dominions which may so desire to withdraw from the operation of the treaty without impairing the treaty in respect to the rest of the empire."

government, in the words of Sir Wilfrid Laurier, never negotiates a commercial treaty without putting in a stipulation that the treaty will not apply to Canada or any of the self-governing dominions except with their consent.[6]

But the colonies were by no means satisfied with these concessions. They were desirous of securing the additional right of independent negotiation with foreign powers. In 1879 the Canadian government declared in a memo to the imperial authorities "that the large and rapidly augmenting commerce of Canada and increasing extent of her trade with foreign nations is proving the absolute necessity of direct negotiations with them for the proper protection of her interests."[7] The British government objected strongly at first to the full recognition of this claim "as equivalent to breaking up the Empire" but by way of compromise agreed to the policy of associating colonial delegates with the imperial representatives in the negotiation of treaties, though the power and responsibility of conducting the negotiations were still retained by the British diplomatic officers. The procedure to be followed was laid down by Lord Ripon:

"In order to give due help in the negotiations, her majesty's representative should as a rule be assisted by a delegate appointed by the colonial government either as a plenipotentiary or in a subordinate capacity as the circumstances might require. If as a result of the negotiations any arrangements were arrived at they would require approval of her majesty's government and by the colonial government and also by the colonial legislature if they involved action before the ratification took place."[8]

By this procedure the British government hoped to secure "at once the strict observance of existing international obligations and the preservation of the unity of the empire."

But this mode of conducting negotiations soon underwent an important modification. The colonial representative, as we have seen, was expected to act in a subordinate or advisory capacity to the British diplomatic officer, but in actual practice he soon

[6] Speech of Sir Wilfrid Laurier at Simcoe, Aug. 15, 1911. Porritt, Evolution of the Dominion of Canada, p. 216, note. See also proceedings of the Imperial Conference, 1911, p. 116.

[7] Tupper, The Treaty Making Powers of the Dominions, 17 J. of Soc. of Comp. Leg. 7. A short but excellent outline of the growth of the treaty making powers of the dominions will be found in Ewart, The Kingdom Papers pp. 69-81.

[8] Dispatch of Lord Ripon, June 28, 1895, Parl. Pap. C 7824; Keith, Responsible Government in the Dominions, vol. 3, p. 116; Ewart, The Kingdom Papers, pp. 68-81; Myers, Representation in Public International Unions, 8 J. of Int. Law 106.

acquired an equal and quasi-independent status.[9] It was then but a short step to the practical elimination of the British representative from the course of negotiations. The Canadian reciprocity treaty with France in 1907 marked the triumph of the principle of colonial autonomy in foreign affairs. In a dispatch to the chargé d'affaires at Paris, Sir Edward Grey declared:[10]

"The selection of the negotiator is principally a matter of convenience, and, in the present circumstances, it will obviously be more practical that the negotiations should be left to Sir Wilfrid Laurier and to the Canadian Minister of Finance, who will doubtless keep you informed of their progress.

"If the negotiations are brought to a conclusion at Paris, you should sign the agreement jointly with the Canadian negotiator, who would be given full powers for the purpose."

In speaking of these negotiations in the House of Commons, Mr. Balfour stated:[11]

"The Dominion of Canada technically, I suppose it may be said, carried on their negotiations with the knowledge of his majesty's representatives, but it was a purely technical knowledge. I do not believe that his majesty's government was ever consulted at a single stage of those negotiations. I do not believe they ever informed themselves or offered any opinion as to what was the best policy for Canada under the circumstances. I think they were well-advised. But how great is the change and how inevitable. It is a matter of common knowledge and may I add, not a matter of regret but a matter of pride and rejoicing that the great dominions beyond the seas are becoming great nations in themselves."

In theory, however, the principle of imperial unity was still maintained. The colonial delegates were appointed by the British government and the treaty itself was duly submitted to the imperial government for examination and final ratification. The negotiations, it is true, were carried on by colonial representatives but the treaty derived its legal character solely and exclusively from its imperial sanction. In short, from the legal standpoint, a treaty thus concluded, was an imperial and not a colonial agreement. The autonomy of the dominions was in law far from complete.

But this procedure was too cumbersome for the colonies. They desired direct action without imperial interference. Aus-

[9] Tupper, op. cit., p. 8; Todd, Parliamentary Government in the British Colonies, 2nd ed., p. 268-273; Ewart, The Kingdom Papers p. 69-73.

[10] Myers, Representation in Public International Unions, 8 J. of Int. Law 106; Ewart, The Kingdom Papers, p. 5.

[11] Tupper, op. cit., p. 14.

tralia led the way by entering into an agreement with the Japanese consul in the Commonwealth for special facilities of transit and trade for Japanese students, tourists and merchants.[12] This precedent was followed by Sir Wilfrid Laurier in a number of important agreements with the consular representatives of foreign nations at Ottawa.[13] These negotiations were carried on with the full knowledge and approval of the British government, but the latter took no part whatever in the making or execution of the same. The agreements took the form of concurrent legislative action on the part of the contracting parties in order to avoid the necessity for formal ratification on the part of the imperial government. In commenting on one of these treaties, Sir Wilfrid Laurier declared:[14]

"It has long been the desire, if I mistake not, of the Canadian people that we should be entrusted with the negotiation of our own treaties, especially in regard to commerce and this looked-for reform has come to be a living reality. Without revolution, without any breaking of the old traditions, without any impairment of our allegiance, the time has come when Canadian interests are entrusted to Canada, and just within the last week a treaty had been concluded with France—a treaty which appeals to Canadians alone and which has been negotiated by Canadians alone."

But these agreements, it will be observed, are almost exclusively of a commercial character. The imperial government has retained to a much larger degree its original control over matters of a distinctly political character.[15] The colonies, however, have begun to invade this special preserve. It has long been a recognized principle of imperial policy that the British government must consult the dominions in respect to all political treaties which affected their interests.[16] This policy was successfully followed in the course of British negotiations with the United States over the Newfoundland fisheries[17] and with France in the

[12] Keith, op. cit., p. 1133.

[13] "This tendency," Mr. Jebb declares, "was viewed with alarm by some in Britain as leading up to a demand for the regular diplomatic representation of foreign powers at Ottawa, and of Canada at foreign capitals." Jebb, The Britannic Question, p. 182; Ewart, op. cit., p. 14; Ewart, The Kingdom Papers, p. 75.

[14] Tupper, op. cit., p. 14; Ewart, The Kingdom Papers, p. 75.

[15] Proceedings of the Imperial Conference, 1911, p. 116.

[16] The Colonial Conference of 1902 adopted a resolution "that so far as may be consistent with the confidential negotiations of treaties with foreign powers, the views of the colonies affected should be obtained in order that they may be in a better position to give adhesion to such treaties."

[17] Keith, op. cit., p. 1113.

case of the New Hebrides. An even more striking example of the growing independence of the dominions may be seen in the recent treaties with the United States regarding arbitration and pecuniary claims.[18] In both these treaties the British government expressly reserves the right to obtain the concurrence of the dominions whose interests are affected by the reference of the dispute to arbitration.

As the dominions are still an integral part of the empire from the standpoint of international law, they have not yet secured the right to send and receive diplomatic officers. The consuls who are accredited to the dominions enjoy, it is true, certain limited diplomatic privileges and exercise, as we have seen, quasi-diplomatic functions. But they are not actually invested with a diplomatic character and powers. Two of the colonial governments, however, have set up distinct departments for the direction of international affairs. In 1900 the Australian government created a department of external affairs[19] and a few years later Canada followed suit. The Canadian act[20] provides that:

"The secretary of state . . . shall have the conduct of all official communications between the government of Canada and the government of any other country in connection with the external affairs of Canada and shall be charged with such other duties as may from time to time be assigned to the department by order of the governor in council in relation to such external affairs or to the conduct and management of internal or intercolonial negotiations so far as they may appertain to the government of Canada."

These departments are no mere shams.[21] The first report of the under-secretary of state for foreign affairs in Canada reveals a

[18] Ibid, p. 1113.

[19] This act did not divest the Imperial Parliament "of its authority over the external affairs of Australia and commit them to the Commonwealth Parliament. Australia did not acquire the right to correspond directly with foreign powers but could deal with them only through his majesty's government." In other words, external meant "external to the Commonwealth, not external to the Empire." Tupper, op. cit., p. 13. This interpretation of the powers of the dominions was not acceptable to Sir Wilfrid Laurier and he accordingly framed the Canadian act so as to empower the secretary of state to deal expressly with foreign countries. Ewart, The Kingdom Papers, p. 77.

[20] Canada, 8 and 9 Ed. VII, No. 13. Sir Wilfrid Laurier declared that Canada had "now reached a standard as a nation which necessitates the establishment of a Department of External affairs," Ewart, The Kingdom Papers, p. 77.

[21] Mr. Asquith attempted to limit the authority of the Canadian government to intra-imperial negotiations but the Canadian act expressly confers the power of international negotiations with any other country. Ewart, The Kingdom Papers, p. 77.

series of international agreements with European and American states on a variety of subject matters, both commercial and political in character.[22]

The most striking illustration of the new treaty-making powers of the dominions may be seen in the recent treaty concluded between this country and Great Britain on behalf of Canada[23] for the creation of a joint international commission for the settlement of all disputes between Canada and the United States. The three Canadian representatives on this commission, it should be observed, are appointed by the Canadian government, not by the British, and are solely responsible to the government and Parliament at Ottawa. By article 10 of this agreement it is provided:[24]

"Any questions or matters of difference arising between the high contracting parties involving the rights, obligations or interests of the United States or of the Dominion of Canada, either in relation to each other or to their respective inhabitants, may be referred for decision to the International Joint Commission by the consent of the two parties, it being understood that on the part of the United States any such action will be by and with the advice and consent of the Senate and on the part of his majesty's government with the consent of the Governor-General in council."

The treaty-making power of an independent state could scarcely extend further. There is here no semblance of colonial dependency. On the contrary, the Canadian government treats with the United States on terms of equality. From this point it is but a short step to the establishment of direct diplomatic relations between Ottawa and Washington and in a recent statement Sir Robert Borden has announced his intention of appointing a permanent Canadian representative at Washington in the near future.

But the international interests of the dominions are not confined to their immediate neighbors; they touch the whole outside world. By force of circumstances they have also become in a limited sense world powers, since they have world interests and are immediately affected by the determination of world policies. The dominions, therefore, were very much annoyed at the action of the British government in calling the naval conference of 1909

[22] Tupper, op. cit., p. 16; Ewart, The Kingdom Papers, p. 80.

[23] This convention was first drawn up between the Canadian and American governments and was thereupon submitted to the British government for formal acceptance and ratification.

[24] Charles, Treaties, Conventions, International Acts, etc., between the U. S. and other powers, 1910-13, vol. 3, p. 44; Ewart, The Kingdom Papers, p. 79.

and agreeing to the celebrated declaration of London without consulting them in regard to the matter or affording them an opportunity of participating in its proceedings. They accordingly took advantage of the imperial conference of 1911 to raise the whole question of the right of the dominions to be consulted in respect to the negotiation of international conventions.[25] The British government frankly admitted its fault and promised to mend its ways.[26] The conference accordingly agreed:

"(a) That the Dominions shall be afforded an opportunity of consultation when framing the instructions to be given to British delegates at future meetings of the Hague Conference, and that conventions affecting the Dominions provisionally assented to at that Conference shall be circulated among the Dominion governments for their consideration before any such convention is signed; (b) that a similar procedure where time and opportunity and the subject matter permit shall, as far as possible, be used when preparing instructions for the negotiations of other international agreements affecting the Dominions."[27]

An even more significant revelation of the development of the international autonomy of the dominions will be found in the separate representation of the colonies at international conferences. The practice of sending colonial representatives to international congresses of a general social and economic character has long prevailed, but in the case of political conferences the colonies have been either omitted altogether or included in a subordinate capacity as advisers to the imperial representatives.[28] At the international fur seal conference in 1911, for example, the Canadian under-secretary of external affairs was associated with the other British delegates since Canada had a material interest in that question.[29]

The right of India and the self-governing colonies to separate representation at international conferences was first clearly recognized in the International Postal Union. As the dominions had their own national postal systems, it was not only natural but also necessary that they should have an independent voice in the determination of matters of common concern. At the International Postal Convention at Rome in 1906 the British Empire was repre-

[25] The Prime Minister of Australia, Hon. A. Fisher, moved; "That it is regretted that the dominions were not consulted prior to the acceptance by the British delegates of the terms of the Declaration of London," etc. Proceedings of The Imperial Conference, 1911, p. 97.

[26] Speech of Sir Edward Grey, Ibid, p. 114.

[27] Ibid, p. 15; Myers, op. cit. p. 85.

[28] Keith, Imperial Unity and the Dominions, p. 277.

[29] Ibid.

sented by six delegates.[30] The colonial representatives, it is true, were officially accredited by the British government through the secretary of state for the colonies, but in fact they acted independently and not as part of the British delegation. At the London conference on electrical units and standards in 1908 separate votes were likewise accorded to Australia, Canada and India.[31] The United States also extended a special invitation to the Canadian government to be present at the international conference at Washington for the protection of industrial property.[32]

An important new precedent was established at the Radio-Telegraphic Conference in 1912.[33] Heretofore, as we have seen, the British Empire has been represented in form at least by a single delegation. But on this occasion the delegates of the four great self-governing dominions appeared with special credentials under the great seal authorizing them to represent their respective dominions with full powers and on terms of absolute equality with the delegates from Great Britain. The colonies had at last secured a status equal to that of the mother country; and foreign states had given quasi-international recognition to that fact by accepting their credentials. The precedent laid down in this case was followed two years later at the International Conference on the "Safety of Life at Sea," at which Canada, Australia and New Zealand were represented by fully accredited plenipotentiaries.[34]

"The essential difference from the new as compared with the old practice," as Professor Keith points out,[35] "lies of course in the fact that the plenipotentiaries of the dominions are now no longer merely plenipotentiaries for the United Kingdom. In the case of their being included in the British delegation, the vote of

[30] Ibid, p. 278. Additional representatives were given to the greater nations "by according votes to groups of colonies." "The British colonies," Mr. Sayre remarks, "are the only ones which have not always voted with the mother country." Sayre, Experiments in International Administration, p. 24. By the Agricultural Convention of 1915, provision was made by Art. 10 for the admission of colonies into the Institute "on the same conditions as the independent nations." For a full discussion of the question of representation at international conferences and on international unions, see Myers, op. cit., p. 81-108.

[31] Keith, op. cit., p. 1133.

[32] Keith, Imperial Unity and the Dominions, p. 278.

[33] Keith, The Canadian Constitution and Colonial Relations, J. of Soc. of Comp. Leg., No. 42, p. 13. Apr. 1919.

It was agreed at this conference that colonies should be admitted to future conferences with one vote for each colony, the limit of votes for each sovereign being six. "Great Britain's relations with her self-governing colonies fixed her multiple representation." Myers, op. cit., p. 97-99.

[34] Keith, Imperial Unity and the Dominions, p. 278.

[35] Ibid.

the British delegation must be cast in the same sense, whatever the views of the different members; in the case of separate plenipotentiaries the votes of the several plenipotentiaries might be very differently cast. This involves of course the curious position that his majesty may through one set of plenipotentiaries declare one view and through another another view. But it is merely a common sense recognition of the diversity within the uniformity of the empire. It is no more curious than the existence of independent governments within the empire pursuing different policies in many respects."

The constitutional significance of these precedents, it is safe to assert, has not been properly appreciated by the people of the United Kingdom. Still less has their international significance been understood by foreign nations. The separate representation of the dominions at these conferences carried with it as a necessary corollary the due recogniton of their distinct international status on the part of foreign nations. The transition from a colonial to an international status had been going on so gradually and unconsciously that the powers did not realize what was taking place until they found themselves confronted at the peace conference with a series of significant precedents.

The fact that these conferences dealt primarily with non-political questions does not affect the principle at stake. No clear-cut line can be drawn between commercial and political questions. In this day of international competition in trade and commerce, every economic question is bound up potentially if not actually with important political issues. The point of the matter is that the dominions had secured international recognition of their autonomy and that recognition was as full and complete as it could well be, short of the recognition of their absolute independence.

This modification in the status of the dominions was carried through the more easily by reason of the fact that it involved no material change in the outward form of the imperial constitution. The political evolution of the imperial constitution, like that of the mother country, has been concealed from the general public by a camouflage of legal fictions. The external form of the constitution has been preserved amid all the changes in its spirit and operation. The international position of the colonies furnishes an excellent illustration of the application of this principle. To the outside world the empire was still a constitutional unit. The imperial government had surrendered none of its legal powers to the ambitious dominions. The representatives of the colonies

appeared at the international conferences in the guise of British delegates rather than as representatives of independent states. They owed their commissions to the crown and their acts were subject to the ratification of the imperial government. The unity and supremacy of the empire were apparently amply safeguarded by the ultimate authority of king and parliament. But few of the political leaders of foreign states were aware of the fact that imperial control had lost its effectiveness and that from a constitutional standpoint the colonies had practically become independent nations.

In dealing with this topic early in 1914 Mr. Myers declared:[36]

"Moreover, in the developments of recent years such large aggregations of territory as the British Empire have shown a tendency to break up into self-governing dominions; and by the technical rules of international law the sovereignty of these divisions of the empire is only perceptibly inchoate, even if it is optional. The Dominion of Canada, for instance, is probably quite as much entitled to fall within the definition of a sovereign state—though it prefers its membership in the British Empire—as was Montenegro entitled to fall within that definition before the Balkan War, notwithstanding the numerous servitudes placed upon it by the Ottoman Empire from which it was separated and by Austria-Hungary to which it was adjacent. The emergence of these inchoate sovereignties constitutes a new fact which diplomacy must face."

Such was the constitutional and international position of the dominions in the spring of 1914. The dominions had good reason to be satisfied with the progress they were making in the international world. They had won a partial recognition of their international status without the sacrifices of their constitutional position in the empire. They were soon to learn, however, that their triumph entailed heavy international obligations. They had claimed the right of nationality; they were now to be called upon to assume its full responsibility. The world war was the test of their nationalism and they nobly stood the test.

The outbreak of war raised a number of perplexing constitutional and international questions for the dominions. The decision of the British cabinet bound the whole empire in law and in fact. Neutrality was out of the question.[37] The colonies were all at war whether they wished to be or not. But the

[36] Myers, op. cit., p. 84.

[37] Curtis, The Problem of the Commonwealth, pp. 90-91. For an iteresting proposal for the neutrality of the colonies in war see the report of the Royal Commission of Victoria on A Federal Union for the Australian colonies. Parl. Pap. 1870, Sess. 2, vol. 2, p. 247.

dominions were still free to determine what active part, if any, they would play in the war.[38] The policy of non-participation held out great practical advantages. It was extremely unlikely that Germany would strike at the British colonies unless the latter saw fit to intervene in the European struggle. Canada might possibly have sheltered herself behind the Monroe Doctrine.[39] But the dominions did not hesitate for a moment. Even before the formal declaration of war the governments of the respective dominions had promised to come to the assistance of the mother country in case of necessity, and with the opening of hostilities this pledge was backed up by the whole-hearted support of parliament and people.[40]

The action of the dominions, as we have seen, was entirely voluntary. In theory the king is commander in chief of the military forces of the empire,[41] but in fact the colonial governments maintain exclusive control over their own local militia. The British government could not raise a single man or dollar within the dominions without the express authorization of the colonial legislatures. The dispatch of colonial troops over seas was the act of the colonies themselves and not of the British government or empire. The same principle was operative, though to a less degree, in the case of the naval forces of the colonies. Only two of the dominions, namely Canada and Australia, have adopted the policy of creating independent navies of their own.[42] But these two governments immediately proceeded to put their ships at the free disposal of the British admiralty. The war was indeed an imperial war but the dominions went into it as free and autonomous allies in a common cause.

It was soon found necessary to devise new constitutional machinery to deal with this anomalous situation. The British government accordingly set up the so-called imperial war cabinet, in which the colonies were represented by the colonial premiers or other responsible ministers.[43] The imperial war cabinet

[38] Sir Wilfrid Laurier was a staunch advocate of the freedom of Canada to determine whether she would take part in imperial wars or not. Ewart, op. cit., p. 157.

[39] Both Sir Robert Borden and Sir Wilfrid Laurier declared that this would be a humiliating thing to do. The Round Table, No. 18, pp. 431-2.

[40] The Round Table, No. 17, p. 181-2. Dec. 1914.

[41] By section 15 of the British North America Act the command in chief of all naval and military forces of and in Canada is vested in the sovereign. In Australia, on the other hand, it is vested in the governor-general as the king's representative.

[42] Jebb, The Britannic Question, p. 36.

[43] Report of the War Cabinet, 1917, Ch. II.

was not truly an executive body but rather a conference of British and over-sea ministers formed for the purpose of promoting imperial coöperation and of exercising a general supervision over the political and military policies of the empire during the war. In other words, the dominions were admitted into a constitutional partnership with the mother country for war purposes.

As the dominions had taken the part of full-fledged nations in the war, it was natural that they should seek to have an equal part in the peace settlement. Early in the war they had secured a promise from the British government that they would be consulted if possible in regard to the peace terms.[44] Accordingly just prior to the conclusion of the armistice Lloyd George wired Sir Robert Borden to come to London at once "in order to participate in the deliberations which will determine the line to be taken" by the British delegates at the interallied conference which would precede the peace conference.[45] This invitation, it will be observed, was to a preliminary imperial conference. There was apparently no intention on the part of the British government to invite the dominions to participate in the peace conference itself. But the Canadian premier declined to accept a minor rôle for his country and demanded an independent seat at the peace table.

"There is need of serious consideration as to the representation of the dominions in the peace negotiations. The press and people of this country take it for granted that Canada will be represented at the peace conference. I appreciate possible difficulties as to representation of the dominions, but I hope you will keep in mind that certainly a very unfortunate impression would be created and possibly a dangerous feeling might be aroused if these difficulties are not overcome by some solution which will meet the national spirit of the Canadian people. We discussed the subject today in council and I found among my colleagues a striking insistence which doubtless is indicative of the general opinion entertained in this country. In a word, they feel that new conditions must be met by new precedents. I should be glad for your views."[46]

Lloyd George readily admitted "the importance" of this suggestion and with his usual diplomatic skill turned the inquiry into an additional argument for urging the immediate attendance of the Canadian premier.[47] Accordingly Sir Robert Borden and three of his ministers sailed for London where they met the repre-

[44] Keith, Imperial Unity and the Dominions, p. 583, note.
[45] Congressional Record, 66th Congress, I Sess., p. 7167.
[46] Ibid.
[47] Ibid.

sentatives of the other self-governing dominions and India. The colonial delegates then joined forces in pressing their demand for separate representation at the peace conference. But their claims were not conceded without a struggle. Unexpected opposition was encountered, according to Mr. Sifton, from "the most conservative representative of the British government and the representative of the most conservative people in Great Britain."[48] The secrets of these preliminary conferences have not yet been divulged, so that we are left to speculate as to the person or persons referred to in this statement.[49] We do know, however, that the Tory Imperialists viewed the colonial proposals with marked disfavor. They welcomed the preliminary conference of English and colonial statesmen as a means of formulating a common imperial policy but they insisted most strenuously that the empire should enter the peace conference as a unit and not as a group of separate delegations. The Dominion representatives succeeded, however, in winning Lloyd George over to their side. That settled the matter so far as the mother country was concerned. The British government determined to support the colonial contentions at the peace conference and did so most heartily.[50] Various proposals were put forward as to the proper basis of colonial representation but it was finally agreed at the instance of Sir Robert Borden "that there should be a distinctive representation for each dominion, similar to that accorded to the smaller allied powers and in addition that the British representation of five delegates should be selected from day to day from a panel made up of representatives of the United Kingdom and the Dominions."[51]

The more difficult task of gaining the support of the allied powers had now to be faced. Matters moved smoothly at first. At a preliminary conference in London of the three chief European allies, France, Italy and Great Britain, the British proposal for the representation of the Dominions was accepted in principle. The question was again taken up by the council of ten at

[48] Stevenson, The Political Status of Canada. International Relations Section. The Nation, Dec. 13, 1919. p. 750.

[49] Mr. Stevenson hazards the opinion that "it was probably Mr. Balfour or Lord Curzon and possibly both."

[50] "In all these efforts," Sir Robert Borden declared, "the dominions had the strong and unwavering support of the British prime minister and his colleagues." The New York Sun, Oct. 7, 1919. The Congressional Record, op. cit., p. 8011.

[51] Congressional Record, op. cit., p. 8010; The London Times, Weekly Edition, Jan. 17, 1919.

the preliminary peace conference at Paris. At first "strong objection was made to the proposed representation of the British dominions."[52] For this opposition, according to rumor, Mr. Lansing was chiefly responsible.[53] The Dominions, however, refused to yield one iota of their claims and at a subsequent meeting of the entire imperial delegation "a firm protest was made against any recession from the proposal adopted in London." The proposition was now put up to President Wilson who finally recognized the justice of the colonial contention.[54] With the withdrawal of American opposition the Dominion plan of representation was accepted without further controversy.

The position of the Dominion delegates throughout the controversy found admirable expression in a subsequent article by Sir Robert Borden:

"On behalf of my country I stood firmly upon this solid ground that in this, the greatest of all world wars, in which the world's liberty, the world's justice—in which the world's very destiny—were at stake, Canada had led the democracies of both the American continents. Her resolve had given inspiration, her sacrifices had been conspicuous, her effort was unabated to the end. The same indomitable spirit which made her capable of that effort and sacrifice made her equally incapable of accepting at the peace conference in the League of Nations or elsewhere a status inferior to that accorded to nations less advanced in their development, less amply endowed with wealth, resources and population, no more complete in their sovereignty and far less conspicuous in their sacrifices."[55]

Thanks to this concession, the dominions were placed in a privileged position in the conference. They had their own separate representation in the general assembly of delegates and in addition were represented through the British Empire on the inner council of ten. The British government, as we have seen, treated the dominions with marked consideration by according them a permanent place on the British delegation by a system of rotation among the colonies.

"The adoption of the panel system," Sir Robert Borden declared, "gave to the dominions a peculiarly effective position. At plenary sessions there were sometimes three Canadian plenary delegates, two as representatives of Canada and one as representative of the empire. Moreover, throughout the proceedings of the conference the Dominion delegates as members of the British

[52] Ibid.
[53] Stevenson, op. cit., p. 750.
[54] Speech of Lloyd George at Llanystymdwy, Wales, Dec. 27, 1919.
[55] Cong. Rec., p. 8016.

Empire delegation, were thoroughly in touch with all proceedings of the conference and had access to all the papers recording its proceedings. This enabled them to watch and check those proceedings effectively in the interest of their respective dominions and placed them in a position of decided advantage. Dominion ministers were nominated to and acted for the British Empire on the principal allied commissions appointed by the conference from time to time to consider and report upon several aspects of the conditions of peace."[56]

The panel system nevertheless was far from satisfactory in certain important respects. Under this system it was practically impossible for the dominions to secure adequate representation on the British delegation.[57] The Dominion delegate who sat in that body could not hope to represent the divergent interests of the different colonies. This defect was overcome to some extent in practice by according to the several dominions special representation when their particular interests were affected. The dominions, however, were still placed at a disadvantage by reason of the fact that their delegation did not possess distinct voting power in the conference as was the case with the petty independent states. The dominions had secured a partial recognition of their international status but this recognition still fell short of the full political rights of independent states. They enjoyed the privilege of participating in the deliberations of the conference but they had no independent voice in the final determinations. They appeared in the conference as Dominion representatives, but they could vote only as members of the British delegation. This arrangement was manifestly a compromise which could not serve as a satisfactory basis so far as the colonies were concerned for their permanent representation in the proposed League of Nations.

Notwithstanding these concessions to the dominions, the other allied powers still found it difficult to readjust their political preconceptions of the British empire to the new condition of affairs.

"It took some time," General Smuts subsequently explained,[58] "for the position to be realized at Paris because so many of the powers were under the impression . . . that everything seemed to be under the tutelage of the British parliament and government. They could not realize the new situation arising and that the British empire instead of being one central government con-

[56] Ibid.
[57] Keith, The Canadian Constitution and External Relations, J. of Soc. of Comp. Leg., 1919, No. 42, p. 14.
[58] The Round Table, op. cit., p. 192.

sisted of a league of free states, free, equal and working together for the great ideals of humane government. It was difficult to make people realize this but afterwards they fully applauded and their approval was given as embodied in this international document. No doubt new forms would have to be made. No one recognized this more strongly than the British government itself but whatever the forms there was no doubt whatever about the substance of the new status of the dominions."

In the organization of the League of Nations the dominions scored their greatest victory. The views of the dominions on the constitution of the League were clearly expressed in a speech of General Smuts before the South African Parliament.[59]

The dominions felt very strongly that if there was to be a League of Nations in which the nations were to be equally represented, then that league should include the British dominions. They were determined to see that that recognition was given to us but they were equally anxious to see that nothing was done which would loosen the ties which bound together the British Empire. We kept both these things clearly before our eyes. Still we wanted our equality with the rest of the world recognized. We also wanted to remain in the British league of nations which has worked with such enormous success in the past and has worked together in this war, probably becoming the real organizer of victory for all the allies and the rest of the world."

In other words, the dominions were heartily in favor of the League, provided they could go into it as members of the British Empire with distinct rights and nationality. The demands of the dominions in this respect found ample satisfaction in the covenant. The dominions were accorded separate representation in the assembly with full voting powers, together with the right of representation in the council.

But the significance of this concession was not fully understood by all the members of the conference. An excellent illustration of the failure of foreign states to understand the new position of the dominions was afforded during the closing session in the controversy over the constitution of the International Labor Organization. The dominions were forced to fight their battle for separate representation all over again. As originally drafted, the labor convention did not "adequately recognize the status of the dominions."[60] The Canadian delegation was much displeased at this omission. Sir Robert Borden accordingly moved in conference that the resolutions be amended by adding

[59] Ibid, p. 193.
[60] Cong. Rec., op. cit., p. 8011.

a provision authorizing the drafting committee "to make such amendments as were necessary to have the convention conform to the League of Nations in the character of its membership and in the method of adherence." Objections were again raised by some of the delegates to the special representation of the dominions but by keeping up the fight the colonial delegates finally succeeded in carrying their point. "As a result the labor convention was finally amended so that the dominions were placed on the same footing as other members of the international labor organization, becoming eligible like others to nominate their government delegates to the governing body."[61]

The dominions' delegates took an active part in the proceeding of the conference. From the very outset they showed a marked independence of judgment and did not hesitate to oppose their fellow members on the British delegation when their interests came in conflict with the policy of the mother land. The first public utterance of the Canadian premier was a protest against the policy of the greater powers in withdrawing important questions from the consideration of the general body of delegates.[62]. The interests of Canada in this respect coincided with those of the smaller nations. The Canadian premier was much more concerned about preserving the independent rights of the dominions in the conference than in maintaining the power and unity of the empire as a whole. The other Canadian delegates likewise played an independent part from time to time. Mr. Sifton was chiefly responsible for the separate representation of the dominions in the International Labor Conference.[63] It is interesting to observe, moreover, that another Canadian delegate led the fight for the democratization of the constitution of the League. To this end Mr. Doherty filed a separate memo[64] on his own account in favor of the creation of a world parliament made up of delegates from the parliaments of the respective members of the League. The entire delegation, it should be added, also entered a strong protest against any interpretation of article 10 which would automatically commit every nation of the

[61] Ibid.

[62] The controversy arose over the inadequate representation of the smaller nations on the League of Nations committee. Sir Robert Borden objected to "any decisions as to procedure and representation being taken except by the conference itself." The Times Weekly Edition, Jan. 31, 1919.

[63] Mr. Sifton was the Canadian representative on the commission which drew up the labor convention.

[64] Stevenson, op. cit., p. 750.

League to participate in the quarrels of other members or afford an unlimited guarantee of the territorial readjustments of the treaty of peace.

Mr. Hughes, the Australian premier, was the obstreperous small boy of the imperial delegation. He was an ardent nationalist and a fervid imperialist at one and the same time. There were two subjects in particular in which the Commonwealth was most vitally interested, namely the question of racial equality and the disposition of the German colonies in the Pacific. As a nationalist Mr. Hughes championed the cause of a white Australasia. This brought him into a controversy with the Japanese delegates which greatly embarrassed the British government and even threatened to impair the Anglo-Japanese alliance. But that danger did not greatly worry Mr. Hughes since he knew that he could count upon the support of the other British colonies and the sympathy of the United States. To avoid a breach he was apparently willing to recognize the general principle of racial equality provided that the Commonwealth's control of immigration policy was in no way affected.[65] In other words, he would admit the principle in theory but deny it in effect. Needless to say, the Japanese would not agree to such a sham settlement of the question. When the suggested compromise failed Mr. Hughes became an intransigent and kept up his fight against the Orientals to the very end. In fact, it required all the tact of Lloyd George and the pressure of the other members of the imperial delegation to prevent an open rupture between the two countries at the conference.

In the matter of the German colonies Mr. Hughes was a strong annexationist. He was as staunch an imperialist as Lord Curzon or any of the other adherents of the old school of Tory imperialists. He was a nationalist, however, even in his imperialism whenever the interests of Australia were involved; and in this case he was insistent that the German colonies in the southern Pacific should be added to the Australian Commonwealth and not placed under the jurisdiction of the British colonial office.[66] He supported this policy not only as a just retribution on Germany for her crimes but also as a necessary measure of defense in the Pacific. Australia had long had a Monroe doctrine of her own and she did not take kindly to the presence of

[65] The Round Table, op. cit., p. 182-3.
[66] Ibid.

foreign colonial possessions so near her own shores.[67] But this policy did not find much favor with the British or other colonial delegations. If the policy of annexing the German colonies south of the equator was adopted, it was pointed out, a similar right of annexation must needs be conceded to Japan in respect to the northern group of German colonies. The extension of Japanese sovereignty to these islands would bring the Japanese menace even closer to the Australian shores. These counsels of wisdom ultimately prevailed and Mr. Hughes was forced to be satisfied with an Australian mandate for the southern Pacific in place of annexation.

The attitude of the South African delegates, Generals Botha and Smuts, was strikingly different from that of their Australian colleagues. They were the earnest champions of the policy of international reconciliation. They were both strongly of the opinion that the penalties inflicted on Germany were unduly severe, especially in respect to the provisions for the wholesale punishment of individuals. They maintained, on the contrary, that the terms should be modified in the interests of permanent peace and future friendship among nations. In short, the policy of General Botha was directed "to the end that a small number of the most prominent war criminals should be selected for summary judgment but that there should not be this indiscriminate hanging of the sword over Germany."[68] The work of General Smuts at the conference is too well known to require extended comment. He was undoubtedly one of the great outstanding figures in that gathering of statesmen. To him perhaps more than to any other man save Lord Robert Cecil, we owe the project for a League of Nations;[69] he was the great moderating influence throughout the course of negotiations and to him is largely due the mandatory system of colonial administration. It is safe to prophesy, moreover, that his open message in respect to the ratification of the treaty of peace and the League of Nations will go down in history as one of the most significant political documents of the age.

[67] At the intercolonial conference, 1883, a resolution was unanimously adopted "that the further acquisition of dominions in the Pacific, south of the equator, by any foreign power would be highly detrimental to the safety and well being of the British possessions in Australia and injurious to the interests of the Empire." Parl. Pap. 1884.

[68] The Round Table, op. cit., 197.

[69] See statement of President Wilson to Foreign Relations Committee, Cong. Rec. op. cit., p. 4272.

The independent attitude of the dominions at the conference should convince the most doubting Thomases of the falsity of the cry of British domination in the League of Nations. The British government was not able to command the support of the self-governing dominions at the peace conference on all occasions and there is still less reason to believe that it can succeed in so doing in the League of Nations. The truth of the matter is that the dominions look at international questions from a colonial rather than an imperial point of view. They are nationalists above everything else. If the interests of the various states of the empire coincide, the empire acts as a unit, but if on the other hand they conflict, the several governments feel free to go their own way. The dominions are a law unto themselves. They have the power to make and unmake their own political futures. They have worked out their own distinctive fiscal policies within the empire and there is little doubt but that they will pursue the same independent policies with respect to international affairs. The colonies will appoint their own delegates to the League of Nations and these delegates will be responsible only to their own local governments and legislatures. The very disunity of the empire is the secret of its strength.

With the close of the conference the question of the status of colonies again came to the front over the method of signing the peace treaty. The form of signature of the various treaties concluded at the conference marks an important stage in the development of the constitutional and international life of the dominions.

"Hitherto," Sir Robert Borden explained,[70] "it has been the practice to insert an article or a reservation providing for the adhesion of the dominions. In view of the new position that had been secured and of the part played by the Dominion representatives at the peace table, they thought this method inappropriate and undesirable in connection with the peace treaty. Accordingly I proposed that the assent of the king as high contracting party to the various treaties should in respect of the Dominion be signified by the signature of the Dominion plenipotentiaries and that the preamble and other formal parts of the treaties should be drafted accordingly. This proposal was adopted in the form of a memorandum by all the Dominion prime ministers at a meeting which I summoned and was put forward by me on their behalf to the British empire delegation by whom it was accepted. The proposal was subsequently adopted by the conference and the various treaties have been drawn up accordingly, so that the

[70] Cong. Rec., op. cit., p. 8010.

dominions appear therein as signatories and their concurrence in the treaties is thus given in the same manner as that of other nations.

"This important constitutional development involved the issuance by the king as high contracting party of full powers as to the various Dominion plenipotentiary delegates. In order that such powers issued to the Canadian plenipotentiaries might be based upon formal action of the Canadian government, an order in council was passed on April 10, 1919, granting the necessary authority. Accordingly he addressed a communication to the prime minister of the United Kingdom requesting that necessary and appropriate steps should be taken to establish the connection between this order in council and the issuance of the full powers by his majesty so that it might formally appear on record that they were issued on the responsibility of the government of Canada."

Another phase of the same question bobbed up at the last moment, in respect to the ratification of the treaty by the several dominion parliaments. The British government was in a hurry to get the treaty out of the way and accordingly proposed that inasmuch as the dominion ministers had participated in the peace conference and in signing the preliminaries of the treaty, the king should proceed at once to ratify the treaty for the whole empire as he was constitutionally entitled to do. "The king," Lord Milner declared,[71] "by a single act would bind the whole empire as it is right he should do, but that act would represent the considered judgment of his constitutional advisers in all self-governing states of the empire because it would be merely giving effect to an international pact which they had all agreed to." But Sir Robert Borden had given "his pledge to submit the treaty to parliament before ratification on behalf of Canada" and he was determined to carry out his pledge. The principle of parliamentary ratification, he said, was as applicable to the colonial parliaments as to the parliament at Westminster.[72] In other words, he insisted that the same constitutional procedure should be followed in the colonies as in England. The signature of the Dominion plenipotentiaries could not be considered as equivalent to the tendering of advice to ratify in the case of the colonies when parliamentary ratification was deemed necessary in England in order to carry the treaty into effect in the mother land. In short, the Dominion parliament should be placed upon an equality with the British government. The Dominion delegates had signed the

[71] Ibid, p. 7176.
[72] Ibid.

treaty on behalf of their respective states. The Dominion parliaments should likewise carry the treaty into effect by express legislative action. A special session of the Canadian Parliament was accordingly summoned to pass upon the treaty and in a short period of time parliamentary approval was given to it by resolution of both houses and an order in council was issued to give effect to the same. Similar action was taken by the parliaments of Australia, New Zealand and South Africa.

In laying the treaty before the South African Assembly General Smuts referred to the significance of dominion signatures to the peace treaty in the following terms:[73]

"For the first time in history the British Dominions signed a great international instrument not only along with the other ministers of the king but with the other ministers of the great powers of the world and although the tremendous importance of this great act has not yet been fully recognized, there is no doubt that the treaty signed as it has been with the parties to it not only representative of the king in the British Isles but in the dominions form one of the most important land marks in the history of the British Empire. The dominions did not fight for status. They went to war from a sense of duty, from their common interests with the rest of the world vindicating the great principles of free human government. Not only has victory been achieved for the objects for which they fought but what for the British Dominions is equally precious, they have achieved international recognition of their status among the nations of the world."

From this review of the theory and practice of colonial participation in international affairs we may safely conclude that there is absolutely no warrant for the frequent charge that the British government skillfully manipulated the national pretensions of the colonies to secure its electoral or political predominance in the League. The special representation of the dominions is not the result of a clever conspiracy nor is it a political subterfuge. It is rather a stage, though a most important one, in the long-drawn out progress of the colonies toward a distinct national and international status. In the course of this progress, as we have seen, they have often had to overcome the opposition of the British government as well as of foreign states. But at last they have realized the most of their desires in the formal recognition of their status in the League of Nations and that recognition has come with the full approval of all the allied powers save the United States.

[73] The Round Table, op. cit., p. 192.

But the national aspirations of the colonies were not yet fully realized. The dominions still fell short of a complete international status. They were included, it is true, in the list of original members of the League of Nations, but they were not parties to the treaty of Versailles. According to the preamble of the treaty the terms of peace were drawn up by the five principal and associated powers, the United States, France, Italy, Japan and the British Empire and 22 other powers on the one side and Germany on the other, but the name of none of the dominions is to be found in the list of allied states. The treaty in fact is an agreement between sovereign states but as the dominions have not yet been granted international recognition as independent states, they were not legally qualified to enter into the agreement. From the standpoint of international law they were still subordinate parts of the British empire. From a strictly legal viewpoint it must be admitted that the signature of the dominions to the terms of peace and the subsequent ratification of the treaty by the several dominion parliaments were not necessary to the validity of that instrument, however advantageous they may have been from the standpoint of imperial relations. The signatures of the Canadian ministers, according to J. S. Ewart, one of the leading constitutional lawyers of the country, were a mere act of supererogation. They had no more value than would the signatures of the mayors of any municipalities in England or in Canada.[74] The Dominion government and parliament according to this conception, were simply trying to assume an international importance which they did not legally possess. The acts of the Canadian plenipotentiaries were characterized by the Hon. W. S. Fielding as "an attempt to get a shoddy status where no real status exists." The further pretense that Canada must give formal and definite approval to the treaty was "arrant humbug."[75]

This criticism is undoubtedly correct as a general legal proposition, but it is nevertheless subject to two important qualifications. The treaty-making power of the crown is subordinate to the sovereignty of parliament.[76] For example, the king could not enter into an international obligation which would impair the personal or property rights of any of his subjects.[77] The intervention

[74] Ibid., p. 151.

[75] Debate in the House of Commons, The Toronto Globe, Sept. 9, 1919.

[76] Dicey, Law of the Constitution, p. 37.

[77] Wright, The constitutionality of Treaties, 13 Am. J. of Int. Law 264.

of parliament would be necessary to give validity to any such engagement. The same principle is equally applicable to the colonies.[78] In so far, therefore, as the peace treaty trenched upon the rights of the colonies, confirmatory action on the part of the dominion parliaments was necessary to carry the treaty into effect within the dominions. In other words, a treaty according to the English constitution is an international engagement; it is not a part of the law of the land. For this reason if for no other, the dominion governments acted wisely in submitting the treaty to parliament for ratification.

The criticism, moreover, is subject to a second qualification. The king can undoubtedly bind the whole empire by a declaration of war or by the conclusion of peace but in the exercise of these great imperial prerogatives he is subject, as we have seen, to certain conventions of the constitution. He is under a political obligation to consult his duly constituted advisers at home and if possible in the colonies as to the mode of exercising these powers. The legislative supremacy of the British Parliament over the dominions has long since disappeared in practice; the Parliament of Westminster is now a provincial and not an imperial body. A similar transformation is going on in respect to the royal treaty-making power. The ancient theory of the executive unity of the empire is going the way of the doctrine of parliamentary sovereignty. In practice the kingship has been divided. The separate signatures of the dominion ministers at Paris and the ratification of the treaty by the dominion parliaments is the most conclusive evidence on this point.

The problem of the international status of the dominions is in fact an outgrowth of the anomalous constitutional organization of the empire. The imperial constitution has a two-fold aspect, legal and political. According to the law of the constitution, the empire is a great unitary state; according to the conventions of the constitution, it is a confederation of free and autonomous states. The legal principles of the empire are hopelessly at variance with the working relations of the governments of the several states. The divergence between law and custom is as marked a characteristic of the imperial as of the British constitution.[79] The system has worked well in actual practice and that is its chief commendation. The dominions have not

[78] Walker v. Baird, [1892] A. C. 491, 497.

[79] Myers, op. cit., p. 108; Ewart, op. cit., p. 58.

troubled themselves about the legal fiction of the sovereignty of the British government so long as they have enjoyed the practical advantages of the management and direction of their own domestic affairs. In a word, the British Empire has itself become a league of nations.

It is no easy matter to fit this disjointed empire into the modern national organization of states. According to the political theory of today, unity and sovereignty are essential characteristics of a state. The Empire, however, is not a perfect political unit nor are the dominions sovereign states. The empire has both a single and a multiple personality; it is six in one and one in six. Some times it manifests itself as a great imperial state and again it appears as a loose alliance of more or less discordant nations with conflicting policies and interests. It is not surprising in the circumstances that foreign states have been puzzled as to what kind of an international family this is that is seeking admission into the League of Nations. The sons of the mother land have grown up, they have left home and set up establishments of their own, they have entered into contracts in their own names, but they still claim the rights and share the responsibilities of the old homestead and put off the day of their complete emancipation. In short, the dominions are minors in law but they have reached their majority in fact. They are minors in respect to common imperial matters; they are free-born states in all that concerns their particular interests. The empire is a unit for certain purposes; it is divisible for others. The line of demarcation between these purposes whether imperial or autonomous, cannot be clearly drawn as the dominions are constantly encroaching upon what are supposed to be imperial powers.

Such was the problem which confronted the delegates at Versailles. The conference had to choose between the principles of international law and the hard political facts; and when these two factors come into conflict there can be but one decision in the long run, viz., the law must give way. The conference wisely determined to stick close to the realities of the situation by laying down the principle of the unity of the empire for purposes of war and peace and by acceding to the demands of the dominions for separate representation in the League to safeguard their particular interests. This division is indefensible in principle but is justifiable in fact. The inclusion of the Dominion representatives in the peace conference and their subsequent admission into

membership in the League of Nations are simply an international recognition of the political fact that the Dominions have passed out of the territorial stage of their existence into that of autonomous nations.

The covenant of the League is in truth one of the greatest constitutional and international documents in the history of the empire. It is scarcely an exaggeration to look upon it in somewhat the same light as the American Declaration of Independence. The time had indeed come "in the course of human events" for the dominions "to assume among the powers of the earth the separate and equal station to which the laws of nature and of nature's God entitled them." The covenant of the League was both the evidence and the acknowledgement of that fact. In this case, it is true, the dominions have seen fit to work out their independence by peaceful methods within the empire rather than by war and forceful separation. If, then, the political independence of the dominions be acknowledged in fact it necessarily follows that the same right of separate representation must be extended to them as to independent states. Political character, not legal form, should be the real test of the right of admission into the League.[80] The covenant of the League gives sanction to that principle.

The American public, it must be confessed, have been largely indifferent to what has been going on in the outside world. The Senate likewise has been provincialistic in its outlook. It is evident from the speeches of some of the members that they have been but dimly conscious of the constitutional changes that have taken place in the British Empire.[81] They have shown no lack of appreciation of the war services and the social and economic development of the dominions, but they have failed to understand the peculiar nature of the relations of the dominions to the mother country and to foreign states. They have looked at the external form of the imperial constitution and not at its actual operations. Least of all have they realized the extent to which the United States government had already committed itself to the recognition of the international position of the dominions. The United States has long had a special interest in promoting the autonomy or independence of the dominions by reason of its intimate economic and political relations with Canada. Only a

[80] Ibid., p. 107.

[81] See speech of Senator Shields, Cong. Rec., op. cit., p. 7879.

few years ago Secretary of State Bayard protested against the circuitous mode in which the government of this country was obliged to carry on its negotiations with Canada through the British ambassador at Washington and the Foreign Office at London.[82] This government, as we have seen, was among the first to recognize the nationalistic aspirations of Canada by entering into direct relations with Ottawa. It is not long since that Mr. Taft "invited the Canadian delegates at Washington to be present as guests at a diplomatic dinner at the White House."[83] The United States has constituted itself the foremost champion of nationalism and democracy throughout the world. It has always been among the first to recognize a new republican government or state.[84] It is passing strange indeed in these circumstances to see this country now hanging back at a time when foreign nations are hastening to welcome the young democracies of the dominions into the circle of nations.

But in any case it would seem that the opposition of a small group of senators to colonial representation has come too late. The right of recognizing foreign states is primarily a presidential function. To the president is entrusted the power of dealing with foreign states and determining the legitimate governments of the same.[85] When the president admitted the dominion delegates into the conference at Versailles, for all practical purposes he committed the United States to the further recognition of the dominions in the League of Nations. The Senate can undoubtedly lay down the conditions upon which this country will consent to enter the League. It can properly demand an equal voting strength with the British Empire or refuse to assume any obligations, as under the proposed Lenroot reservation,[86] "to be bound by any election, decision, report or finding of the council or assembly in which any member of the

[82] Tupper, op. cit., p. 9.

[83] "The effect," as the Toronto Globe pointed out, "is to proclaim to the assembled ambassadors of foreign nations that the Dominion of Canada is sufficiently a nation to be regarded as not out of place among the real ones." Ewart, The Kingdom Papers, p. 7.

[84] Dispatch of Mr. Buchanan to Mr. Rush in respect to recognition of French Republic of 1848. 1 Moore, Digest of Int. Law 124.

[85] United States v. Hutchings, (1817) 2 Wheeler Cr. Cas. 543, Fed. Cas. No. 15, 429; Williams v. Suffolk Ins. Co., (1838) 3 Summ. (U. S. C. C.) 270, Fed. Cas. No. 17738; U. S. v. Palmer, (1818) 3 Wheat. 634, 4 L. Ed. 471; 1 Moore's Digest of Int. Law 243; Sen. Ex. Doc. 54 Cong., 2 Sess., no. 54, p. 23.

[86] Cong. Rec., op. cit., p. 9226; Allin, Representation on the Council of the League of Nations, 4 MINNESOTA LAW REVIEW 147.

League and its self-governing dominions, etc., in the aggregate have cast more than one vote," etc. But the Senate cannot withdraw, it is submitted, the recognition already accorded by the president to the dominions at the peace conference. In other words, the autonomous status of the dominions should be no longer open to question but the voting strength of the empire in relation to the United States still remains a proper subject for senatorial determination.

The nationalistic spirit is still running strongly in the colonies. Even the theory of British supremacy is beginning to prove distasteful. The dominions are looking forward to the goal of complete constitutional equality with the mother land and of international equality with foreign states. In the near future an imperial conference will be called to discuss the whole question of the future organization of the empire and the relation of its parts. There is no doubt whatever, in the judgment of Sir Robert Borden,[87] but that that relationship "will be based upon equality of nationhood. Each nation must preserve unimpaired its absolute autonomy but it must likewise have its voice as to those external relations which make the issue of peace or of war." When that day comes the autonomy of the colonies will be complete.[88]

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[87] Cong. Rec., op. cit., p. 8011.

[88] It is interesting to observe that at the coronation of King George the representatives of the dominion were accorded rank with the diplomatic representatives of foreign states.

Minnesota Law Review

Published monthly, December to June inclusive, by the Faculty and Students of the Law School, University of Minnesota.

Subscription Price, $2.50 per annum. Forty cents per number.

CORPORATIONS—DISCLOSING THE ACTUAL IDENTITY OF RELATED CORPORATIONS FOR THE PURPOSE OF IGNORING THE CORPORATE FICTION WHEN ONE IS INSOLVENT.—In whatever sacred esteem the corporate fiction may at one time have been held, and however much the trend of recent decisions may now offend the theories of its devotees, it can hardly be denied that the courts, not only in equity but at law, have frequently done violence to the fiction that a corporation is a separate legal person existing as an entity apart from the shareholders who compose it.[1] And

[1] In re Muncie Pulp Co., (1905) 139 Fed. 546; Interstate Telegraph Co. v. Baltimore & Ohio Tel. Co., (1892) 51 Fed. 49, affirmed, (1893) 54 Fed. 50; Lake Charles National Bank v. J. I. Campbell Co., (1909) 57 Tex. Civ. App. 362, 122 S. W. 601; Hunter v. Banker Motor Vehicle Co., (1911) 190 Fed. 665; Pa. Canal Co. v. Brown, (1916) 235 Fed. 669; S. G. V. Co. of Delaware v. S. G. V. Co. of Pennsylvania (Pa. 1919) 107 Atl. 721.

as a general proposition it may be said that the courts will disregard the fiction in order to do substantial justice in any case where it becomes obvious that to be bound by it would subvert the purposes for which the fiction was created and would defeat the ends of justice.[2] So where one corporation or its stockholders owns the stock of another and thereby controls, either directly or indirectly, the affairs of the other corporation, if once it clearly appears that the subsidiary corporation is nothing more than an instrumentality or adjunct through which the controlling corporation carries on its own business, the courts now have no hesitation in saying that where the rights of creditors upon the insolvency of one are involved, they will look behind the artificial personality, and, if need be, ignore it altogether.[3] Under such circumstances if one of the corporations has become insolvent the court will regard the two corporations as, in fact, one and the same corporation for the purpose of allowing creditors of the insolvent corporation to reach the assets of the solvent corporation.[4] And, obviously, it makes no difference whether it be the controlling or the subsidiary corporation which has become insolvent. It follows, therefore, as was held in a recent Pennsylvania decision,[5] that where one corporation conducts its own business through the instrumentality of another and in its name, the former, upon the insolvency of the latter, cannot treat capital, which it has invested in the subsidiary corporation, as a loan to that corporation as against the rights of third parties, since "one who invests money in his own business cannot, in case of failure, shift the loss to innocent parties because of the name under which the business was done or the manner of doing it."[6]

The rule explained in the preceding paragraph is simple and easy to state; the determination of its applicability to any given set of facts is far more difficult. The problem encountered in every case of this character is: what conditions must exist to warrant the court in holding that the "A" corporation is merely the instrumentality or adjunct of the "B" corporation, in order that it may tear aside the cloak of corporate entity and reveal in its

[2] See "Piercing The Veil of Corporate Entity," 12 Col. L. R. 496.

[3] In re Muncie Pulp Co., (1905) 139 Fed. 546; S. G. V. Co. of Delaware v. S. G. V. Co. of Pennsylvania, (Pa. 1919) 107 Alt. 721.

[4] Note 1, supra.

[5] S. G. V. Co. of Delaware v. S. G. V. Co. of Pennsylvania, (Pa. 1919) 107 Atl. 721.

[6] S. G. V. Co. of Delaware v. S. G. V. Co. of Pennsylvania, (Pa. 1919) 107 Atl. 721, 722.

nakedness the "alter ego" of the controlling corporation? An examination of the cases shows that the courts have laid down no convenient rule of thumb which might furnish a safe and accurate test. Four principal considerations, however, have been factors entering into every case, and a brief analysis of these as the courts have viewed them may serve to suggest the underlying essentials. Concisely stated, these factors are: (1) ownership of the stock of the one by the other, or an identity of stockholders; (2) identity of directors and officers; (3) the manner of keeping the books and records; and (4) the methods of conducting the corporate business.

The following statement of a few of the principal cases where the corporate fiction has been disregarded and where it has been maintained may serve, if not to clarify, at least to show the state of the law. As illustrative of cases where the fiction has been disregarded the following are typical examples:

A. *In re Muncie Pulp Company,*[7] where the following facts appear: (1) the stockholders are identical in both companies, but no stock in the subsidiary company is owned by the controlling company; (2) the directors are identical; (3) there are no separate books; (4) the business of the subsidiary company was conducted almost wholly by the board of directors of the controlling company.

B. *S. G. V. Company of Delaware v. S. G. V. Company of Pennsylvania*[8] where the following facts appear: (1) the stock of the subsidiary company is owned by the controlling corporation; (2) the directors are not identical, but the directors of the subsidiary corporation are only figureheads; (3) the business of the subsidiary company was transacted by the board of directors of the controlling company as such.

The corporate fiction was maintained in *In re Watertown Paper Company*[9] where the following facts appeared: (1) the stock was owned by identical stockholders, but not by the controlling corporation; (2) the directors were identical; (3) the books were kept by the controlling company, which maintained a separate account for the subsidiary company, to which the former charged part of office expenses and advancements made by the controlling company in payment of the bills of the subsidiary

[7] (1905) 139 Fed. 546.
[8] (Pa. 1919) 107 Atl. 721.
[9] (1909) 169 Fed. 252.

company and to which proper credits were entered; (4) each company had separate creditors and assets.

From a consideration of the foregoing cases it would seem that each of the four factors mentioned are merely evidentiary facts, and that the existence of any one, while it may be persuasive of one or the other of the conclusions, cannot of itself be conclusive. On the other hand, it seems clear that if all of these evidentiary facts agreed in pointing to the conclusion that the one corporation was in fact the mere instrumentality of the other, there would be no difficulty in so concluding. But it must not be forgotten that a corporation does not lose its legally distinct and separate personality simply by reason of the ownership of the bulk or the whole of its stock by another corporation or the stockholders thereof, "nor by its joining hands with another in a common enterprise."[10] nor by reason of an identity of directors alone.[11]

The question of stock ownership presents the most troublesome problems, and herein lies the greatest possibility of confusion and error. There must be ownership, either by the controlling corporation in its corporate capacity or by its stockholders, of at least some of the stock of the subsidiary corporation. For clearly, if none of the stock of the subsidiary corporation is so owned, there can be nothing upon which to base even a suggestion that the two corporations are even related, much less identical. And, on the other hand, no one would seriously deny the possibility that two corporations, which had identically the same stockholders, or one of which owned the whole of the stock of the other, might be operating in entirely different fields, have no business dealings in common, and be in no manner connected or related. It is therefore apparent that the matter of stock ownership has a double significance which may be expressed by the following questions: first, what form must this ownership take in order to justify a finding upon further evidence that the two corporations are actually identical?—and, secondly, what is the probative value of a showing of the necessary form of ownership?

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[10] Kendall v. Klapperthal, (1902) 202 Pa. 596, 607, 52 Atl. 92, 96.

[11] Davidson v. Mexican Nat. Ry. Co., (1893) 54 Fed. 653; Richmond & I. Construction Co. v. Richmond Rd. Co., (1895) 68 Fed. 105; Lange v. Burke, (1901) 69 Ark. 85, 61 S. W. 165; Waycross Air-Line Rd. Co. v. Offerman & W. Rd. Co., (1900) 109 Ga. 827, 35 S. E. 275.

As to the form of the stock ownership in the subsidiary corporation, it is believed that much of the confusion is due to the fact that those who advocate the inviolability of the corporate fiction, while they can tolerate a disregard of the fiction where there is corporate ownership of the whole of the stock of the subsidiary corporation, yet find their sensibilities outraged by a similar disregard, where there is merely an identity of stockholders, on account of a contemplation of the usually shifting and changing personnel of the stockholders and a resulting fear of an overextension of the doctrine to cases where there is less than a complete identity of stockholders. But the point to be borne clearly in mind is that in these cases the court is investigating a past situation where either there has been or there has not been a complete identity of stockholders; and a possibility that at some future date the condition may change should not enter into the matter. The court is looking at the substance of the relationship, and it is believed that if it be shown that there actually existed a complete identity of stockholders during the relationship, that is a sufficient basis upon which to predicate the identity of the two corporations, provided the other elements to be considered are present. This, of course, will involve a double disregard of the fiction, for it is identifying each corporation with its stockholders and then identifying them with each other on the theory that things equal to the same thing are equal to each other; but if the fiction can be ignored once, where the corporation is the stockholder of the other, why not twice where the stockholders are identical and the reasons are the same? The border line cases, where corporate ownership is of less than the whole but is of the bulk of the stock of the subsidiary corporation, or where there is, not complete, but only substantial identity of stockholders, should be treated with the greatest caution. This form of stock ownership probably should be considered as too remote a basis upon which to support a conclusion that the two corporations are actually and legally identical, unless other facts clearly show that the outstanding shares are mere puppets; that the subsidiary corporation was run for the purpose of transacting the business of the controlling corporation, and that the understanding of all the shareholders was that they would profit by the running of the subsidiary corporation not by virtue of the shares of stock they owned in that corporation but by virtue of their shares of stock in the controlling corporation, and that they

did so profit. The object in permitting the disregard of the corporate fiction at all, it must be remembered, is to prevent schemers from defeating justice, and to avoid opening the door to fraud.

As to the probative value of the necessary showing of ownership of stock in the subsidiary corporation, it has been shown that it is a sine qua non to proving two corporations legally identical, but that it is not of itself conclusive to that end. It is submitted that it is also a material link in the chain of proof that the subsidiary corporation was the mere instrumentality of the other. For before it can be shown that one corporation controlled the affairs of the other, it is necessary to show that that corporation actually had the power to control. There can be no doubt that ownership of the bulk or the whole of the stock of the subsidiary corporation by the other corporation in its corporate capacity does actually give the stock-owning corporation the power to control the affairs of the other, and even raises the presumption that the power was exercised, though not necessarily that it was exercised to render the subsidiary corporation a mere instrumentality for the transaction of its own business. On the other hand, it has been doubted even by the Supreme Court of the United States whether an identity of stockholders could give to the one corporation the power to control the other. So, in *Standard Oil Co. v. The United States,*[12] that court decreed distribution of the stock of the subsidiary companies proportionally among the share-holders of the Standard Oil Co. as a means of breaking up the combine. The complete failure, as a practical matter, of this attempt at dissolution is convincing proof that identity of stockholders actually does give power of control, although it does not follow that the power was in fact exercised in any particular case. The fact of the identity of stockholders is to be considered in this light: as evidence of the existence of the *power* of control and not as showing actual control, and to this point the courts should give it as much weight as evidence of corporate stock-ownership.

The matter of identity of directors may be of little probative value of itself, for it is entirely consistent with the existence of two entirely independent and unrelated corporations, but taken in conjunction with an identity or substantial identity of stockholders, it strengthens the evidence of the existence of the power

[12] (1910) 221 U. S. 1, 55 L. Ed. 619, 31 S. C. R. 502.

of control. It is believed that failure to show an identity of directors would tend strongly to the conclusion that whatever power of control there may have been was not exercised, unless it is shown that the directors of the subsidiary corporation transacted practically no business and were, in fact, mere puppets. At least it would be more difficult to show that the power of control was exercised where the directors of the two corporations are different persons and are both active. But whether the directors are identical or separate, the manner in which they have carried on the business is most important in determining whether the power of control has been exercised, and if so, to what end. This phase of the matter will be considered later.

Concerning the maintenance of separate books of account, the courts appear to be in conflict. In *In re Muncie Pulp Co.* where no separate books were kept and where the business was managed almost wholly by the board of directors of the controlling company, the court held that the non-existence of separate books was good evidence that the one corporation was a mere instrumentality of the other. In the *Watertown Paper Co.* case, where there were no separate books as such, it was held that the companies were not legally identical. Here it appeared on the evidence that the business was all conducted from the office of the controlling company which kept a separate account for the subsidiary company; that the subsidiary company had no bank accounts; that all the bills of the subsidiary company were paid by the controlling company and charged to the account of the former; and that the latter collected all the credits and kept the books, charging a proportional share of the office expenses to the subsidiary company. Both of these companies were transacting the same kind of business, and had identical officers and directors. This case is authority for the proposition that the existence of separate acounts, even though there be no separate books, is not conclusive, but fairly convincing evidence of the separate legal existence of two inter-related companies. An earlier decision[18] had held that identity of stock-ownership and intimate business relations of two corporations employing the same bookkeeper in the same office with each contributing proportionally to his salary does not prove that the two corporations are one. Yet, it is quite possible that each company might nominally maintain its separate books and both, nevertheless, be so inter-related as to be, for all

[18] Lange v. Burke, (1901) 69 Ark. 85, 61 S. W. 165.

practical purposes, legally identical. Where two companies with the same stockholders and directors, do the same kind of business, operate from the same office, and use the same bookkeeper it is a simple matter to make additional entries for one company in a separate book, or to make the entries correspond to the business transactions of the two. It seems, therefore, that the most that can be said of this is that the non-existence of separate books of account is evidence that the companies are under the same control and probably legally identical; but that the existence of separate books, alone, should be far from conclusive, but in conjunction with other facts of a similar kind, ought to indicate at least what the officers and stockholders of the two corporations contemplate concerning their relationship.

Perhaps, the most potent consideration in determining the legal identity of two corporations is the method of conducting the corporate business. Where, as was the case in the recent Pennsylvania case,[14] practically all of the corporate business of both companies is conducted and managed by the board of directors of the controlling company as such, there is little difficulty in perceiving that the corporate fiction is used as a mere subterfuge. Yet the matter is often complicated by the fact that although the two companies have in most of these cases identical boards of directors, in many cases separate meetings are held, and separate minutes are kept of these meetings. In the Pennsylvania case, annual meetings for the election of directors and officers were held by the subsidiary company. This, the court recognizes, was a mere matter of form. On the other hand, where no meetings of the board of directors of the subsidiary company as such have been held for the purpose of transacting its business, the courts have invariably held the subsidiary company to be an instrumentality or adjunct of the controlling company.[15] This is as clear evidence as can be obtained that the two companies are virtually one. On the other hand, the fact that separate meetings are held by the board of directors of the two companies is not conclusive of the separate legal existence of the two companies. Where the board of directors of the subsidiary company held its own meetings and made its own minutes of these meetings and then sent the minutes to the controlling

[14] S. G. V. Co. of Delaware v. S. G. V. Co. of Pennsylvania, (Pa. 1919) 107 Atl. 721.

[15] Interstate Tel. Co. v. Baltimore & Ohio Tel. Co., (1892) 51 Fed. 49; See also Note No. 3 supra.

company for approval, it was held that the subsidiary company was an adjunct of the other.[16] Here again is an illustration of the fact that the separate meetings may be more a matter of form than of substance.

The conclusions drawn from the foregoing considerations may be quickly summarized. Prima facie, two corporations should be presumed to have their respective existences as legal persons entirely separate and distinct from each other and from their stockholders. The only justification for disregarding the fiction is that to recognize it would defeat justice and open the door to fraud. Where one corporation has conducted its own business through the instrumentality of another and in its name and has thereby run that other into insolvency, to allow the controlling corporation to escape the creditors of the insolvent corporation or to stand as a creditor of the insolvent corporation for capital which it has invested therein nominally as a loan, would certainly defeat justice and open the door to fraud. But it cannot be said that the one corporation has conducted its own business through the instrumentality of another and in its name unless it appears: (1) that the real parties in interest to reap the benefits of the business transacted by both corporations were actually identical; (2) that the one corporation actually had the power to control the other; (3) that it exercised that power to secure the transacting of such business by the subsidiary corporation as would inure to the benefit of the controlling corporation and its stockholders by virtue of their ownership of stock in the controlling corporation and would not inure to the benefit of the stockholders of the subsidiary corporation as such. Each of the four considerations discussed are evidently facts to be considered in their proper places in the chain of circumstances outlined above. The only true tests that can be laid down, it is submitted, rests in the exercise of sound common sense and judgment upon all the facts in the case, with a view to an accurate understanding of the essential relationship which existed between the two corporations.

PRIVILEGED COMMUNICATIONS—PRIVILEGE OF JUDGE—JUVENILE COURT JUDGE.—The question of allowing judges the privilege of refusing to testify is one on which there is very little

[16] Hunter v. Banker Motor Vehicle Co., (1911) 190 Fed. 665.

authority,[1] and that, conflicting. The better rule would seem to be; 1, that a judge cannot, on the ground of public policy, claim privilege from testifying at a subsequent trial over which he is not presiding, as to the facts of a former trial of the same person before him;[2] 2, that, ordinarily, neither the party making a confidential communication to a judge knowing him to be such, nor the judge himself, since he is estopped in most cases from acting as attorney,[3] can claim privilege for communications made by the confessor to the judge on the ground that the technical relation of client and attorney exists between them;[4] and, 3, that public policy does not justify a judge in refusing to testify regarding facts communicated to him in confidence outside of court. In the eyes of the law he occupies no better position in such case than a friend who receives such a communication.[5]

A recent case in Colorado,[6] however, raises the question of the propriety of applying this third rule to confidential communications made to a juvenile court judge. The facts of the case were that a boy named Neal Wright came to Judge Lindsey of the juvenile court of Denver privately and outside of court, and made a confession to him regarding the violent death of his father. This confession was made on the understanding that it would not be revealed. Later the boy's mother was placed on trial for the murder. Young Wright was called to testify in his mother's behalf and stated that he and not his mother was guilty of the crime charged. He also admitted that he had talked with Judge Lindsey and said that he was willing to have him testify as to what he had confessed to him. Judge Lindsey was called but refused to disclose what the boy had told him. He was fined for criminal contempt of court and appealed. On appeal the judgment of the lower court was sustained and a rehearing denied.

[1] Welcome v. Bachelder, (1843) 23 Me. 85; State v. Duffy, (1889) 57 Conn. 525, 18 Atl. 791; People v. Pratt, (1903) 133 Mich. 125, 94 N. W. 752, 67 L. R. A. 923 and note; People v. Hess, (1896) 8 N. Y. App. 143, 40 N. Y. Supp. 486.

[2] State v. Duffy, (1889) 57 Conn. 525, 18 Atl. 791.

[3] For example, see Revised Statutes of Colorado, 1908, Sec. 1595; General Statutes of Minnesota, 1913, Sec. 148, (district court judge).

[4] People v. Hess, (1896) 8 N. Y. App. 143, 40 N. Y. Supp. 486; Hutton v. Robinson, (1833) 14 Pick. (Mass.) 416; Barnes v. Harris, (1851) 7 Cush. (Mass.) 576, 54 Am. Dec. 734; Satterlee v. Bliss, (1869) 36 Cal. 489; Coates v. Semper, (1901) 82 Minn. 460, 85 N. W. 217.

[5] People v. Hess, (1896) 8 N. Y. App. 143, 40 N. Y. Supp. 486; Note, 67 L. R. A. 923.

[6] Lindsey v. People ex. rel. Rush, (Colo. 1919) 181 Pac. 531.

Judge Lindsey defended his refusal to testify on the grounds; 1, that, as a juvenile court judge, a public officer, he was privileged by statute from revealing a communication which would be against public policy;[7] 2, that the relation of juvenile court judge to a delinquent child was a relation of such value to the public that its confidentiality should not be destroyed; and, 3, that the State, in its capacity as parens patriae, conferred upon the judge of the juvenile court a guardianship over all delinquent children from the moment of their delinquency, and, at the same time, it automatically conferred jurisdiction over the child and the offense; and furthermore, any communication made by a child in confidence to the judge of the juvenile court was made in a case indirectly pending before the judge because of this jurisdiction. For such communications Judge Lindsey claimed privilege.[8]

On the question of public policy, the majority of the court ruled against Judge Lindsey. Their main reasons may be briefly summarized: The benefit to be gained by the correct disposal of the litigation was so infinitely greater than any injury which could possibly inure to the relation by the disclosure of the communication that the requirements of the fourth section of the rule [Wigmore's Rule][9] were not met. And they added that, inasmuch as the privilege, if any existed, must have belonged to Wright, if Wright waived his privilege, the judge should have testified.[10] They stated further that the position of Judge Lindsey in regard to the matter of immediate jurisdiction was untenable.

Three of the judges differed from the majority of the court on the question of jurisdiction and the public policy of interfering with that jurisdiction.[11] They stated in part:

[7] "Fifth, a public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the court, would suffer by the disclosure." Rev. Stat. of Col., 1908, Sec. 7274, Par. 5. It will be noted that the court is made judge of whether a statement should or should not be disclosed. The corresponding Minnesota Statute is G. S. 1913, Sec. 8375, par. 5. "A public officer shall not be allowed to disclose communications made to him in official confidence when the public interest would suffer by the disclosure." See Cole v. Andrews, (1898) 74 Minn. 93, 76 N. W. 962.

[8] Lindsey v. People ex rel. Rush, (Colo. 1919) 181 Pac. 531.

[9] "4. The injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of litigation." Wigmore, Evidence, Sec. 2285.

[10] Lindsey v. People ex rel. Rush, (Colo. 1919) 181 Pac. 531, 534.

[11] Ibid., 536.

"It is equally plain that anything which tends to destroy the trust of the child in the court which has jurisdiction over such matters must necessarily nullify all possibility of good which otherwise might thereby be accomplished. To permit the violation of a confidence made by a delinquent to the judge of the court having jurisdiction would at once remove the cornerstone of his faith in the one to whom he is authorized to appeal for help and protection."[12]

The juvenile court "is a vast power for good, concerning which no narrow construction should be indulged tending to weaken or discredit its work."[13]

The theory of jurisdiction which Judge Lindsey advocated, even though it would have no effect on the decision of the court under the rule of privilege to judges developed supra, is so important that it needs consideration. Judge Lindsey contended that his jurisdiction over a delinquent child became complete on the commission of the act of delinquency, and that any communication had with the child after such act was made in a case pending before him indirectly, and that until they were formally entered, the proceedings remained in the breast of the judge. This is certainly a new idea of jurisdiction. Ordinarily the term has a well known technical meaning, referring to a procedure designed to protect the rights of both parties.[14] While a court may have a general jurisdiction over a certain class of cases it cannot acquire jurisdiction of a particular case of that class unless the appropriate legal steps are taken by a party interested to bring that particular case definitely before the court.[15] Then and only then does the court acquire technical jurisdiction over the particular case.[16] It would seem that there had been a confusion here of the ethical with the legal idea of jurisdiction, for it is evident that the definition contended for, if applied to other

[12] Ibid., 538.

[13] Ibid.

[14] Burnside v. Ennis, (1873) 43 Ind. 411. "The word 'jurisdiction' (jus dicere) is a term of large and comprehensive import, and embraces every kind of judicial action upon the subject matter, from finding the indictment to pronouncing the sentence." . . . "To have jurisdiction is to have power to inquire into the fact, to apply the law, and to declare the punishment, in a regular course of judicial proceeding." Hopkins v. Commonwealth, (1842) 3 Metc. (Mass.) 460, 462. Technical jurisdiction depends on 1, jurisdiction of persons, Brady v. Richardson, (1862) 18 Ind. 1; and 2, jurisdiction of property or thing involved, Hollenback v. Poston, (1905) 34 Ind. App. 481, 73 N. E. 162.

[15] Powell v. National Bank of Commerce, (1903) 19 Col. App. 57, 74 Pac. 536; O'Brien v. People, (1905) 216 Ill. 354, 75 N. E. 108, 108 Am. St. Rep. 219; Gen. Stat. of Minn., 1913, Sec. 7741.

[16] Reynolds v. Stockton, (1890) 140 U. S. 254, 11 S. C. R. 773, 35 L. Ed. 464.

courts, and even if applied only to the juvenile court, would lead to an authority on the part of the courts involved which the legislatures can scarcely have wished to bestow.

As for the matter of public policy privileging the statements made to Judge Lindsey by Neal Wright, certain questions immediately present themselves. 1. Does the power of a juvenile court judge necessarily depend upon the *confidentiality* of the relation existing between him and the delinquent children who are brought before him? In other words, is it indispensable for the proper administration of justice that a judge of juvenile court make promises of secrecy to delinquents before they will talk freely to him? To hold that such confidentiality is necessary seems a criticism of the judge. Such a judge should depend primarily for his authority with children on his reputation for fairness, impartiality, justice and friendship, and not on promises of secrecy. In the end, the judge who, in fairness to himself, to the public, and to the delinquent child, demands that he be free in the use he makes of the information he receives, gains the confidence of the child just as well as the judge who depends on promises of inviolability. His reputation for justice and fairness will ordinarily give the child just as much confidence in his discretion as will an oath of secrecy.

And this leads to the second question: 2. Does a judge of juvenile court who receives a confession outside of his court receive it impressed with the character of his judicial office, or only as any other citizen trusted by the youth of the community? Certain judges may build up a reputation with children for their "squareness" and as a result have boys and girls stop them on the streets with their troubles, or come to them in their chambers. Such a reputation undoubtedly attaches a moral obligation upon its possessor. But it is doubtful whether a privilege, validity aside, claimed because of a judgeship, should be allowed to attach to a communication made to a judge in his private individual character on account of the reputation for justice and wisdom gained through his conduct in his courtroom. Indeed, it would seem that in such a case, a judge occupies a position no better than that of any good citizen receiving such a communication. Good ethics may demand that his mouth be sealed, and moral conviction is often stronger than the compulsory power of the law as Judge Lindsey's case illustrates, but if a person under such circumstances insists on refusing to testify when ordered to do

so by the court he should be forced to pay the penalty of his silence.

RECENT CASES.

BANKS AND BANKING—LIABILITY OF DIRECTORS—COMMON LAW OR STATUTORY—COMMON LAW LIABILITY NOT SUPERSEDED BY STATUTORY.—Bowerman, living in a town 200 miles away, was a director of a national bank from its inception until its failure, a period of five and one-half years. He did not attend a single directors' meeting, nor did he, by inquiry or examination, keep informed of the actual conditions of the bank. He assumed to be and was known as a "nominal director." The officers of the bank so grossly mismanaged its affairs that even slight attention on the part of the directors would have disclosed its unsound condition. In an action by the receiver for the money lost by the unlawful and negligent conduct of the bank's affairs, *held*, (1) counts for the violation of statutory and common law duty may be joined in the same action; (2) a director of a national bank is bound by his common law liability as a director of a corporation except where specific statutory provisions alter that liability; (3) as to common law duties, the common law rules for determining their violation apply. *Bowerman v. Hamner*, (1919) 39 S. C. R. 549.

This case involves the question of common law rather than statutory liability. Where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability. *Yates v. Jones National Bank*, (1907) 206 U. S. 158, 51 L. Ed. 1002, 27 S. C. R. 638; *Farmers' etc., Bank v. Dearing*, (1875) 91 U. S. 29, 23 L. Ed. 196. Statutory regulations do not interfere with the common law obligations of directors except where they directly supersede them. *Yates v. Jones National Bank*, supra; *Briggs v. Spaulding*, (1891) 141 U. S. 132, 11 S. C. R. 924, 35 L. Ed. 662; *Dykman v. Keeney*, (1897) 21 App. Div. 114, 47 N. Y. Supp. 352.

The rule in all jurisdictions holds directors liable for misfeasance. *Killen v. Barnes*, (1900) 106 Wis. 546, 82 N. W. 536; *Horn Silver Mining Co. v. Ryan*, (1889) 42 Minn. 196, 44 N. W. 56; *Fisher v. Parr*, (1901) 92 Md. 245, 48 Atl. 245. On the question of the amount of care required by a director serving gratuitously, there is some division of authority. Certain courts hold directors responsible for the highest good faith in their transactions for the corporation. *Ryan v. Leavenworth, etc., Ry. Co.*, (1879) 21 Kans. 365; others, that they must exercise ordinary business care and diligence in the management of the corporation. *Lake Harriet State Bank v. Venie*, (1917) 138 Minn. 339, 164 N. W. 225; *Marshall v. Farmers', etc., Bank*, (1889) 85 Va. 676, 8 S. E. 586, 2 L. R. A. 534, 17 Am. St. Rep. 84. These last two cases hold distinctly that a director's liability depends upon the fiduciary nature of his office; that he is, in a sense, a trustee and liable correspondingly. The trustee theory is discussed and denied in the case of *Killen v. Barnes*, supra. The Wis-

consin court there holds that directors are only liable for that degree of care which ordinarily prudent men would exercise in respect to a similar gratuitous employment.

The present rule in a majority of the courts of this country follows the liability of a director as stated in *Briggs v. Spaulding*, supra: "that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than acting as figureheads." The old English case of *The Charitable Corporation v. Sutton*, (1742) 2 Atk. 400, with facts similar to those of the instant case, stated a broader rule than that given in *Briggs v. Spaulding*, and this case has been quoted with approval in some state courts. *Williams v. McKay*, (1885) '40 N. J. Eq. 189, 53 Am. St. Rep. 775.

The Wisconsin court in *Killen v. Barnes*, supra, following *North Hudson, etc., Asso. v. Childs*, (1892) 82 Wis. 460, 52 N. W. 605, 33 Am. St. Rep. 62, purports to found its rule "in the main" on *Briggs v. Spaulding*. Its statement is that directors "are not to be held to the degree of responsibility of bailees for hire . . . They are not, in the absence of any element of positive misfeasance, and solely on the ground of passive negligence, to be held liable, unless their negligence is gross or they are fairly subject to the imputation of want of good faith."

It is doubtful if this is a proper statement of the rule of *Briggs v. Spaulding*, supra. In fact the supreme court, in the instant case does not find it necessary to widen that rule, although there is an intimation that it might do so under different facts, p. 619. Certain courts have stated a wider rule, based on an implied trust, which seems more in keeping with the great importance of the office of director in institutions that deal with the savings of the public: "Directors, as trustees of a corporation, are bound to manage the affairs of the company with the same degree of care and prudence which is generally exercised by business men in the management of their own affairs." *Marshall v. Farmers,' etc., Bank*, supra. Minnesota follows this rule. *Lake Harriet State Bank v. Venic*, supra.

BOUNTIES—CONSTITUTIONALITY—SOLDIERS' BONUS LAW—PUBLIC PURPOSE.—Action was brought to restrain the attorney general of Minnesota from carrying out the provisions of the Soldiers' Bonus Law. This act appropriated $20,000,000 for payment as additional compensation to those residents of the state who served in the military or naval forces of the United States or associated nations during the world war; payment to be made at the rate of $15 per month for each month of service between April 6, 1917, and the conclusion of peace with Germany. *Held*, that the act is constitutional, such debt being created for a public purpose and that it will be a direct liability of the state. *Gustafson v. Minnesota*, (Minn. 1920) — N. W. —.

It was contended that the bonus law was a violation of section 5, art. 9, of the Minnesota constitution which limits the aggregate of state debts to $250,000, and section 6, which requires the debt so authorized to be contracted by a loan on state bonds. But sec. 7, art. 9, states that "the state

shall never contract any public debt, unless in time of war, to repel invasion or to suppress insurrection, except in the cases and in the manner provided in the fifth and sixth sections of this article." With regard to these exceptions contained in art. 7, no limit has been placed on the debt which may be contracted. United States Supreme Court decisions sustaining the validity of the war time prohibition act are cited as to the fact that war existed at the time of enactment of the Minnesota Soldiers' Bonus Law. *Hamilton v. Kentucky,* (1919) U. S. Adv. Ops. 1919-20, 115, 40 S. C. R. 106. The Minnesota court held that the emergency provided for in the state constitution was not limited merely to repelling invasion or suppressing insurrection, in time of war but was extended to a public debt for a public military purpose legally contracted in time of war. *State v. Stewart,* (1918) 54 Mont. 504, 171 Pac. 755. In the case of *Franklin v. State Board of Examiners,* (1863) 23 Cal. 173, a California statute for the payment of an additional $5 per month to California volunteers during the Civil War was upheld under a constitutional provision almost identical with that of Minnesota. The California court held the existence of the emergency required by the constitution to permit an increase of indebtedness was purely a political question of which the legislature was the sole judge. Of course there is an implied restriction that the debt incurred in time of war must be for some legitimate military or naval purpose pertaining to the existing state of war.

The proposition that the payment of a bounty or bonus to soldiers and sailors is an expenditure of public funds for a public purpose seems fairly well settled. Bounty acts were held constitutional in no less than seventeen states during the Civil War period upon the ground that the encouragement of enlistments was for the public good in order to relieve the community of the necessity for a draft, and that the burden of supporting the war rested upon the entire people and not alone upon those in the military service. 9 *C. J.* 301; *Winchester v. Corinna,* (1866) 55 Me. 9; *Hilbish v. Catherman,* (1870) 64 Pa. 154. As the court stated in *Cass Tp. v. Dillon,* (1864) 16 Ohio St. 38, 42: "The state has a deep interest in the preservation of the government of the United States in all its integrity and power; and when endangered in war by a hostile power, the state government may, within the bounds of its constitutional powers, aid in its preservation, and, in so doing, is but in the exercise of the legitimate power of self-defense." Many of these bounty cases in the Civil War placed the public benefit principally upon the fact that the bounty enabled the community to fill its quota of men without resort to the draft, a consideration which was not present in the instant case. *Speer v. School Dst. of Blairsville,* (1865) 50 Pa. 150; *Taylor v. Thompson,* (1867) 42 Ill. 1. Other decisions are based upon the theory that the general good of the people of the state is involved in the maintenance of the national government and that the legislature may properly act for the promotion of this general good. *Booth v. Woodbury,* (1864) 32 Conn. 118. In sustaining the Wisconsin soldiers' bonus act the court of that state holds that considerations of gratitude alone will be sufficient to sustain a tax for bounties paid to the soldier or his family. *State v. Johnson,* (Wis. 1919) — N. W. —. The United States Supreme Court

has likewise recognized the weight of moral obligations, holding that it would not comport with the dignity of the government to break faith with the men who had served their country. *United States v. Hosmer,* (1869) 9 Wall. (U.S.) 432, 19 L. Ed. 662. However, at least one state has held that when the national government, instead of calling on the states for quotas of soldiers, went directly to the people, there was no power to levy a tax for added compensation for these soldiers. *Ferguson v. Landram,* (1866) 1 Bush (Ky.) 548. That court held that no state can aid in prosecuting a national war in which the citizens of all the states are equally interested, for the provision for the common defense and general welfare of the United States is a power given to the federal government under the constitution.

The bonus act would hardly be questionable had the law been enacted before its beneficiaries entered the service, for Minnesota, with many other states, permitted, through the local subdivisions, gratuities in the nature of bounties for service men during the Civil War. *Comer v. Folsom,* (1868) 13 Minn. 295. There has been some doubt on this question of bounty for service already performed, certain states holding that a bounty is an inducement to enter the service, not a gratuity or reward for service previously rendered, and that as to the latter it would be a promise without consideration and hence under such condition would be an expenditure of public money without public benefit and in violation of constitutional provisions. *Greenwood v. DeKalb County,* (1878) 90 Ill. 600; *Amity Tp. v. Reed,* (1869) 62 Pa. St. 442. As stated in *Kidder v. Stewartstown,* (1869) 48 N. H. 290, 292: "The term bounty used in the law would ordinarily imply that the money so raised was to be used as an inducement to enter the service, and not as a gratuity or acknowledgment for services already rendered." In *Opinion of the Justices,* (1904) 186 Mass. 603, 72 N. E. 95, it was decided that an act of the legislature providing bounties for certain veterans of the Civil War would be unconstitutional as an expenditure of public money for a private purpose, there being no promise to these soldiers and no obligation to pay them and the war having been over so long that manifestly public welfare would not be promoted by payment of such proposed bounties. On the other hand some courts have held that the giving of such bounties is a matter which intimately concerns the public welfare and they may be provided for the soldier or his family after enlistment or even after his term of service has expired. *Broadhead v. Milwaukee,* (1865) 19 Wis. 624, 88 Am. Dec. 711; *State v. Newark,* (1861) 29 N. J. L. 232; *Laughton v. Putney,* (1868) 43 Vt. 486. The right to raise money for a particular object yet to be accomplished and a right to raise it to defray the expenses of the same object after it has been attained can be distinguished only on purely theoretical reasoning. The Massachusetts court, while it still maintains that a bounty provided for after the service has been performed is unconstitutional since the purpose of such payments was to encourage enlistments, has held that a reward in recognition of meritorious service, if calculated and intended to promote loyalty and patriotism, is for a public purpose and valid. *Opinion of the Justices,* (1912) 211 Mass. 608, 98 N. E. 338. Pensions are a notable example of payment of public funds for services previously rendered.

The instant case quotes with approval the statement of *Cass Tp. v. Dillon*, supra: "Bounties are but a mode of compensation for services and may be either for past, or as an inducement to future service. Their purpose is to strengthen the military power, not to weaken it; to commend the service to public favor and induce men to enter it." Upon the theory that the bonus is to promote loyalty and patriotism and to indicate that the state will in a measure recompense the men who place their lives at the disposal of the nation if the need should again arise, the public welfare is promoted and hence the expenditure is for a public purpose.

EMINENT DOMAIN—MUNICIPAL CORPORATIONS—RESTRICTED RESIDENCE DISTRICTS—PUBLIC USE.—On re-argument the supreme court of Minnesota reverses its former ruling, and *holds* that Minn. laws 1915, c. 128 authorizing cities of the first class to designate and establish restricted residence districts and to prohibit the erection of buildings therein for certain prohibited purposes (specifically, apartment buildings) is constitutional. *State ex rel. Twin City Building, etc., Co. v. Houghton*, (Minn. 1920) 175 N. W. —.

This decision, Brown, C. J., and Dibbell, J., dissenting, establishes the proposition that while the police power is not competent to prohibit the erection of apartment buildings within restricted residential district, *State v. Houghton*, (1916) 134 Minn. 226, 158 N. W. 1017, eminent domain may be constitutionally resorted to; that the purpose though largely aesthetic is public. The thing condemned is the owner's right to use his property for the specific purpose, the compensation being paid by the property benefited, which in the instant case is a single block. The court somewhat questionably invokes the rule sic utere tuo, etc., the chief basis of the police power, in support of eminent domain. The police power denies the right of a property owner to use his property in a particular way; eminent domain takes from him for public use an admitted property right and compensates him for it. See full discussion: 1 MINNESOTA LAW REVIEW 86, 150, 487; Vol. 4, p. 50.

BOOKS RECEIVED

CASES ON THE LAW OF EVIDENCE. By Edward W. Hinton. American Casebook Series. St. Paul: West Publishing Company. 1919. Pp. xxiii, 1098. Price $6.00. Review will follow.

CASES ON THE LAW OF PROPERTY. Volume 2, Introduction to the Law of Real Property; Rights in Land. By Harry A. Bigelow. American Casebook Series. St. Paul: West Publishing Company. 1919. Pp. xxiii, vii, 88, xviii, 741. Price $5.00. Review will follow.

MINNESOTA LAW REVIEW

VOL. IV MARCH, 1920 No. 4

NEGLECTED MODES OF INTERNATIONAL ARBITRATION

SUPPOSING that two countries, having a dispute to settle, agree to refer it to the decision of a third party, but without binding themselves necessarily to adopt that decision, what is the proper name of the transaction?

What name, that is, is least misleading to the ordinary person who may find it used? Surely arbitration most fittingly covers these cases of recurrence to the benefit of a third opinion, which in all but their consequences so closely resemble reference to the obligatory determination of a third party. In both cases the procedure is exactly the same—the parties desire a definite pronouncement as to which of them is in the right, and they set about obtaining it in exactly the same way, only in one case they bind themselves to abide by the decision—in the other case they leave it to have its moral weight.

This is not slight—for if your own chosen referee has pronounced against you, you can without loss of dignity pay up and look pleasant. The invocation of the opinion of a third party has a powerful influence—and it may very well happen that a nation will consent to take such an opinion and in the end will very probably abide by it, where it would think twice and thrice before committing itself to abide by it in advance.

Mr. Merignhac would call such a proceeding "mediation" and although we should not quarrel about names, yet we think that such nomenclature has the unfortunate effect of slurring over the existence and usefulness of this kind of open arbitration. It is not in the least like mediation as the term is generally

understood: and if it is shut up in the same box with it, the result will be that it will be neglected and forgotten. Merignhac shuts it up in the mediation box because he has made up his mind that arbitration must be decisive on the parties, but it differs from mediation toto coelo. In mediation the third party endeavors to compose the differences between the parties. He takes the initiative, suggests compromises, presses concessions, listens to considerations outside the subject-matter in dispute, introduces considerations of morality and good-neighborliness, and acts, in short, as a friend and advisor rather than as a jurist. In arbitration, the third party says (or should say) simply who is right and who is wrong. There is nothing in common between it and mediation.

This is not to confuse mediation with good offices. The power (or powers) which tenders its good offices to disputants does not concern itself with the points which are in dispute, but only with the means of settling them. It interposes at the request of one or other, or spontaneously, to dissuade from war or mobilization—to suggest reasons of conciliatory settlement—to propose disarmament, mediation, arbitration or some step which will place a check on war.

Few, if any, instances of such arbitration as has been mentioned exist in history, and yet one must recognize that, especially in the more vital and important classes of dispute a reference of this kind might prove of the greatest value. It is seldom that a nation can contemplate calmly the irrevocable submission of its case in an important matter to three or four gentlemen, however eminent, or to any municipal court, however august. But if it referred the case to the candid opinion of expert friends, it would be easy as regards the result; whilst at the same time, if their opinion should be against it, it might well proceed to accept it. Turbulent elements in the state would be checked by the citation of the arbitrators' decision. The natural reluctance of the government to yield to external force or threats would be replaced by a comparative willingness to yield to enlightened outside opinions.

Two individuals quarrel. Neither can induce the other to give way. Without washing their dirty linen in public, and subjecting each other to the compulsion of sheriff and constable, they, like sensible people, invoke the opinion of a common and

trusted friend—perhaps (and indeed very often) an honest lawyer. "Well, if he says you are right, I suppose you must be right, though I can't see it myself," says the one party, and gives way, where nothing could have induced him to alter his own opinion. This is surely a procedure which international laws might well encourage, rather than smother under a misleading nomenclature.

Much must always turn, in international as in other arbitrations, on the personality of the arbitrators. In a reference for opinion, this is particularly important—since it is in the value which the parties have for the opinion of the arbitrator that its importance consists. In the case of decisive arbitration, where the parties bind themselves to accept the judgment, the case may be wrongly decided, but at any rate it *is* decided. But in consultative arbitration (as it may be styled), the whole force, or nearly the whole force, of the proceeding depends on the disputant's confidence in the competence of the arbitrator. Some weight comes also from the natural unwillingness to stultify oneself in the eyes of the world by refusing to accept the determination of one's own appointed referee:—but this again rests in the long run on his accepted fitness.

A great deal more stress should be laid than has hitherto been the custom, on the personal qualifications of those who are selected as arbitrators. This has a vicious historical reason. As states are disputants, it was at first natural and common that states should be the arbitrators; nothing less seemed calculated to satisfy their dignity. But as states could not literally act as arbitrators the choice, equally naturally, fell on sovereigns, and sovereigns, not being personally conversant with or much caring to be troubled with the details in dispute, chose any decently competent person to prepare their decision for them. It is obvious that in such a state of things the disputants have no special confidence in the real arbitration;—they only have confidence that it will be the choice of a personage whom they trust. This system was succeeded by one in which the sovereign was expected to do openly what he no doubt did privately and the dispute was referred to an un-named person to be named by him. Here also the parties may have a fair guarantee of impartiality and competence—but they clearly have no special trust and confidence in the personal qualities of the referee, for they do not know who he is.

A far better system would be frankly to recognize that it is really individuals who decide these cases, and that their individual characters and capacities are transcendently important. That an arbitrator is a Portuguese or a Norwegian is nothing beside the fact that he has a judicial, an instructed, and a patient temperament. An eminently judicial, instructed and patient temperament is what the disputants want,—and the fact that the arbitrator is a supreme court judge will not of itself secure it, nor will the fact that his government has a high opinion of his ability, based on his usefulness to them in some quite different sphere of activity.

We have spoken of "the arbitration" in the singular; for it is a remarkable and regrettable fact that arbitrators chosen by single parties or by sovereigns nominated by single parties, almost invariably reduce themselves to the position of advocates at the table. Such arbitrators with a mission—to secure the advocacy of their own cause—should never be admitted. If once the rational system were well established of selecting arbitrators for their own personal competence, there would be little or no reason for the exclusion of persons of the nationality of one or both disputants. Such a person as the late Lord Courtney in England, or Carl Schurz in America, might well have commanded confidence in any mind. At the same time one would not necessarily have taken Lord Courtney's opinion on a point of navigation, or Mr. Schurz's on a military proposition. Technical competence must be a matter to be considered. A dispute on a question of conveyancing needs quite different qualities for its solution from those which are useful in establishing the truth in conflicts of evidence.

With those qualifications, the neglected process of referring disputes for a friendly but not necessarily binding decision may be seriously recommended for adoption.

A further word may be added on defects which seem to exist in the usual type of arbitral body.

In the first place, it imitates too closely the procedure and the de haut en bas attitude of a municipal court. This is not the place to attack or to examine the propriety of that attitude assumed by municipal judges. Everybody is conscious of it:—the judge, carrying out the traditions of a day when the sovereign sat on the bench, regards the parties and their advocates with an Olympian air. Even where the bar is highly capable and

highly organized this attitude of the judicial person subsists. It subsists in Britain, and anyone who needs the rebuke to which David Dudley Field and his colleagues submitted to listen to a not very distinguished judge, will agree that it has its place in America. Where a court sits to exercise jurisdiction over a vast mass of populace, such an attitude may have its merits, but where arbitrators sit to determine by consent a dispute between two or three of a circle of fifty friends it is entirely out of place. An international tribunal has to determine disputes between states. If it arrogates to itself the lofty attitude of municipal judges it goes far to reduce them to the level of subjects. An international arbitration ought to be conducted on terms of the fullest equality: the advocate of the sovereign litigant ought to argue on equal terms with the arbitrators. He ought not to stand before them. He ought not to be told to be silent by them. This is partly why nations cling to the bad practice of appointing arbitrators who are practically national advocates: they secure their dignity thereby. But those who appear before an arbitral body to represent the interests of a sovereign state ought to yield in no substantial or formal respect to those who appear to give their arbitral decision. It may be objected that, on such a footing, the proceedings will fall into hopeless confusion. If the advocates appointed by a litigant nation throw the conduct of the case into confusion, then they stultify the reference and expose their country to the charge of failing to fulfill its engagements. If the arbitrators do the like, they fail in their duty. This ought to be sufficient to secure a proper conduct of business, without enthroning the arbitrator as a dictatorial judge. An international arbitration ought to be a friendly discussion; not a tournament of wits under judicial dictation.

It ought to be possible for advocates to converse freely and familiarly with the persons who will decide the matter. They should be hampered by no considerations of an unreal and conventional respect for the superior position of the board. The ideal would be for all to sit together at a round table in armchairs.

In the second place, the imitation of law courts has probably been carried too far in the adoption of a small fixed number of arbitrators for all classes of disputes. There are some disputes so far-reaching and delicate that it is not safe or fair to entrust

them to the decision of a majority of three lawyers. One wants, to decide such matters, something which will fairly represent the sense of justice of the whole world. I am not alluding to the distinction sometimes drawn between "justiciable" and "non-justiciable" disputes: I am old fashioned enough to believe that in any dispute a nation is either right or wrong, and that if it can be judicially declared to be wrong it is its business to make the best of it. But, even so, a great national question is not to be settled by the opinion of two or three majority jurists, however eminent. Jurists are apt to have eccentric views on particular topics. F. F. de Martens, who is not inferior to any of his contemporaries, gave a decision in *The Costa Rica Packet* which would hardly have been concurred in by many of the rest, and international jurists are particularly apt to be carried away by academic and impractical dogmatism. Statesmen are the real authorities on the law of nations—and they, again, are liable to be warped by political considerations and prepossessions. Accordingly it would seem that far greater elasticity in the composition of boards of international arbitration might well be introduced. For some disputes a single well-equipped technical authority would be sufficient, for others the conventional majority of two or three, for others a unanimous four or five.

But, for the most important class of differences a far more representative opinion is required. It might be secured by forming a sort of international jury. Each side might arrange the countries of the world in order of preference, and from the twelve highest in both lists might make a mutual selection of twelve or twenty-four thoroughly impartial and able persons to give their considered opinion after hearing the advocates of both sides. Such an Areopagus might command an influence which would ultimately crystallize into the formation of a regular tribunal whose seat, as Lorimer, the Edinburgh professor, suggested might well be fixed, with sovereign rights at Constantinople. For the same personages would probably be chosen again and again. But whether it did so or not—and perhaps it is to be deprecated that it should—the decision of such a specially selected body would carry far greater weight than the ipsi dixerunt of two or three individuals.

Elasticity is what is wanted. Elasticity in the reference—making it possible to refer for an opinion as well as for a decree. Elasticity in the procedure—dethroning the dictatorial procedure

of municipal courts and introducing the frank familiarity of a cabinet. Elasticity in the staff—fitting the composition of the tribunal to the relative importance and delicacy of the work in hand.

It is confidently suggested that these neglected elements in a satisfactory system of arbitration are well worth the attention of statesmen and jurists, and that their introduction with practice would enormously set forward the popularity of arbitral settlement.

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RIGHTS OF AGENTS ACTING FOR FOREIGN PRINCIPALS

ENGLISH decisions of the last fifty years have tended materially to enlarge or modify what has generally been understood to be the law regarding the rights of agents acting for foreign principals, but it is doubtful whether the doctrine found in the text-books[1] and in the professional opinion in this country has quite assimilated the position as it now stands in the light of recent authorities. It has been too readily accepted that by presumption of law the agent is personally liable on the contract, the foreign principal being left altogether out of the account. There was formerly authority for this view; but it has been now shaken and perhaps altogether discredited, and recent decision will, it is suggested, establish that the liability of the agent is, as in other cases, a question to be decided upon a construction of the instrument which is before the court in any given case.

I shall endeavor to present the modifications in the doctrine by calling attention, not to all the decisions on the point, for they are innumerable, but to those which mark a definite stage in development.

Hutton v. Bullock[2] was decided in 1874. The facts are unimportant, but the judgments in the case are significant. Thus Keating, J.:—

"The presumption is that the foreign principal does not intend that the agent employed in London shall make him a party to the contract to purchase these goods. I see nothing in this case to vary the general principle."

Similarly Brett, J.:—

"In such cases it is now settled that it is not in ordinary course for the foreign merchant to authorize the English merchant to bind him for the English contract."

A few years earlier *Paice v. Walker*[3] was decided on the same principle, to which great emphasis was given by Cleasby, B., who quotes Eyre, C. J., as saying,

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[1] See for example Leake on Contract, 343; Bowstead on Agency 389.
[2] (1874) L. R. 9 Q. B. 572, 30 L. J. 648.
[3] (1870) L. R. 5 Ex. 173, 39 L. J. Ex. 109.

"I am not aware that I have ever concurred in any decision in which it has been held that if a person, describing himself as agent for another residing abroad, enters into a contract here, he is not personally liable on the contract."

The judgments in *Hutton v. Bullock* and *Paice v. Walker* are representative, then, of the older authorities and carry on their tradition.

Gadd v. Houghton[4] (1876) can hardly be described as anything short of revolutionary, in view of the language used in the previous discussions. Fruit-brokers in Liverpool gave a fruit-merchant a sold note in which they recited the sale of 2000 cases of Valencia oranges "on account of James Morand & Co., Valencia," without any additional words limiting or purporting to limit their liability to that of agents. The Exchequer Division held that the brokers were not liable, their decision being upon the express ground that on a true construction of the sold-note there was an intention to make the foreign principals and not the brokers liable on the contract.

There is no authority of any importance on the point until the great case of *Miller, Gibbs & Co. v. Smith & Tyrer, Ltd.*, (1917).[5] This is, in the opinion of the writer, an epoch making authority, and it will be consequently necessary to refer to it in some detail. Lumber was sold by foreign principals "through the agency of Smith & Tyrer, Ltd." (the defendants). The contract was signed "By authority of our principals, Smith & Tyrer, Ltd., Chas. T. Tyrer, Managing Director, as agents." The plaintiffs sought on this contract to make Smith & Tyrer personally liable, as having contracted for foreign principals, and failed.

Swinfen Eady, M. R., in giving judgment, cited the opinions of Blackburn, J., in *Armstrong v. Stokes*,[6] and Lord Tenterden in *Thomson v. Davenport*[7] to the effect that it had been "long settled that a foreign constituent does not give the commission merchant any authority to pledge his credit to those from whom the commissioner buys them by his order and on his account," a doctrine which is founded by those learned judges on long usage of trade. The learned Master of the Rolls then went on to show how the existence of such a custom, assuming it for the moment

[4] (1876) L. R. 1 Ex. Div. 357, 46 L. J. Ex. 71.
[5] (1917) 2 K. B. 141, 86 L. J. K. B. 1289.
[6] (1872) L. R. 7 Q. B. 598, 41 L. J. Q. B. 253.
[7] (1829) 9 B. & C. 78, 4 Man. & Ry. 110.

to be proved, can and should be reconciled with *Gadd v. Houghton.*[8] He says:—

"If upon the contract the foreign principal is directly liable to the persons with whom the agent contracts, this provision is inconsistent with the custom, and the custom is thereby excluded."

It is suggested that this is both good sense and good law, for it rests upon the general and indisputable rule that a custom will not be allowed to prevail if it is at variance with the plain terms of a written instrument.

Brag, J., in his judgment is clear and emphatic in his language. He says:—

"Many years have elapsed since Blackburn, J., stated that there was this usage. Trade has changed greatly and has increased enormously. My experience at the Bar and on the Bench in the Commercial Court leads me to doubt whether this usage still exists. British firms and companies do not hesitate to make contracts with foreign firms and companies, whether negotiated or not through British agents. British agents are loth to make themselves responsible for their foreign principals. But, however that may be, according to the terms of the usage it seems only to apply when the foreign principal is buying. To apply it to contracts such as we have been considering would be contrary to *Gadd v. Houghton.* . . . It is not true to say that there is a presumption of fact or law that the agent for the foreign principal is primarily liable."

With this, the most recent authoritative expression of the law, it is appropriate that our enquiry should close. The case discussed above places the law upon a clear footing and does away with an artificial presumption which served too often to obscure realities.

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[8] (1876) L. R. 1 Ex. Div. 357, 46 L. J. Ex. 71.

THE NATIONAL POLICE POWER UNDER THE TAXING CLAUSE OF THE CONSTITUTION*

WHEN the United States Supreme Court decided in the summer of 1918 that the Keating-Owen Act,[1] closing the channels of interstate commerce to the products of mines and factories employing child labor, was an attempt by Congress to exercise a power not confided to it by the constitution and was therefore null and void,[2] the child labor exterminators, in Congress and out, apparently undismayed, girt up their loins and sallied forth on what one of them aptly termed "a quest of constitutionality."[3] There seemed to be no thought that Congress should abandon its efforts to prohibit child labor; the problem merely resolved itself into one of method. One method had failed and another must be found.[4] Accordingly a rather astonishing variety of proposals was brought forward in the hope that an effective and at the same time constitutional federal child labor law might be evolved. Three resolutions were introduced proposing a child labor amendment to the national constitution.[5] Senator Owen demanded the reënactment of the Keating-Owen Act with an added provision that no judge should have the power to declare it unconstitutional.[6] Also a bill embodying the principle of the Webb-

*This article, though complete in itself, is a development of the topic of National Police Power under the Commerce Clause, 3 MINNESOTA LAW REVIEW 289, 381, 452.

[1] Act of September 1, 1916, Chap. 432, 39 Stat. at L. 675.

[2] Hammer v. Dagenhart, (1918) 247 U. S. 251, 62 L. Ed. 1101, 38 S. C. R. 529.

[3] Title of an article by Raymond G. Fuller, in Child Labor Bulletin, Nov., 1918, Vol. 7, 207.

[4] Senator Lodge declared in the Senate debate on the Child Labor Tax (see infra note 10), "The main purpose is to put a stop to what seems to be a very great evil and one that ought to be in some way put a stop to. If we are unable to reach it constitutionally in any other way, then I am willing to reach it by the taxing power, which the courts have held can be used constitutionally for such a purpose. I see no other way to do it." Cong. Rec., Dec. 18, 1918, Vol. 57, 611.

[5] House Joint Resolution 300, introduced by Mr. Mason (Ill.), Cong. Rec., June 11, 1918, Vol. 56, 7652; House Joint Resolution 302, Mr. Rogers (Mass.), ibid, 7776; House Joint Resolutions 304, Mr. Fall (Pa.), ibid, 7776.

[6] Cong. Rec., June 6, 1918, Vol. 56, 7418, Sen. bill 4671. Debated June 6, 1918, ibid, 7431, 7435.

Kenyon Act was introduced, forbidding the shipment of the products of child labor into states which prohibit the employment of children.[7] Again it was proposed that the use of the mails be denied to the employers of children.[8] Still another bill relied upon the war power as a basis for a flat prohibition of child labor by declaring such a prohibition necessary for "conserving the man power of the nation and thereby more effectually providing for the national security and defense."[9] Finally, proposals were made to drive child labor out of existence by use of the federal power of taxation; and when the Revenue Act of February 24, 1919, was passed, it contained provisions placing an excise tax of ten per cent upon the net profits of mining and manufacturing establishments employing children.[10]

Within three months of the enactment of this law it was declared unconstitutional by a federal district judge in North Carolina on the ground that it was an invasion of the domain of

[7] Sen. bill 4762, June 27, 1918, by Mr. Pomerene. Referred to Committee on Interstate Commerce. Cong. Rec., Vol. 56, 8341. See comments in Survey, June 15, 1918, p. 324.

[8] Sen. bills 4732, 4760, June 27, 1918, by Mr. Kenyon. Referred to Committee on P. O. and P. Roads. Cong. Rec., Vol. 56, 8341.

[9] House bill 12767, Aug. 15, 1918, by Mr. Keating (Col.), Cong. Rec., Vol. 56, 9238. Text of this bill is reprinted in Child Labor Bulletin, Aug., 1918, Vol. 7, 98.

[10] On June 27, 1918, Mr. Pomerene introduced a bill to tax the employment of children (S. R. 4763) which was referred to Committee on Interstate Commerce, Cong. Rec., Vol. 56, 8341. On. Nov. 15, 1918, he introduced a similar measure drafted in collaboration with Senators Kenyon and Lenroot as an amendment to the general revenue bill (H. R. 12863). This amendment was finally enacted.

The pertinent part of the act as passed is the first section, Act of Feb. 24, 1919, 40 Stat. at L. 1138. It reads as follows: "Every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (a) any mine or quarry situated in the United States in which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock post meridian, or before the hour of six o'clock ante meridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory or manufacturing establishment."

Other proposals for destroying child labor by taxation were made in Congress. Two bills (H. R. 12705, 13087) introduced by Mr. Green (Ia.) and Mr. Gard (Ohio) provided for the taxation of articles of interstate commerce in the manufacture of which child labor is employed. Cong. Rec., Vol. 56, 9051, 11310. It was proposed by Mr. Mason (Ill.) to levy

state authority.[11] At the time of the writing of this article an appeal from this decision is pending before the Supreme Court of the United States.

It would seem that in no case could the question be more squarely raised whether there are any constitutional limitations upon the purposes for which Congress may use its power to tax. The friends of this law do not claim that it was designed for the purpose of raising revenue, or for any other purpose than the destruction of child labor.[12] If it should be held that this is a constitutional use of the taxing power it follows that there is stored up in the power to tax a most substantial fund of congressional authority to deal with social and economic problems, a police power more comprehensive and far-reaching in scope than can be derived from any other grant of power to Congress.[13] It is the purpose of this article to examine the nature of such national police power as may be derived from the power to tax and to determine what are the limitations, if there be any, to which that power is subject.

The Clause Granting the Power to Tax

Congressional authority to tax is granted in the following words of the federal constitution: "The Congress shall have Power (1) To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States."[14] For what seems at first glance to be a perfectly straightforward and unambiguous statement, this brief sentence has given rise to a surprising number of constitutional controversies of the very first magnitude. These disputes have related to two entirely separate

a tax of two dollars per day on all who employ chlidren. Cong. Rec., Vol. 56, Appendix, 461.

[11] May 2, 1919. The decision was handed down by Judge James E. Boyd, who rendered the district court decision in Dagenhart v. Hammer, invalidating the Keating-Owen Act. No opinion was written and the facts set forth above are based on press reports. See New York Times, May 2, 1919.

[12] With the possible exception of its author, Senator Pomerene, who insisted that the purpose of its enactment was two-fold, to raise revenue and to destroy child labor. He expressed the belief that it would produce some revenue. Cong. Rec., Dec. 18, 1918, Vol. 57, 613.

[13] See articles by the writer on National Police Power under the Commerce Clause of the Constitution, (1919) 3 Minnesota Law Review, 289, 381, 452; Judge Charles M. Hough, Covert Legislation and the Constitution, (1917) 30 Harvard Law Rev. 801; Paul Fuller, Is There a National Police Power? (1904) 4 Col. Law Rev. 563.

[14] Art. I, sec. 8, cl. 1.

aspects of the taxing power.[15] In the first place, there has been bitter disagreement as to the purposes for which Congress is authorized to raise revenue. In other words, what may Congress legitimately do with the money raised by taxation? In respect to this question, which is not the one under consideration, we may merely note in passing that the following principles are now settled: First, the clause, "to pay the debts and provide for the common defense and general welfare of the United States," is not a separate grant of general legislative power, but is a statement of limitation indicating the purposes for which Congress may use the power to "lay and collect taxes, duties, imposts and excises." In short, Congress may lay and collect taxes *in order* to pay the debts and provide for the common defense and general welfare.[16] Second, Congress is not limited in the purposes for which it may spend money raised by taxation to such purposes as are covered by the legislative powers delegated to Congress by the constitution. It may spend money not only to aid in the exercise of those delegated powers but also for the more comprehensive and general objects of "providing for the common defense and general welfare."[17]

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[15] Story, Commentaries on the Constitution, I, Sec. 958.

[16] No one has expressed this more clearly than Jefferson in his opinion on the power of Congress to establish the Bank of the United States: "To lay taxes to provide for the general welfare of the United States, that is to say, 'to levy taxes for the purpose of providing for the general welfare.' For the laying of taxes is the power, and the general welfare the purpose, for which the power is to be exercised. Congress are not to lay taxes ad libitum, for any purpose they please; but only to pay the debts, or provide for the welfare of the Union. In like manner they are not to do anything they please to provide for the general welfare, but only to lay taxes for that purpose. To consider the latter phrase, not as describing the purpose of the first, but as giving a distinct and independent power to do any act they please, which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless" Jefferson's Correspondence, Vol. 4, 524, 525. On the same point see Story, op. cit., Secs. 907-930; Miller on the Constitution, 229; Hare American Constitutional Law, I, 241; Watson, Constitution, I, 390; Black, Constitutional Law, 207; Tucker, Constitution, I, 470; Federalist, No. 41.

Compare the opposite view of Chancellor Kent: "At present it will be sufficient to observe, generally, that Congress are authorized to provide for the common defense and general welfare; and for that purpose, among other express grants, they are authorized to lay and collect taxes, etc. . . ." Commentaries, 13th Ed., I, 259.

[17] The classic argument in support of this position is that of President Monroe in his message accompanying his veto of the Cumberland Road Bill. Richardson: Messages and Papers of the Presidents, II, 164-167; Hamilton's Report on Manufactures, Dec. 5, 1791. Works, Lodge Ed., Vol. 4, 151. See also Story, op. cit. Secs. 975-991; Willoughby, op. cit., I, 588. For opposite view see Tucker, op. cit., I, 475.

The second group of controversies over the meaning of the taxing clause of the constitution has dealt, not with the question of the purposes for which revenue may legitimately be raised by taxation, but with the question whether or not Congress may use the power to tax for purposes which do not include the raising of any revenue at all, or include it only incidentally. For instance, may Congress tax solely in order to promote industry, or to drive out of existence practices or commodities injurious to the national welfare? It is clear that the scope and nature of any police power which Congress may enjoy under the taxing clause will depend upon the extent to which it may use its power to tax for purposes other than revenue.

The question of the purposes for which Congress may use the power to tax has been answered with different degrees of conservatism. On the one hand are those who believe that this power may be legitimately used only for the raising of revenue. Midway, a more numerous group has urged that Congress may properly tax for revenue and in addition to accomplish or promote any other legislative object within the enumerated powers of Congress. Finally, the friends of the new child labor tax and measures like it allege that Congress may levy taxes for the purpose of regulating or controlling indirectly problems clearly outside of its delegated legislative authority, provided that such taxation has for its object providing for the common defense and general welfare of the nation. An examination of the merits of these three views in the light of the arguments advanced in their support will help materially in determining whether or not there is a national police power properly deducible from the congressional power to tax; and if there is such a police power, what, if any, are its limits.

Taxation for Revenue Only

The proposition that Congress may use its grant of taxing power only to raise revenue is ancient and familiar doctrine. It has served as an argument for over a hundred years to those who have denied the constitutionality of the protective tariff.[18] To that end it was vigorously urged by Calhoun and his South

[18] For analysis of arguments for and against the constitutionality of protective tariffs, see passim Stanwood, Tariff Controversies in the United States in the Nineteenth Century. See also arguments on this point in Elliott's Debates, Vol. IV. Of course this is not the only argument urged against the validity of such tariffs.

Carolina adherents in 1829 during the critical period of the nullification controversy;[19] and it stood as a solemn pronunciamento in the party platform on which President Wilson was elected in 1912.[20]

It must not be assumed, however, that this view of the federal taxing power is the sole property of the free trader. It is not even incompatible with a belief in the constitutional propriety of protection. Nor does it place one in the position of maintaining with an unyielding literalness that Congress may, under no circumstances, impose a money exaction or tax for a purpose other than revenue. The present day advocates of this theory usually recognize that Congress may levy a tax to make effective some other power delegated to Congress by the constitution, such as the power to regulate commerce or to control the currency. They insist, however, that in such cases Congress has exercised not its delegated taxing power but its commerce power or its currency power. In other words, the power of taxation granted by article I, section 8 of the constitution is definitely limited to the laying of taxes for revenue only: but in addition to this expressly delegated and definitely limited power, there is derived from the other grants of congressional authority an implied power to levy money exactions which may be called taxes, so that a tax is constitutional which furthers any object within the scope of the delegated powers of Congress even though it is not levied by virtue of the taxing power specifically granted in article 1, section 8. To overlook this important distinction puts the adherent of the "revenue only" theory in an entirely false position.

This view that the power of taxation granted to Congress may constitutionally be used only for the purpose of raising revenue is supported by three main arguments which may be briefly reviewed.[21]

1. In its commonly accepted meaning as well as by legal definition, the term "taxation" is confined to the power of gov-

[19] Works, VI, 1-59.

[20] The Democratic Platform in 1912 contained the following declaration: "We declare it to be a fundamental principle of the Democratic Party that the Federal Government under the Constitution has no right to impose or collect tariff duties except for the purposes of revenue. . . ." The Democratic Platform in 1892 contained a practically identical statement.

[21] For an excellent presentation of this whole theory of federal taxation, see the valuable article by J. B. Waite, (1908) 6 Mich. Law Rev. 277.

ernments to raise revenue. All the English dictionaries concur in regarding the purpose of securing money as an inherent attribute of a tax.[22] The raising of revenue has been commonly recognized as the sine qua non of the taxing power.[23] This general impression of the layman and the lexicographer has been confirmed with definiteness and precision in the law, which has recognized and emphasized the distinction between money exactions for revenue purposes and money exactions imposed for purposes of regulation or destruction. Charges of the first class are based on the taxing power; those of the second class upon the police power. Commentators[24] and courts[25] have again and again insisted upon the observance of this classification. The state governments possess, of course, a general police power for the protection of public health, safety, morals and welfare. As a necessary and reasonable means of exercising this police power the state may levy what, for want of a better term, may be called taxes, which are prohibitive or repressive or regulatory in purpose and effect. In the legal and constitutional sense these taxes are to be regarded as police regulations, and not as exertions of the power of the state to tax. To prove this it is merely necessary to point out that these so-called "taxes" have been subjected to all the constitutional limitations resting upon the police power and when they have been imposed in a manner or for a purpose which cannot be justified under the police power, the courts have not hesi-

[22] Webster defines a tax as "a rate or sum of money assessed on the person or property of a citizen by the government for the use of the nation or state."

[23] While admitting that the purpose to raise revenue is a common attribute of the taxing power, there are those who deny that it is an essential attribute. See infra 261, 265.

[24] "License fees, occupation taxes, inspection fees, and other like exactions, which are not imposed for the purpose of raising revenue, but for the proper regulation of matters deemed essential to the public safety, health, or welfare, are not 'taxes' in the ordinary and proper sense of that term, and are not governed by the constitutional rules and maxims applicable to taxation, but by those which define and limit the exercise of the police power." Black, Constitutional Law, 3d Ed., 467; Cooley, Constitutional Limitations, 7th Ed. 283, n. 1, 709, n. 1, 713; Cooley on Taxation, 3d Ed. II, 1125; Freund, Police Power, Sec. 25; McClain, Constitutional Law in the U. S., 133; 27 Amer. & Eng. Ency. of Law & Proc., 578; 37 "Cyc." 707.

[25] Gundling v. Chicago, (1900) 177 U. S. 183, 189, 20 S. C. R. 633, 44 L. Ed. 725; Phillips v. Mobile, (1908) 208 U. S. 472, 478, 28 S. C. R. 370, 52 L. Ed. 578; Reymann Brewing Co. v. Brister, (1900) 179 U. S. 445, 45 L. Ed. 269, 21 S. C. R. 201; Pabst Brewing Co. v Crenshaw, (1904) 198 U. S. 17, 49 L. Ed. 925, 25 S. C. R. 552; Tanner v. Little, (1916) 240 U. S. 369, 60 L. Ed. 691, 36 S. C. R. 379.

tated to declare them unconstitutional.[26] If, therefore, it should be admitted that the power of taxation belonging to Congress is exactly the same in nature and scope as that which the states enjoy, a proposition which has been vigorously urged,[27] it by no means follows that that power affords any basis for the exercise of a general federal police authority by means of regulatory and prohibitive taxation. When the state lays a tax for police purposes, it is exercising one of its admitted powers, the police power. No one will deny that Congress, also, may lay taxes as a means of carrying out its own granted powers.[28] But the use by the state of the power to lay taxes in aid of an admitted state power can furnish no authority for the exercise by Congress of the power to levy taxes in aid of powers clearly not granted to the national government.

To regard the power of taxation as in its very nature limited to purposes of revenue is not to deny or discount the truth of Marshall's famous dictum, "the power to tax is the power to destroy."[29] The two propositions are entirely compatible. This oft-quoted maxim, instead of being regarded as a blanket authorization of the unrestrained use of the taxing power for any and all purposes irrespective of revenue, is more reasonably construed as an epigrammatic statement of the political and economic axiom that since the financial needs of a state or nation may outrun any human calculation, so the power to meet those needs by taxation must not be limited even though the taxes become burdensome or confiscatory.[30] To say that "the power

[26] State v. Ashbrook, (1899) 154 Mo. 375, 55 S. W. 627, 48 L. R. A. 265, 77 A. S. R. 765; Sperry and Hutchinson v. Owensboro, (1912) 151 Ky. 389, 151 S. W. 932; Little v. Tanner, (1913) 208 Fed. 605 (overruled in 240 U. S. 369 on other grounds). Earlier cases are cited by Cooley, Taxation, II, 1140.

[27] See infra, p. 267.

[28] See infra, p. 261.

[29] McCulloch v. Maryland, (1819) 4 Wheat. (U.S.) 316, 431, 4 L. Ed. 579; Weston v. City Council of Charleston, (1829) 2 Pet. 449, 7 L. Ed. 481. It should be noted that this statement is in reality obiter dictum. What Marshall was proving was that a state could levy no tax whatever on an instrumentality of the federal government even though the tax was neither burdensome nor destructive. See article by T. R. Powell, Indirect Encroachment on Federal Authority by the Taxing Powers of the States, (1918) 31 Harvard Law. Rev. 321.

[30] "The sense of the opinion is that, as a sovereign state, governments may be pressed for money, each may take from its people a portion of their possessions; that this right may be exercised again and again until the whole of the property has been exhausted: In this sense there is a like right in the federal government to destroy." Waite, op. cit., 6 Mich. Law Rev. 292.

to tax is the power to destroy" is to describe not the purposes for which the taxing power may be used but the degree of vigor with which the power may be employed in order to raise revenue.[31]

2. It is urged, in the second place, that the framers of the federal constitution intended to confer upon Congress the power to tax only for the purpose of raising revenue.[32] It is true that the clause granting this power contains language susceptible of a more liberal construction. It authorizes the levying of taxes "to pay the debts and provide for the common defense and general welfare of the United States." The power described by these words, however, is the power to tax for the purpose of securing the necessary money with which to pay the public debts and provide for the common defense and general welfare. In other words, "to provide for the common defense and general welfare" is a statement of the objects for which money raised by taxation may be spent rather than a statement of the objects for which the power to tax may be used irrespective of revenue. It is urged that such meagre evidence as is available regarding the meaning attached to this clause by those who framed it[33] and by

[31] This view finds support in Marshall's further comment on the doctrine in the same case: "The people of a state, therefore, give to their government a right of taxing themselves and their property, *and as the exigencies of government cannot be limited,* they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against its abuse." 4 Wheat. (U. S.) 316, 428.

[32] Waite, op. cit., 6 Mich. Law Rev. 284; Bruce, Interstate Commerce and Child Labor, (1919) 3 MINNESOTA LAW REVIEW 101; Tucker, op. cit., I, 478.

[33] The problem of the purposes for which Congress was to be authorized to lay taxes evoked little discussion in the Convention of 1787. The Virginia Plan as introduced by Randolph on May 29 contained no separate grant of the taxing power to Congress but provided "that the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate states are incompetent, etc. . . ." Farrand, Records of the Federal Convention, I, 21.

Section 2 of the New Jersey Plan introduced by Patterson on June 15 provided that Congress "be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandise of foreign growth or manufacture, imported into any part of the United States, by stamps on paper, vellum or parchment, and by a postage on all letters or packages passing through the general Postoffice, to be applied to such federal purposes as they shall deem proper and expedient." Ibid, I, 243.

The plan for a new constitution proposed by Charles Pinckney on May 29, provided in Art. IV that "The legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises." Ibid, III, 595. This was the form in which the clause was reported by the Committee of Detail on Aug. 6. Ibid, II, 181. A further report from the same committee on Aug. 22 added to the clause as quoted the

those who discussed it while ratification of the constitution was pending[34] tends to support the view here urged. The clause was placed in the constitution in order to remedy that serious defect of the articles of confederation arising from the inability of Congress to raise revenue directly. The new government must enjoy this power to raise revenue, and these were the words in which that power was conferred.[35] That the framers did not intend to give Congress a general police power to be exercised by means of destructive or regulatory taxation is evidenced by two more definite considerations. First, the fundamental principle on which the new national government was to rest was that of enumerated powers. Its founders desired it to deal with a definitely limited group of subjects and no others. They cannot therefore reasonably be presumed to have intended to confer upon Congress, under the guise of the power to lay taxes, the power to deal with any problem of social or economic policy which might be indirectly affected or controlled by an ingenious use of the taxing power. Had they so intended, they would have swept away by this one specific grant of power most of those limitations upon the scope of federal authority which it was the purpose of the other spe-

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words, "for the payment of the debts and necessary expenses of the United States." Ibid, II, 366. Among the records of the Committee of Detail was found a proposal in Randolph's writing that Congress should have power "To raise money by taxation, unlimited as to sum, for the past or future debts and necessities of the union." Ibid, II, 142.

On Aug. 25 a motion was lost to add to the clause granting Congress the power to tax the clause "for the payment of said debts and for the defraying the expenses that shall be incurred for the common defense and general welfare." Ibid, II, 408.

[34] The Federalist discusses the federal taxing power at length. See Nos. 30-36 inc. It nowhere suggests that the power could be used for purposes other than revenue.

Sherman and Ellsworth in transmitting a copy of the new constitution to the governor of Connecticut, Sept. 26, 1787, wrote: "The objects for which Congress may apply monies, are the same mentioned in the eighth article of the confederation, viz. for the common defense and general welfare, and for the payment of the debts incurred for those purposes." Farrand, op. cit., III, 99.

McHenry, member of the Convention of 1787 from Maryland, speaking on Nov. 29 before the Maryland House of Delegates, declared: "The power given to Congress to lay taxes contains nothing more than is comprehended in the spirit of the eighth article of the Confederation." Ibid, III, 149.

[35] Art. VIII of the Articles of Confederation had provided that "All charges of war, and all other expenses that shall be incurred for the common cause or general welfare, . . . shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all such land within each State, etc. . . ." It was the method of raising money, rather than the purposes of taxation which the framers of the Constitution sought to change.

cific grants of power to build up.[36] And secondly, had the framers of the constitution desired to have Congress enjoy that generous police power which it has been urged it may exercise through the medium of taxation, is it probable that they would have limited Congress in the exercise of that police power to the inconvenient and indirect agency of taxation? Would they not rather have allowed a reasonable choice of method instead of saying, in effect, "you may exercise a police power, provided only you do it under the guise of taxation?"[37]

3. Finally, in every case in which the Supreme Court of the United States has been willing to recognize that Congress has levied taxes for purposes other than revenue, it has looked upon these taxes not as exercises by Congress of its granted power to tax, but as means employed for carrying out other delegated congressional powers. And this view has been shared by distinguished legal commentators. In other words, the cases commonly cited to prove that the delegated power of taxation may be used for purposes of regulation and destruction prove nothing more in fact than that the power of Congress to lay taxes may be an implied power derived from other congressional powers, or that Congress may lay taxes as a necessary and proper means of carrying out its other granted powers.

This is, in the first place, the constitutional justification of the prohibitive tariff. While there is no decision of the Supreme Court squarely upon this point, the weight of authority leans to the view that a prohibitive tariff is not an exercise of the taxing power at all, but should rather be classified as a regulation of commerce.[38] In cases where a tariff is levied not only to raise

[36] Tucker writes: "It is surprising how this sophistical device has been upheld by learned commentators, for it is obvious that, by such construction of the Constitution, Congress may range with no limit but its discretion through the realms of reserved and ungranted powers by means of a clause to tax *ad libitum* and appropriate at will the money of the people to the promotion of anything through other agencies than its own and to the accomplishment of anything it may deem to be for the common defense and general welfare; for this, in effect, is worse than if the words 'to provide for the common defense and general welfare' were held to grant the unlimited power claimed, as it incites to profuse expenditure and excessive taxation as the only avenue to the unlimited usurpation of ungranted powers." Op. cit., I, 484. See also Bruce, op. cit., 3 MINNESOTA LAW REVIEW 101-103.

[37] Waite, op. cit., 6 Mich. Law Review 285.

[38] The authority most frequently cited is Cooley who writes: "Constitutionally a tax can have no other basis than the raising of a revenue for public purposes, and whatever governmental exaction has not this basis is tyrannical and unlawful. A tax on imports, therefore, the purpose of which is, not to raise a revenue, but to discourage and indirectly prohibit

revenue but also for the protection of home industry, it may be regarded as an exercise of both the taxing and the commerce powers.[39] Even Story, who repudiates the doctrine of taxation for revenue only, regards the protective tariff as a means of regulating foreign commerce;[40] and his view would probably be followed by any court before which the issue could be raised.

In the second place, Congress has laid destructive taxes as a means of regulating the currency. In 1866, shortly after the establishment of the national banking system, Congress laid a prohibitive tax of ten per cent upon state bank notes in order to protect the notes of the new national banks from their competition.[41] The Supreme Court of the United States upheld the constitutionality of this tax in the case of *Veasie Bank vs. Fenno,* decided in 1869.[42] Counsel for the bank urged upon the court that the tax was invalid because it was so excessive as to indicate a purpose on the part of Congress to destroy the thing taxed rather than to raise revenue. The court replied:

"The first answer to this is that the judicial cannot prescribe to the legislative department of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the constitution."

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some particular import for the benefit of some home manufacture, may well be questioned as being merely colorable, and therefore not warranted by constitutional principles. But if any income is derived from the levy, the fact that incidental protection is given to home industry can be no objection to it, for all taxes must be laid with some regard to their effect upon the prosperity of the people and the welfare of the country, and their validity cannot be determined by the money returns. . . . And perhaps even prohibitory duties may be defended as a regulation of commercial intercourse." Principles of Constitutional Law, 3d Ed., 58. See also Hall, Constitutional Law, 181; Watson on Constitution, I, 485 n. s.; Willoughby, op. cit., I, 607. See contra Pomeroy's statement: "A protective tariff is certainly not indispensable to the execution of the power to lay taxes; but it is so certainly one of the methods of exercising that power." Constitutional Law, 217.

[39] "The protective tariff laws are measures properly enacted under the express power to raise revenue and to regulate foreign commerce." McClain, op. cit., 88.

[40] Op. cit., Secs. 1084-1094. But note that Story also regards it as proper to base protective tariffs on the taxing clause, ibid, Secs. 962-965. He says, however, that the commerce power is the one from which the right to enact such tariffs "is more usually derived." Ibid, Sec. 763.

[41] Act of July 13, 1866, 14 Stat. at L. 146.

[42] (1869) 8 Wall. (U. S.) 533, 19 L. Ed. 482.

It then went on to say that:

"Under the constitution the power to provide a circulation of coin is given to Congress . . . .Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile. Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration."

The first of the paragraphs quoted has frequently been cited as authority for the statement that Congress can tax to an unlimited degree for any purpose it chooses, irrespective of revenue and without fear of judicial interference.[43] While it is hard to see in the passage much more than a statement of the perfectly obvious doctrine that a tax, otherwise legal, cannot be held void because a court thinks it is too high, it must be admitted that it does indicate an opinion on the part of the court that the power which is being exercised is the taxing power. Since the power is quite obviously not being employed to raise revenue, such a view conflicts with the theory of taxation for revenue only which now is under consideration. But whatever comfort those who contend for a federal police power through taxation may derive from this statement will be minimized if not destroyed by the second of the paragraphs quoted, wherein it is plainly stated that this destructive tax is merely a convenient method of protecting the national currency. As a matter of fact, the Supreme Court in subsequent decisions[44] as well as

[43] This is apparent from a scrutiny of the debates in Congress upon any of the regulatory or destructive taxes which have been passed. See infra, p. 266.

[44] Miller, J. in The Head Money Cases said: "In the case of Veazie Bank v. Fenno, the enormous tax of eight per cent [it was in fact ten per cent] per annum on the circulation of state banks, which was designed, and did have the effect to drive all such circulation out of existence, and was upheld because it was a means properly adopted by Congress to protect the currency which it had created; namely the legal tender notes and the notes of the national banks. It was not subject, therefore, to the rules which would invalidate an ordinary tax pure and simple." (1884) 112 U. S. 580, 596, 5 S. C. R. 247, 28 L. Ed. 798. In National Bank v. U. S., (1879) 101 U. S. 1, 6, 25 L. Ed. 979, the court

numerous text writers[45] and other authorities[46] have with practical unanimity regarded the *Veazie Bank case* in this light and leaned to the opinion that the constitutional basis for the levy imposed by the act of 1866 was the currency power and not the taxing power.[47]

In one or two other cases of less importance the Supreme Court has recognized the distinction between levies made under the taxing power and those made under other granted powers of Congress. In the *Head Money Cases*[48] involving the validity of a duty of fifty cents for every alien immigrant brought by vessel into the United States, the court met such objections to the law as rested upon its alleged non-conformity to the constitutional requirements regarding federal taxation by declaring that "the true answer to all these objections is that the power exercised in this

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commented on the Act of July 13, 1866, as follows: "The tax is on the notes paid out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore the banker who helps to keep up the use of paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for what he does. The tax was no doubt intended to destroy the use; but that, as has just been seen, Congress had the power to do." Flint v. Stone Tracy Co., (1911) 220 U. S. 107, 31 S. C. R. 342, 55 L. Ed. 389, Ann. Cas. 1912B 1312.

[45] Hall, op. cit., 311; Hare, op. cit., I. 269; McClain, op. cit., 133; Willoughby, op. cit., I. 580.

[46] Senator Hoar declared in the Senate in 1902 (in discussing the oleomargarine tax passed in that year), "We had no right to suppress the state banks in the time of war merely because the wildcat bank was an evil, it being confined to state business and authorized by state power; but when we established a national currency we had a right by any method of constitutional action to protect that national currency against the competition or rivalry of any other. Therefore we had the right to tax out of existence the currency of the state banks, just as we should have had the right to pass a law directly that no state bank should issue currency in competition with ours." Cong. Rec., Mar. 26, 1902, Vol. 35, 3280.

[47] Those who adhere to the second and third of the three general views of the scope of the federal taxing power place a different interpretation on the Veazie Bank Case. There is eminent authority holding the power therein discussed to be the taxing power. See Cooley, Constitutional Limitations, 681, n. 685; Cooley, Principles of Constitutional Law, 58; Pomeroy, op. cit., 233. See also dissenting opinion of Holmes, J. in Hammer v. Dagenhart, (1918) 247 U. S. 251, 277, 62 L. Ed. 1101, 38 S. C. R. 529. Senator Spooner declared in the Senate in 1902 that the tax of 1866 did not rest on the currency power but that it was upheld "not because it was required in aid of another power, but because under the plain language of Sec. 8, it [Congress] had the power to do it." Cong. Rec., Apr. 1, 1902, Vol. 35, 3506.

[48] (1884) 112 U. S. 580, 5 S. C. R. 247, 28 L. Ed. 798. The court used these words: "If this is an expedient regulation of commerce by Congress, and the end to be attained is one falling within the power, the act is not void, because, with a loose and more extended sense than was used in the constitution, it is called a tax." Ibid, p. 596.

instance is not the taxing power. The burden imposed on the ship owner by this statute is the mere incident of the regulation of commerce." Thus the requirement that a stamp be placed on goods intended for export in order to prevent fraud is not levying a tax even though a charge is made for the stamp.[49] But if the charge is made for purposes of revenue rather than regulation it becomes a tax.[50]

Use of Taxing Power Not for Revenue But in Furtherance of Delegated Congressional Authority

The second view of the real scope of the federal taxing power may be regarded as middle ground between the revenue only doctrine just discussed and the theory that the power may be used for general police purposes. This second position admits the propriety of using the power of taxation for purposes other than revenue, but not for all such purposes. Its adherents claim that the grant of taxing power may be exercised for purposes of revenue plus any other purposes lying within the scope of delegated congressional authority. It has been seen that those who defend the revenue only theory are under the necessity of maintaining that when taxes are laid by Congress in order to regulate commerce or protect the currency, those taxes must be viewed constitutionally not as expressions of the granted power of taxation but rather as expressions of the power to regulate commerce or the currency respectively. The constitutional basis for such taxes is not the power of taxation at all but the particular power in aid of which the taxes are laid. Those who hold the second view, now being analyzed, maintain that taxes laid in order to help regulate commerce are exercises of the granted power of taxation and that it is quite proper to employ the taxing power as a means of supplementing and supporting any other granted power of Congress. Having thus admitted that the power of taxation itself, not as an implied power but as a granted power, may be used for purposes other than the raising of revenue, it is necessary to defend the position that there are still definite limits upon its scope. It is necessary to show why, from a constitutional viewpoint, the power of taxation may be used to regulate commerce or the national currency but not to regulate such mat-

[49] Pace v. Burgess, (1875) 92 U. S. 372, 23 L. Ed. 657.

[50] Almy v. California, (1860) 24 How. (U. S.) 169, 16 L. Ed. 655.

ters as child labor, lotteries,[51] or political campaign contributions.[52]

The argument in support of this position may be summarized as follows: The powers of Congress are enumerated and delegated. The grants of power to Congress taken together were clearly intended to constitute the sum total not only of the powers confided to that body but also of the legislative objects about which or in furtherance of which Congress might exercise those powers. In short, the various delegations of power must be regarded not merely as legislative instruments placed in the hands of Congress to be used for any or all purposes; they must be regarded also as the ends, objects, or purposes for which Congress may exercise legislative power. This, it is stated, is what Marshall had in mind when he said, "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, etc. . . . are constitutional;"[53] and when in the same case, he declared, "Should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."[54] It follows, therefore, that when Congress attempts, through the

[51] A destructive tax on lotteries was urged upon Congress with great vigor. See remarks of Senator White (now Chief Justice) of Louisiana upon the propriety of this legislation: "When my people were clamoring for its suppression and crowding upon me petitions to introduce a bill suppressing the Louisiana Lottery by the exercise of the power of federal taxation, I said to them, 'Great as is this evil, there is an evil yet greater, and that is the disruption and the destruction of all the great principles of our government by calling upon the Federal Government to do an illegal and unconstiutional thing. . . .' I declined to introduce a bill taxing the Louisiana Lottery by the Federal Government because I thought it violated the Federal Constitution." Cong. Rec., July 21, 1892, Vol. 23, 6519. Such bills were, however, introduced. Compare with this the view of Judge Cooley, set forth in an article advocating such a tax, infra, note 81.

[52] Senator Thomas (Col.) introduced an amendment to the war revenue bill of 1919, providing for a tax of 100% on any campaign contribution in excess of $500 in any primary or election campaign for the nomination or election of presidential electors, senators, or members of the House. Cong. Rec., Oct. 10, 1918, Vol. 56, 11169. The amendment was defeated.

[53] McCulloch v. Maryland, (1819) 4 Wheat. (U. S.) 316, 421, 4 L. Ed. 579.

[54] Ibid, p. 423. For an analysis of this argument see Tucker, op. cit., I; Green, The Child Labor Law and the Constitution, Ill. Law Bull., April, 1917, 16. Compare Marshall's statement, "Congress is not empowered to tax for purposes which are within the exclusive province of the state." Gibbons v. Ogden, (1824) 9 Wheat. 1, 199, 6 L. Ed. 23.

See also Kent, Commentaries, 13th Ed. I 279.

instrumentality of a granted power such as that of taxation, to regulate or control a subject matter nowhere confided to its authority by virtue of any delegation of power, such as the subject of child labor, it has exceeded its powers, usurped the reserved authority of the states, and violated the tenth amendment.[55]

This same doctrine may be put in slightly different form by saying that in exercising the powers delegated to it by the constitution Congress must be regarded as exercising them under the implied limitation that they shall be employed only for the objects or ends confided by the constitution to congressional authority. The taxing power has long since been held subject to two other implied limitations, the binding force of which there is no disposition to question: one is the limitation of public purpose in respect to the use of the money raised by taxation;[56] the other is the limitation implied from the essential nature of our federal

[55] This doctrine has been accepted by the supreme court of the Commonwealth of Australia. In King v. Barger, (1908) 6 Com. L. R. 41, a federal tax on articles manufactured in the states, dependent upon the rate of wages paid and designed to control such wage rate, was held to be invalid on the ground that the federal government had no authority to control wages in the states. The following excerpts indicate the main features of the reasoning of the court:

Higgins, J., "This act is not a taxing act. This is quite a novel form of legislation, and, if held to be valid, will give to the Commonwealth Parliament complete control over everything which was intended to be reserved to the states. Under the guise of a taxing act with exemptions, the Commonwealth Parliament could control the whole of the business and social relations of the people of the Commonwealth, and the provisions of the constitution, intended to reserve to the states the right of managing their internal affairs, would be worthless. (P. 47) . . . The Commonwealth Parliament can tax any person and any thing; and it can divide persons and things into classes for the purpose of taxation. But the moment the particular discrimen for distinguishing between one class and another in itself involves a regulation of conduct which is within the exclusive power of the state legislature, the Commonwealth legislation is invalid." (P. 52.)

Isaacs, C. J., "The power of taxation granted to the Commonwealth Parliament does not authorize the impairment of the power reserved to the states to regulate wages." (P. 49.) Par. 107 Ch. V of the Commonwealth of Australia Constitution Act reads: "Every power of the Parliament of a colony which has become or becomes a state, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the state, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the state, as the case may be."

Compare also the last clause in the following sentence from the Veazie Bank case, supra: "It would undoubtedly be an abuse of the power [of taxation] if so exercised as to impair the separate existence and independent self government of the states, or if exercised for ends inconsistent with the limited grants of power in the constitution." P. 451. See Tucker, op. cit., I, 373.

[56] Loan Association v. Topeka, (1875) 20 Wall. (U.S.) 655, L. Ed. 455. This case involved the taxing power of the states but the principles

system which forbids Congress to tax the governments, agencies, or functions of the state.[57] It is urged that the taxation by Congress of the salary of a state judge is no more subversive of the fundamental principles of our constitutional system than the use by Congress of its taxing power to destroy child labor within the states.[58] For to what purpose did the framers of the constitution reserve certain subjects to the exclusive jurisdiction of the states if Congress, under the guise of an exercise of the power to tax, may step in and control those subjects? To admit the power to tax on the part of Congress for any and all purposes would "abrogate and destroy every limitation found in the constitution and every reservation in favor of the states."[59]

It is interesting to note that the present Chief Justice of the United States seems to share the view now under consideration. Mr. White was United States senator from Louisiana at the time a destructive tax upon cotton and grain futures was being debated in Congress in 1892.[60] At that time he expressed himself vigorously and at length upon the constitutionality of the proposed tax, taking the position that such "subterfugeous and cheating" use of the taxing power was clearly outside the constitutional authority of Congress. He took occasion in the course of his argument to draw the distinction between the use of regulatory or destructive taxation in aid of the exercise of delegated congressional power and its use for purposes not so delegated.

"In other words, I contend," he declared, "that where power to destroy exists, the use of a wrong instrumentality to do the destruction, may be the abuse of an instrumentality but not an abuse of power, because the power to destroy is vested. But where the power to destroy does not exist, the use of an instrumentality to destroy that which there is no power to destroy is

involved are applicable with equal force to the federal taxing power. It should be noted that the limitation of public purpose does not rest on the due process of law clause as has been sometimes assumed.

[57] Collector v. Day, (1871) 11 Wall (U. S.) 113, 20 L. Ed. 122; Fifield v. Close, (1867) 15 Mich. 505.

[58] "The principle is equally applicable to a case where the court can see that a power of government is called into play not for its professed object but solely for the purpose of defeating rights that cannot be destroyed consistently with any other of the principles upon which the constitution rests, but there is no principle more fundamental than the principle in fulfillment of which the national government was created of circumscribed powers, each conferred for the accomplishment of a specified object, purpose or end." Green, op. cit., Ill. Law Bull., April, 1917, 26.

[59] Remarks of Senator White, Cong. Rec., July 21, 1892, Vol. 23, 6516.

[60] The question of the constitutionality of this bill was discussed at great length. Senator White's long speech against the bill is found in Cong. Rec., July 21, 1892, Vol. 23, 6513-6520. The bill was defeated.

not alone an abuse of the instrumentality but a usurpation of power itself."[61]

And in commenting upon the *Veazie Bank case,* he went on to state that according to that decision the destructive tax on state bank notes could be regarded as either a prohibition or a tax. If it be viewed as a prohibition, then it is merely an exercise of the admitted power of Congress over the currency. If it be viewed as a tax, it is not unconstitutional, "because Congress had the power to use the taxing power to prohibit that which it had the right to prohibit under another provision of the constitution." But he was emphatic in his belief that this affords no precedent for the use of the power to tax for purposes not confided to congressional authority.[62]

Destructive or Regulatory Taxation for Police Purposes Outside the Scope of Delegated Congressional Authority

It is clear that Congress has not acceded to either of the views thus far presented. It has regarded the purposes for which it may use its power to tax as limited neither to the raising of revenue nor to the furtherance of objects within its delegated authority. It has legislated more than once upon the theory that the power to tax is available as a means or instrument for accomplishing any purpose which will further the national welfare and that Congress may regulate or destroy by taxation things over which it plainly has no direct authority. Such legislation may be briefly reviewed.

1. *Instances of Federal Taxation for General Police Purposes.*[63] In 1886 it was proposed to levy an excise tax of ten cents per pound upon all oleomargarine manufactured in the

[61] Ibid, 6517.

[62] Ibid, 6517. He further pointed out that the power to lay a prohibitive tariff did not furnish a precedent for the tax under discussion. To argue that it does, "overlooks the clear distinction between the nature of the taxing power lodged in the federal government for the purpose of imposts and the nature of the taxing power lodged in the federal government for the purpose of internal taxation. . . . When the federal government deals with imposts the constitution has vested in it the power which would be vested in any government in that regard. . . . . No power as to imposts was reserved in the states by the federal constitution. All the lawful powers of government which could be exercised in that particular passed into the life and being of the federal government by the lodgment in that government of the power to levy imposts—imposts deal externally beyond our borders. Beyond those borders the power of the federal government was restricted and restrained by no limitation resulting from a reservation in the constitution." Ibid, 6516.

[63] No attempt has here been made to search out all the cases in which Congress has laid taxes for purposes of regulation. Only those are here treated regarding which there has been sharp controversy on the point of constitutionality.

United States. After considerable debate in both houses of Congress, the tax was reduced to two cents per pound, a rate so low as to preclude the tax from being classed as destructive in character.[64] In 1902, however, a tax of ten cents per pound was placed upon all oleomargarine colored to look like butter;[65] and this tax has accomplished the purpose for which it was admittedly imposed, the destruction of the business of manufacturing colored oleomargarine. In 1892 it was proposed in Congress to place a license tax of $1000 upon all brokers or dealers engaged in the selling of cotton or grain on future contracts or options and a tax of five cents per pound or twenty cents per bushel upon all products so sold.[66] This tax did not become law, but in 1914 Congress did impose a tax of two cents per pound upon all cotton sold on future contracts.[67] In 1890 a tax of ten dollars was imposed upon the sale of smoking opium.[68] In 1914 this tax was raised to $300 per pound.[69] In 1912 Congress drove out of existence the manufacture of matches made from poisonous phosphorus by subjecting these matches to the crushing tax of two cents per hundred.[70] Finally, as has been already stated, Congress has placed a tax of ten per cent upon the net profits of establishments employing children.[71]

An examination of the congressional debates on these measures makes perfectly clear that Congress was not trying to raise revenue but was trying to exercise police power in matters outside the scope of its delegated authority. The oleomargarine taxes were openly defended upon the ground that the legitimate dairy interests of the country must be protected against the destructive competition of a product alleged to be not only inferior but positively dangerous to health.[72] The taxes on options or sales on future contracts were urged as necessary restraints on com-

[64] Act of Aug. 2, 1886, 24 Stat. at L. 209.

[65] Act of 1902, 32 Stat. at L. 193.

[66] The text of this proposed measure is printed in the Cong. Rec., July 21, 1892, Vol. 23, 6514.

[67] Act of Aug. 18, 1914, 38 Stat. at L. 693. This was declared unconstitutional by a United States district court because, being a revenue measure, it originated in the Senate rather than in the House of Representatives as required by art. I, sec 7, cl. 1 of the constitution. Hubbard v. Lowe, (1915) 226 Fed. 135. It was re-enacted as Act of Aug. 11, 1916, 39 Stat. at L. 476.

[68] Act of Oct. 1, 1890, 26 Stat. at L. 5670.

[69] Act of Jan. 17, 1914, 38 Stat. at L. 277.

[70] Act of April 9, 1912, 37 Stat. at L. 81. The constitutionality of this act has never been passed upon by any court.

[71] Supra, note 10.

[72] See debates on H. R. 9206, Index to Cong. Rec., Vol 35.

mercial gambling.[73] When the tax on white phosphorus matches was being discussed in the Senate in 1912, Senator Lodge, who was sponsoring the bill, declared without hesitation, "The real purpose of the bill is to destroy an industry that ought to be destroyed."[74] He was equally frank as to the purpose of the recent child labor tax, as were most of the other friends of the bill.[75] In fact, the debates on this measure show that the Senate Committee on Finance, in estimating the revenue expected from the various taxes included in the Revenue Act of 1919, placed no estimate opposite the child labor tax, indicating that they did not expect any revenue to flow from it into a sadly depleted treasury.[76]

2. *Argument in Support of This Theory.* In order to show that Congress enjoys the broad power of taxation for police purposes it is necessary at the outset to dispose of the revenue only theory already discussed.[77] There are two steps in this process of refutation. It is pointed out, first, that the power of taxation granted to Congress is no different in character and no more limited, save as to the specific requirements of apportionment and uniformity and the specific prohibition against export taxes, than is the power of taxation possessed by the states of the union or by any other sovereign government. As Senator Edmunds expressed it in the debate on the oleomargarine tax statute of 1886, "the taxing power of the United States is just as extensive, just as supreme, just as illimitable as the taxing power of every state is."[78] Gray states this position even more strikingly in the following passage commenting upon the intentions of the framers of the federal constitution:

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[73] See debates on Senate bill 110; Index to Cong. Rec., Vol. 51.

[74] Cong. Rec., April 3, 1912, Vol. 4235. In regard to the same bill Mr. Longworth (Ohio) declared in the House, "It is the purpose of the bill to destroy it [the poisonous match industry] and that is the reason I am for the bill, because I want it stamped out." Ibid, 3973.

[75] Supra, notes 4 and 12.

[76] In response to a question on this point, Senator Simmons, chairman of the Committee on Finance, stated: "I can only say to the Senator that I do not think there was an estimate made as to the amount of revenue that would be raised by it . . . and I do not think any one suggested that any would be derived." Cong. Rec., Vol. 57, 612. It is interesting to compare this with the argument of Mr. Miller Outcalt for the plaintiff in error in the McCray case: "It is not out of place to advert to an overflowing treasury, and the expediency which this same Congress felt in reducing the revenue derived under the Spanish War Acts, in this same year, by an amount equal to $70,000,000. The law was avowedly not a revenue measure but a police regulation." 43 L. Ed. 78, 80.

[77] Supra, p. 251.

[78] Cong. Rec., July 19, 1886, Vol. 17, 7139.

"The example of a strong general government which they had in mind, and the only one with which most of them were familiar, was the government of Great Britain. The powers of that government were well known to them, its machinery had been copied in most of the states. In view of these facts it may be generally stated that in their bestowal of powers on the general government and in their restriction of those powers (particularly of taxing powers, since dispute as to taxation was one of the chief causes of the Revolution) they intended:

"1. To grant to the general government those powers usually exercised by the government of Great Britain, and in matters of taxation to grant the same general authority of classification and selection as was possessed by the British government and by the state governments modeled upon it.

"2. To restrict those powers thus granted in such a way as to prevent discrimination among the states."[79]

In short, unless state governments and the governments of sovereign nations generally at the time of the formation of our national government were limited in the use of their taxing powers to the raising of revenue, there is no reason to assume that the taxing power granted to Congress was so limited.

This raises the question, in the second place, whether the power of taxation enjoyed by sovereign governments at this period was thus limited to the raising of revenue. On this point there can be no clearer or more definite statement than that of Story's:

"Nothing is more clear, from the history of commercial nations, than the fact that the taxing power is often, very often applied for other purposes than revenue. It is often applied as a regulation of commerce. It is often applied as a virtual prohibition upon the importation of particular articles, for the encouragement and protection of domestic products, and industry; for the support of agriculture, commerce and manufactures, for retaliation upon foreign monopolies and injurious restrictions; for purposes of state policy and domestic economy; sometimes to banish a noxious article of consumption; sometimes, as a bounty upon an infant manufacture, or agricultural product; sometimes, as a temporary restraint of trade; sometimes, as a suppression of particular employments; sometimes, as a prerogative power to destroy competition and secure a monopoly to the government.

"If, then, the power to lay taxes, being general, may embrace, and in the practice of nations does embrace, all these objects, either separately or in combination, upon what foundation does the argument rest which assumes one object only, to the exclu-

[79] Limitations of the Taxing Power, p. 350.

sion of all the rest, which insists, in effect, that because revenue may be one object, therefore it is the sole object of the power . . . ?"[80]

Among the eminent authorities who have agreed with this view may be mentioned Judge Cooley, who, in 1892, in urging Congress to place a destructive tax on lotteries, declared, "Revenue is not and has never been the sole object of taxation."[81]

In the third place, it should be noted that the constitutional clause granting the power of taxation seems to repudiate the revenue only doctrine. By the plain words of that clause, Congress enjoys the power to "lay taxes, to pay the public debts and provide for the common defense and general welfare." Now, as Story pertinently inquires:

"If the common defense or general welfare can be promoted by laying taxes in any other manner than for revenue, who is at liberty to say that Congress cannot constitutionally exercise the power for such a purpose? No one has a right to say that the common defense and general welfare can never be promoted by laying taxes, except for revenue. No one has ever yet been bold enough to assert such a proposition."[82]

That Hamilton placed a similar broad construction upon this clause is evidenced by the fact that he defended the constitutionality of the protective tariff as an exercise of the congres-

[80] Commentaries, Sec. I, 965, 966. For analysis in this respect of the taxes imposed by England to which the American colonists took exception see Farrand, The Development of the United States, p. 37. Farrand quotes Madison's statement made after the Revolution, that "The line of distinction between the power of regulating trade and that of drawing revenue from it, which was once considered the barrier of our liberties, was found, on fair discussion, to be absolutely undefinable." Ibid, 38 See also Story, op. cit., II, Sec. 1080. For careful argument from the standpoint of economics that taxes laid for purposes of regulation and destruction should be subsumed under the power of taxation and not under the police power, see Seligman, Essays in Taxation, pp. 402-406, 411-413.

[81] Federal Taxation of Lotteries, (1892) Atlantic Monthly, Vol. 69, 523. Supplementing the phrase quoted in the text, Judge Cooley adds that the lawmaker "must not aim to make his law as productive as possible, but rather to make the demand upon the people as little burdensome as may be, and at the same time, as far as possible, incidentally beneficial." Commenting further upon the proposed tax he says: "Such taxation would, of course, contemplate no revenue to the government. It would be imposed for the express purpose of destroying altogether the institutions which, by any unfriendly action of Congress, taken with the express intent of destruction and shaped professedly to that end, it would be powerless to reach. It would, in other words, be making a practical application by the federal government of the legal aphorism that 'a power to tax is a power to destroy.' Ibid, p. 526. Arguments for and against the tax are discussed in the article. Compare with the statement of same writer in his work on Taxation, 3d Ed. I, 191.

[82] Commentaries, I.

sional taxing power for the purpose of providing for "the common defense and general welfare."[83]

After dealing thus with the revenue only theory of the federal taxing power, the friends of the child labor tax and similar legislation, in order to establish their case, must still demolish the proposition that Congress may use its power of taxation for only such purposes as fall within the scope of the other delegated powers of Congress.[84] The argument on this point may be summarized thus: In the first place, while Congress enjoys only delegated powers, those powers, save when limited by an express restriction or prohibition, are plenary and complete. This is elementary constitutional law.[85] "Except when expressly limited, . . . a power granted to the federal government is construed to be absolute in character."[86] This means that apart from these specific exceptions Congress has the same power to lay taxes or to regulate commerce as is possessed by the British Parliament or any other sovereign government in the world.[87] Its granted powers do not shrink or melt away by the insidious working of implied restrictions or reservations. Secondly, it must be remembered that what section 8 of article I of the constitution grants to Congress is "power." Nothing is said about the purposes for which the various grants of power there delegated are to be used. The grant stands as an independent and self-sufficient delegation of authority. Congress is not given a list of topics about which it is to be allowed to pass laws; nor is it given merely a set of legislative tools or methods to be used in doing a certain limited group of assigned tasks and in the use of which, to borrow Professor Powell's apt phrase, Congress "suffers the limitations of the player at jackstraws,"[88] fearful

[83] Report on Manufactures, Dec. 5, 1791. Works, Lodge Ed., Vol. IV, 151. It should be noted, however, that Hamilton's argument did not proceed on the assumption that no revenue would be raised by the protective tariffs proposed.

[84] Supra, p. 261.

[85] "But it must not be forgotten that when the constitution was adopted there came into existence a nation (as distinguished from a league of states) which possessed absolute and unlimited inherent powers." Black, op. cit., 35; Hall, op. cit., 255; Hare, op. cit., 94; McClain, op. cit., 43; Pomeroy, op. cit., 70. McCulloch v. Maryland, supra, p. 405; United States v. Cruikshank, (1876) 92 U. S. 542, 550, 23 L. Ed. 588.

[86] Willoughby, op. cit., I, 54.

[87] Supra, p. 268. Story, op. cit., II, 1081.

[88] The Child Labor Decision, The Nation, June 22, 1918, Vol. 106, p. 730.

always of trespassing on the domain of state authority.[89] It is given the *power* to lay taxes and to coin money and to regulate commerce and these powers are to be used in the broad discretion of Congress for the promotion of the national welfare. Finally, by very definition it is utterly impossible for the reserved powers of the states to operate as a limitation upon the scope or method of operation of the powers delegated to Congress by the constitution. Such a conception involves a flat contradiction in terms. What are the reserved powers of the states but the powers left after the powers of Congress have been delegated?[90] Curious indeed would be the arithmetical process of subtraction in which the remainder, somehow rendered inviolable in advance, helped determine the size of the subtrahend. And yet precisely this absurdity is involved in the theory that the reserved powers of the states have become transformed into a sort of ark of the covenant which Congress in the exercise of its granted authority must not touch. If a power is delegated to Congress, then by virtue of that very fact there can be no reserved power of the states with which it could in any way or under any circumstances conflict.[91]

If Congress is not limited in using its power to tax to the raising of revenue or to such purposes as may be subsumed under the grants of power in article I, it follows that that power may be wielded generously in any way which will promote the common defense and general welfare. It may stimulate industry; it may regulate the size of incomes or private fortunes; it may

[89] "The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the states in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state." Dissenting opinion of Mr. Justice Holmes, Hammer v. Dagenhart, supra.

[90] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Constitution of U. S., Amendment X.

[91] Compare Professor Powell's argument on this point in respect to the Keating-Owen Act: "If the child labor law was a proper exercise of the power to regulate interstate commerce, it was by the explicit terms of the tenth amendment not an exercise of a power reserved to the states. If it was not a proper exercise of the power to regulate interstate commerce, it was unconstitutional, and nothing more need be said about it." The Child Labor Law, the Tenth Amendment and the Commerce Clause, (1918) 3 So. Law Quar. 175.

suppress vice or other conditions fraught with menace to the people. In short, questions which may arise regarding the purposes for which Congress uses its power of taxation are questions solely of legislative policy and not in any sense questions of constitutional law.[92]

The right to use the taxing power for these broad purposes would not, even in the judgment of its advocates, warrant its exercise in such a way as to destroy fundamental private rights. Should Congress impose a tax of a thousand dollars upon all persons who ate bread or were members of the Roman Catholic Church, the court would of necessity decide that such an exercise of the power to tax was an invasion of the rights which are, in any free government, inviolable.[93] Such a limitation would clearly be in line with the theory upon which the Supreme Court has held that taxes may be levied only for a public purpose.[94] But these limitations in behalf of the fundamental rights of the citizen would not interfere with the use of the congressional taxing power for any purposes related to the common defense and general welfare of the nation.

The Problem of Objective Constitutionality

Thus far the purposes for which Congress may use its power to tax have been considered in the light of general constitutional

[92] After adverting to the implied restriction that Congress may not tax the states or their instrumentalities, Cooley states: "With the exception of cases resting on like or kindred reasons to those suggested, the protection as against the abuse of the federal power to tax must be looked for in the good sense of the representatives of the people, and in keeping alive the feeling that for all improper legislation they may be held to strict accountability by their constituents." Op. cit., Atlantic Monthly, Vol. 69, 534. "In selecting objects of taxation we have a right to keep in mind, as every Congress has kept in mind, the general welfare of the people of the United States. The object of taxation is revenue. The motive with which, for one, I vote to select this particular article for taxation is the interest, as I understand it, of the people." Speech of Senator Spooner on Oleomargarine Tax Act of 1902, Cong. Rec., April 1, 1902, Vol. 35, 3506.

[93] "Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the constitution rests, that it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred." White, C. J. in McCray v. U. S., (1904) 195 U. S. 27, 64, 24 S. C. R. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.

[94] Loan Association v. Topeka, supra.

principles. The questions discussed here have been those which each member of Congress must settle in his own mind before voting for a taxing bill regarding which these controversies might arise, since he is bound by his oath of office to support the constitution. They have all been concerned with the broad issue: Is the use of the taxing power for general police purposes defensible on sound constitutional principles? They all relate, therefore, to what has been aptly termed the problem of *subjective* constitutionality.[95]

There remains to be considered what may be called the problem of *objective* constitutionality. Assuming for the sake of argument that the child labor tax or some analogous act violates sound constitutional principles, can the Supreme Court actually get hold of that unconstitutionality and declare the tax null and void? In other words, is the constitutionality of the act of such a nature that the courts can afford judicial relief? For it must be borne in mind that there are plenty of instances in our constitutional system in which the Supreme Court is powerless to prevent even the flagrant violation of our fundamental law.[96] Does the use by Congress of a constitutional power for an unconstitutional purpose create a case in which the remedy for unconstitutional action must be political rather than judicial?

Consideration of this problem may well begin with an examination of the case of *McCray v. United States*,[97] in which in 1904 the Supreme Court sustained the validity of the oleomargarine tax of 1902. It was urged upon the court in this case that the tax of ten cents per pound upon colored oleomargarine was not designed to raise revenue but to suppress the manufacture of the article taxed. Everyone knew of course, that this was true. Such a tax was alleged to be unconstitutional because it amounted to an invasion of the reserved power of the states, because it was not in itself a legitimate means of exercising the taxing power, because of its destructive nature, and because it amounted to a deprivation of liberty and property rights which no free government might destroy.

The opinion of Mr. Justice White in the *McCray case* declared, first, that the court could not inquire into the motives

[95] Infra, p. 275.

[96] These instances are those in which the Court faces what it has called "political questions." See Black, op. cit., 100, Cooley, Principles, 157, Hall, op. cit., 40, Willoughby, op. cit., II, 999.

[97] (1904) 195 U. S. 27, 24 S. C. R. 769, 49 L. Ed. 78, 1 Ann. Cas. 561.

which actuated a particular exercise of an admitted power of Congress. This is, of course, familiar doctrine.[98]

"No instance is afforded," said the court, "from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. . . .

"It is, however, argued if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the constitution, all limitations of power must disappear, and the grave functions lodged in the judiciary, to confine all the departments within the authority conferred by the constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse of one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department."

In the second place, the court refused to invalidate the act on the ground that the results of the law, irrespective of its form or the motives of its framers, were such as to indicate an unconstitutional use of the taxing power. The court said:

"Undoubtedly, in determining whether a particular act is within a granted power, its scope and effect is to be considered. Applying this rule to the acts assailed, it is self-evident that on their face they levy an excise tax. That being their necessary scope and operation, it follows that the acts are within the grant of power. The argument to the contrary rests on the proposition that, although the tax be within the power, as enforcing it will destroy or restrict the manufacture of artificially colored oleomargarine, therefore the power to levy the tax did not obtain. This, however, is but to say that the question of power depends, not on the authority conferred by the constitution, but upon what may be the consequence arising from the exercise of the lawful authority."

The upshot of the *McCray case,* then, seems to be that the Supreme Court will not invalidate any congressional act which *"on its face"* levies a tax, no matter what the motive or results

[98] Black, op. cit., 69; Cooley, Constitutional Limitations, 257; Story, op. cit., II, sec. 1090; Willoughby, op. cit., I, 18; United States v. Des Moines Nav. & R. Co., (1891) 142 U. S. 510, 544, 35 L. Ed. 1099, 12 S. C. R. 308; Weber v. Freed, (1915) 239 U. S. 325, 330, 60 L. Ed. 308, 310, 36 S. C. R. 311, Ann. Cas. 1916C 317; Dakota Cent. Teleph. Co. v. South Dakota, (1919) 250 U. S. 163, 194, 63 L. Ed. 910, 924, 39 S. C. R. 507.

of that act may be. This is all that the case actually decided. The court suggests by way of dictum that there may be attempts by Congress to exercise the taxing power which are not "on their face" acts of taxation and which not only amount to "an abuse of delegated power, but the exercise of an authority not conferred." But it seems clear that what Mr. Justice White had in mind was the possibility of the use by Congress of its taxing power for the destruction of fundamental private rights.[99]

This raises the interesting question, when, if ever, does a law purporting to be an exercise by Congress of its power to tax cease to be a tax *"on its face,"* so as to justify the court in declaring it null and void.[100] The answer to this question is not to be found in Mr. Justice White's opinion in the *McCray case,* but some light upon the meaning which he attached to the phrase *"on its face"* may be gleaned from a further perusal of his remarks in the United States Senate while he was a member of that body.

In the first place, it is apparent from the statements of Senator White that a law purporting to be a tax law does not in his judgment necessarily cease to be a tax "on its face" and thereby fall under the judicial ban even when as a member of Congress he would be obliged to vote against the bill as unconstitutional because he knows the purpose of the tax to be not revenue but prohibition or regulation.[101] He cannot necessarily know and act upon as a judge the things which he knows as a legislator.

"It is perfectly self-evident when a bill, which is a revenue bill, comes to me for consideration, as to whether I will vote for it or not, it may be to me—if I may be allowed to use the word, a philosophical word—subjectively unconstitutional per se, and I may not vote for it as constitutional, because I know that, although it is a revenue bill, there is a purpose of destruction and prohibition contained in it. But when it comes to the court, the court can only look at it objectively. The court must look at its provisions, and if on its face it is a revenue bill, if on its face it be for the purpose of raising revenue, the court will say that it cannot consider the motive, but must decree its enforcement. . . .

[99] For the full context see note 93, supra.

[100] It is interesting to note that Cooley also uses this phrase "on its face" in discussing the validity of taxing acts. He says: Practically, therefore, a law purporting to levy taxes, and not being on its face subject to objection, is unassailable, whatever may have been the real purpose." Principles of Constitutional Law, p. 58.

[101] It is clear, of course, that Senator White adhered to this narrower view of the proper purposes of federal taxation. Supra, p. 264.

"If I were the Executive or a judge and the bill came to me, then having passed out of this sphere and into another sphere where motives could not enter, I should say the sole question presented to me was, does it raise revenue on its face, and if so, I would hold it constitutional."[102]

But in the second place, if a judge is convinced from a study, not of the congressional debates, but of the provisions of the taxing measure itself, that it cannot in practical effect raise any revenue, but must of necessity result in regulation or destruction of things outside congressional authority, he may then conclude that it is not a tax law "on its face" and may hold it unconstitutional. This was Senator White's attitude toward the destructive taxes proposed to be levied upon cotton and grain futures. He declared that:

"On the very face of the bill not even a pretext of taxation can be found. By the very terms of the bill no tax can result from its provisions. . . .

"It is perfectly true that in two or three cases the Supreme Court of the United States has said that where on the face of a statute there was the exercise of taxation, as the statute was on its face a taxing statute, the court would not destroy the face of the statute with the sponge of the motives which may have actuated the members who passed it. Is that the case here? Where the face of the statute shows no tax, where the face of the statute itself eliminates all human possibility of the exercise of the taxing power for revenue, then I say the mission of jurisdiction is given to the courts of this land to brush that statute away for its flagrant and open violation of the constitution. . . . If the usurpation is clear on the face of the act, if the act itself shows the usurpation, the power exists in the Supreme Court to prevent the usurpation."[103]

In short, when the court concludes from a scrutiny of the act itself that the act cannot in effect produce revenue, it need not

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[102] Cong. Rec., July 21, 1892, Vol. 23, 6518-6519.

Compare with this the following statement by President Cleveland in his message accompanying his approval of the Oleomargarine Tax Act of 1886: "It has been urged as an objection to this measure that while purporting to be legislation for revenue its real purpose is to destroy, by the use of the taxing power, one industry of our people for the protection and benefit of another.

"If entitled to indulge in such a suspicion as a basis of official action in this case, and if entirely satisfied that the consequences indicated would ensue, I should doubtless feel constrained to interpose executive dissent.

"But I do not feel called upon to interpret the motives of Congress otherwise than by the apparent character of the bill which has been presented to me, and I am convinced that the taxes which it creates cannot possibly destroy the open and legitimate manufacture and sale of the thing upon which it is levied." Richardson, Messages and Papers of the President, VIII, 427.

[103] Cong. Rec., July 21, 1892, Vol. 23, 6516.

hesitate, according to Senator White, to declare that Congress has tried to wield an authority which it does not possess and that such an exercise of the taxing power is "objectively" unconstitutional.[104]

Senator White's standard for judging the objective constitutionality of a congressional use of the taxing power has much more than an academic interest, first because his present position as Chief Justice of the United States gives him an opportunity to apply it or urge its application in the forthcoming decision on the validity of the child labor tax, and also because he has already had one opportunity to apply it, namely, in the *McCray case,* and it is therefore possible to observe its nature and limitations. The fact that the oleomargarine tax of 1902 was under the circumstances found objectively constitutional throws some light upon the true value of Senator White's test as a check upon the use of the federal taxing power for police purposes. In commenting in the Senate in 1892 upon the oleomargarine tax of 1886, Senator White declared that when this measure was introduced into Congress it provided for a "prohibitive tax" but that in spite of the pressure for its passage it was too much for the "constitutional stomachs" of some of the members and it was accordingly reduced to a revenue-producing capacity.[105] The implication is perfectly clear that Senator White regarded this "prohibitive" tax as one which was objectively unconstitutional; while the tax in its reduced form was objectively constitutional. Now this objectively unconstitutional tax on oleomargarine was a tax of ten cents per pound. In 1904, however, when as associate justice of the Supreme Court, Mr. White wrote the opinion in

[104] "Now let us reason out the consequences, if it be not true. If this be not true, then the beautiful system by which, as I said just now, all the departments of the government move in a common orbit, vanishes out of the sidereal universe of government and passes into confusion and chaos. The precedents are against it. The power which the Supreme Court of the United States exercises in the review of statutes is like unto the power exercised by the supreme courts of all the states. The books are full of cases in the state courts drawing the distinction which I have made. In the Topeka case it is drawn in plain words by the Supreme Court of the United States. There a government appropriated a sum of money, declaring it to be for a public purpose. The case went to the Supreme Court of the United States and it said your motive and your purpose cannot be inquired into. That is removed beyond the domain of controversy or question. But where you have called the statute one thing and the very terms of the statute indicate another thing, and that other thing is outside the powers of government, then it is not a statute at all, but it is a violation of authority and we strike it from the statute books." Cong. Rec., July 21, 1897, Vol. 23, 6516.

[105] Cong. Rec., July 21, 1892, Vol. 23, 6518.

the *McCray case*, the same tax of ten cents per pound on colored oleomargarine seemed to him "on its face" to be a revenue measure and therefore objectively constitutional. A tax objectively unconstitutional in 1886 turns out to be objectively constitutional in 1904.[106] One is forced to the conclusion that he found as justice of the Supreme Court insurmountable difficulties in the way of declaring "objectively unconstitutional" a taxing statute which as a legislator he had felt convinced should fall under the judicial ban.

It is not at all surprising that the Supreme Court, even had it been unanimously inclined to do so, should have found it exceedingly difficult to declare unconstitutional a law purporting to be an exercise by Congress of its delegated power of taxation because it did not "on its face" levy a tax. In addition to the general presumption of constitutionality which attaches to any act of the legislature there is added, unless Congress is unusually careless, the presumption arising from the legislative label declaring the act to be for the raising of revenue.[107] It is necessary also for the court to give full weight to the unquestioned freedom of Congress to select the subjects of lawful taxation,[108] and, having selected them, to impose rates which are restricted only by legislative discretion.[109] The court must also exercise sufficient self-control to rule out of consideration all that it may know about the purposes and motives actuating the legislators responsible for passing the law.[110] It is not at liberty to decide

[106] There is a theory on which the Act of 1886 can be distinguished from the Act of 1902. The earlier law levied a uniform tax upon all oleomargarine. The Act of 1902 levied a tax of one-quarter of a cent per pound on uncolored oleomargarine and a tax of ten cents per pound on that which was colored. It was argued in Congress that the destructive tax upon the colored product was to aid the government in the enforcement of the revenue-producing tax on the uncolored product by preventing a deception which would facilitate tax evasion. See remarks of Senator Hoar, Cong. Rec., Mar. 26, 1902, Vol. 35, 3282, and of Senator Spooner, ibid 3506. This is the theory upon which the Supreme Court upheld the Harrison Anti-Narcotic Act in the recent case of the United States v. Doremus, (1919) 249 U. S. 86, 63 L. Ed. —, 39 S. C. R. 214. There is no evidence, however, that Mr. Justice White attached any significance to this point when writing his opinion in the McCray case.

[107] The entire statute was entitled "An Act to Provide Revenue and For Other Purposes;" the section relating to child labor was entitled "Tax on the Employment of Child Labor."

[108] Treat v. White, (1900) 181 U. S. 264, 45 L. Ed. 853, 21 S. C. R. 611; Patton v. Brady, (1902) 184 U. S. 608, 46 L. Ed. 713, 22 S. C. R. 493. See Cooley, Principles, p 57; Cooley, Taxation, I, 179-180.

[109] Marshall established this doctrine in McCulloch v. Maryland. Knowlton v. Moore, (1900) 187 U. S. 41, 58, 20 S. C. R. 747, 44 L. Ed. 969.

[110] See note 98, supra.

whether or not "on its face" the act raises revenue by finding out whether or not, when set in operation, it actually does raise any revenue.[111] Probably in most cases also such evidence would be lacking at the time the court needed it,[112] and such evidence might be of very questionable reliability as a guide to the court.[113] If the court is able thus to orient itself sufficiently and to bring to bear on its problem the mental complex which should result from the considerations above noted, it must then address itself to the problem whether the provisions of the statute which it is scrutinizing are, in and of themselves, of such a character as to leave no reasonable doubt that the act is not an act to raise revenue. To make this judicial guess as to what the statute was probably meant to accomplish and what it probably will accomplish, the court must deal with factors which are not only highly speculative in character but have an awkward tendency to fluctuate. Whether an alleged revenue law may be reasonably presumed to produce revenue will depend upon circumstances, and circumstances may change. The measure of constitutionality might thus tend to shift.[114] In short, in applying this test of objective unconstitutionality, the court will properly feel that it must be more than usually sure of its ground in respect to a

[111] See paragraph quoted from Mr. Justice White's opinion in the McCray case, note 93 supra.

[112] As when the question of the validity of the taxing act is raised in an action seeking an injunction to restrain enforcement. This was the nature of the proceeding in the United States district court in which the child labor tax has been held invalid. Supra, note 11. The court might be compelled to determine this question before the law had been fairly put into operation.

[113] It is, of course, well known that even fiscal experts are frequently deceived as to the actual revenue-bearing capacity of a particular tax. Furthermore, interested parties might secure the payment for a temporary period even of prohibitive taxes in order to provide evidence of the ability of the tax to produce some revenue.

[114] This was pointed out in humorous fashion by Mr. Hepburn in the debate in the House on the oleomargarine tax of 1886: "In the year 1887, when the effect of the bill, we will suppose, is to prohibit the manufacture of oleomargarine, the bill becomes unconstitutional. But suppose the next year on account of the withdrawal of 200,000,000 pounds of this spurious butter that is sold, and used as butter, leaving on the market 1,000,000 pounds of good butter, the price of butter is enhanced, going up to 25c or 30c a pound. The manufacturer of the bogus article can then compete, if he can make the article and pay the tax, so that there will be a revenue of $20,000,000 to the government. Then the law becomes a constitutional measure! So that according to the gentleman's argument the bill may be constitutional in 1886, unconstitutional in 1887, and again become constitutional in 1888. The bill is not constitutional or unconstitutional because of the nature of the enactments that it contains, but because of the price of butter!" (Laughter.) Cong. Rec., Vol. 17, 4901.

problem so vague and baffling in character that sureness of ground will frequently be well nigh unattainable.

The writer ventures the opinion that should the majority of the Supreme Court adopt either the revenue only theory of federal taxation or Chief Justice White's theory that the purposes for which Congress may tax are limited by the reserved powers of the states, it would find the problem of applying any satisfactory test of objective constitutionality for the purpose of enforcing such limitations so fraught with difficulties that those limitations would practically cease to function. Congress would find itself possessed in reality of practically the same broad powers of taxation which the states and other sovereign governments enjoy. Such power would continue to be subject to all the express limitations found in the constitution; it would be subject to the implied limitation that the revenue raised must be for a public purpose; it would be subject to the implied limitation that it must not burden the governments or functions of the states; it would be subject to the implied limitation that it must not infringe the individual rights which under a free government are inviolable. It seems exceedingly doubtful that any instance will arise in which a law passed by Congress in exercise of its power to tax which was safely within all these express and implied restrictions will be declared null and void by the Supreme Court because "on its face" it does not "levy a tax." If Senator White's standard of objective constitutionality failed to function in the *McCray case,* it is not easy to imagine the kind of taxing statute to which it would apply. If it was inapplicable to the oleomargarine tax of 1902 it is hard to discover its applicability to the child labor tax of 1919.

By way of summary and conclusion it may be suggested that the nature of the purposes for which Congress may properly use its power to tax is a question on which there is now and has always been a wide difference of opinion. There is plenty of respectable authority for the support of each one of the three views discussed. It may be noted that Congress has proceeded upon the theory that it may use its power to tax for the accomplishment of any purposes which will aid the common defense and general welfare. It is apparent that the Supreme Court has never put its official sanction upon any one of the three theories of federal taxation to the exclusion of the others. It seems probable that the narrower and more restricted conceptions of

the taxing power would, from the standpoint of the practical problem of judicial construction, prove incapable of satisfactory enforcement. There is every indication that Congress, if it is sufficiently circumspect, may continue to exercise a liberal police power through the medium of regulatory and destructive taxes without fear of judicial interference.

But if the child labor tax is upheld, either because the Supreme Court decides upon broad grounds that the law is constitutional or because it finds its unconstitutionality inaccessible, Congress will be justified in feeling that it has been substantially fortified in its position that it may use its power to tax as an instrumentality for the exercise of a broad national police power. It will be reasonable to look for further and more far-reaching measures seeking by means of taxation to regulate conditions and suppress evils over which Congress has no direct authority.*

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*This series of articles will be concluded by an article, "The National Police Power under the Postal Power."

Minnesota Law Review

Published monthly, December to June inclusive, by the Faculty and Students of the Law School, University of Minnesota.

Subscription Price, $2.50 per annum. Forty cents per number.

MAY AN EXECUTOR RECOVER ATTORNEY'S FEES AND EXPENSES INCURRED IN AN UNSUCCESSFUL ATTEMPT TO SUSTAIN LEGACIES OF A VALID WILL?—The question whether an executor nominated in a will is entitled to reimbursement out of the funds of the estate for his services, expenses, and attorney's fees incurred while acting in good faith in an ultimately unsuccessful effort to sustain the will or some of its provisions is one upon which the authorities are in conflict. The diversity of opinion seems to turn upon the question whether there is any duty on the part of the executor so to defend in case of attack.[1]

[1] Of course any liability which an executor incurs or expenditure which he makes in the administration of the estate is regarded as his personal obligation until it has been allowed to him upon the judicial settlement of his accounts. Austin v. Munro, (1872) 47 N. Y. 360.

The numerical weight of authority allows recovery where the executor in good faith defends the will, although he is ultimately unsuccessful, on the ground that the executor nominated in a will is upon acceptance of such nomination under a legal obligation not only to offer the will for probate but actively to defend it and its provisions.[2] This view is criticized by the New York courts in the following language:[3]

"These authorities are based upon an assumption which we believe fundamentally fallacious. They are necessarily predicated upon the theory that one who in good faith offers for probate a paper purporting to be a will, acts for the benefit of the estate, and thus becomes legally entitled to reimbursement for his expenditures necessarily and reasonably incurred. . . ."

There is a second line of authorities which do not go to the extreme of the majority view. They deny that any duty to defend the will is imposed on the executor by the mere fact of his nomination in the instrument, holding that he has discharged his duty when he has once offered the will for probate, but allow recovery for the expenses of unsuccessful litigation in seeking to uphold the will where it has been once admitted to probate.[4] Again, there is a respectable line of decisions which hold that where the will is finally determined to be void the executor cannot in any case recover his expenses incurred in defending the will, even though the will was once allowed in probate, on the ground that where there is no will there can be no executor, no probate, and no letters testamentary, and hence a person nominated as executor in such void will is a mere stranger to the estate.[5]

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[2] Henderson v. Simmons, (1858) 33 Ala. 291, 70 Am. Dec. 590; Hazard v. Engs, (1882) 14 R. I. 5; Baldwin v. Barber, (1912) 142 Ky. 370, 146 S. W. 129; In Re Estate of Hentges, (1910) 86 Neb. 75, 124 N. W. 929; See Note, 26 L. R. A. (N.S.) 757, which states this is the majority rule; See also cases cited in L. R. A. 1917A 452. It is stated in Davison v. Sibley, (1913) 140 Ga. 707, 79 S. E. 855, that courts following the common law rule hold that duty rests upon executor to defend the will and therefore allow recovery.

[3] Dodd v. Anderson, (1910) 197 N. Y. 466, 470, 90 N. E. 1137, 27 L. R. A. (N.S.) 336.

[4] Matter of Waldron, (1911) 74 Misc. 310, 133 N. Y. S. 1104, reversed upon question of fact in 152 App. Div. 909.

See Butler v. Bocock, (1911) 160 Ill. App. 561, holding that an administrator with will annexed who succeeds to the duties of an executor was under the duty, as well as the executor, to defend the will in the first court where it was assailed and to defend it until it was once adjudged invalid, and that if he acted in good faith, and not from personal interest, and was not chargeable with fraud, was entitled to an allowance for counsel fees from the estate although the will was invalid.

[5] Doan v. Herod, (1914) 56 Ind. App. 613, 104 N. E. 385; Kelly v. Kennedy, (1916) 133 Minn. 278, 158 N. W. 395; Minnesota Loan & Trust Co. v. Pettit, (Minn. 1919) 175 N. W. 540.

The New York courts have held, however, that if the will itself is valid, an executor, seeking in good faith to uphold a provision of the will against an attack by a beneficiary after probate, is entitled to be reimbursed from the estate the amount legitimately expended by him in the litigation, though it resulted in a judgment, adjudging the provision attacked to be invalid.[6] And in *Dodd v. Anderson,*[7] a later decision, refusing the executor his expenses where the will was void and was never admitted to probate, the distinction is made that:

"When once a will has been admitted to probate and the executor named in it has qualified under it, he stands in a different relation to the estate and to the public than one who offers a paper for probate without knowing whether it will be accepted or not. In the former case what was at first simply a moral right has ripened into a legal duty, and the executor, as the legal representative of the estate, is bound to employ all fair means to sustain the will under which he has been granted letters testamentary. In the performance of that duty, the executor may incur obligations which although purely personal in their inception are regarded as equitably chargeable upon the estate, and for that reason are allowed to the executor when he presents his accounts for judicial settlement. That is the distinction, it seems to us, between a case in which a will is admitted, although subsequently revoked, and one where a paper purporting to be a will is never admitted to probate, because the court of first instance has held it to be invalid."[8]

But in the same decision the court says:

"Since these principles are established, they may be most succinctly stated in the form of legal aphorisms: 1. There can be no executor where there is no will. 2. Unless a will is admitted to probate there can be no letters testamentary. 3. Until letters testamentary or of administration are issued upon the estate of a decedent, there is no legal representative of the estate. 4. Although a person is nominated as executor in a paper purporting to be a will, he is under no legal obligation to accept."[9]

An amendment of the New York Code in 1911[10] apparently gave legislative approval to the rule allowing reimbursement, in

It is interesting to note that in California by statute it is provided that if probate of a will is revoked, it is in the discretion of the court to charge either the unsuccessful proponent or the estate with the costs of the contest. Sec. 1332 and 1720, Code of Civil Procedure of California; See Estate of Berthol, 163 Cal. 343, 125 Pac. 750; Jones Estate, (1913) 166 Cal. 141, 135 Pac. 293; Re Higgins, (1910) 158 Cal. 355, 111 Pac. 8.

[6] In re Title Guaranty & Trust Co., (1907) 114 App. Div. 778, 100 N. Y. S. 243, aff. on other grounds in 188 N. Y. 542.

[7] (1910) 197 N. Y. 466, 90 N. E. 825.

[8] Dodd v. Anderson, (1910) 197 N. Y. 466, 473, 90 N. E. 825.

[9] Dodd v. Anderson, (1910) 197 N. Y. 466, 470, 90 N. E. 825.

the discretion of the court, where the will was held void, but the court[11] doubted that it was intended thereby to overthrow the doctrine of *Dodd v. Anderson.*

There is a distinction between the case of an executor seeking to recover expenses of litigation where the will is ultimately held void, though once admitted to probate, and the case where the validity of the will itself is undoubted and probate has been allowed and letters testamentary granted and the executor is seeking to recover expenses of litigation incurred in good faith in an unsuccessful endeavor to uphold certain of the provisions of the will. If there is any duty on the part of an executor nominated in a will to defend the will or any of its provisions such duty must be found in the policy of the law imposing such duty, either by virtue of the nomination of the executor in an instrument purporting to be a will and the acceptance of the nomination by the person named, or upon the issuance of letters testamentary alone, or upon the issuance of letters testamentary plus the existence of a valid will duly admitted to probate. As to the first proposition, in the absence of a statute expressly or impliedly imposing such duty upon a person nominated as executor in an instrument purporting to be a will, it is difficult to perceive what policy of law there is which would impose upon the estate the burden of bearing all the expenses of a litigation necessary to avoid an invalid will. As to the second, it would seem too clear for argument that where there is no will, there can be no valid letters testamentary. The correct view, it is believed, is that the executor's authority is derived from the will and vested in him by the granting of letters testamentary,[12] and that in the absence of statute otherwise providing he can have neither authority nor duties unless both elements—a valid will duly admitted to probate and letters testamentary granted thereon—exist. If this is true, it would seem that while no recovery for his expenses in litigation should be allowed against the estate where the will is void, even though it has been erroneously admitted to probate and supposed letters testamentary granted, yet where the will itself is valid, and admitted to probate, although

[10] New York Laws 1911, c. 539, amending section 2558 of the Code of Civil Procedure.

[11] In re Waldron's Will, (1911) 74 Misc. 310, 133 N. Y. S. 1104, allowing an executor of a prior will duly admitted to probate to recover costs and expenses of an unsuccessful contest of the probate of a later will.

[12] 1 Williams, Executors, 209; Hartnett v. Wandell, (1875) 60 N. Y. 346.

certain of its provisions are void, the executor is a de jure officer competent to administer the estate and clothed with authority and duties, and it is not difficult to find strong reasons why the defence of the provisions of the will might well be included in his duties in the administration of the estate.

Recent decisions by the Minnesota supreme court have definitely determined that in this state an executor cannot recover from the estate reimbursement for his services, expenses and attorney's fees incurred in attempting in good faith, but unsuccessfully, to defend either an invalid will or invalid devises contained in a valid will, even though the will was duly admitted to probate and letters testamentary granted thereon.[13] In *Kelly v. Kennedy,*[14] where the will had been admitted to probate and letters testamentary granted thereon but finally held void on the ground of lack of testamentary capacity, the Minnesota court denied the executor recovery of his expenses of litigation in seeking to uphold it on the ground that the statutes impose no affirmative duty on the executor either to petition for probate of the will or to defend the will.[15] In the *Pettit Will case,*[16] however, the will itself had been sustained, but all of the devises were held void by the probate court with the exception of one small legacy. The Minnesota Loan and Trust Co., having qualified as executor under the will, appealed from the order of the probate court, and after expensive litigation the order of the probate court was affirmed. One of the difficult features of the case was the fact that the only persons interested in sustaining the provisions of the will which were contested, were persons not yet in being, while the cestuis under the devises, who were to have the life interest were interested adversely to the interests of the cestuis que trustent not yet in being, leaving no one to defend the will or to protect the interests of these unborn children unless it was the executor. The court denied recovery to the executor on the authority of *Kelly v. Kennedy,* omitting any reference to the fact that in the instant case the will was valid, and stating the question thus:

"Is an executor nominated in a will, entitled to reimbursement from the funds of the estate for services, expenses and counsel fees, in an unsuccessful appeal to sustain a will, the

[13] Minnesota Loan and Trust Co. v. Pettit, (Minn. 1919) 175 N. W. 540, Dibell, J., and Hallam, J., dissenting.
[14] (1916) 133 Minn. 278, 158 N. W. 395.
[15] See Minn. G. S. 1913, sections 7266 and 7258.
[16] Minnesota Loan and Trust Co. v. Pettit, (1919) 175 N. W. 540.

heirs contesting upon the ground that the will is void under the statute of trusts?"[17]

It is submitted that the real question was rather: Is an executor administering an estate under a valid will, duly probated, entitled to reimbursement for expenses, including counsel fees, incurred in attempting in good faith, but unsuccessfully, to defend a void trust devise contained in the will against attack, when the beneficiaries to be affected are not yet in being and the other beneficiaries are adversely interested?[18]

INTERPRETATION OF SECTION 3 OF THE CLAYTON ACT.—Section 3 of the Clayton Act[1] provides that it shall be unlawful for a person engaged in interstate commerce to make a sale or lease of goods, or fix a price or rebate thereon, upon the condition or agreement that the lessee or vendee shall not deal with a competitor of the lessor or vendor, where the effect of such transaction "may be to substantially lessen competition or tend to create a monopoly." In the interpretation of this section an interesting question arises as to what circumstances will justify a finding that a given contract is illegal because its effect may be to substantially lessen competition or tend to create a monopoly. A recent decision in the United States district court indicates the general tendency of the federal courts, and contains a careful consideration of the question.[2] Plaintiff, a pattern

[17] Ibid., page 541.

[18] Hallam, J., in dissenting opinion in the Pettit will case says, at page 542, "I think the better rule is that when a will makes provision for beneficiaries not yet in being, the court may in its discretion make allowance out of the estate for the fees of an attorney who in good faith conducts litigation to sustain the will for their benefit. As a practical proposition this seems to be necessary. Otherwise the interests of such beneficiaries could not be protected at all."

[1] 38 Stat. at Large 731, U. S. Comp. Stat. sec. 8835c, Barnes, sec. 7960, 9 Fed. Stat. Annot. 733.

It has been decided that the section under consideration applies as well to continuing contracts made before its enactment as to those entered into thereafter. Elliott Mach. Co. v. Center, (1915) 227 Fed. 126; United States v. United Shoe Mach. Co., (1915) 227 Fed. 507; Motion Picture Patents Co. v. Universal Film Mfg. Co., (1916) 235 Fed. 398, 148 C. C. A. 660. This is upon the principle that "all persons entering into contracts involving interstate commerce must do so subject to the right of Congress thereafter to control, regulate, or prohibit the performance thereof." Elliott Mach. Co. v. Center, supra, at p. 126. See also Louisville, etc., R. Co. v. Mottley, (1911) 219 U. S. 467, 31 S. C. R. 265, 55 L. Ed. 297, 34 L. R. A. (N.S.) 671; Armour Packing Co. v. U. S., (1908) 209 U. S. 56, 28 S. C. R. 428, 52 L. Ed. 681; Philadelphia, etc., R. Co. v. Schubert, (1912) 224 U. S. 603, 32 S. C. R. 589, 56 L. Ed. 911.

[2] Standard Fashion Co. v. Magrane Houston Co., (1919) 259 Fed. 793.

manufacturing firm controlling about two-fifths of the pattern agencies of the country, made an agreement with a Boston retailer, whereby the latter agreed that no part of his premises should be used for the sale of patterns other than those of plaintiff's manufacture. Plaintiff filed a bill for an injunction to restrain defendant from selling other patterns. The court held that the agreement was prohibited by the Clayton Act and denied the injunctive relief asked. In an elaborate opinion, concurring in the result, Brown, J., argued that the contract was not shown to be illegal as substantially lessening competition or creating monopoly.

The prohibition of the statute affects agreements whose effect "*may be* to substantially lessen competition or *tend* to create a monopoly." It is plain that such an agreement as that in the instant case entered into with a retailer in a small community would generally very effectively limit competition. And even in large cities to limit to a single pattern maker the pattern business of those few dealers who are most resorted to by fashionable buyers would have a similar effect. The nature of the business is properly taken into consideration in determining whether the contract may tend to create monopoly and stifle competition or not.[3]

On the other hand it is argued in the concurring opinion that full effect should be given to the final clause of section 3, limiting its application to cases where the effect of such contract "may be to substantially lessen competition or tend to create a monopoly;" that since every agreement concerning trade in a sense restrains, "the true test of legality is whether the restraint imposed is such as merely regulates, and perhaps promotes competition, or whether it is such as may suppress or even destroy competition."[4] It is further argued that an agreement not to deal with competitors of the vendor is of no practical effect in imposing a restraint on trade in the absence of any desire so to deal; and that the actual effect of such a restriction is of itself in such case of negligible consequence so far as tending to create a monopoly is concerned.[5]

[3] Chicago Board of Trade v. United States, (1918) 246 U. S. 231, 238, 38 S. C. R. 242, 244, 62 L. Ed. 683.

[4] Standard Fashion Co. v. Magrane Houston Co., (1919) 259 Fed. 793, 799.

[5] United States v. United Shoe Machinery Co., (1915) 222 Fed. 349, 414; id., (1918) 247 U. S. 32, 66, 38 S. C. R. 473, 485, 62 L. Ed. 968.

Section 3 of the Clayton Act does not seem to have been construed by the United States Supreme Court. In *Motion Picture Patents Co. v. Universal Film Mfg. Co.*[6] it was held by the circuit court that the contract there considered was prohibited by section 3 of the Clayton Act, but the case was decided upon other grounds when it reached the Supreme Court.[7]

But a study of the decisions of the lower federal courts makes it plain that the tendency so far has been to regard the statute as having an effect designedly beyond that of the Sherman Act.[8] The court said in *Standard Pattern Co. v. Magrane Houston Co.*,[9]

"Doubtless a substantial lessening of competition would amount to an unreasonable restraint of trade; but I do not think it is the duty of the court to find this before it can pronounce a contract unlawful, the effect of which it has found may be to 'substantially lessen competition.' The reports of the committees of both houses of Congress, as well as the legislative history of the bill, show the intent of Congress to protect the public from practices which it believed to be inimical to the public good by preventing these practices from being put in operation. I think, therefore, it is the duty of the court to determine whether or not the contract *has provided means* for a real or substantial lessening of competition, irrespective of what use has been or is being made of these means."

And in *United States v. United Shoe Machinery Co.*,[10]

"Evidently Congress was not satisfied to only prohibit actual lessening of competition, or monopolizing but to make it unlawful for any person to do those acts, which may put it in his power to do so. For these reasons, in the opinion of the court, all that is necessary to state a cause of action under the Clayton Act is to charge that the defendants committed the acts prohibited by the statute and that they tend to substantially lessen competition or create a monopoly in interstate commerce."

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[6] (1916) 235 Fed. 398, 148 C. C. A. 660.

[7] 243 U. S. 502, 37 S. C. R. 416, 61 L. Ed. 871, L. R. A. 1917E 1187, Ann. Cas. 1918A 959. See 2 MINNESOTA LAW REVIEW 66.

[8] The following are some cases holding restrictions similar to those forbidden by section 3 valid at common law and under the Sherman Act: In re Greene, (1892) 52 Fed. 104; Whitwell v. Continental Tobacco Co., (1903) 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689; Mogul Steamship Co. v. McGregor, [1892] A. C. 25; Com. v. Strauss, (1905) 188 Mass. 229, 74 N. E. 308; Southern Fire Brick Co. v. Sand Co., (1906) 223 Ill. 616, 79 N. E. 313, 7 Ann. Cas. 50; Peerless Pattern Co. v. Dry Goods Co., (1912) 171 Mich. 158, 136 N. W. 1113, 42 L. R. A. (N.S.) 843; Standard Fashion Co. v. Siegel-Cooper Co., (1898) 30 App. Div. 564, 52 N. Y. S. 433; Id., 157 N. Y. 60, 51 N. E. 408, 43 L. R. A. 854; 68 A. S. R. 749; Butterick Pub. Co. v. Rose, (1910) 141 Wis. 533, 124 N. W. 647.

[9] (1919) 259 Fed. 793, 799.

[10] (1916) 234 Fed. 127, 150.

But compare with this the following extract from the concurring opinion of Brown, J, in the principal case:

"The statute does not create a presumption that such contracts are inherently vicious, nor does it impose upon the plaintiff the burden of proving that the contracts are not illegal. The presumption is of legality, and the burden is upon him who asserts illegality. The application of the statute should be made only upon full proofs. The consequences of applying it otherwise are too serious to be disregarded."[11]

It is believed that the possibility for confusion as to the meaning of the courts in interpreting the applicability of section 3 of the Clayton Act to any given set of facts is due rather to the interpretation given by the court to the facts of the particular case before it, than to any uncertainty as to their interpretation of the meaning of section 3 of the act. However ambiguously the language of some of the decisions may have expressed their meaning, it seems clear from the decisions that the courts will construe that section as condemning certain contracts or transactions even though no *actual* lessening of competition or creation of a monopoly is shown. But it does not follow, nor does it seem likely, that the courts will declare a contract to be illegal as in violation of the Clayton Act simply because it appears on its face that its effect under *some* conceivable circumstances might or would be to substantially lessen competition or tend to create a monopoly. It is submitted that the effect of the decisions is simply this: that those contracts are illegal under section 3 of the Clayton Act which do actually provide the means under all the special conditions of the particular case before the court, for a real or substantial lessening of competition, irrespective of whether, under the circumstances of the case, these means have been used to effect an actual lessening of competition or the creation of a monopoly. And further, that the "full proofs" referred to by Mr. Justice Brown are satisfied if the party asserting the illegality of the contract establishes affirmatively that the contract does, under the particular facts of the case, give to one party the *power* to substantially lessen competition.

The very common occurrence of "exclusive dealer" contracts[12] in the world of business makes section 3 of the Clayton Act a

[11] (1919) 259 Fed. 793, 802.

[12] An interesting subsidiary question in the construction of section 3 is that of the status of contracts establishing "exclusive agencies," as distinguished from sales or leases. It seems clear that the intention of Congress was that the section should not apply to agencies. "It not only

matter of vital interest and importance. The decisions so far indicate that its construction will be approached in a spirit which may very well make the statute a powerful preventive instrument against monopoly. This suggests the corresponding danger that its broad terms may easily be directed against what business men everywhere regard as entirely justifiable methods. That Congress by section 3 scarcely did more than to pass the problem on to the courts is too obvious to need more than statement.

RECENT CASES

BAILMENTS—NEGLIGENCE—BURDEN OF PROOF.—Plaintiff delivered an automobile to a garage for safe keeping. Upon plaintiff's calling for it, it could not be found, and was conceded to have been stolen. *Held*, that the burden of proving absence of negligence was upon defendant; and this is not merely the burden of going forward with the evidence, "but a burden of establishing before the jury that its negligence did not cause the loss." *Hoel v. Flour City Fuel and Transfer Co.*, (Minn. 1920) 175 N. W. 300; *Stevenson v. Flour City Fuel and Transfer Co.*, (Minn., 1920) Jan. 175 N. W. 681.

Upon similar facts involving the bailment of a trunk at a hotel for storage, it was held in *Miles v. International Hotel Co.*, (Ill. 1919) 124 N. E. 599, that upon showing a delivery to bailee and failure to return upon demand, the bailor makes out a prima facie case, and the burden is then on the defendant to show the absence of negligence. But upon the production of such evidence the case goes to the jury with the instruction that "the bailor, in order to make out her case, must show that the bailee was, in fact, negligent and that its negligence caused the loss or contributed thereto."

The problem raised by these two cases apparently was settled in Minnesota by the case of *Rustad v. G. N. Ry. Co.*, (1913) 122 Minn. 453, 142 N. W. 727, where the rule applied in the *Hoel Case* was stated. The *Rustad Case* came up for decision, however, upon a directed verdict for the defendant, and there was no charge of a trial judge as to the burden

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does not prohibit or forbid exclusive agencies, but on the contrary it in no way whatsoever relates to agencies, properly so termed." Quoted from reports of the judiciary committees of the House and Senate, in Standard Fashion Co. v. Magrane Houston Co., (1919) 259 Fed. 793, 796. But the court will scrutinize the transaction closely and if there is an actual sale, it will not avail the parties to have designated the contract as one of agency. Standard Fashion Co. v. Magrane Houston Co., *supra;* Straus v. Victor Talking Mach. Co., (1917) 243 U. S. 490, 37 S. C. R. 412, 61 L. Ed. 866, L. R. A. 1917E 1196, Ann. Cas. 1918A 955; Ford Motor Co. v. Union Motor Sales Co., (1917) 244 Fed. 156, 156 C. C. A. 584; Dr. Miles Medical Co. v. Park & Sons Co., (1911) 220 U. S. 373, 31 S. C. R. 376, 55 L. Ed. 502; Bauer v. O'Donnell, (1913) 229 U. S. 1, 33 S. C. R. 616, 57 L. Ed. 1041, 50 L. R. A. (N.S.) 1185, Ann. Cas. 1915A 150. But see Willcox & Gibbs Co. v. Ewing, (1891) 141 U. S. 627, 12 S. C. R. 94, 35 L. Ed. 882.

of proof to be passed upon. The other case laying down the same doctrine is *Davis v. Tribune Job-Printing Co.*, (1897) 70 Minn. 95, 72 N. W. 808. The *Rustad Case* disapproved *Bagley Elev. Co. v. Am. Ex. Co.*, (1895) 63 Minn. 142, 65 N. W. 264, where the rule is stated as laid down in *Miles v. International Hotel Co.*, supra. See also *Wickstrom v. Swanson*, (1909) 107 Minn. 482, 120 N. W. 1090.

It is held practically everywhere that where such a state of facts as existed in the above cases is proved, the bailor has made out a prima facie case, and the burden is on the bailee to show absence of negligence. *Schaefer v. Safety Deposit Co.*, (1917) 281 Ill. 43, 117 N. E. 781, Ann. Cas. 1918C 906. But conceding that, if the case stops at this point, the bailor is entitled to a verdict, is the burden of proof still on the bailee when conflicting evidence has been introduced upon the issue of negligence? The Illinois courts hold it is not; the Minnesota courts hold it is. The logic of the situation may be with the former view; the Minnesota court adopts its rule on the ground of fairness and practical convenience. The burden is normally on the plaintiff to prove the facts he alleges in his complaint. Such at the outset is the bailor's burden here. He proves the delivery and failure to return, and the law gives him the benefit of a presumption that the loss was due to the bailee's negligence. The Minnesota court insists that the burden is not a shifting one; but it is difficult to see how otherwise logically the bailee at the end of the trial can have acquired it. As sustaining this view see *Sanford v. Kimball*, (1910) 106 Me. 355, 76 Atl. 890, 138 A. S. R. 345; *James v. Orrell*, (1900) 68 Ark. 284, 57 S. W. 931, 82 A. S. R. 293; *Knights v. Piella*, (1898) 111 Mich. 9, 66 A. S. R. 375; *Hunter v. Ricke Bros.*, (1905) 127 Ia. 108, 102 N. W. 826; *Yazoo, etc., R. Co. v. Hughes*, (1908) 94 Miss. 242, 47 So. 662, 22 L. R. A. (N.S.) 975, with notes; *Stone v. Case*, (1912) 34 Okla. 5, 124 Pac. 960, 43 L. R. A. (N.S.) 1168, with note, wherein the annotator states the general rule to be, at least in the United States, that "if the bailee proves that the property was stolen or destroyed by fire, or accounts for his failure to return or for the injury in any other way which does not on its face involve negligence or call for further explanation, the bailor must prove negligence."

CARRIERS—RATE SCHEDULE REQUIRING PASSENGER TO PAY THROUGH RATE VALID THOUGH HIGHER THAN SUM OF LOCAL RATES—INTENT TO MAKE CONTINUOUS JOURNEY.—The sum of the local passenger fares from A to B and from B to C, all in Indiana, was less than the through fare from A to C over the same line. One Wilcoxon bought a ticket from A to B and telephoned ahead to B for a ticket from B to C. At B he left the train and got the ticket for which he had telephoned. He offered this to the conductor for the journey from B to C, but the conductor refused to accept it unless he paid one cent additional to make up the through fare. The rate scheduled, properly filed with the Indiana Public Service Commission, prohibited any passenger from taking advantage of a combination of the local rates to avoid paying the higher through rate. On Wilcoxon's failure to pay the extra one cent demanded by the

conductor, he was ejected. The conductor was found guilty of assault and battery, sentenced, and appealed. The court in reversing the verdict, *held*: 1, the regulation prohibiting a passenger from using an advantageous combination of local rates was filed with the Commission, and was accordingly binding on the traction company and its passengers; 2, the passenger's intent, here, was clearly to make a through trip. *Arbuckle v. State*, (Ind. 1919), 124 N. E. 395.

As a result of state and national regulation, rates have become largely a matter of law, rather than a matter of contract solely, and rate schedules, when properly approved and adopted, become binding upon both shipper, or passenger, and carrier. *Boston & Maine R. v. Hooker*, (1914), 233 U. S. 97, 34 S. C. R. 526; 58 L. Ed. 868; *New York, etc., R. Co. v. Whitney Co.*, (1913) 215 Mass. 36, 102 N. E. 366; *Armour Packing Co. v. United States*, (1908) 209 U. S. 56, 28 S. C. R. 428, 52 L. Ed. 681; *Goodnow Coal Co. v. Northern Pacific Ry. Co.*, (1917) 136 Minn. 420, 162 N. W. 519; *Mannheim Ins. Co. v. Erie, etc., Transp. Co.*, (1898) 72 Minn. 357, 75 N. W. 602; *Schenberger v. Union Pacific R. Co.*, (1911) 84 Kans. 79, 113 Pac. 433, 33 L. R. A. (N.S.) 391; *Cleveland, etc., R. Co., v. Alexandria Paper Co.*, (Ind. 1919) 124 N. E. 402.

Where no part of the properly filed schedule prohibits a passenger from taking advantage of a favorable combination of local rates, he may elect to ride under the most favorable combination. *Brown v. Terre Haute etc., Traction Co.*, (1916) 63 Ind. App. 327, 110 N. E. 703, 113 N. E. 313; *Savannah Bureau of Freight and Transp. v. Charleston etc., R. Co.*, (1898) 7 I. C. C. Rep. 601; *Kurtz v. Pennsylvania Co.*, (1909) 16 I. C. C. Rep. 410; *Horton v. Erie R. Co.*, (1903) 86 App. Div. 379, 83 N. Y. S. 733.

Two foreign cases on questions similar to those in the instant case have decided that when a rule intended to prohibit the passenger from taking advantage of special local rates is incorporated as part of the contract for passage it is binding on the passenger. *London & Northwestern Ry. Co. v. Hinchcliffe*, [1903] 2 K. B. 32; *Davis v. Williamson*, (1900) 21 N. S. W. L. Rep. 124. In the United States, the obligation imposed upon shipper and carrier by the legal promulgation of a rate is superior to any contractual obligation entered into with reference to that rate. *Cleveland etc. R. Co. v. Alexandria Paper Co.*, supra. This is equally true for passengers. The Indiana court in reaching its decision has followed the decisions of the British courts.

The opinions in the English case and in the Australian case cited above, seem to consider that if the passenger remains for through passage on the same train, the question of his original intention to do so or not to do so is immaterial. This same idea is also expressed in *Brown v. Terre Haute, etc., Traction Co.*, supra, on rehearing, p. 347. The instant case might have been decided therefore without any reference to the intent of Wilcoxon to make a through journey.

COMMERCE—TELEGRAPH—GOVERNMENT CONTROL OF TELEGRAPH LINES —LIMITING LIABILITY FOR UNREPEATED MESSAGE.—Defendant contracted with plaintiff in Mississippi to send an interstate message, the contract

limiting to a refund of the price of transmission any liability on account of its being an unrepeated message. A state statute prohibited limitation of liability for negligence. The state court held the contract controlled by state law and hence void. On appeal to the United States Supreme Court, *Held* that the Act of Congress, June 18, 1910, brought within federal control the interstate business of telegraph companies and was an occupation of the field to the exclusion of state control, and hence state statutes prohibiting limitation of liability for negligence were invalid. *Postal Telegraph-Cable Co. v. Warren-Goodwin Lumber Co.,* (1919) 40 S. C. R. 69.

The usual contract made by a telegraph company provides that unless an additional fee is paid for having the message repeated recovery is limited to the price of the message. Prior to 1910 a majority of the states had held that such condition is a mere device to enable the company to avoid responsibility for its own negligence and hence contrary to public policy and void. *Western Union Telegraph Co. v. James,* (1896) 162 U. S. 650, 16 S. C. R. 934, 40 L. Ed. 1105; *Vermilye v. Western Union Telegraph Co.,* (1911) 207 Mass. 401, 93 N. E. 635. In that year the Interstate Commerce Act was amended to include telegraph, telephone and cable companies. *U. S. Comp. Stat.* 1916, sec. 8653. This amendment provides that all charges shall be just and reasonable and that messages may be classified into day, night, repeated, unrepeated, letter, commercial, press, government and such other classes as are just and reasonable and different rates charged for the different classes of messages. The holdings of the state courts have been in hopeless conflict as to whether this act is a taking over by the federal government of the field of liability for negligence of telegraph companies with respect to interstate messages. The courts of more than forty states had held that public policy opposed any such limitation of liability as provided for by the contract in the instant case and since 1910 many of these have decided that Congress by placing telegraph companies under the Interstate Commerce Act did not intend to set aside this policy and permit such companies to exempt them from liability for their own negligence. *Western Union Telegraph Co. v. Boegli,* (Ind. 1917) 115 N. E. 773; *Dickerson v. Western Union Telegraph Co.,* (1917) 114 Miss. 115, 77 So. 779. Thus it has very recently been held that refusal by a state to allow such limitation of liability for negligence is not an unlawful regulation of interstate commerce in the absence of Congressional action providing a different measure of liability from that established by the settled law of the state. *Bowman & Bull Co. v. Postal Telegraph-Cable Co.,* (Ill. 1919) 124 N. E. 851. As stated in *Western Union Telegraph Co. v. Bailey,* (1917) 108 Tex. 427, 196 S. W. 516, "There is no mention of the liability of such companies for negligence. . . . If it had been the purpose of Congress to legislate upon it, we think it would have done so in terms clear and unmistakable." The decision of the federal supreme court in the case of *Adams Express Co. v. Croninger,* (1912) 226 U. S. 491, 33 S. C. R. 148, 57 L. Ed. 314, was often quoted to support this view. There the court stated: "That a common carrier can not exempt itself from liability for its own negligence or that of its servants is ele-

mentary. . . . Nor can adherence to the common law principle which invalidated such a stipulation be viewed as a burden upon or interference with interstate commerce, or as being in conflict with the authority of the Interstate Commerce Commission over that subject, for, as before stated, the exemption does not come within the scope of the regulation of rates or of classification of messages, but is purely an attempt to contract against the general law of the land with respect to liability for negligence." It has been held, however, in accord with the weight of authority that the effect of the amendment of 1910 was to suspend all state regulations on the subject and all state common law doctrines pertaining thereto which are inconsistent with the rules obtaining in the federal courts. *Gardner v. Western Union Telegraph Co.*, (1916) 231 Fed. 405, 145 C. C. A. 399; *Western Union Telegraph Co. v. Lee*, (1917) 174 Ky. 210, 192 S. W. 70; Ann. Cas. 1918C 1033, note. Under this view the absence of specific federal regulation on any matter relating to interstate telegraph business was held indicative of a determination that no regulation should exist on such subject.

The decision in the instant case definitely settles this conflict and holds that the federal government has occupied the field with respect to the control of interstate telegraph business to the exclusion of state control. The court bases its decision on three grounds. In the first place the purpose of the act of 1910 was to establish equality and uniformity of rates and this purpose would not be accomplished if the telegraph company's contracts were subject to divergent state laws. Secondly, the power given to fix reasonable rates includes the right to fix rates for unrepeated messages and reasonably to limit responsibility when such rate is charged. This had previously been held not a limiting of liability for negligence but merely a reasonable adjustment of the charge for the service rendered to the duty exacted. *Primrose v. Western Union Telegraph Co.*, (1893) 154 U. S. 1, 14 S. C. R. 1098, 38 L. Ed. 883. Finally, since the act provides for the classification of messages into day, night, repeated, unrepeated, and others, "it would seem unmistakably to draw under the federal control the very power which the construction given below to the act necessarily excludes from such control."

COMMERCE—TELEGRAPH—INTRASTATE MESSAGE NOT RENDERED INTERSTATE BY TRANSMISSION THROUGH ANOTHER STATE—Defendant telegraph company, merely to evade liability under state law for negligence in the delivery of death messages, sent messages from one point in North Carolina to another point in the same state via a point in South Carolina, there being four more direct routes wholly within the state. In a suit for negligent delay, *held*, that defendant cannot by the use of this subterfuge make the transaction interstate and so subject, not to the state, but to the federal law of liability in such cases. *Watson v. Western Union Tel. Co.*, (N. C. 1919) 101 S. E. 81.

The decision is rested upon the authority of *Bateman v Western Union Tel. Co.*, (1917) 174 N. C. 97, 93 S. E. 467, L. R. A. 1918A 803, and *Speight v. Western Union Tel. Co.*, (N. C. 1919) 100 S. E. 351. The latter case went the extent of holding that where a message was trans-

mitted between two points in the same state, passing through points in another state, it was intrastate as matter of law, regardless of whether or not it was sent through another state to evade the state law. In the *Bateman Case* there was no direct line wholly within the state, the message being necessarily sent out of the state; the court held that if this was done in good faith it was an interstate message. The doctrine of the *Speight Case* seems to have been established in North Carolina by *Commissioners v. Western Union Tel. Co.*, (1893) 113 N. C. 213, 18 S. E. 389, 22 L. R. A. 570. But in that case the court relied on *Lehigh Valley R. Co. v. Pennsylvania*, (1892) 145 U. S. 192, 12 S. C. R. 806, 36 L. Ed. 672, which held that a state might lawfully levy a tax against transportation between two points in the same state, though it passed during carriage over state lines. This case was sharply distinguished and limited to the right to impose a tax, by *Hanley v. Kansas City So. Ry. Co.*, (1903) 187 U. S. 617, 23 S. C. R. 214, 47 L. Ed. 333, where it was also said that *Comrs. v. Tel Co.*, supra, went too far.

Commerce between two ports in the same state becomes interstate if the vessel navigates the ocean beyond a marine league from the shore. *Pac. Coast S. S. Co. v. Comrs.*, (1883) 9 Sawy. 253. For purposes of rate making a shipment of goods between two points in the same state, passing in transit through a portion of another state, is interstate commerce. *Hanley v. Kansas City So. Ry. Co.*, supra. And so under the Elkins Law as to rebates, *United States v. Delaware, etc., R. Co.*, (1907) 152 Fed. 270.

There are numerous decisions in the state courts holding either that commerce of this character is not interstate, *Comrs. v. Tel. Co.*, supra; *Seawell v. Kansas City, etc., R. Co.*, (1893) 119 Mo. 222, 24 S. W. 1002; *Campbell v. Chicago, etc., Ry. Co.*, (1892) 86 Ia. 587, 53 N. W. 351, 17 L. R. A. 443, or that it is nevertheless subject to state police control, *People v. Abrahamson*, (1913) 208 N. Y. 138, 101 N. E. 849. All of these cases, however, rely upon *Lehigh Valley R. Co. v. Pennsylvania*, supra, and fail to notice the limitations placed upon this case by *Hanley v. Kansas City So. Ry. Co.*, supra. Such commerce is held to be interstate by *Davis v. Tel. Co.*, (1918) 198 Mo. App. 692, 202 S. W. 292; *State v. Chicago, etc., Ry. Co.*, (1889) 40 Minn. 267, 41 N. W. 1047, 3 L. R. A. 238, 12 A. S. R. 730; *Hardwick Farmers' Elevator Co. v. Ry. Co.*, (1910) 110 Minn. 25, 124 N. W. 819, 19 Ann. Cas. 1088 (but see *State v. U. S. Express Co.* (1911) 114 Minn. 346, 131 N. W. 489, holding such commerce not interstate, with reference to gross earnings tax); *W. U. Tel. Co. v. Mahone*, (1917) 120 Va. 422, 91 S. E. 157, where it is said, "The Supreme Court of the United Staes, however, has made it plain that in determining such questions they will only consider the facts and not inquire as to motives."

CORPORATIONS—RIGHT OF STOCKHOLDERS TO INSPECT CORPORATE BOOKS AND RECORDS.—Plaintiff stockholder of defendant corporation, desiring to sell his stock placed it in the hands of his attorney, who offered the shares for sale to defendant's president. On latter's refusal to buy, plaintiff's attorney threatened to occasion expense and trouble by a vast,

laborious examination of all assets of defendant corporation. *Held,* plaintiff can not compel by mandamus the exercise of his statutory right to inspect corporate books where improper purpose is shown. *Lien v. Savings Loan & Trust Co.*, (N. Dak. 1919) 174 N. W. 621.

At common law the right of a stockholder of a corporation to examine its books and accounts is not absolute, but subject to implied qualifications, that the right be exercised for a proper purpose and at a proper time. *Matter of Steinway,* (1899) 159 N. Y. 250, 53 N. E. 1103; *Varney v. Baker,* (1907) 194 Mass. 239, 80 N. E. 524. An honest belief of mismanagement was sufficient to establish a proper purpose. Ibid. Today the common law is replaced nearly everywhere by statute. In many states, it is provided by statute that an absolute right of inspection be given the stockholder. According to Fletcher on Corporations, sec. 2815, by weight of authority, where the statute is mandatory, it is immaterial what the purpose of stockholder is, and mandamus issues as a matter of course. *Johnson v. Langdon,* (1902) 135 Cal. 624, 67 Pac. 1050; *Cincinnati Volksblatt Co. v. Hoffmeister,* (1900) 62 Oh. St. 189, 56 N. E. 1033. For notes, see: 45 L. R. A. 446; 20 L. R. A. (N.S.) 185; 42 L. R. A. (N.S.) 332; and 107 Am. St. Rep. 674. Thus it matters not that the object of stockholders is to obtain information to aid a rival business. *Schmidt v. Anderson,* (1915) 29 N. D. 262, 150 N. W. 871. The instant case expressly overrules the latter decision and reads into the statute the qualification that the right of inspection can not be exercised for an improper purpose. Apparently any purpose is improper where such inspection would result injuriously to the interests of the corporation. *People ex. rel. Britton v. American Press Ass'n.,* (1912) 133 N. Y. S. 216 and 1138, 149 App. Div. 917 holds that though right of inspection is absolute, mandamus is a discretionary remedy, and it will not issue where purpose is improper. Other courts recognize the qualification, by way of dicta, that inspection should not be demanded out of idle curiosity. *Stone v. Kellogg,* (1897) 165 Ill. 192, 46 N. E. 222; *Foster v. White,* (1888) 86 Ala. 467, 6 So. 88. Other states like Minnesota impose express restrictions upon the right of inspection, to-wit: that "All such books and records shall at all reasonable times and for all proper purposes be open to inspection of every stockholder." G. S. Minn. 1913, Sec. 6183. It has accordingly been held that where purpose was to obtain information with which to prosecute a claim against the corporation, the purpose was proper. *Humphrey v. Monida & Yellowstone Stage Co.* (1910) 110 Minn. 193, 124 N. W. 971, 125 N. W. 676. On basis of authority, the instant case is in the minority, but in principle it is correct; for while the object of the statute giving an absolute right of inspection is to insure protection of the rights of the minority stockholders, yet to grant it when injury to the corporation will result can hardly have been within the contemplation of the legislature.

EQUITY—STATUTE OF LIMITATIONS—LACHES—STALE CLAIMS.—Plaintiff brought his suit in federal court to enforce as upon an express trust an accounting of an improvement fund, some seventeen years after an open repudiation of the trust. During this time he brought one suit

which he did not prosecute, and made some attempts to negotiate a settlement of his claim. Claim would have been barred by local statute of limitations in ten, if not in six, years. *Held*, that federal courts of equity are not bound by state statutes of limitation, but are guided by them in determining their action on stale claims. The delay in this case was fatal to the maintenance of the suit. *Benedict v. City of New York*, (1919) 250 U. S. 321, 39 S. C. R. 476.

It is generally held that federal courts of equity are not bound by state statutes of limitations. *Etting v. Marx's Executor*, (1880) 4 Fed. 673, 4 Hughes 312; *Chewett v. Moran*, (1883) 17 Fed. 820; *Bisbee v. Evans*, (1883) 17 Fed. 474; *Kirby v. Lake Shore, etc., R. Co.*, (1887) 120 U. S. 130, 138, 30 L. Ed. 569, 7 S. C. R. 430, 434, where the court says: "The equity jurisdiction of the courts of the United States cannot be impaired by the laws of the respective states in which they sit." The rule is the same in admiralty courts. *The Key City*, (1872) 14 Wall. (U. S.) 653, 20 L. Ed. 896.

But the rule is not based on the peculiarities of federal jurisdiction. Federal courts in common law actions give effect to state statutes of limitation. *Leffingwell v. Warren*, (1862) 2 Black (U. S.) 599, 17 L. Ed. 261; *Michigan Ins. Bank v. Eldred*, (1889) 130 U. S. 693, 32 L. Ed. 1080, 9 S. C. R. 690. At the same time courts of equity generally do not consider themselves bound by statutes of limitation, in cases where the jurisdiction of equity is exclusive. *Evans v. Moore*, (1910) 247 Ill. 60, 93 N. E. 118, 139 A. S. R. 302; *Neppach v. Jones*, (1891) 20 Ore. 491, 23 A. S. R. 145. The reason is that the statutes by their terms cover only legal remedies, and the statute is purely legal and not an equitable defence. *Thorndike v. Thorndike*, (1892) 142 Ill. 450, 32 N. E. 510, 34 A. S. R. 90, 21 L. R. A. 71. So it is nowhere questioned that statutes of limitation apply to equitable proceedings wherever the distinctions between legal and equitable actions no longer exist. *Patterson v. Hewitt*, (1904) 195 U. S. 309, 49 L. Ed. 214, 25 S. C. R. 35. Where the jurisdiction of law and equity is concurrent, a suit in equity will be barred if an action at law would be. *United States Bank v. Daniel*, (1838) 12 Pet. (U.S.) 30, 9 L. Ed. 989. And in cases where the jurisdiction is purely equitable, the court will frequently act on the analogy of the statute of limitations. *Layton Co. v. Church & Dwight Co.*, (1910) 182 Fed. 35, 104 C. C. A. 475, 32 L. R. A. (N.S.) 274; and cases cited in the instant case. But the court will not consider itself bound to apply the statute even by analogy where it would be inequitable to do so. *Stevens v. Grand Central Min. Co.*, (1904) 133 Fed. 28, 67 C. C. A. 284.

EVIDENCE—SUFFICIENCY TO SHOW FORGERY IN CIVIL ACTION.—Upon a bill in equity to avoid a deed on the ground of forgery, the lower court found the fact of forgery to have been made out by "a preponderance of the testimony," and granted the relief. *Held*, that a mere preponderance of the evidence is not sufficient to establish forgery in a civil action, but it must be "full, clear, and convincing." *Colby v. Richards*, (Me. 1919) 107 Atl. 867.

This has been a somewhat mooted question, but it is now settled by the large weight of authority that a preponderance of the evidence is sufficient in a civil action such as this, regardless of the fact that there is involved the proof of facts which might be made the basis of a criminal charge. *Jones, Stranathan & Co. v. Greaves,* (1875) 26 Ohio St. 2, 20 Am. Rep. 752; *Aetna Ins. Co. v. Johnson,* (1875) 11 Bush. (Ky.) 587, 21 Am. Rep. 223; *Blackmore v. Ellis,* (1904) 70 N. J. Law 264, 57 Atl. 1047; *Welch v. Jugenheimer,* (1881) 56 Ia. 11, 8 N. W. 673, 41 Am. Rep. 77, overruling *Barton v. Thompson,* (1877) 46 Ia. 30, 26 Am. Rep. 131; *Hale v. Matthews,* (1888) 118 Ind. 527, 21 N. E. 43; *Kurz v. Doerr,* (1904) 180 N. Y. 88, 72 N. E. 926, 105 A. S. R. 716, 2 Ann. Cas. 71 and note. A few courts still hold to the contrary rule that the offense must be proved beyond a reasonable doubt. *McInturff v. Ins. Co.,* (1910) 248 Ill. 92, 93 N. E. 369, 140 A. S. R. 153, 21 Ann. Cas. 176. It is held in Minnesota that a preponderance of the evidence is enough in a civil action to prove a charge involving criminality. *Thoreson v. Northwestern Ins. Co.,* (1882) 29 Minn. 107, 12 N. W. 154.

Some courts take the view that such evidence need not prove beyond a reasonable doubt, but that it must overcome the presumption of innocence. *Welch v. Jugenheimer,* supra; *Klipstein v. Raschein,* (1903) 117 Wis. 248, 94 N. W. 63. This may have been all that the Maine court intended to hold in the instant case. See *Palmer v. Blanchard,* (1915) 113 Me. 380, 94 Atl. 220, Ann. Cas. 1917A 809. But this view is open to the objection that "the presumption of innocence is not indulged in a civil action, as the plaintiff rests only under the burden of proving his case by a preponderance of the evidence." *Kurz v. Doerr,* supra.

EXECUTOR'S RIGHT TO ATTORNEY'S FEES—UNSUCCESSFUL ATTEMPT TO MAINTAIN LEGACIES OF VALID WILL.—Curtis Pettit nominated plaintiff trust company executor and trustee in his will in which he bequeathed and devised to plaintiff most of his property upon trust "to hold, manage and control during life of his wife, their daughter, her husband and their three children and for twenty years after the death of the survivor of them." Will was admitted to probate and probate court made decree adjudging these provisions of will invalid. Executor appealed from that part of the order giving the daughter two-thirds of estate, which order was affirmed in 135 Minn. 413. Executor filed supplement to final account asking credit for counsel fees and legal services in connection with appeals prosecuted from the decree of distributon. *Held,* plaintiff could not recover, two justices dissenting. *Minnesota Loan and Trust Co., v. Pettit,* (Minn. 1919) 175 N. W. 540.

Dibell and Hallam, J. J., dissenting, point out that the will makes provision for beneficiaries not yet in being, who must be protected by the executor or not protected at all.

For discussion see note, page 282.

JOINT ADVENTURES—PURCHASE OF PROPERTY—SECRET ADVANTAGE SECURED BY ONE THROUGH FRAUDULENT COLLUSION WITH VENDOR—RESCISSION OF CONTRACT OF PURCHASE.—Vendor agreed with four purchasers

to sell them the undivided four-fifths of a mine for $20,000. Part of the price was represented by the note of A, one of the associates, for $7,500 which, as well as the balance of $12,500, was payable out of the profits. The associates were to expend at least $15,000 in improvements. The venture failed after the expenditure of over $30,000 by purchasers B, C and D. Alleging a secret agreement between vendor and A, that if the operation of the mine did not produce sufficient profits to enable A to pay his note within two years he should have the right to reconvey to vendor his one-fifth interest and have back his note. B, C, and D sue the vendor for rescission of the contract and for the recovery of the amount of their expenditures for improvements. On demurrer, the complaint is held to state a cause of action. *Menefee et al. v. Oxnam*, (Cal. 1919) 183 Pac. 379.

The short ground of the decision is that the secret agreement between the vendor and A was a fraud upon his co-adventurers which entitled them to rescind their contract of purchase and to a return of all that they had paid out pursuant to contract and the amount of their permanent improvements. This theory as a basis for rescission in turn rests upon the principle that the rights of joint adventurers inter se are governed by the rules fixing the rights of partners, and that the duty of faithful dealing exacted of fiduciaries is therefore due their fellows in adventure. Participation by a third person in a transaction by which a joint adventurer gets a secret advantage over his associates in such fraud as entitles them to the relief granted.

This view of the relation of joint adventurers was not the rule of the common law. Story, Partnership, 7th ed. Sec. 30. *Coope et al v. Eyre*, (1788) 1 H. Bl. 37; *Hourquibie v. Girard*, (1808) 2 Wash. (U. S. C. C.) 212. Co-adventurers were recognized in the courts only when the elements of partnership were proved. Gaynor, J. in *Goss v. Lanin*, (1915) 170 Ia. 57, 61, 152 N. W. 43, 45. There once existed in England, however, when the law of partnership was in a formative stage, a relation called partnership as to third persons, which arose by operation of law and which was neither a true partnership nor a partnership based on estoppel. This doctrine was first distinctly enunciated in *Waugh v. Carver*, (1793) 2 H. Bl. 235, where the rule was stated that those who shared the profits of a business should be liable as partners to third persons for debts incurred in the business. It is important to notice that this is quite a different rule of law from that laid down in the instant case, where the community of interest in the profits gave rise to a relation inter se upon which to predicate constructive fraud by reason of collusion of one of the co-adventurers with a third party.

The doctrine of *Waugh v. Carver* was overthrown in England by the case of *Cox v. Hickman*, (1860) 8 H. L. C. 268; see the judgment of Blackburn, J. in *Bullen v. Sharp*, L. R. 1 C. P. 86, 108, 35 L. J. C. P. 105; and never met with any considerable favor in America. Cooley, J. in *Beecher v. Bush*, (1881) 45 Mich. 188, 200, 7 N. W. 785; *Eastman v. Clark*, (1873) 53 N. H. 276, 16 Am. Rep. 192. But see contra, *Smith v. Wright*, (1854) 4 Abb. App. (N. Y.) 274, 1 Abb. Prac. 243; *Leggett v. Hyde*, (1874) 58 N. Y. 272, 47 How. Prac. 524; *Leeds v. Townsend*, (1907) 228 Ill. 451, 81 N. E. 1069; *Wessels v. Weiss*, (1895) 166 Pa.

St. 490, 31 Atl. 247; *Steele v. Michigan Buggy Co.*, (1911) 50 Ind. App. 635, 95 N. E. 435; *Bacon v. Christian*, (1916) 184 Ind. 517, 111 N. E. 628. In its stead intention of the parties came to be recognized as the true test. *Meehan v. Valentine*, (1890) 145 U. S. 611, 12 S. C. R. 972, 36 L. Ed. 835; *Foley v. McKinley*, (1911) 114 Minn. 271, 131 N. W. 316; *Uniform Partnership Act*, (adopted by the National Conference on Uniform State Laws 1914) sec. 7, sub-d. 4. And the passage of the Uniform Partnership Act in the three leading jurisdictions which persistently clung to the profit sharing test has modified it even there to mere prima facie evidence of a partnership. Pa. Laws 1915 No. 15 Part 2 sec. 6 sub-d. 4 N. Y. Laws 1919 Ch. 408 sec. 11 sub-d. 4. Illinois adopted the act in 1917. Proceedings Twenty-seventh Annual Conference on Uniform State Laws, 1917.

It was nevertheless a doctrine which must have influenced our courts when questions arising out of joint adventures came up. As a principle of natural justice mutuality of burden and benefit still commends itself, though the law of partnership must logically exclude it. *Eastman v. Clark*, supra. At all events the tide of our decisions, while opposing partnership liability in favor of third persons merely because co-adventurers were to share in the profits of their venture, has set strongly in favor of the application of rules of partnership liability to the relationship existing between co-adventurers inter se. *Calkins v. Worth*, (1905) 215 Ill. 78, 74 N. E. 81; *Stone v. Wright Wire Co.*, (1908) 199 Mass. 306, 85 N. E. 471; *Church v. Odell*, (1907) 100 Minn. 98, 110 N. W. 346; *Irvine v. Campbell*, (1913) 121 Minn. 192, 141 N. W. 108, Ann. Cas. 1914C 689. *Wilcox v. Pratt*, (1890) 125 N. Y. 688, 25 N. E. 1091; *Selwyn & Co. v. Waller*, (1914) 212 N. Y. 507, 106 N. E. 321, reversing 160 App. Div. 725, 146 N. Y. S. 7, which affirmed 142 N. Y. S. 1051.

It is worth noticing that all these cases and those relied on by the court in the instant case were actions between the co-adventurers for some breach of the fiduciary relation into which they are held to have entered. See especially *Church v. Odell*, supra. The principal case carries the law one step farther in imposing upon third persons a liability derived from the fiduciary relationship of the parties affected. In effect it raises a constructive trust in favor of B, C and D and against the vendor of the mining property who received their contract,—the trust res—under a collusive agreement with A, whom they had entrusted with the right to procure the contract for the four. The case of *Merritt v. Joyce*, (1912) 117 Minn. 235, 135 N. W. 820, where a constructive trust was imposed on mining property obtained by one joint adventurer through secret purchase of an option in the hands of a stranger, is a suggestive analogy. In thus affording to co-adventurers the protection against fraud given to stockholders, partners, and constructive cestuis que trustent, a commendable advance has been made in the law.

JUDGES—DISQUALIFICATION—STOCKHOLDER.—Application was made for a writ to prohibit a judge of the superior court from trying a cause against a corporation on the grounds that he was disqualified under the code which provided that "no judge shall sit in any proceeding to which he is

a party or is interested, or when he is related to any party, or to an officer of a corporation which is a party," because his wife was a stockholder in the corporation, and, where, although not alleged in the petition, the judge had been a stockholder in the corporation and under the constitution was still directly liable for its debts. *Held*, the judge was not disqualified. *Favorite v. Superior Court of Riverside County*, (Cal. 1919) 184 Pac. 15.

This case follows the general rule that a stockholder of a corporation is not a "party" to a suit to which the corporation or its directors are actual parties, and consequently a judge is not disqualified by reason of relationship to such stockholder. 15 R. C. L. 533; 15 Ann. Cas. 533. The statute confines the disability to the relatives of the parties and a stockholder, in a legal sense, is not a party to the suit. *Searsburgh Turnpike Co. v. Cutler*, (1834) 2 Vt. 315. Legally speaking the above rule is correct and is the majority holding, but looking at the actual interests of the parties the rule may be considered technical. It has been held that in the absence of a statute, although the wife is not a party she is interested and the husband, because he will fall heir to part of her property upon her death, is indirectly interested, enough so that the combined interest of the wife as a stockholder and the indirect interest of the husband would disqualify the husband as judge in a case where the corporation is a party. *First Nat. Bank v. McGuire*, (1899) 12 S. D. 226, 80 N. W. 1074, 76 A. S. R. 598, 47 L. R. A. 413. It is generally held that a judge is disqualified if he is a stockholder in a corporation which is a party to the action before him. *Colcord v. Young*, (1893) 31 Fla. 594, 12 So. 673, 34 A. S. R. 41, 19 L. R. A. 636; *Gregory v. Cleveland, etc., R. Co.*, (1855) 4 Ohio St. 675; *Dimes v. The Proprietors of the Grand Junction Canal*, (1852) 3 H. L. Cas. 759, 10 Eng. Rep. 301.

The instant case raises the question—although not directly because of a lack of an allegation in the petition—whether a judge would be disqualified who had been a stockholder, and had disposed of his stock, but was still liable, directly, for the debts of the corporation. Looking at the case from the business point of view, it seems quite plain that the judge retains a disqualifying interest in the corporation and its affairs. The instant case indicates, however, a contra view. In Minnesota the law is clear that a stockholder cannot escape his constitutional liability by a transfer of the stock to another person after the debt has been incurred. *Gunnison v. U. S. Investment Co.*, (1897) 70 Minn. 292, 73 N. W. 149; *Tiffany v. Giesen*, (1905) 96 Minn. 488, 105 N. W. 901; *Way v. Mooers*, (1917) 135 Minn. 339, 160 N. W. 1014. The action against the stockholder accrues so as to set the statute of limitations running, when the the corporation is declared insolvent and a receiver appointed to wind up its affairs. *Shearer v. Christy*, (1917) 136 Minn. 111, 161 N. W. 498. In the case of banking corporations the double liability "shall continue for one year after any transfer or sale of stock by any stockholder or stockholders," const. art. 9, sec. 13, (3). This means one year after the stock has been transferred from his name on the records of the bank; if within the year the bank becomes insolvent, and proceedings are instituted to sequestrate its property, the right of the creditors to enforce

his liabiliy becomes complete, and action may be brought by the receiver at any time within six years thereafter. *Hunt v. Doren,* (1904) 92 Minn. 423, 100 N. W. 222; *Harper v. Carroll,* (1895) 62 Minn. 152, 64 N. W. 145, s. c. (1896) 66 Minn. 487, 69 N. W. 610. In all other corporations there is no one-year preliminary period for fixing liability, so an action could be brought against a person who had been a stockholder, but had sold his stock, for all unpaid debts incurred by the corporation while he was a stockholder and the limitation period would be six years after the corporation was declared insolvent and a receiver appointed. *Shearer v. Christy,* supra. This personal liability should disqualify a judge from hearing a case where the corporation in which he was a stockholder is a party, if the statute has not completely run in his favor.

LANDLORD AND TENANT—ESTOPPEL—RIGHT OF TENANT TO SET UP ACQUIRED TITLE AS DEFENCE TO SPECIFIC PERFORMANCE BY LANDLORD.—Wood was tenant at will of Wise. Plaintiff made an oral contract, voidable by the statute of frauds, for purchase from Wise. Wood then took a lease for a term from plaintiff. On learning that the contract of sale was voidable, Wood bought the land of Wise, taking a deed which was recorded. In a suit by plaintiff for the specific performance of the contract, in which Wood and Wise are joined as defendants, *Held,* that Wood is not precluded from setting up his acquired title against that of his landlord, this not being an action for use and occupation, but one in which the title is in issue. *Hambey v. Wood,* (Cal. 1919) 184 Pac. 9.

It is an elementary general rule that a tenant cannot dispute his landlord's title. *Hoen v. Simmons,* (1850) 1 Cal. 119, 52 Am. Dec. 291; *Jackson v. Rowland,* (1831) 6 Wend. 666, 22 Am. Dec. 557; *Beck v. Minn. etc. Co.,* (1906) 131 Ia. 62, 107 N. W. 1032, 7 L. R. A. (N.S.) 930. But where the lessor seeks not only to recover the possession, but also seeks by the action a decree which will settle the title, the tenant is not estopped to deny any right claimed by the lessor greater than that of possession. *Jochen v. Tibbells,* (1883) 50 Mich. 33, 14 N. W. 690; *McKie v. Anderson,* (1890) 78 Tex. 207, 14 S. W. 576; *Stevenson v. Rogers,* (1910) 103 Tex. 169, 125 S. W. 1, Ann. Cas. 1912D 99, with note. If this were not the rule, a title in fee might be obtained by an unwarrantable extension of estoppel.

OFFICERS—PERSONAL LIABILITY FOR NEGLIGENCE IN PERFORMANCE OF MINISTERIAL ACTS—INDEPENDENT CONTRACTOR.—Defendants, R. S. and S. acting as members of a school board authorized the celebration of a school field day. They directed the fourth defendant, F., their clerk, to make the necessary arrangements including the erection of a tier of seats. F. hired one P. to construct the seats. P. was an independent contractor. Plaintiff was injured when the seats fell in consequence of their negligent construction. No inspection had been made until after the accident when the negligent workmanship was discovered. *Held,* that in the performance of the acts in preparation for the event the defendant's duties were ministerial and for negligence therein they may be liable in

damages even though the acts were performed by an independent contractor. *Adams v. Schneider,* (Ind. 1919) 124 N. E. 718.

A decision that school board members or other public officers may be personally liable for injuries growing out of such an entertainment, even though the negligence through which it occurred is directly attributable to an independent contractor seems rather startling, but appears to be based upon accepted legal principles. That officers with both discretionary and ministerial duties may be personally liable for damages from the negligent performance of the latter, seems well settled. *Olmstead v. Dennis,* (1879) 77 N. Y. 378; *Tearney v. Smith,* (1877) 86 Ill. 391; *Newell v. Wright,* (1861) 3 Allen (Mass.) 166, 80 Am. Dec. 63; *McCord v. High,* (1868) 24 Ia. 336. The general rule is that the employer is relieved from liability when the negligent or wrongful acts were done by an independent contractor, *Salliotte v. King Bridge Co.,* (1903) 122 Fed. 378, 58 C. C. A. 466; see note 65 L. R. A. 620. To this rule however there are several well settled exceptions. First, where the employer's own act is the proximate cause of the injury he cannot shift liability to an independent contractor. Under this head comes the hiring of an incompetent contractor, the active interference with the work by the employer, and the ratification of the contractor's torts or negligent acts by the employer. *Ice Machine Co. v. Kiefer,* (1890) 134 Ill. 481, 25 N. E. 799, 10 L. R. A. 696; *St. Louis, etc., R. Co. v. Madden* (1908) 77 Kan. 80, 93 Pac. 586, 17 L. R. A. (N.S.) 788; see note, 66 L. R. A. 941. Second, where injuries naturally follow as a direct result of the work contracted for, the employer is liable even though the work be done by an independent contractor. *McHarge v. Newcomer,* (1906) 117 Tenn. 595, 100 S. W. 700, 9 L. R. A. (N.S.) 298. Included under this are the cases where the work is illegal, or where the work as ordered would necessarily result in an act of trespass. *Southern Ry. Co. v. Lewis,* (1910) 165 Ala. 555, 51 So. 746, 138 A. S. R. 77; *Chicago v. Murdock,* (1904) 212 Ill. 9, 72 N. E. 46; see note, 65 L. R. A. 742. Third, where the work is dangerous unless certain precautions are observed, the employer cannot shift responsibility for observing these precautions upon an independent contractor. Under this head come the cases where the work is inherently dangerous, as blasting operations, etc., *Chicago v. Murdock,* supra, or where it would be a nuisance if done in the ordinary manner, *Sturges v. Theological Education Society,* (1881) 130 Mass. 414, 39 Am. Rep. 463; *Boswell v. Laird,* (1857) 8 Cal. 469, 68 Am. Dec. 345, or where the work done is such that it may render the premises dangerous to invitees, work done in preparations for exhibitions or in giving them forming the bulk of the cases in this class, *Conradt v. Clauve,* (1883) 93 Ind. 476, 47 Am. Rep. 388; *Wodnick v. Luna Park Amusement Co.,* (1912) 69 Wash. 638, 125 Pac. 941, 42 L. R. A. (N.S.) 1070; *Richmond, etc., Ry. Co., v. Moore,* (1897) 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; see note, 65 L. R. A. 833. Fourth, the liability cannot be shifted to an independent contractor where the injuries result from the non-performance of some absolute duty of the employer. Under this exception come the cases where there is a duty to comply with a statute or ordinance, or cases which involve the duty of a municipality to keep roads in repair, *Woodman v. Metropolitan R. R.*

Co., (1889) 149 Mass. 335, 21 N. E. 482; *Springfield v. Le Claire*, (1869) 49 Ill. 476; also in cases of invitees there is a duty to see that the premises are safe, *Montgomery St. Ry. Co. v. Smith*, (1905) 146 Ala. 316, 39 So. 757; *Thompson v. Lowell, etc., R. Co.*, (1898) 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345; *Peerless Mfg. Co. v. Bagley* (1901) 126 Mich. 225, 85 N. W. 568, 53 L. R. A. 285; *Corrigan v. Elsinger* (1900) 81 Minn. 42, 83 N. W. 492; see note, 66 L. R A. 119.

The instant case might fall within either the third or fourth exceptions. The work that was done was in its nature dangerous unless precautions were taken, and there was a clear duty owed by the defendants to the plaintiff and the invited public to see that the stands were safe. "Where the employer owes certain duties to third persons or the public . . . he cannot relieve himself from liability, . . . by committing the work to a contractor." *Montgomery St. Ry. v. Smith*, supra.

TAXATION SHARES OF STOCK OF NATIONAL BANK—PERSONAL JUDGMENT WITHOUT NOTICE AGAINST STOCKHOLDERS—NON-RESIDENT STOCKHOLDERS.—In 1915 the Security National Bank of Minneapolis sold its assets to the First National Bank, and as part of the agreement the stockholders of the former were to surrender their shares of stock to a receiver and receive new stock of the First National Bank. On May 1st 1915 the stock of the Security National was still outstanding and was assessed to that bank which was held not liable in *State v. Security National Bank*, (1918) 139 Minn. 162, 165 N.W. 1067. Upon the production of the list of stockholders the court on second trial ordered personal judgment against each of them for a proportion of the tax without any notice to any stockholder. Some stockholders appear specially, moving for vacation of the judgment. *Held*, judgment was void for want of jurisdiction. *State v. Security National Bank*, (Minn. 1919) 173 N.W. 885.

A tax of this kind is not a tax upon the bank, for a state has no power to tax national banks upon their capital stock. *Bank v. Commonwealth*, (1869) 9 Wall. (U.S.) 353, 19 L. Ed. 701; *Owensboro National Bank v. Owensboro*, (1898) 173 U. S. 664, 19 S. C. R. 537, 43 L. Ed. 850; *State v. Security National Bank*, (1918) 139 Minn. 162, 165 N. W. 1067. Nor is it a tax in rem, against the property, but instead is one in personam against the stockholder. *State v. Eberhard*, (1903) 90 Minn. 120, 95 N.W. 1115; *State v. Barnesville Bank*, (1916) 134 Minn. 315, 159 N. W. 754; *State v. Security National Bank*, supra. See 3 MINNESOTA LAW REVIEW 257. It is provided by statute in Minnesota that "The stock of every bank . . . shall be assessed and taxed in the town, city or village where such bank . . . is located . . . in the name of the bank." Sec. 2018 G. S. Minn. 1913. Sec. 2021 provides in addition: "To secure the payment of taxes on . . . bank stock . . . every bank . . . shall before declaring any dividend, deduct from the annual earnings of the bank such amount as may be necessary to pay any taxes levied upon the shares of the stock, and such bank . . . or officers thereof shall pay the taxes, and shall be authorized to charge the amount

of such taxes paid to the expense account of such bank." On the first trial of the instant case it was decided that on the basis of this latter section the bank was not liable for the tax on the ground that a bank is liable to pay taxes levied on its stock only out of earnings, or at least out of assets of some sort, belonging to the stockholders and in the hands of the bank, and that this bank, having quit business March 27, had distributed among its stockholders its entire assets before the tax was actually "levied" upon the stock. In so holding the court followed the rule adopted in *State v. Barnesville National Bank,* (1916) 134 Minn. 315, 159 N. W. 754, that where the bank is insolvent and in the hands of a receiver, and has no earnings or unpaid dividends due the stockholders the bank cannot be compelled to pay the tax. In the instant case, the state, finding it impossible to collect the tax from the bank, seeks to obtain judgment against the stockholders personally without any personal service of summons upon them, but the court holds that personal notice is essential to due process and service upon the bank is not sufficient. The reason of this decision applies equally to resident and to non-resident stockholders. The court expressly leaves untouched the question as to what methods are open to the state to enforce the tax in a case such as this. A personal judgment against resident stockholders upon proper citation seems unquestionably good, but such service is impossible against non-residents. Some words in the opinion in *State v. Barnesville National Bank,* supra, seem to leave the state without remedy: "If the tax be not paid, and become delinquent, and the usual procedure be adopted in the collection of the same, no jurisdiction can be acquired over the non-resident, and as to him the proceeding must fail, leaving the resident stockholder alone liable." But there appears to be no good reason why the state may not enforce the personal obligation of the non-resident owner of bank stock to pay taxes thereon, securing jurisdiction by attachment of the stock. *Tappan v. Bank,* (1873) 19 Wall. (U.S.) 490, 499, 22 L. Ed. 189; see G. S. Minn. 1913, Sec. 2083; *Lavell v. Bullock,* (N. D. 1919) 174 N. W. 764. That Congress expressly authorized the taxation of non-resident stockholders at the city or town where the bank is located is clear from the National Banking Act, 15 Stat. at Large, 34; *Tappan v. Bank,* supra. If the stock has a special situs for taxation at that place, it must have the same situs for the purpose of attachment, when the attachment is for the purpose of enforcing taxation. An attachment of the shares would reach not only earnings and dividends, but the shareholders' interest in a bank which had no earnings. It is hardly conceivable that the state intended to leave untaxed the shares of banks which do not make earnings or which have distributed them among the stockholders. The court in the instant case says, "We do not think the statute evinces such an intention." Although the tax law makes no express provision for acquiring jurisdiction of non-resident stockholders by means of attachment, yet in cases where the bank has no earnings but the stockholder has interests in the bank, attachment may perhaps be successfully resorted to by the state as well as by any other creditor. For a discussion of the taxation of stockholders' interest as distinct from the property of the bank, see 3 MINNESOTA LAW REVIEW 257.

MINNESOTA LAW REVIEW

VOL. IV APRIL, 1920 No. 5

FUTURE INTERESTS IN PROPERTY IN MINNESOTA

II[1]

A. IN REAL PROPERTY, AT LAW.

THE statutes of Minnesota have had little effect on the future possibilities, interests, or estates in real property which are peculiar to the grantor. Possibilities of reverter, rights of re-entry for condition broken, and reversions have generally the characteristics, incidents, and restrictions of the American common law, or, indeed, of the English common law.[2] Future possibilities, interests, and estates to others have, on the other hand, been greatly changed by the statutes.[3] For the common law remainders, future uses and devises the statutes have substituted a "future estate" which is scarcely recognizable as a descendant of common law ancestors. There is still, however, a relationship between the old and the new. The change has not been great enough to dispense with a knowledge of these interests as they were at the common law.[4] A real knowledge of the statutory future estate requires a knowledge of future interests as they have been. The very terms of the statutes can only be understood in the light of the conditions which they were intended to change; and where the statutes are silent the common law continues to speak. The aim of this article is to outline these inter-

[1] This article, while complete in itself, is a continuation of an earlier article in 3 MINNESOTA LAW REVIEW 320.

[2] 3 MINNESOTA LAW REVIEW 327-341.

[3] For the source of the statutory provisions see 3 MINNESOTA LAW REVIEW 320 et seq.

[4] Fowler, Real Property Law of the State of New York 3.

ests as they were at the American common law, that is, under the English common law and the amendatory English statutes,[5] and to show the effect upon them of the Minnesota statutes.

Future Interests under the English Common Law before 1536. *Remainders.*—By the English common law, the only future interest in real property that could be limited to a stranger was a remainder.[6] Not every limitation was a remainder. To be a remainder it must have certain qualities, and unless it had these qualities, it was void. The necessity of these qualities arose from the mode of conveyance and the rules of seisin.

Prior to 1536, the normal mode for limiting legal freehold interests, present or future, was livery of seisin. For A to convey a fee simple estate to B he must take B upon, or near to, the land, and there make a symbolic delivery of the seisin to him. The act was accompanied by a deed of feoffment but the livery was the significant and effective part of the ceremony, without which no title passed.[7]

Seisin was the possession of a freehold interest in land by oneself or his tenant. The rules of feudal tenure required that there be always someone seised of the land to meet adverse claims to it, and to render the services due to the lord of whom the land was held. For these reasons the seisin must never be in abeyance.

The seisin transferred by the livery might be appropriated to a number of successive estates. But the seisin for all must be delivered at one time. Furthermore the nature of the act required that it be delivered presently.[8] A freehold estate could not be created to begin in futuro, as to C, to take possession after the death of A. The livery was made to the first tenant for himself and for those to follow him in the possession, as to B for life, and after his death to C and his heirs. There had consequently to be a present or particular estate created at the same time with the future estate, and this is the first rule governing the creation of remainders.

The livery to B would not support a broken series of estates. It must be possible for each successive estate to become an estate in possession the moment the prior estate ended. If an

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[5] Dutcher v. Culver, (1877) 24 Minn. 584, 617.
[6] Leake, Property in Land 33; Tiffany, Real Property 278.
[7] Co. Lit. 48a; Leake, Property in Land 35; Challis, Real Property 48, 107, 397; Tiffany, Real Property, 848.
[8] Challis, Real Property 105.

interval elapsed the seisin transferred by the livery would be in abeyance. The seisin during the interval would be in the grantor and the future limitation would have to take effect out of his seisin and would be open to the objection that, looking from the date of the livery, the estate was to begin in futuro. So on a conveyance to B for life, and one day after his death to C and his heirs, the limitation to C was void. For a future limitation to be a remainder it must be capable of taking effect in possession immediately the prior estates end.

There was no restriction on the number of remainders that could be created out of the fee. There might be any number of life estates, or estates tail, with or without an ultimate remainder in fee. The tenants took in strict succession to each other, and the seisin of all together made up the seisin of the fee transferred by the livery. But a limitation that was to take effect in derogation of a prior estate was not a remainder. The seisin given to one could not be limited to shift to another upon some event. The second limitation was thought repugnant to the first, and partook of the nature of a limitation to begin in futuro. In a conveyance to B for life, or in fee, but unless within a year B pays C £100, to C, the limitation to C was void. The familiar rules that a condition could not be made in favor of a third party, that a fee could not be mounted upon a fee, and that no remainder could be limited after a fee simple, were particular applications of this general rule. A remainder must be limited to take effect upon the termination of the precedent estate, and not in abridgment of it.

That a limitation might be a remainder, then, it had to be limited by the same act of conveyance that created a present estate, to begin immediately on the termination of the prior estate and not in derogation of it. These qualities, arising from the combined operation of the mode of conveyance and the rule of seisin, still characterize remainders under the American common law and distinguish them from the other future interests which became possible after 1536.[9]

Future Interests introduced by the Statutes of Uses (1536)—*Springing and Shifting Uses.*—Down to 1536 the system of limitations at law was restricted and simple. There could be no other interests limited to strangers but present estates and remainders.

[9] Challis, Real Property 81 et seq.; Leake, Property in Land 28, Tiffany, Real Property 274 et seq.

But for a century[10] there had been developing another system of limitations in equity superimposed upon the system at law. This was the system of uses, the prototype of the modern trust. The legal title was in one, known as the feoffee to uses, and the use, the equitable title, was in another, the cestui que use.

There were several reasons for the origin of uses. Statutes of mortmain had restricted the holding of lands by the church. The statutes were evaded by giving the lands to a feoffee to the use of the church. Legal estates were forfeited for treason, but the use was not forfeitable. The legal title was not devisable, but the use was. They could be created without ceremony and there was greater freedom in limiting them than in limiting legal estates.

There were two general methods for raising uses, (1) by transmutation of possession, and (2) without transmutation of possession.[11] (1) A might convey the legal title to B to the use of A himself or to the use of C. The legal title was conveyed by the methods known to the law. The practice of conveying land to the feoffor's own use became so common that it led to the doctrine of resulting uses. Equity came to presume that a conveyance without consideration or without a declaration of the use, was to the use of the feoffor.[12] (2) A simpler method of raising uses to others than the grantor was without transmutation of possession. This method took the two forms of bargain and sale of the use and covenant to stand seised to the use of another. The bargain and sale was, in effect, the promise by one for a valuable consideration to stand seised to the use of another.[13] The promise originally might be oral. The consideration was required to make the promise enforceable in equity against the promisor which was the basis of the use.[14] The covenant to stand seised was likewise a promise of A to stand seised to the use of another, but it had to be made by deed and the consideration was relationship by blood or marriage.[15] The

[10] Feoffments to uses occur much earlier, but the interest of the cestui que use was not protected by the Court of Chancery until this time. Ames, The Origin of Uses and Trusts, 21 Har. Law Rev. 265.

[11] Co. Lit. 271b; 1 Sanders, Uses 83 et seq.

[12] Leake, Property in Land, 83, 254.

[13] Digby, Hist. Real Prop. 330; Williams Real Prop., 21 Ed., 172, 202. Tiffany, Real Prop. 202.

[14] Bacon, Uses 13. The practice of stating at least a nominal consideration in deeds is traceable to this requirement.

[15] Sharington v. Strotton (1565) Plowd. 298; Collard v. Collard, (1593) Moore 687.

two forms differed only in these formal requisites. They were identical in their operation. In both A retained the legal title, and C had a promise enforceable in equity.

There was no seisin of the use. The feoffee to uses held the seisin and his seisin satisfied the requirements of the feudal law. The law looked to him and did not recognize the cestui que use. The use was consequently free from the restrictive influences of seisin.[16]

As uses were created without livery and were free from the restrictions of seisin, they could be limited in ways unknown to estates at law. Equity followed the law in determining the descent of the use, and in other respects, but did not follow the law in restricting the limitations that might be created in the use.[17] Uses could be created in the same form as remainders, but they could also be created to begin in futuro without a present estate; with intervals between them; and to take effect in derogation of prior uses. The limitations in the first two cases were called springing uses and in the last case a shifting use, the difference being that the former arose out of the interest of the grantor and the latter cut short the use already limited to the prior cestui que use. So limitations of future interests in the use fell into three classes, remainders, analogous to remainders at law, and springing and shifting uses which had no counterparts at law.[18]

Upon these interests the statute of uses[19] came into operation for various reasons set forth in the preamble, the statute aimed to end the dualism of equitable and legal interests, not by forbidding the creation of uses, but by laying hold of them after they were created and transforming them into legal interests.[20] To this end the statute provides that the person who has an estate in the use, shall have a corresponding seisin or possession; and that the estate of the persons seised to uses shall be in them who have the use "after such quality, manner, form and conditions as they had before, in or to the use."

One result of the statute was to make the hitherto equitable interests of remainders in the use and springing and shifting uses cognizable by the law, and to bring the last two into

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[16] 1 Spence Eq. Jur. 445.
[17] Digby, Hist. Real Prop. 327.
[18] Leake, Property in Land 87 et seq.
[19] 27 Hen. VIII c. 10.
[20] Sugden's Gilbert, Uses 73 Note; Goodeve, Real Prop. 258.

the legal system of future interests with all the freedom from restraint in their creation that characterized them while they were equitable interests. The statute in no wise changed the manner of their creation. On the contrary it made the methods above outlined for creating uses, available for conveying legal interests, both present and future. Bargain and sale and covenant to stand seised were added to livery of seisin as modes of conveying legal estates.[21] The statute turned the use raised by the promise into a legal estate, or as it was expressed, it "executed" the use.

The manner of operation of the statute was such that some uses were executed at once, some in due course, and others not at all. If the use were a present one, or one in remainder in the strict sense, it was changed at once into a legal estate. Thus, if the use were to B for life, and after to C in fee, B and C had forthwith by force of the statute legal estates in possession and remainder. If the use were to arise in the future, there being no present use created, or a present use were given, to be cut short later by another, the future use was not executed until it could be enjoyed in possession or in remainder and the seisin meanwhile remained in the bargainor, or first cestui que use respectively.[22] Thus if A bargained and sold the use to C in fee to have it after the death of B who took no interest, A remained seised in fee until the death of B and then the statute executed the use in C; or if A gave the use to B in fee, but if B die under 21, to C in fee, the statute executed the use in B at once, and the use to C when the event happened. These continued to be called springing and shifting uses and they were the distinctly new classes of interests which the statute made cognizable by the courts of law.[23]

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[21] Leake, Property in Land 82 et seq.

[22] Gray, Perpetuities, secs. 56, 57, 114 note, 201.

[23] Of the third class of uses which were not executed at all two were of great importance. When the person seised to the use had active duties to perform with respect to the property, as to manage the property and to pay the rents and profits to the cestui que use, since the execution of the use would leave him powerless to perform these duties, and thus defeat the intention of the person creating the use, the use was not executed, but continued cognizable only in a court of equity. Thus originated the doctrine of modern active trusts. Symson v. Turner, (1700) 1 Eq. Cas. ab. 383 note.

And when there was a use upon a use, as a use to B to the use of (or on trust nevertheless for) C, although B had no active duties to perform, the second use was not executed by the statute. Tyrrel's Case, (1557) Dyer 155, Benl. 61, 1 And. 37, A. Bendl. 28; Doe d. Lloyd v. Passingham, (1827) 6 B. & C. 305, 9 D. & R. 416, 5 L. J. K. B. O. S. 146.

Future Interests introduced by the Statute of Wills (1540) —*Executory Devises.*—Under the feudal system, freehold interests in land were not devisable at law. The power to devise legal freehold estates was first given by the statute of wills in 1540. As devises passed the title without livery of seisin, they could be made not only of present estates and remainders, but also to begin in futuro, with intervals between the successive interests devised, and to shift from one to another. These limitations were known as executory devises and corresponded to springing and shifting uses in conveyances inter vivos. They could be created with the same freedom and had the same incidents. The term conditional limitation was a common name for a shifting use and a "shifting" executory devise.[24]

Thus after 1540 the following future interests could be limited: remainders created by assurances at the common law, by way of use, and by devise; springing and shifting uses by conveyances operating by way of use, and executory devises by devise. By a common law conveyance only remainders could be created, but by a conveyance of bargain and sale or by devise the future limitation might be either a remainder or one of the new executory interests, and, as future interests were generally limited by way of use or by devise, there was difficulty in determining whether the limitation was a remainder or one of the new executory interests. Before considering how they were distinguished, the importance of the distinction should be noted. The importance lies in the different incidents which attended the several interests.

The Different Legal Incidents of the Several Future Interests.—In the early period of the law only vested remainders

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This rule has often been attributed to the narrowness of the courts of law. The true reason was that before the statute the second use was repugnant to the first and void even in equity. And the statute executed no other uses than those which had been good in equity before. See Article by Ames, The Origin of Uses and Trusts, 21 Har. Law Rev. 270. The use to B was executed by the statute but the use to C was void at law. About a century later this use upon a use was taken cognizance of by equity and B was held trustee of the land for C. This is the origin of the modern passive trust, which led Lord Hardwicke to say that the statute of uses "had no other effect than to add at most three words to a conveyance." Hopkins v. Hopkins, (1738) 1 Atk. 581, 591. A bargain and sale of land to B to the use of C created a passive trust, since the statute would execute only the use thereby raised to B.

[24] Goodeve, Real Prop. 260, 261. "Conditional limitation" is applied by some writers in another sense. Gray, Restraints on Alienation, sec. 22 note.

could be created.[25] Later contingent remainders were allowed. When the remainderman "owns" the estate and merely awaits the termination of the preceding estates to have the right of possession of the land, the remainder is vested. That the remainderman may "own" the estate, he must be in esse and ascertained, and his right to possession must not be subject to any condition precedent other than the ending of the prior estates. Vested remainders had in general like incidents with reversions. The remainderman had most of the rights, privileges and immunities of present tenants except those dependent upon actual seisin.

The contingent remainderman does not "own" an estate. There is but the possibility of an estate to him.[26] If the remainderman is not in esse, or not ascertained, or if his right to possession is dependent upon the fulfillment of some condition precedent other than the ending of the prior estates, the remainder is but a possibility and is contingent.

There was the greatest difference between the incidents of contingent remainders and the other executory interests. The requirement that seisin should not be in abeyance had peculiar effect on contingent remainders. That a contingent remainder might be created, there must also be created by the same conveyance a present estate of freehold to support it. A term for years would not support it because a termor had no seisin. The livery to the present freehold tenant was effective for himself and those in remainder, and his seisin answered the requirements of the rule while his estate lasted, but the rule further required that the contingent remainder vest before, or instantly, the prior estate determined; otherwise the next vested estate in remainder or reversion became the estate in possession and the contingent remainder could never take effect.[27] Thus if A conveyed to B for life, and then to the first of his children to attain 21, in fee, and B died leaving a child not of age that child could never take.

The present estate might, moreover be terminated prematurely in several ways and with like effect upon the contingent remainder. An alienation by the present tenant by livery of seisin, fine or recovery, purporting to convey a greater estate than he

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[25] Williams, Real Prop., 21 ed., 356; cf. Maitland, 6 Law Quar. Rev. 23; 2 Pol. & Maitland, Hist. of Eng. Law 23; Fletcher, Contingent and Executory Interests in Land 20 et seq.

[26] 2 Prest. Abst. Title 107; Challis, Real Prop. 42, 58.

[27] Fearne, Cont. Rems. 207 et seq.

had, operated as a forfeiture of his present estate.[28] So of attainder of treason or felony. The present estate might also be destroyed by merger. If A conveyed to B for life, remainder to B's first born son for life, remainder to C in fee, and B before a son was born, surrendered his estate to C, or C released his estate to B the two estates merged, and B's life estate was drowned in the fee. Where contingent remainders were limited in fee, the inheritance, pending the happening of the contingency, was in the grantor, or in the residuary devisee or heirs of the devisor. So if in the example given in the last paragraph B surrendered his estate to A, or if A released the reversion (which he had pending the happening of the contingency) to B, B's life estate was drowned in the reversion.[29] In these several ways it was in the power of the present tenant to destroy the estate which supported the contingent remainder before it vested, and the remainder could not take effect although the contingency upon which it was to vest happened before B's death.

After the statutes of uses and wills, all contingent remainders, whether created by a common law conveyance, or by way of use or devise, were liable to be defeated in these ways.

Springing and shifting uses and executory devises, on the other hand, were not dependent upon the seisin of prior estates to support them. They were limited to take effect, not in immediate succession to prior estates limited at the same time, but in defeasance of the estate in the grantor or of another granted estate. Consequently they took effect whenever the time arrived, or the contingency happened upon which they were to vest. And future uses and executory devises were held, in the celebrated case of *Pells v. Brown*,[30] indestructible by any acts of the tenant of the present estate. To illustrate, on devise to B for life, remainder to the first of his children to attain 21 in fee, the child could not take unless it attained 21 in B's lifetime, and B might, in any one of the several ways indicated above, while the child was a minor, destroy the possibility of its taking, even if it attained 21 while he lived; whereas if the devise were to the first born child of B to attain 21, in fee

[28] Archer's Case (1599) 1 Coke 66b; Waddell v. Rattew, (1835) 5 Rawle (Pa.) 231; McElwee v. Wheeler, (1877) 10 S. C. 392.

[29] 3 MINNESOTA LAW REVIEW 135.

[30] (1620) Cro. Jac. 590; Stoller v. Doyle, (1913) 257 Ill. 369, 100 N. E. 959; Gray, Perpetuities, sec. 142.

(there being no preceding life estate) the child could take whenever it attained 21, the fee descending to the devisor's heirs in the meantime, and no act of the heirs could destroy the child's possibility. The intention of the testator is obviously the same in both cases, but in the former it is defeated by the rules of seisin peculiar to remainders.

How Future Limitations were classified.—In determining whether a future limitation created by way of use or devise was a remainder or one of the new executory interests, the law was not impartial. The courts of law were accustomed to remainders, and disliked the new interests. The former, if contingent, were destructible, but the latter were indestructible and, therefore, tended towards perpetuities. The courts adopted the rule that any limitation, no matter how created, capable of taking effect as a remainder must be so classified. Only those that could not take effect as remainders were executory uses or devises. A limitation was capable of being classified as a remainder when it had the qualities necessary to a remainder at the English common law. Therefore if it had a freehold estate to support it, was to come into possession in immediate succession to, and not in derogation of, the prior estate, it was a remainder; if it lacked any of these qualities it was not a remainder. It was no longer void but belonged to the new categories provided also that it was created by way of use or devise.[31]

The greatest difficulty lay in distinguishing between contingent remainders and the other contingent executory interests. The courts looked at the limitations as from the time when they were made (the delivery of the deed or the death of the devisor). If the contingent limitation, looked at from that point of time, could by any possibility take effect as a remainder, it was classified as a contingent remainder.[32] For example, if the devise were to B for life, and after to the first of his children to attain 21 in fee, since a child might be born and attain 21 in B's life the limitation was a remainder, destructible, and would fail, at all events, if B died before the child attained 21; whereas if the devise were to the first child of B to attain 21 in fee, it could not, since there is no estate limited to support it, by any possibility take effect as a remainder. It would be classified as an executory devise, would be indestructible, and would vest when-

[31] Williams, Real Prop., 21 ed., 356.
[32] Gray, Perpetuities, sec. 921.

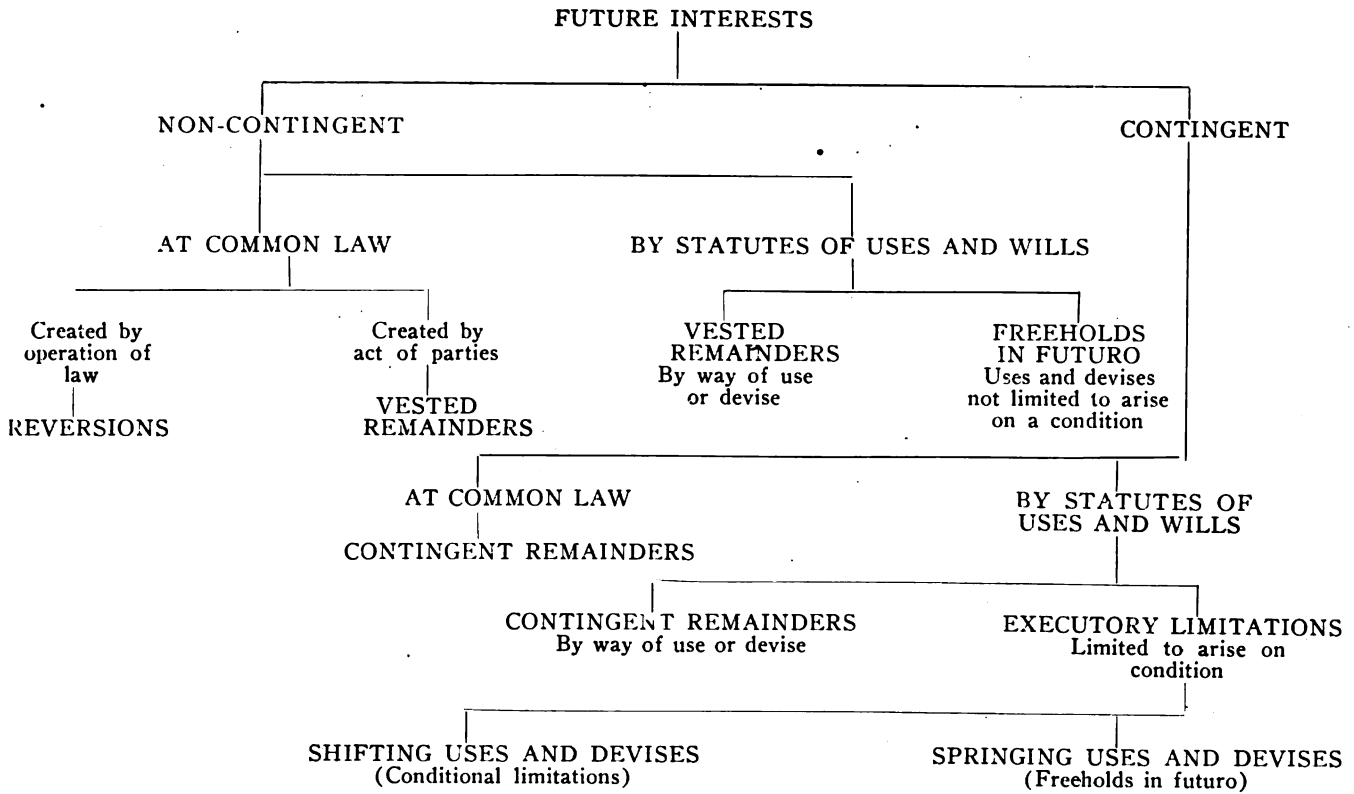

Diagram showing the different classes of future interests that might be limited by the American Common law. See Fletcher, Contingent and Executory Interests in Land 5.

ever the condition was satisfied. And there would be a like classification, as in the last example, with like results, where the future limitation was not in immediate succession to a prior estate or was to take effect in derogation of it.

Such in general outline was the American common law. Livery of seisin was recognized in many of the early cases as a mode of transferring title.[33] The English statute of uses is generally regarded as a part of the American common law, or is reënacted in substance.[34] The several classes of future interests which had arisen under the English common law and statutes were recognized. [34a] The same rules governed the classification of limitations and there was the same preference for remainders. Springing and shifting uses and executory devises were indestructible and took effect according to the intention of the grantor. Contingent remainders were destructible and failed with the supporting estate, the intention of the grantor being defeated by the rules of seisin.[35] Statutes have tempered the effect of this rule in all jurisdictions, but in many states contingent remainders still lack the complete immunity of the future use and devise.[36]

Changes effected by the Minnesota Statutes.[37]—*The "future estate" and "remainder."*[38]—Estates in expectancy are divided

[33] Dehon v. Redfern, (1838) Dud. Eq. (S.C.) 115; Perry v. Price, (1825) 1 Mo. 553; Knox v. Jenks, (1811) 7 Mass. 488; Matthews v. Ward, (1839) 10 Gill & J. (Md.) 443.

[34] Stimson, Am. Stat. Law, secs. 1701-1703.

[34a] See diagram, page 317.

[35] Craig v. Warner, (1887) 5 Mack. (D.C.) 460, 60 Am. Rep. 381; Benson v. Tanner, (1917) 276 Ill. 594, 115 N. E. 191; Archer v. Jacobs, (1904) 125 Ia. 467, 101 N. W. 195; Irvine v. Newlin, (1885) 63 Miss. 192; Waddell v. Rattew, (1835) 5 Rawle (Pa.) 231; McElwee v. Wheeler, (1877) 10 Rich. (S.C.) 392.

[36] Washburn, Real Prop., 6 ed., sec. 1600.

[37] *Conveyancing in Minnesota.* Livery of seisin is not expressly abolished in Minnesota. A conveyance by livery might still be effective between the parties; see Morton v. Leland, (1880) 27 Minn. 35, 6 N. W. 378; Johnson v. Sandhoff, (1883) 30 Minn. 197, 14 N. W. 889; Conlan v. Grace, (1886) 36 Minn. 276, 30 N. W. 880, provided that it complied with the statute of frauds, G. S. 1913, sec. 7002. The statutes prior to the revision of 1895, provided that a conveyance might be made by deed, acknowledged and recorded, "without any other act or ceremony." G. S. 1866 c. 40, sec. 1; G. S. 1878 c. 40, sec. 1; G. S. 1894 sec. 4160. In Smith v. Dennett, (1870) 15 Minn. 81, the court referring to this statute said that "the execution, delivery and recording of a deed operate to pass the grantor's seisin without any other act or ceremony whatever; so that if the grantor has seisin the grantee becomes seized without an actual entry." This provision was repealed by the revision of 1905. R. L. 1905 sec. 5518. The statutes now state the requisites of a deed to entitle it to record G. S. 1913, secs. 6833, 6835, but the nature of the conveyance

into future estates and reversions. Reversions are defined as they were at common law and continue to be governed by com-

and what would suffice to pass title between the parties are not specified. That deeds generally operate under the statute of uses is, however, impliedly recognized by the statutes which provide that a "deed of quitclaim and release shall be sufficient to pass all the estate which the grantor could convey by a deed of bargain and sale." G. S. 1913, sec. 6827.

The chapter of the statutes on uses and trusts provides that:

"6701. Uses and trusts except as authorized and modified in this chapter, are abolished; and every estate and interest in lands shall be deemed a legal right, cognizable as such in the courts of law, except when otherwise provided by statute."

"6702. Every estate which is now held as a use executed under laws as they formerly existed is confirmed as a legal estate."

"6703. Every person who, by virtue of any grant, assignment or devise, is entitled to the actual possession of lands, and the receipt of the rents and profits thereof, in law or equity, shall be deemed to have a legal estate therein of the same quality and duration and subject to the same [illegible] as his beneficial interests. But this shall not divest the estate of any trustee in any existing trust where the title of such trustee is not merely nominal but is connected with some power of actual disposition or [illegible] in relation to the lands which are the subject of the trust."

"6704. Every disposition of lands whether by deed or devise, except where otherwise provided in this chapter, shall be made directly to the person in whom the right to the possession and profits are intended to be vested, and not to any other to the use of, or in trust for, such person, and, if made to one or more persons in trust for or to the use of another, no estate or interest, legal or equitable, shall vest in the trustee."

The effect of these provisions is to reënact the most important feature of the English statute of uses and to extend it. All passive uses and trusts, without regard to their number or the manner of their creation are executed and the interest of the beneficiary becomes a legal title. Farmers Nat. Bank v. Moran, (1883) 30 Minn. 165, 14 N. W. 805; Thompson v. Conant, (1893) 52 Minn. 208, 53 N. W. 1145. (Cf. Whiting v. Whiting, (1890) 42 Minn. 548, 44 N. W. 1030). The English statute of uses was doubtless intended to put an end to passive uses and trusts, but they were revived under the form of a use upon a use. See note 23, ante. The Minnesota statute fully accomplishes the reformation which the English Parliament aimed at.

[38] The sections of the statutes material to this discussion are:

6658. Estates, as respects the time of their enjoyment, are divided into estates in possession and estates in expectancy. An estate in possession is where the owner has an immediate right to the possession of the land; an estate in expectancy is where the right to possession is postponed to a future period.

6659. Estates in expectancy are divided into, (1) estates commencing at a future day, denominated future estates, and (2) reversions.

6660. A future estate is an estate limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.

6661. When a future estate is dependent upon a precedent estate, it may be termed a remainder, and may be created and transferred by that name.

6662. A reversion is the residue of an estate left in the grantor, or his heirs, or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised.

6663. Future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to

mon law rules.[39] "Future estate" is defined to exclude reversions, and to include contingent future interests limited to third parties which were not estates, but mere possibilities at common law. The statutory title "future estate" includes all the limitations which at common law were denominated remainders, vested or contingent, springing and shifting uses and executory devises. Every limitation which might have been made under the common law may be created under sections 6660, 6674 and 6677. Irrespective of their nature, the mode of conveyance by which they are created, and of their relation to the estate of the grantor, or to other granted estates, they are classified under the statutory term "future estate."

In *Sabledowsky v. Arbuckle*,[40] A, reserving to himself a life estate, bargained and sold land to his son B. It was urged that a freehold estate to commence in the future cannot be created without a precedent particular estate to support it. The court held that although it would have been void at common law, the statutes recognized and impliedly authorized such a conveyance. The limitation would have been good by the American common law as a springing use.

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the possession of the lands upon the ceasing of the intermediate or preceding estate. They are contingent while the person to whom, or the event upon which, they are limited to take effect remains uncertain.

6674. Subject to the rules established in sections 6652-6673 [the sections omitted deal with restrictions on the creation of future estates which are not material to this discussion], a freehold estate, . . . may be created to commence at a future day. . . .

6677. A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed as a conditional limitation, and shall have the same effect as such limitations would have by law.

6682. No expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate, or precedent estate, nor by any destruction of such precedent estate, by disseizin, forfeiture, surrender, merger or otherwise.

6683. Section 6682 shall not be construed to prevent an expectant estate from being defeated in any manner, or by any act or means, which the party creating such estate has, in the creation thereof, provided or authorized; nor shall an expectant estate thus liable to be defeated be on that ground adjudged void in its creation.

6684. No remainder, valid in its creation, shall be defeated by the determination of the precedent estate before the happening of the contingency on which the remainder is limited to take effect; but, should such contingency afterward happen, the remainder shall take effect in the same manner and to the same extent as if the precedent estate had continued to the same period.

6685. Expectant estates are descendible, devisable, and alienable in the same manner as estates in possession.

6692. All expectant estates, except such as are enumerated and defined in this chapter are abolished.

[39] 3 MINNESOTA LAW REVIEW 339.

[40] (1892) 50 Minn. 475, 52 N. W. 920.

In *Thomas v. Williams,*[41] a deed of land was made by A to B "to have and to hold to B and his heirs in case he survives A." This was held to be a good conveyance of a "present contingent right in the land in the nature of a contingent fee." This would be good as a contingent springing use by the common law.

In *Whiting v. Whiting,*[42] A devised (in legal effect) to B in fee, "but if he die within ten years it shall go to his issue." The court said:

"At common law a fee could not be limited on a fee. The object of chapter 45 of our statutes was to abolish the technical distinctions between contingent remainders, springing and secondary uses, and executory devises, and to bring all these various executory interests nearer together, and to resolve them into a few plain principles, and to render all expectant estates equally secure from being defeated by the subtle refinements of the common law, contrary to the intention of the grantor or devisor. And . . . we do not see why a remainder may not now be limited after a fee. But whatever may be the rule, as to 'remainders' properly so called, created by a conveyance, even at common law, in a will a fee could be limited on a fee by way of executory devise."[43]

By abolishing expectant estates as they were at common law[44] and substituting the statutory future estate, the statutes neither prevent any limitation possible at the American common law nor allow any limitation that was impossible by some mode

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[41] (1908) 105 Minn. 88, 117 N. W. 155. See also Vesey v. Dwyer, (1911) 116 Minn. 245, 133 N. W. 612; Hagen v. Hagen, (1917) 136 Minn. 121, 161 N. W. 380.

[42] (1890) 42 Minn. 548, 44 N. W. 1030.

[43] The court said that apart from the statutes it "would have been void as a feoffment or a bargain and sale." The court added:

"The courts, however, succeeded in inventing a contrivance by which to uphold such conveyances by implying a covenant on the part of the grantor to stand seized of the lands to his own use during his life, and after his decease to the use of the grantee. Of course, they could not be upheld in this state on any such ground, for under our statutes, there are no implied covenants, and such uses are abolished."

But the limitation would have been good as a bargain and sale at common law. The court was probably misled by the error of the Massachusetts cases cited in argument which is examined and explained in Rogers v. Eagle Fire Co., (1832) 9 Wend. (N. Y. 611, and see Gray, Perpetuities, secs. 52-57.

As to the second dictum quoted, it is a well recognized doctrine of the common law that if a conveyance cannot take effect in the form intended, it will be moulded over into some other form for which the requisites are present. Gray Perpetuities, sec. 65. Is not the statute against implying covenants in deeds, but declaratory of the common law which did not prevent the application of this rule, and are not the Minnesota statutes on uses apt to execute such a use in the covenantee? See sec. 6704 and note 37, ante, and Thompson v. Conant, (1893) 52 Minn. 208, 53 N. W. 1145. Cf. Eysaman v. Eysaman, (1881) 24 Hun. (N.Y.) 430.

[44] Sec. 6692.

or other. But they make all limitations valid without regard to the mode of their creation. And they give to all future limitations the immunity from destruction[45] and the capacity of taking effect according to the intention of their creator that characterized certain classes of limitations at common law. It is, consequently, no longer material to which class or denomination, as they were at common law, any particular limitation is to be referred, since all future limitations have the same incidents.[46] The statutory future estate includes within itself all the common law classes of limitations and has itself the incidents of those classes brought in by the statutes of uses and wills.[47] Thus the common law rules applicable to springing and shifting uses and to executory devises[48] are applicable to the statutory future estate, except so far as other rules are provided by the statutes themselves. The statutes eliminated the class of contingent remainders with their peculiar incidents arising from the feudal rules of seisin. But the limitations that had hitherto been classified as such are now classified simply as "future estates."

Some future estates are further denominated "remainders." They are remainders when they are dependent upon precedent estates.[49] The term includes limitations denominated remainders at common law, and also limitations which operate to

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[45] Secs. 6682, 6684.

[46] The New York Revisers who prepared the original draft of these statutes said in their appended notes:

"The object of this section [6682] is to extend to every species of future limitation, the rule that is now well established, in relation to an executory devise, namely, that it cannot be barred or prevented from taking effect by any mode whatever. . . . The whole doctrine of the law in respect to the means by which contingent remainders may be destroyed, is strictly feudal. . . . The protection of the interests of the persons entitled in remainder, will be effectually answered by placing all contingent remainders on the same footing as executory devises, and the end is thus attained in the most simple and direct manner, without the necessity of present expense, or the hazard of future litigation.

"Another most important advantage . . . will result from reducing all expectant estates substantially to the same class. We shall prevent all future litigation on the purely technical question, to which class or denomination any particular limitation is to be referred. It is a well known rule, that no expectant estate, even if created by will, or a conveyance to uses, is to be construed as an executory devise, or secondary use, if it be so limited, as to be capable of taking effect as a remainder and some of the most difficult and obstruse cases to be found in the reports, have turned exclusively on the application of this rule."

[47] Fowler, Real Prop. Law 51, 218.

[48] See G. S. sec. 6677.

[49] G. S. sec 6661.

abridge or determine the precedent estate[50] which were not remainders at common law. The latter are also called conditional limitations,—their common law designation. The statutory remainder thus includes all the estates which take effect in possession subsequently to some other estate, created at the same time, either in immediate succession to it, or in derogation of it. Does it include springing uses and devises that are limited to commence in futuro without the limitation of any present estate? Chancellor Kent was of the opinion that it does.[51] If so it would be synonymous with "future estate." A learned modern writer questions this conclusion and is of the opinion that these are "future estates" but not "remainders."[52] The distinction is perhaps of no importance except to determine what can be passed as a "remainder" under section 6661. The term is used in several other sections of the statutes,[53] but limitations dealt with by these sections are such as would fall under the more restricted definition. The term is, however, unnecessary, and its use in a restricted sense unfortunate, and tends only to renew the confusion which it is the aim of the statutes to remove. The term "future estate" might replace "remainder" throughout the statutes without altering their meaning.

Vested and Contingent Limitations—At Common Law and under the Statutes.—By the common law reversions and remainders are the only vested interests.[54] Future interests are non-contingent and contingent. Interests non-contingent include vested interests and certain executory interests which are neither vested nor contingent. A springing use or an executory devise to an ascertained person to commence on a future event certain to happen, as to C in fee after the death of B is not vested; whereas if the limitation to C were after a life estate to B, it is a remainder and vested. The explanation lies in the fact that reversions and vested remainders are the only true future *estates* at common law.[55] The reversioner or vested remainderman has a portion

[50] G. S. sec 6677.
[51] 4 Comm. 272.
[52] Fowler, Real Prop. Law 222.
[53] G. S. secs. 6666, 6668, 6669, 6670, 6671; see also secs. 6672, 6678, 6679, 6684.
[54] Gray, Perpetuities, secs. 113-114, 201.
[55] Goodeve, Real Prop. 211; Hawkins, Wills 221. The term "vested" is often used in the secondary sense of "transmissible." In that sense many contingent and executory limitations are vested. "As far as I can discover, the only case in which a contingent future interest is not trans-

of the fee of which conveyance has been made. But when the future limitation is of a use or devise, which cannot take effect by way of remainder, the conception is that the whole fee remains in the grantor, or in the devisor's heirs, until the time comes for the future limitation to become an *estate* in possession or in remainder.[56] The future use or devise, although certain, remains until that time an executory limitation.

The Minnesota Statutes provide that "future estates are either vested or contingent."[57] This provision eliminates the distinction between vested remainders and other executory interests which are certain. It makes all future non-contingent limitations vested, and brings them within the concept of estates which was restricted to reversions and remainders at common law. In respect to vesting all future estates under the statutes are of the nature of remainders at common law.

There are many definitions of vested and contingent remainders. Blackstone defines them thus:[58]

"Vested remainders (or remainders *executed* whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed to remain to a determinate person, after the particular estate is spent. Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious or uncertain *person,* or upon a dubious or uncertain *event;* so that the particular estate may chance to be determined, and the remainder never take effect."

Gray says[59] that the line between vested and contingent remainders is drawn as follows:

"A remainder is vested in A, when, throughout its continuance, A, or A and his heirs, have the right to the immediate possession, whenever and however, the preceding estates may determine. A remainder is contingent if, in order for it to come into possession the fulfillment of some condition precedent other than the determination of the preceding freehold estates is necessary."

These definitions are sufficient for our present purpose of contrasting the common law with the definition given by the statutes.

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missible, is where the being in existence when the contingency happens is an essential part of the description of the person who is to take." Per Kay J. in Re Creswell, (1883) L. R. 24 Chancery Div. 102, 107. And see Gray, Perpetuities, sec. 118.

[56] See p. 312 ante.

[57] G. S. sec. 6663.

[58] 2 Com. 168, 169.

[59] Perpetuities sec. 101.

The statutes[60] provide that future estates—

"Are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or preceding estate. They are contingent while the person to whom, or the event upon which, they are limited to take effect remains uncertain."

This provision, when first enacted in New York, was said by Chancellor Kent to express accurately and fully the common law.[61] But the courts have decided that it makes limitations, which were contingent at the common law, vested.

The common law itself favors the vesting of estates and has gone a long way in holding certain limitations vested. A remainder is not prevented from vesting merely because it may terminate before it becomes the present estate. A life estate in remainder may terminate before the preceding estate, yet it may be vested. Again a remainder is none the less vested because it *may* be terminated, by the operation of a condition subsequent before it becomes the present estate. Thus, if the limitations are to B for life, remainder to C in fee, but if when C dies he leaves no children, then to D in fee, C's remainder is vested, although he may die childless in B's lifetime. And when a condition attached to a remainder is susceptible of being construed as either precedent and so to be satisfied before the remainder becomes the present estate, or subsequent so that it might become operative after the remainder has become the present estate, it will preferably be regarded as subsequent, and the remainder as vested, although the condition *may* become operative to terminate the remainder and so to prevent it ever becoming the estate in possession.[62]

But suppose the condition is by its terms to be operative *only* in case it is fulfilled before the remainder becomes the present estate. Of this class of cases Gray says:[63]

"One class of cases, however, presents some difficulty, that, namely, in which the contingency, if it happens at all, must happen at or before the termination of the particular estate, and the coming into possession of the remainder. Suppose, for instance, a gift to A for life, remainder to B and his heirs, but if B dies before the termination of the particular estate, then to C and his heirs. Here, if the condition ever affects B's estate at all, it will prevent it from coming into possession; it will

[60] G. S. 6663.
[61] 4 Com. 202.
[62] Gray, Perpetuities sec. 102, 103.
[63] Perpetuities secs 104-108.

never divest it after it has once come into possession. Remainders subject to conditions of this sort might have been regarded in three ways.

"(1) If the law looked on vested and contingent interests with an impartial eye, it would seem that such remainders should be held contingent. A condition which may prevent an estate coming into possession, but which can never divest it after it has come into possession, is a condition in its nature precedent rather than subsequent. But the preference of the law for vested interests has prevented this view being adopted.

"(2) Such a condition might be regarded in all cases as a condition subsequent, the circumstance that the contingency must happen, if at all, at or before the end of the particular estate being regarded as immaterial. The effect of this construction would be to make a remainder vested at any time, if there was, at that time, a person ready and entitled to take possession as remainder-man, should the particular estate then determine, although, should the particular estate determine at some other time, such person might not be entitled to the remainder. Upon this theory, if there was a devise to A for life, remainder to his surviving children, the remainder would be at any particular moment vested in the children who would survive A should he at that moment die.

"(3) Neither of these views is that of the common law. Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus on a devise to A for life, remainder to his children, but if any child dies in the lifetime of A his share to go to those who survive, the share of each child is vested, subject to be divested by its death. But on a devise to A for life, remainder to such of his children as survive him, the remainder is contingent."

The statutory definition adopts the second view stated above. In *Moore v. Littel*[64] the conveyance was to B for life, and after his death to his heirs. The remainder was held to be vested under the statute, although the heirs could not be ascertained until the death of B. Woodruff, J., said:

"If there 'is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, then that remainder is vested' within the terms of the statute. It is not 'a person who now has a present fixed right of future possession or enjoyment' but a person who would

[64] (1869) 41 N. Y. 66. Other decisions and articles are collected in Gray, Perpetuities sec. 107 notes. Cf. Minnesota Debenture Co. v. Dean, (1902) 85 Minn. 473, 89 N. W. 848; Armstrong v. Armstrong, (1893) 54 Minn. 248, 55 N. W. 971.

have an immediate right if the precedent estate were now to cease. I read this language according to its ordinary and natural signification, and if you can point to a human being and say as to him, 'that man, or that woman, by virtue of the grant of a remainder, would have an immediate right to the possession of certain lands if the precedent estate of another therein should now cease,' then the statute says, he or she has a vested remainder."

The statutory definition of vested remainders is unfortunate. It has caused confusion and uncertainty in the law of New York.[65] The definition of contingent remainders contradicts it. A remainder is said to be contingent while the person to whom it is limited remains uncertain. The two contradictory definitions led Chief Justice Savage to say that some remainders are, by the definitions, both vested and contingent at the same moment.[66]

The vesting of remainders is a matter of law and logic. The various definitions of vested remainders do not define what they are but state when they exist. The legal concept of a vested remainder is "ownership" of an estate which has not yet become a right to possession of the land.[67] The concept requires an "owner," and is not satisfied by saying that a certain person *would be "owner"* if something happened. It would be almost as good sense to say that an heir apparent has a vested estate in his ancestor's land because he would succeed to it if the ancestor died now. The common law in its partiality for vested remainders has pushed logic to the limit; but the statutory definition sends it beyond. There was sound reason for the common law tendency. Contingent remainders failed unless they were vested when the precedent estates terminated. But the statutes make all remainders independent of the precedent estates. No reason remains for forcing vesting in unusual cases and any leaning away from the common law ought rather to be in the other direction.

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[65] See article "The New York Test of Vested Remainders." 9 Columbia Law Review 587, 687, in which the learned writer ingeniously construes the definition to accord with the common law, and with the definition of contingent remainders. If such is the intent of the statute it could be better expressed. See also article "Uncertainties In The Law of Vested Remainders," 10 Bench & Bar (N.S.) 197, 248, 439; 11 ibid., p. 287.

[66] Carter v. Lorillard, (1835) 14 Wend. (N.Y.) 265.

[67] The vested remainderman "is vested with a portion of the ownership of the land." Hawkins, Wills 210. See Gray, Perpetuities, sec. 108, note 2.

Alienation of Future Interests.—Vested remainders are descendible, devisable, and alienable at the common law. Some contingent interests are descendible at common law, others are not. A contingent interest is descendible[68] when the person to whom it is limited is ascertained and the condition upon which it is limited may be satisfied after his death. When the person to whom it is limited is unascertained, or the condition can only be satisfied by his continued existence the interest is not descendible. Thus upon a limitation to C in fee if B leaves no children, the interest of C is descendible; but upon limitations to B's children who survive him in fee, or to C in fee if he live to twenty-one, there is no descendible interest in either case until the limitation vests. Contingent future interests which are descendible are also devisable.[69]

At common law contingent future interests were not assignable.[70] Vested remainders and reversions could be conveyed by deed of grant, but contingent interests were mere possibilities which were deemed incapable of alienation by a conveyance at law. They could be released to the tenant in possession.[71] They might, furthermore, be passed by fine by way of estoppel, so as to bind the interest which should afterwards accrue on the fulfillment of the condition.[72] And assignments for a valuable consideration were enforced in equity.[73]

The statutes provide that "expectant estates are descendible, devisable and alienable in the same manner as estates in possession."[74] Contingent "remainders" are "expectant estates" for

[68] By the common law rules of descent both vested and contingent future interests descended to the heirs of the first purchaser of the interest, and not to the heirs the person last entitled. Thus if a descendible future interest were limited to B, and B died leaving C his heir, and C also died before the interest vested in possession, the interest would pass not to the heirs of C but to the heirs of B. The claimant must make himself heir to the first purchaser. Fearne, Cont. Rems. 561b. American statutes of descent have generally changed the common law rule, and descent is traced from the person last entitled. See, Galladay v. Knock, (1908) 235 Ill. 412, 85 N. E. 649, 126 A. S. R. 224; Kales, Cases on Property 86 note. "Three Suggestions concerning Future Interests" by Prof. Ernst Freund, 33 Har. L. Rev. 526. The Minnesota statutes make such interests to descend as do estates in possession. Sec. 6691.

[69] Fletcher, Contingent and Executory Interests in Land 177; Roe v. Griffiths, (1766) 2 W. Bl. 606; Goodtitle v. Wood, (1741) 3 Durn. & East 94; Moor v. Hawkins, (1765) 2 Eden 342.

[70] Fulwood's Case, (1591) 4 Co. Rep. 64b; Lampets' Case, (1612) 10 Co. Rep. 48a; 1 Tiffany, Real Property 306.

[71] Williams, Real Property, 21 ed. 367; 1 Tiffany, Real Property 306.

[72] Fearne, Cont. Rems. 365, 551. Doe d. Christmas v. Oliver, (1829) 10 B. & C. 187.

[73] Withered v. Withered, (1828) 2 Simmon 183.

[74] G. S. 6691.

the purposes of this section.[75] Limitations contingent on some event but certain as to the person may be transferred, subject to the condition.

Limitations to persons not in being are inalienable, and those to persons not ascertained are not absolutely alienable. Even though there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate, and so the interest be vested,[76] an alienation by that person will be effective only when, and in so far as, he proves to be the person ultimately entitled. Thus if the limitations are to A for life, remainder to his heirs, the heirs apparent may alien during A's life, but the alienee's interest is dependent upon the alienors proving to be A's heirs at his death.[77] Future estates to persons not in being or not ascertained, are, consequently liable to offend the rule against restraints on alienation, and to be void for that reason, but the discussion of this topic must be left for another time.

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[75] Fowler, Real Property Law 372.

[76] See, p. 326 ante.

[77] Kilpatrick v. Barron, (1891) 125 N. Y. 751, 26 N. E. 925; Harris v. Strodl, (1892) 132 N. Y. 392, 30 N. E. 962; Downey v. Seib, (1906) 185 N. Y. 427, 78 N. E. 66, 8 L. R. A. (N.S.) 49 113 A. S. R. 926; Cf. Wainwright v. Sawyer, (1889) 150 Mass. 168, 22 N. E. 885; Brown v. Fulkerson, (1894) 125 Mo. 400, 28 S. W. 632.

BILLS FOR RAISING REVENUE UNDER THE FEDERAL AND STATE CONSTITUTIONS

INTRODUCTION

SOME time ago the author's attention was attracted to this statement of Senator Pomerene, made in debate June 3, 1918:

"The provision in the constitution that 'all bills for raising revenue shall originate in the House of Representatives,' even if comprehensive enough to cover the change of time of payment of revenue, is purely directory and not mandatory."

This study is the result of an attempt to discover if the statement that the provision is directory, rather than mandatory, has any foundation either in law, as a matter of principle, or in fact, as a matter of practice. A study of similar provisions in the constitutions of the American states was necessitated, in addition to some analysis of such provisions as they exist in foreign countries.

Article I, section 7, clause 1, of the federal constitution provides that:

"All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills."

The constitution of the Confederate States of America duplicated the federal provision.

It is said that such a provision exists in twenty-two state constitutions.[1] Many states say that money bills can originate in either house. Thus, the New York constitution provides: "Any bill may originate in either house of the legislature." But where the constitution so provides or is silent on the question the senate, as a general practice, concedes to the lower house the right of initiating measures for raising revenues and often general appropriation bills as well.[2]

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[1] Dealey, American State Constitutions, 190.

[2] Agger, Budget in the American Commonwealth, 25 Columbia University Studies, 22.

1. History of the Federal Convention

In 1776, eight of the states adopted new constitutions, five of these providing that all money bills must originate in the lower house. Two of these, Maryland and Delaware, provided against the abuse of this privilege by the lower house putting riders on money bills. In 1780 Massachusetts adopted a provision almost identical with that of the federal constitution. So that prior to 1787 six states had such provisions. Many of the delegates from these states opposed the placing of such a provision in the federal constitution.[3]

On June 13, 1787, a proposal that money bills should only originate in the first branch and that the Senate should have no power to alter or amend was defeated eight to three, New York, Delaware, and Virginia voting for it. July 5 Franklin made a report providing all money bills should originate in the House, the Senate being unable to alter or amend. This was coupled with provisions that representation in the House should be based on population and in the Senate should be by states. It was, in fact, an inducement offered by the small to the large states. This passed with five ayes; three noes; three divided. August 6 we find the following in the report of the committee of detail of the draft constitution:

"All bills for raising or appropriating money . . . shall originate in the House of Representatives, and shall not be altered or amended by the Senate."

But by this time it had practically been settled that there would be equal representation in the Senate, and the small states were not so anxious to pass such a provision, depriving them of all power over money measures. So we find that August 8 this provision was defeated seven to four, Connecticut, New Hampshire, Massachusetts, and North Carolina favoring. This action stirred up a great deal of opposition and on August 11 it was moved and seconded to reconsider the former action, by a vote of eight ayes; two noes; and one divided.[4] August 13 a measure "That all bills for raising or appropriating money" belong to the House was defeated. When amended to read "bills for the

[3] E. D. Adams, Control of the Purse, Kansas University Quarterly, April, 1894, reviews the debates on this point in the Federal Convention, and the subsequent disputes between the House and Senate over its interpretation.

[4] According to the Journal of the Convention, South Carolina was divided; New Jersey and Maryland voting, no. Madison's records show New Jersey voting, yes.

purpose of revenue" this was also defeated, by four ayes and seven noes. A proposal designed to win the favor of the small states was made August 15, by giving the Senate power to "propose or concur with amendments as in other cases." September 8 the question came up for final consideration and was adopted in its present form. To the first clause providing that bills for raising revenue shall originate in the House there were two dissenting votes, Maryland and Delaware; there was no vote on the second clause, and presumably no opposition.

"By a majority of the members of the convention the matter was not looked upon as a question of much constitutional importance but simply as a convenient subject upon which to base a compromise."[5]

McHenry before the Maryland House of Delegates on Nov. 29 declared:

"The controversy ended in a compromise by which the lesser states obtain a power of amendment in the Senate . . . The larger states hoped for an advantage by confining this privilege to that branch where their numbers predominated."

Luther Martin before the Maryland House on November 29, 1787, also referred to the final solution as a compromise. The question was so connected with other constitutional provisions that it is difficult to ascertain the principles by which it was settled. Despite the absence of any great regard for it among the members of the convention the people did regard the restriction to the House as a great constitutional principle.[6]

"Gerry was right when he said that the presence or absence of such a provision would have much to do with the acceptance or rejection of the constitution by the people."

The report of Elbridge Gerry to the vice president of the Massachusetts Convention, in 1788, summarizes most of the arguments in favor of the adopted measure. (1) "It was conceived to be highly unreasonable and unjust that a small State, which would contribute but one sixty-fifth part of any tax, should, nevertheless, have an equal right with a large state which would contribute eight or ten sixty-fifths of the same tax, to take money from the pockets of the latter." (2) The right of expending should be in proportion to the ability of raising money, and the larger states would have no security as to this if without due command of their own purses. (3) The power to *amend* practically is the power to *propose*. (4) The senators are further

[5] Adams, 177.
[6] Ibid, 181.

removed from the people, and more extravagant. (5) With the power of amendment the Senate would never be satisfied with the bills of the House. (6) As proposed the constitution gives the lesser states an "undue command of the property of the larger states." The latter two points, it will be observed, are opposed to the last clause, giving the Senate power to amend. Said Franklin on July 6, 1787, in the Convention:

"It was always of importance that the people should know who had disposal of their money, and how it had been disposed of. It was a maxim that those who feel, can best judge. This end would be best attained if money affairs were to be confined to the immediate representatives of the people."

There was, too, a great deal of mistrust of the Senate. Thus, said Gerry on June 13, if the Senate were given power to initiate money bills they would repeat the experiment "till chance should furnish a set of representatives in the other branch who would fall into their snares."

And Mason on July 6 said:

"Should the latter have the power of giving away the people's money they might soon forget the source from which they received it. We might soon have an aristocracy."

What were the objections to the adopted provision? (1) There is not sufficient analogy between the House of Lords and the Senate to justify its adoption. The Senate is elected by the people, through their deputies, while the House of Lords is neither directly nor indirectly representative of the people. (2) Madison, among others, declared that the senators would be a more capable set of men than the representatives, and should have a say in the "preparation of the business, especially of that which was most important, and in our republics, worse prepared than any other." (3) It was also argued that such a discrimination would lead the best men to decline to serve in the Senate, preferring to go into the House. (4) If there was no restriction of any kind the people could compare the bills prepared by both branches. (5) There was no advantage of the system in England. (6) As long as both branches had to approve such bills, what difference did it make as to which branch initiated them? (7) In practice the House would tack other clauses onto money bills. (8) Luther Martin, in his "Genuine Information" said that one argument against the provision was that it would be the source of future disputes as to what *are* or *are not* revenue bills. (9) Williamson on July 6 declared that if the privilege were confined to either branch it

should be to the second "as the bills in that case would be more narrowly watched, than if they originated with the branch having most of the popular confidence." This seems to have been the real idea of many, though most of those who favored property interests did not bring it out so clearly.

2. History and Arguments in England

In the British Parliament, in 1678, it was settled that: (1) "all bills for purpose of taxation, or containing clauses imposing a tax, must originate in the House of Commons and not in the House of Lords." (2) The Lords cannot amend taxing bills, but may reject them. This latter right has rarely been exercised. A valuable precedent for the right of the Commons had been established in 1407, under Henry IV.[7] A money bill, in that case, came from the Lords to the Commons. The lower body remonstrated, claiming the sole right to originate such bills; the king yielded to their claim. But he did so more because of the weakness of the Commons than because of their strength, as that body always did the bidding of the king or the dominant Lords. The theory was that as the Commons were the financially poorest branch, they should be allowed to state the maximum of taxation.

The most interesting debate occurring in Parliament on the subject was in 1860, when the Commons presented a bill repealing the Paper-Duty Bill to the Lords.[8] May 21 Lord Lyndhurst admitted that the Lords could neither alter, originate, or amend money bills, but claimed for them the right to reject such bills. He cited cases where this right was admitted by the Commons and declared by the Lords.[9] He stated that this right included the power of negativing a proposed repeal of an existing bill, supporting his position with precedents.[10] In this position he was supported by Lord Chelmsford, and by Lord Monteagle, the latter also citing precedents. The latter denied

[7] 3 Stubbs, Constitutional History of England, 62, 63.

[8] For history of the dispute see 1860 Annual Register, 76-96.

[9] Rejection by Lords of Money Bills; 1789; 1790; two rejections of bill imposing duty on cocoanuts; 1809, bill granting duties on malt.

Admission by Commons of right of Lords to pass or reject as a whole in 1671 and 1689.

In 1853 Lord Aberdeen, speaking before the Lords, said that body might reject money bills on the second reading.

[10] Rejection by Lords of temporary or permanent repeal of taxes or duties:

1758, bill discontinuing for a limited time duties on tallow imported from Ireland; 1790, bill abolishing stamp duties affecting coasting trade; 1805-1807, bills abolishing fees paid to custom-house; 1808, bill to repeal duties on coal carried coastwise; 1811, bill to suspend temporarily duties on corn; 1816, bill to repeal excise duties on stone bottles.

that this action of the Lords would amount to the imposition of a tax, "for the tax did not exist by virtue of a vote of the House of Commons, but by the law of the land, on the assent of the Queen, Lords, and Commons." Lord Dufferin and the Marquis of Clanricarde admitted the technical force of the claim that a money bill in force could only be repealed by joint action, but urged the impolicy of rejection. Lord Cranworth denied the validity of the precedents cited. The bill for repeal was then rejected, one hundred ninety-three to one hundred four. The country was divided in feeling on the question, leading authorities supporting both sides. The majority of the people from prudential reasons justified the Lords' action as a financial necessity. The opposition was by those interested financially in the repeal.[11] "The cheap newspapers, which felt severely the burthen of the paper-duty on their enterprise, vehemently impugned the conduct of the Lords." This might be compared to the present justifiable opposition to the zone postage law so vigorously opposed by our periodicals. Opinion in the House was likewise divided, the conservatives upholding the constitutionality of the Lords' action. Lord Palmerston on May 25 moved the appointment of a committee to examine the precedents. The motion was passed and a committee of twenty-one appointed, which later reported to the House. On July 6 Lord Palmerston said that as a result of the report he was convinced of the constitutionality of the Lords' action. This view was taken by Whiteside, Disraeli, and Horsmann. Mr. Collier denied the validity of the precedents, as in none of them had bills been rejected on purely financial grounds. Mr. Osborne likewise denied the right of the Lords to reject money bills, but said their action was financially justified. A resolution saying the Lords' attitude was "justly regarded . . . with peculiar jealousy" was passed; though this was generally held to admit the *right* of the Lords to reject. A resolution was then passed that in the future the House should have the sole power to impose or remit taxes. This did not satisfy the opponents of the Lords, who thought that the precedent was likely to prove of dangerous application later. So on July 17 a resolution censuring the Lords was moved, the resolution also saying

[11] 1860 Annual Register, 82. The legislation of 1910 removed from the Lords all of their remaining power over money bills. The present discussion is therefore valuable chiefly as throwing light upon the development historically of the doctrine, and as English experience has been adopted as a precedent in many countries.

the Lords had encroached on the rights and privileges of the Commons. This was rejected, one hundred seventy-seven to one hundred thirty-eight, and when contrasted with the resolution passed July 6 leaves the question of the exact position of the Commons doubtful.

3. SURVEY OF THE PRINCIPLE INVOLVED.

The statement by Hamilton in the Federalist[12] that the sole power to originate money bills was the most effectual weapon of the House seems to summarize most of the arguments favoring the grant. The people "can obtain a redress of every grievance." The most direct and responsible representatives of the people were to be in the House; give them, therefore, the exclusive power to originate bills to raise revenue. Says Cooley:[13]

"As one body is more numerous than the other, and more directly represents the people, and in many of the states is renewed by more frequent elections, the power to originate all money bills, or bills for the raising of revenue, is left exclusively, by the constitutions of some of the states, with this body, in accordance with the custom in England."

4. THE LEGAL PROBLEM.

It will be recalled that Luther Martin, in his "Genuine Information," said that one argument against the constitutional provision was that it would be the source of future disputes as to *what are or are not revenue bills.* Says Miller:[14]

"'Bills for raising revenue' would have reference to laws for the purpose of obtaining money by some form of taxation or other means of raising the necessary funds to be used in supplying the wants of the government, paying its expenses, and discharging its debts."

Despite the seeming clearness of this definition many disputes have arisen.[15] Do all bills which result in the raising of revenue, directly or indirectly, come within the classification of "revenue bills?" Have bills raising revenue originated in the federal or state Senates and become laws?[16] If so, what principles

[12] No. 58.

[13] Constitutional Limitations, 156.

[14] Lectures on the Constitution, 204. See also United States v. Hill, (1887) 123 U. S. 681, 31 L. Ed. 275. 8 S. C. R. 308.

[15] The following statement by Hon. L. R. Sheldon, ex-member of Congress, in the American Economist, June 19, 1903, is rather too optimistic and implies the absence of controversies, some of them serious, which have arisen. "The clause has had a definite and uniform interpretation from the very beginning of the government."

[16] The United States Senate in 1859 insisted that each House was equally competent to pass on the question as to what constituted a revenue bill.

are involved? We must examine the cases coming before the courts, disputes between the two branches of the legislature, and the opinions of other authorities; bearing in mind, of course, that some courts do not apply as strictly as others the rule of stare decisis, and that the results of legislative disputes or opinions by others would have no binding influence, but could only be admitted as evidence of a tendency or in support of particular views.

5. NON-REVENUE BILLS.

We shall here consider the cases arising in federal and state courts in which bills in dispute have been declared not to come within the constitutional prohibition; also similar statements arising during the disputes between the House and Senate.

A. *In the Federal Courts.* "If these courts had not assumed that a revenue bill of Senate origin was a nullity, why spend so much time in proving that the act under consideration was not such a bill?"[17] It was held by Justice Story[18] that the phrase "revenue laws" as used in an act of 1804, meant such laws "as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government." That is, if revenue is not the "direct and avowed" aim of a bill then it is not a revenue bill, even though it may result in the securing of money for the Treasury.

A statute requiring the clerk of the United States circuit court to pay into the treasury any surplus of fees and emoluments which his semi-annual return to the attorney general shows to exist over and above the compensation and allowances authorized by law to be retained by him, is not a "revenue law."[19] The clerk's obligation was held to grow from a statute governing an officer of a court of the United States, and not from a "revenue law."

An act imposing taxes on the notes of a national bank is not a revenue bill, since the tax was to aid in providing a "national currency based upon United States bonds."[20] An act originating in the Senate which established a postal money-order system was upheld.[21] A bill which increased the rates of postage

[17] Hubbard v. Lowe, (1915) 226 Fed. 135.

[18] United States v. Mayo, (1813) 1 Gall. (U.S.C.C.) 397, Fed. Cas. 15755. See also United States v. Norton, (1875) 91 U. S. 566; 23 L. Ed. 454; State v. Bernheim, (1897) 19 Mont. 517, 49 Pac. 443.

[19] United States v. Hill, (1887) 123 U. S. 681, 31 L. Ed. 275, 8 S. C. R. 308.

[20] Twin City National Bank v. Nebeker, (1897) 167 U. S. 196, 42 L. Ed. 134, 17 S. C. R. 766.

[21] United States v. Norton, (1875) 91 U. S. 566, 23 L. Ed. 454.

on third class matter was upheld since it "provides for an equivalent for the money which the citizen may choose voluntarily to pay."[22] The decision might be criticized on two grounds; (1) all taxes should provide to the citizen an equivalent for the money he is forced to pay. This is just as true whether the benefit be direct and immediate or indirectly through the general functioning of government. (2) Strictly speaking, the citizen in the instant case does *not have* to pay; but in the present state of our civilization and advancement is it not in fact almost incumbent upon us to transmit newspapers and communications from one part of the country to another to maintain and improve our economic, social, and political conditions? Then on the assumption that any but an extraordinary increase in the postage rates will have no appreciable effect on the amount of mail sent through the post-office, is not an increase in postage rates in reality a "revenue law"?

The case of *Millard v. Roberts*[23] involved a bill to eliminate grade crossings and for a union station in Washington, D. C., providing for the payment of a sum of money to the railway companies, this money to be raised by a tax on the District property. This was held to be only a means to the purpose provided by the act. McKenna, Justice, said that bills for other than tax purposes that may incidentally create revenue are not revenue bills. This is rather a pretty bit of reasoning. The purpose of the bill could not have been accomplished except by the raising of revenue. Provide for the raising of revenue but specify the purpose for which the money raised is to be used and your bill is not a revenue measure at all.

In fact one cannot but be impressed after a review of the decisions, federal and state, with the truth of this statement:

"It has sometimes required a good deal of mental strain to demonstrate that some piece of legislation originating in a Senate was not a 'bill for raising revenue.'"[24]

B. *In the State Courts.* An Oklahoma law prescribed a fee to the public for services rendered by the clerk of the supreme court. It was held that it was not exacted for revenue, but as compensation, and, therefore, was not a revenue measure, within

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[22] United States v. James, (1875) 13 Blatch (U.S.C.C.) 207, Fed. Cas. No. 15464.

[23] (1906) 202 U. S. 429, 50 L. Ed. 1090, 26 S. C. R. 674.

[24] The court in Hubbard v. Lowe, (1915) 226 Fed. 135, citing as instances, 167 U. S. 196; 13 Blatch, 207; 124 Fed. 197; 97 Fed. 435.

the meaning of the constitution.[25] If this be regarded as a measure to aid the government in "paying its expenses," according to Justice Miller's definition of revenue bills, previously quoted, there might be some grounds for justifiable criticism of this decision. A law restricting to $3000 the sum certain recipients of fees might hold is not a revenue law; it neither increases nor diminishes the burdens of the people or litigants.[26]

Laws taxing mortgages have been upheld.[27] An act providing for the discovery of property not already listed for taxation and providing for the assessment and collection of taxes is not a revenue law.[28]

In Georgia a law originating in the Senate chartered the town of Elberton; and included the power to tax the townspeople. It was held that the taxing is a mere incident, and not the end of the act.[29] It might in addition have been said that (1) it was optional with the town authorities as to whether any tax at all should be levied; (2) the date of levying was optional; (3) the amount or rate of the tax was not specified (except as it might be limited by the debt limit of the town). A Montana law of 1907 authorized the establishment of country free high schools and provided for a tax to supply the funds for expenses, the money to be used only for the particular school in the district in which the money is raised. This was held not to be a revenue bill, as no money was raised for the state.[30]

A Colorado act of 1889, which came up to the federal courts,[31] authorized counties to refund their judgment and bonded debts. This was held, by Sanborn, circuit judge, not to be a rev-

[25] Re Lee, (Okla. 1917) 169 Pac. 53. See also Northern Counties Investment Trust v. Sears, (1895) 30 Ore. 388, 41 Pac. 931.

[26] Commonwealth v. Bailey, (1882) 81 Ky. 395, 4 Ky. L. Rep. 384. Cf. United States v. Hill, (1887) 123 U. S. 681, 31 L. Ed. 275, 8 S. C. R. 308.

[27] Cornelius v. State, (1914) 40 Okla. 733, 140 Pac. 1187; reaffirmed in Trustees v. Hooton, (1916) 53 Okla. 530, 157 Pac. 293. Dundee Mortgage Trust Inv. Co. v. Parrish, (1885) 24 Fed. 197. The question here was whether the act conformed to the Oregon constitution. The court held that the act levied no tax and does not raise revenue, but only provides that when a tax is levied or a revenue raised that mortgages shall contribute thereto as land. In other words, the definition of "land" for the purpose of taxation was made clearer by the act. The federal court professed to follow Mumford v. Sewell, (1883) 11 Ore. 67, 4 Pac. 585, 50 Am. Rep. 462, where the court held that such an act only incidentally created revenue.

[28] Anderson v. Ritterbusch, (1908) 22 Okla. 761, 98 Pac. 1002.

[29] Harper v. Commissioners of Elberton, (1857) 23 Ga. 566.

[30] Evers v. Hudson, (1907) 36 Mont. 135, 92 Pac. 462.

[31] Geer v. Commissioners, (1899) 97 Fed. 435, 38 C. C. A. 250.

enue law, as bills for raising revenue provide for the levy and collection of taxes to defray the expenses of government.

"This act was not of that character. Its main purpose was to authorize certain quasi-municipal corporations to refund their debts. The provisions for the levy and collection of taxes which it contained were mere incidents to the general refunding legislation which it carried."

A bill providing for an increase in the license fees to be paid by saloons was held to be a police regulation, and not a revenue law.[32] Of somewhat similar character was a Colorado law requiring insurance companies to pay to the commissioner of insurance two per cent of the premiums received; it was declared that the primary object of the bill was to regulate the companies.[33]

C. *Miscellaneous.* The following bills raising money originated in the Senate: establishing the post-office, establishing the mint, regulating the sale of public lands.[34]

"It makes no difference whether the bill or measure increases or reduces or repeals taxes, the right of origination is with the House of Representatives."[35]

In 1883, however, the House, under stress of circumstances, permitted the Senate to add to a little bill affecting the tobacco revenue a whole plan of tariff revision.

6. CONSIDERED AS REVENUE BILLS.

A. *In the Federal Courts.* Customs duties can be imposed only in revenue bills arising in the House of Representatives.[36] Internal revenue laws are likewise revenue laws.[37] An interesting case arose in connection with the so-called "Cotton Futures Act." This was originally passed by the Senate. The House struck out all of the clauses after the enacting clause and substituted a different act, seeking to prohibit such contracts by imposition of a prohibitive tax. The court held that this was a

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[32] State v. Wright, (1887) 14 Ore. 365, 12 Pac. 708; contra Thierman v. Commonwealth (1906) 123 Ky. 740, 97 S. W. 366.

[33] Colorado National Life Assurance Co. v. Clayton, (1913) 54 Col. 256, 130 Pac. 330.

[34] 1 Tucker, Constitution 451; 1 Story, Constitution s. 880. "For such bills do not impose a burden on tax payers." The constitutional clause, according to these authorities, was designed to protect the tax payers, and only relates to revenues raised by taxation.

[35] Hon. Lionel R. Sheldon, ex-member of Congress, in American Economist, June 19, 1903.

[36] Rainey v. United States, (1914) 232 U. S. 310, 58 L. Ed. 617, 34 S. C. R. 429; 24 A. & E. Enc. 887.

[37] Pettigrew v. United States, (1878) 97 U. S. 385, 24 L. Ed. 1029; Prather v. United States, (1896) 9 App. Cas. (D.C.) 82.

revenue bill originating in the Senate.[38] "It has not heretofore been found necessary to condemn an act of Congress for this kind of careless journey work."

B. *In the State Courts.* Bills for taxation can only be originated in the House of Representatives.[39]

C. *In the House and Senate.* In the first Congress this question arose, during discussion in the House of a bill for the establishment of the Treasury Department. In June, 1789, a motion was made and carried to strike out a clause making it the duty of the secretary of the treasury "to digest and report a plan for the improvement and management of the revenue and the support of the public credit." This motion was carried by a large majority. It was argued "that the power of reporting plans for the improvement of the revenue is the power of originating money bills." Would such an argument now be advanced by anyone in opposing plans for the establishment of a national budget system?

In the twenty-second Congress (1833) Clay offered a bill in the Senate to reduce tariff duties, to appease the people of South Carolina. It was objected that the Senate had no power to originate bills to raise revenue. Clay insisted that it was a bill to reduce duties and, therefore, did not come within reach of an equitable objection. Webster said that "the subject belonged expressly to the House of Representatives. It was of no consequence whether the duty was increased or decreased; if it is a money bill, it belonged to the House of Representatives to originate it." The same bill was introduced and passed in the House, and the Senate concurred. On his own motion Clay's bill was laid on the table. This debate was confined to the Senate, the House not participating in the discussion. During a debate in the Senate in the twenty-eighth Congress on McDuffie's Tariff Bill, to revive the compromise tariff of 1833, which would have been a reduction of the then existing duties (imposed in the tariff of 1842), by a vote of thirty-three to four the Senate decided that a tariff bill was a revenue measure.

July 26, 1919, there was a debate in the House on Bill H. R. 414, to provide for the establishment and maintenance of free zones in the ports of the United States, and for other purposes.

[38] Hubbard v. Lowe, (1915) 226 Fed. 135.
[39] Stockton, etc., R. Co. v. Common Council of City of Stockton. (1871) 41 Cal. 147, 165.

This bill had been previously referred to the committee on interstate and foreign commerce. Representative Fordney, the chairman of the ways and means committee, said that body believed the bill to be a revenue measure, and moved the bill's reference to the latter committee. Representatives Garner and Moore supported the view that this was a revenue measure, while Representatives Esch and Sanders argued this was a bill dealing principally with interstate commerce. Mr. Kitchin, a Democrat, said that in the past all such bills had been referred to the ways and means committee. On a division Mr. Fordney's motion won, fifty-four to thirty-three.

In 1837 the Senate passed a bill for the issue of treasury notes. When this was sent to the House Mr. Bell of Tennessee objected to its consideration, as it was a money bill and should have originated in the House. Mr. John Quincy Adams agreed. The bill was laid aside and one for the same purpose introduced and passed by the House, and then sent to the Senate, which concurred. This was the first objection by the House to the consideration of Senate bills indirectly bearing on the revenue.[40] In 1859 the House passed a post-office appropriation bill. This was amended by the Senate changing and in some cases increasing postage rates. By a vote of one hundred seventeen to seventy-six the House returned to the Senate, as a revenue measure, the amended bill. In the third session of the forty-first Congress the Senate passed a bill to repeal the law imposing the income tax. The House of Representatives passed a resolution calling the attention of the Senate to the constitutional clause, and insisted that the House had the sole power to impose, reduce, or repeal taxes. Said Mr. Butler: "Cutting off one tax is in fact always equivalent in contemplation of law, to raising another."[41]

7. The Question of Treaties.

On August 2, 1919, in the House, Congressman George M. Young declared the Canadian Reciprocity Act illegal since: (a) The president's power to negotiate with foreign governments does not extend outside the treaty-making power; this power does not extend to revenue measures, whose origination belongs solely to the House; (b) Taft's action was, therefore, an invasion of the House's constitutional prerogatives. That is, the approval of the House was of no effect since the president and Senate had, in the

[40] Adams, Control of the Purse, 192.
[41] Quaere, Was this a valid objection?

first place, no right to negotiate such a treaty. It is well known that in the past the president has been obliged to keep in touch with the House Committee on Foreign Relations; and where an appropriation has been necessary it has been customary to ask the concurrence of the House.

What restrictions, in general, are there on the power of the president and Senate to make treaties?[42] The treaty-making power in practice and authority has been held, says Senator Kellogg, "to embrace all those subjects which it has been the practice and custom of nations to exercise." This includes the questions of customs duties, settlement and payment of damages, etc. Any of the specific grants made to Congress may be made the subject of treaties. Said Chief Justice Ellsworth in a letter of March 13, 1796: "The power goes to all kinds of treaties." Yet this power is limited, and limited only, by the express provisions of our constitution; for instance, no power of Congress given it under the constitution can be annulled or amended.[43] Treaties and laws of Congress are of equal supremacy, and it is well settled that the latest treaty or act relating to a given subject is supreme.

The objections that are made to the League of Nations on the ground of constitutional infringement and that are made to the Reciprocity Act are not new. The same objections were made to the Jay Treaty of 1794—that it restricted the power of Congress to lay taxes or exact higher duties upon commodities, and that it provided for the payment of money. In the bitter discussion that arose over that treaty one of its leading supporters was Hamilton, who said that treaties may include the consideration of pecuniary indemnifications, involving appropriations of money. President Washington, taking the advice of Hamilton and others, refused to submit the treaty to the House.[44] Although the power to raise revenues is vested exclusively in the House many treaties involving modification of the existing revenue laws have been negotiated, and Congress asked to pass the necessary legislation to carry them into operation. Senator Kellogg asserts that the

[42] For the most part these observations will, aside from the author's own comments, be drawn from recent utterances of two of the best known authorities on constitutional law. H. St. George Tucker, 89 Central Law Journal, 79. F. B. Kellogg in the Senate, August 7, 1919.

[43] The Supreme Court has decided that a treaty can not alter the constitution. Thomas v. Gay, (1897) 169 U. S. 264, 42 L. Ed. 740, 18 S. C. R. 340.

[44] A list of treaties involving the payment of money and not submitted to the Congress may be found in Crandall, Treaties 179 (1796-1903).

power to negotiate such treaties is beyond question, though the wisdom is doubtful. In the case of *De Lima v. Bidwell*,[45] the decison of the court asserted that, in effect, the treaty of April 11, 1899, amounted to a repeal of the tariff laws, so far as concerned the Island of Porto Rico. The court held that the question of propriety was for the Senate and president to determine when they made the treaty. This would seem to be but a logical application of the principle formerly advanced in *Luther v. Borden*.[46] The *De Lima* case has since been cited and approved.[47]

To what extent can the House be obligated by the adoption of treaties involving the exercise of some of its constitutional powers? John Forsyth, representative, later secretary of state, instituted in the House, during the discussion of the Jay Treaty, the contention that legislation to administer the treaty was necessary, but made no claim that the treaty was invalid. It was a valid treaty, "but not having the force of law in its operation upon the municipal concerns of this people without legislative enactment."[48] In the *De Lima case* the court said that the Congress clearly reserves the right to refuse to carry out such a treaty.

Is Congress morally, though not legally, bound to carry out the provisions of such a treaty? Many of the great lawyers who oppose the League of Nations assert, for instance, that we might be under moral obligation to declare war in certain cases. Or there might be such an obligation on Congress to reduce tariff duties in certain cases. This is vigorously denied by Tucker.

"If the power given to Congress to declare war means anything, it means that the power must be exercised by the free, independent and untrammelled judgment of the representatives of the people, or it means nothing. To be morally bound is as effective as is being legally bound. . . . In other words, if under this theory, Congress must declare war, it is clear that it has no independent action. . . . The treaty power may make a treaty (a contract) agreeing to declare war, but it is valueless without the act of Congress to execute it—and immorality cannot be imputed to Congress for declining to do what their best judgment does not aprove."

To the author this view seems eminently sound.

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[45] (1901) 182 U. S. 1, 45 L. Ed. 1041, 21 S. C. R. 743.

[46] (1845) 7 How. (U.S.) 1, 12 L. Ed. 581. The court declared it could not consider the propriety of a decision of the President.

[47] Dorr v. United States, (1903) 195 U. S. 138, 49 L. Ed. 128, 24 S. C. R. 808.

[48] Having the power of independent action, Congress can in no wise be obligated by the action of President and Senate. Story, Constitution s. 1508; Tucker, Limitations on the Treaty Making Power, Ch. I, p. 4.

Congress alone has the power, we have seen, to carry out the specific grants given it under the constitution. Nations dealing with the treaty-making power are presumed to have knowledge of the constitutional limitations.[49] In the case of *Turner v. American Baptist Missionary Union*,[50] Mr. Justice McLean on the circuit, said:

"A treaty under the federal constitution is declared to be the supreme law of the land. This, unquestionably, applies to all treaties where the treaty-making power, without the aid of Congress, can carry it into effect. It is not, however, and can not be the supreme law of the land where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative in the sense of the constitution, as money can not be appropriated by the treaty-making power. This results from the limitations of our government. The action of no department of the government can be regarded as a law until it shall have all the sanctions required by the constitution to make it such."

8. Appropriation Bills.

Conceding that the House of Representatives has the sole right to originate revenue bills, and bearing in mind the measures coming within this classification, the question arises whether the House alone has the right to originate measures appropriating money. Or is the right to raise revenue to be distinguished from the right to appropriate money, and can the Senate initiate appropriation bills? Before considering the court decisions on this question we shall examine the principle and practice.

A. *The Principle.* Elbridge Gerry in his address to the vice-president of the Massachusetts Convention, Jan. 21, 1788, seemed to imply that the power to raise money was accompanied by the power to expend, since in support of the constitutional provision he said: "The right of expending should be in proportion to the ability of raising money." And many subsequent authorities and writers have claimed that the right to expend, to appropriate, belongs solely to the House.

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[49] 2 Butler, Treaty-making Power, s. 372, and cases cited. 2 Burgess, Political Science and Constitutional Law 294.

[50] (1852) 5 McLean (U.S.C.C.) 344, Fed. Cas. No. 14251. The author cannot but agree with the principle stated by Senator Kellogg: "There ought not be a promise which should require us to send an army to foreign shores which would be violated if the Congress, in the exercise of a constitutional right, should refuse to act." The author's views on the relations of Congress to the treaty power are more fully expressed in 89 Central Law Journal 370.

Justice Miller, however, says:[51]

"The appropriation of that money, which is always necessarily done by virtue of an act of Congress, would seem to be quite a different thing from the laws prescribing how the money shall be raised."

Gilfrey's Precedents asserts:[52] "A plain and literal interpretation . . . gives the power to originate to the Senate, as well as to the House." The following statement of Mr. Carpenter, in the Senate, April 24, 1872, is cited and approved:

"The fact that the constitution so carefully provides that 'bills for raising revenue' shall originate in the House of Representatives, and makes no such provision in regard to bills appropriating money, is conclusive that it was intended to restrict the Senate in the one case and not in the other."

Tucker even claims[53] that the exclusive power of appropriation which belongs to the Commons of England was specifically refused to the House by the framers of the constitution. In support he quotes from Madison's papers as to the intent of the framers, and cites the defeat on August 13, 1787, of a measure providing that "all bills for raising or appropriating money" shall originate in the House. When we recall, however, that when amended to read "bills for the purpose of revenue" this was also defeated, and that the provision was a source of dispute and the subject of compromise, we cannot but be skeptical of any attempt to prove what the real intent of the framers was on the question whether the Senate should be able to initiate appropriation bills.

Justice Miller goes on to say that:

"There is no apparent connection between a bill for raising money and an appropriation bill to spend that money."

Observe that he refers here only to money that has been already raised.

"It is difficult," he says, "to see, under this clause of the constitution, how it is, when no new law is necessary to raise revenue, that the act appropriating or directing how the revenue already raised . . . shall be appropriated, can be properly called a bill for raising revenue."

Most of our revenue is derived from a system of permanent taxation, and there is no necessity for a yearly law or series of laws for the raising of revenue. Justice Miller then attempts to

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[51] Lectures on the Constitution p. 204.

[52] P. 59.

[53] Constitution of the United States, 448, 450.

explain why it is that the House has insisted that it has the sole right to originate appropriation bills.[54]

"In England a familiar term also is 'the budget,' and this budget, while voting the money necessary for the support of the Government, almost always contains some modification of the system of taxation; they are united together, and they are in fact bills which appropriate the money, and establish the sources at the same time from which it shall be raised."

In analogy our constitutional phrase "bills for raising revenue" has "come to be construed to include both bills of appropriation and bills for establishing or raising revenue; although they may be very different in character, and the bill for an appropriation may contain no element incident to the raising of revenue." But it may have been originally "that appropriation bills were accompanied by more or less legislation on the subject of the means of raising revenue."

In 1872 the principle involved was discussed by committees of the House and Senate, the former contending that it had the exclusive power of originating bills, but was defeated in the controversy. The House Judiciary Committee, majority report, on Feb. 2, 1881, said that the Senate could originate general appropriation bills. No action was ever taken by the House on the report.

B. *The Practice.* The Senate, as we have seen, has the same *legal* right to initiate appropriation bills that the House possesses. Nevertheless, all is not smooth sailing, for, obviously, if the House should refuse to accept Senate prepared bills legislation would be at a standstill. Senator Jones of Washington said on July 10, 1918:

"There is quite a controversy as to whether or not appropriation bills must originate in the House of Representatives or in the Senate, and, as I understand, the Senate has always contended that appropriation bills may originate in the Senate."

The House, however, though wrongly, we believe, has claimed the sole right to originate such bills, "and it has, therefore, a standing 'committee on appropriation.' This has been the practice now for so long a time that it may be doubted whether it will be seriously questioned."[55] But the Senate, denying the House claim, has frequently originated bills appropriating money for

[54] Miller, 207, 208.

[55] Ibid. p. 204. McClain, Constitutional Law in the United States, s. 69, also asserts that the power of the House to pass appropriation bills is the result of custom.

specific purposes that have become law, but while asserting its own rights in the matter refrains from the preparation of general appropriation measures.

The first debate on the right of the Senate to originate general appropriation bills took place in that body in 1853. Senator Seward asserted that none had been prepared or reported or submitted to the Senate since 1789.[56] He said that the *letter* of the constitutional provision gave the right to the Senate, but that the practice was against it. A resolution that the Senate could pass appropriation bills was carried; two bills were prepared, but the House laid them on the table.

Senator Penrose, whose wide experience renders his opinion valuable, in replying to Senator Jones on July 10, 1918, said that *special* appropriation bills can originate in the Senate.

"But we would not undertake to get through the Senate a general appropriation bill for a fiscal year for a government department; because the House of Representatives would not receive such a bill."[57]

C. *In the Courts.* So far as the author has been able to discover the question has never arisen in the federal courts, and but few times in the state courts, where the decisions are conflicting. Chief Justice Gray of Massachusetts said that both Houses could originate appropriation bills, while in Indiana, where only the lower branch can originate revenue bills, it was held that money could not be appropriated by joint resolution, which would certainly imply that the Senate alone could not originate an appropriation measure.[58] In a Kentucky case, Chief Justice Hayes held:[59]

"A bill may originate in the Senate for the appropriation of money or from the treasury, unless it necessitates the levy of taxes or duties to meet its requirements."

In this point he agrees with Justice Miller, who, it will be recalled, refers to an appropriation bill as one to spend money that has already been raised. A Minnesota case,[60] on the other

[56] Congressional Globe, 1855-56, pt. I, 3756.

[57] Hon. Lionel R. Sheldon, American Economist, June 19, 1903. "Never in the whole history of Congress has a revenue or general appropriation bill that originated in the Senate been enacted into law."

[58] (1878) 126 Mass. Rep. supplement 557-602; May v. Rice, (1883) 91 Ind. 546. The former contains a very valuable historical study.

[59] Commonwealth v. Bailey, (1182) 81 Ky. 395, 4 Ky. L. Rep. 384.

[60] Curryer v. Merrill, (1878) 25 Minn. 1, 33 Am. Rep 450. The act in question provided for uniform text books, to be provided from public moneys.

hand, brought forth the view that an act making an appropriation of public money is not a bill for raising a revenue, even though it may lead to the necessity of taxation.

9. METHODS OF EVASION.

A. *General.* There are two chief ways in which the spirit of the constitutional provision is often neglected. First, as Elbridge Gerry in the address previously referred to remarked, the power given to the Senate to "propose or concur with amendments" practically gives the power to propose. Madison also recognized this when on June 13, 1787, he said, when opposing the grant of sole power to originate to the House, that to be logical the Senate should not be given power to make amendments, since "an addition of a given sum would be equivalent to a distinct proposition of it." In South Carolina the Senate, until the constitution of 1790 was adopted, had no right to amend money bills. During the debates in the federal constitutional convention John Rutledge, speaking of the experiences of South Carolina with this provision, said that the Senate, despite the constitutional clause, frequently did make amendments.

"Sometimes, indeed, if the matter of the amendment of the Senate is pleasant to the other House they wink at the enactment; if it be displeasing, then the constitution is appealed to."

The second method of evasion was clearly brought forth in the debate of June 13 by Butler, opposing the grant of sole power to the House.

"If the Senate should be degraded by any such discrimination, the best men would be apt to decline serving it in favor of the other branch. And it will lead the latter into the practice of tacking other clauses to money bills."

Nor was this mere speculation. Some of the early state constitutions, in existence in 1787, as Maryland and Delaware, provided against the lower house abusing its privilege by putting riders on money bills.

B. *The Senate's Amending Power Considered.* In accordance with the Commons resolution of July 3, 1678, the House of Lords is without power to amend revenue measures.[61] To protect themselves, however, the Lords prior to 1910 rejected on sight riders that were tacked to money bills.[62]

[61] See also Hallam, Constitutional History, ss. 508-511.

[62] De Lolme on the Constitution, Ch. 17, pp. 381, 382.

Some of the British colonies have nominative and some have elective upper chambers. So far as the author is aware in none of the former does the upper body have the power of amendment. In the latter the practice is not uniform. In the Cape of Good Hope no alteration by the legislative council is permitted by the House, and the power to amend is also denied in Victoria.[63] In South Australia and Tasmania the claim of power to amend as in the United States and various states, is partially allowed by the lower House.[64] As a result of disputes in 1854 and 1872, and the preparation by mutual consent of a test case for the opinion of the law officers of the Crown in England, it was settled that the upper legislative branch in New Zealand has no power to amend.[65]

In the forty-second Congress (1871-2) the House passed a bill abolishing the duties on tea and coffee. The Senate prepared a bill in the nature of a substitute with a different title, which was a general revision of the revenue laws, customs and internal taxes. Mr. Dawes offered a resolution of protest, alleging the unconstitutionality of the methods of the Senate, and moved that the bill be laid on the table. His motion was adopted. During the debate Mr. Garfield said:

"To admit that the Senate can take a House bill, consisting of two lines relating specifically and solely to a single item, and can graft upon that bill in the name of an amendment a whole system of tariff and internal taxation, is to say that they may exploit all the meaning out of the clause of the constitution which we are considering, and may rob the House of the last vestige of its rights under that clause."

In 1883, however, the House, under stress of circumstances, permitted the Senate to add to a little bill affecting the tobacco revenue a whole plan of tariff revision. The Senate has the constitutional power to amend; but this power may be used so widely and often as to constitute grave abuse, and to avoid this the only remedy of the House is steadfastly to refuse to concur in Senate amendments which seem to go too far.

It is interesting to observe at least one meaning given to the provision by the accepted parliamentary use of pre-constitution times. The Continental Congress had a rule:

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[63] Todd, Parliamentary Government in the Colonies, 709.

[64] Ibid.

[65] Rasden, History of New Zealand, I. 553, II, 157, III, 8.

"No new motion or proposition shall be admitted, under color of amendment, as a substitute for the motion or proposition under debate until it is concurred in or disagreed to."

The courts recognize the principle that a revenue bill of Senate origin is a nullity.[66] But they also recognize the power of the Senate practically to destroy the meaning of the constitutional clause. In *Hubbard v. Lowe,* discussing the "Cotton Futures Act," the court declared:

"The Senate of the United States, having full power to amend a revenue bill, has from the beginning originated taxes by inserting them in House legislation."

A whole new bill not even dealing with the same topic may be offered in the guise of a substitute. It would seem entirely just for the House to refuse to assent to such a clear evasion.[67]

What is the attitude of the courts? In the Tariff Act of 1909 a Senate amendment imposed an excise tax based on gross tonnage on the use of foreign-built pleasure yachts. This proposal was solely of Senate origin. But this excise tax was not invalid, since the bill itself originated in the House.[68] White, Chief Justice, quoted with approval the lower court: "It is not for this court to determine whether the amendment was or was not outside the purpose of the original bill." Here, then, is a possible test for the courts to apply in such cases. *Is the amendment outside the purpose of the original bill?* But Justice White said the court could not pass on the question. In other words, if the House will not protect its rights from impairment, why should the Supreme Court pass on the constitutionality of the Senate action? As in a great many other cases the Supreme Court avoids taking responsibility when a loophole appears. This is not, as was the case in *Luther v. Borden,* a purely political matter, but one which may affect, through the imposition of taxes, the personal and business interests of every individual. Should individuals and firms be protected against taxes adopted

[66] The court in Hubbard v. Lowe, (1915) 226 Fed. 135, says: "It has sometimes required a good deal of mental strain to demonstrate that some piece of legislation originating in a Senate is not a 'bill for raising revenue.'"

[67] Mr. Hinds of Maine in the House, Aug. 21, 1911, denounced as unconstitutional the action of the Senate in adding complicated and formidable amendments raising revenue from manufactures of steel, from chemicals, etc., to a bill of the House sent to the Senate, "raising revenue from manufactures of cotton, and for nothing else." Mr. Hinds was an authority on parliamentary and constitutional law.

[68] Rainey v. United States, (1914) 232 U. S. 310, 58 L. Ed. 617, 34 S. C. R. 429.

in an unconstitutional manner? It is not sufficient for the Court to declare that it is powerless to interfere, since the House has, perhaps under the stress of circumstances or unwittingly, assented to the Senate's abuse of its privilege. Neglect can not fairly be considered as an admission that trespass is justified.

10. The Merit of the Restriction

"It can hardly be said . . . that it constitutes any safeguard against careless and corrupt finance in legislatures; and it must be admitted also that it has slowly been declining in public esteem."[69]

This is probably due to the abuses just considered. If they will stand on their rights both the House and Senate can prevent these; the Senate by rejecting all riders or refusing to consider bills with riders attached, and the House by refusing to agree to amendments which do more than amend and go so far as to initiate. With the popular election of United States Senators and more democratic methods of choosing state senators much of the advantage of the grant of sole power of originating revenue bills to the House has, of course, disappeared. Perhaps the greatest present-day advantage of the system is that by it each House is able to concentrate on the preparation of certain kinds of bills, thus assuring more expert knowledge and less duplication than would otherwise exist. It is certain that in the preparation of new organic laws there are more important restrictions which should be adopted and used.

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[69] Beard, American Government and Politics 707.

Minnesota Law Review

Published monthly, December to June inclusive, by the Faculty and Students of the Law School, University of Minnesota.

Subscription Price, $2.50 per annum. Forty cents per number.

SOLDIERS' AND SAILORS' CIVIL RELIEF ACTS.—Moratory legislation enacted during the late war as a necessary and eminently just form of relief will make itself felt in the law long after peace has been officially proclaimed, and consequently merits careful examination by every lawyer. The general character of these laws may be easily understood by reference to the Soldiers' and Sailors' Civil Relief Act of March 8, 1918, which applies to proceedings in all the courts, federal, state or district.[1] Section 100 declares the purpose of the act to be to extend protection to persons in the military service in order to prevent injury to

[1] Act of Congress March 8, 1918, c. 20, 40 St. L. 440; U. S. Comp. St. 1918, sec. 3078¼a—3078¼ ss.

their civil rights. The modes by which the federal act affords this protection are, broadly: (1) the requirement in default cases of an affidavit setting forth facts showing the defendant is not in the military service; (2) the provision that at any stage in any action or proceeding commenced in any court by or against any person in military service the court may on its own motion, and shall on application by or for such person, unless no interests are materially affected by the fact of service, stay the proceedings for the period of military service and three months thereafter; (3) and generally, to prevent the oppressive assertion of the rights of landlords, mortgagees, and creditors against men who, by reason of their absence in the service, were unable to meet their obligations.[2] Thus, relief under the federal act, while providing immunity from default judgments,[3] requires affirmative action in other cases by the party affected or by the court. The state acts,[4] however, vary from total exemption from civil process to an authorization of judicial stay in specified cases.

[2] Ibid. sec 200 subd. 1. Construed as limited in its application to defendants in the military service and not to require the setting aside of default judgments against defendants who were not in fact in the service. Howie Mining Co. v. McGary, (U.S.D.C. 1919) 256 Fed. 38; Harrel v. Shealey, (Ga. 1919) 100 S. E. 800; contra, Bobcoff v. Chesticoff, (1918) 24 Hawaii 44, holding judgment without filing affidavit void, even as against defendant not in service.

[3] Ibid. sec. 201.

[4] The following states grant a stay irrespective of the ability of the defendants to meet their obligations, and give the court no discretion to refuse the stay or make it conditional: Wis. Laws 1917, c. 409, exempts from civil process for three years from entry into service and requires a stay of suits pending at the time of passage of the act. This act was held void on principles governing the bankruptcy act: Congress having spoken fully the power of the states on the subject is suspended. Konkel v. State, (1919) 168 Wis. 335, 170 N. W. 715.

Iowa Laws 1918 c. 380, exempts from contractual payments and from execution.

Texas Sp. Laws 1917 c. 5 relieves defendants in military service from the necessity of answering during the war. Chap. 4 requires all sales of real property to be confirmed by the court.

Oregon Sp. Laws 1917 c. 275, postpones foreclosures of mortgages and execution of judgment until sixty days after the war.

In Maine, Massachusetts and Maryland (Report of American Bar Assn. Com. on noteworthy changes in Stat. Law 1918) stays are granted in the discretion of the court on its own motion or on application by the party.

Nebraska Sp. Laws 1918 c. 8 prevents judgments by default and provides for discretionary stays at any stage of any proceeding against men in service. The other state acts contain no such provision.

North Dakota (Sp. Laws 1918 c. 10) declares void any proceeding to recover a debt or foreclose a lien taken against a person in service; in order to prevent depreciation the court may order the sale of property subject to lien upon entry of a bond to protect the owner in service.

No question can be made of the full power of Congress under the war power[5] to grant civil relief from the annoyance of creditors during the time the beneficiaries of the federal act were fighting to save credits from utter destruction. By the same token, however, excursions into the broad field of war powers are forbidden to the states, and it is therefore felt by some jurists that Congress having spoken on the subject of moratoriums, the states may not do so.[6] The rarity of state moratoriums would seem to indicate that the state legislatures were of the same opinion or at least considered that supplementary enactments would be superfluous. But the extent to which the late war cut down the power our states exercised in former wars over the troops which each sent into the field, can be gauged only with the perspective of an historian.[7]

But war powers aside, and in the absence of legislation by Congress difficulties may arise in respect to state moratorial legislation on the ground that it impairs the obligation of contracts. Stay laws first became prevalent during the civil war. There then arose an irreconcilable conflict of state decisions upon the constitutionality of these laws, the preponderance of authority holding such statutes void as impairing the obligation

South Dakota, Rpt. A. B. A. Com. on changes in Stat. Law 1918, exempts persons from payment under a contract not a life insurance policy.

Mississippi, Montana, and New Jersey, Ibid., practically duplicate an earlier form of the federal act.

Other state laws are: La. Acts 1918, No. 131, pp. 217-225, 400; Penn. 6 Purdon's Dig. Stat. 1915, sec. 181, p. 6987; Vermont Gen. Laws 1917, secs. 1861, 3447; Virginia, Acts 1918 c. 376, p. 564.

The federal act prohibits without leave of court any proceeding to enforce payment of a tax on real property owned and occupied for a dwelling or business purpose by a person in the service or his dependents, if ability to pay the tax is materially affected by the service. Minn. Laws 1919 c. 140 authorizes the tax commission to abate penalties or taxes against the lands of service men.

[5] "The Soldiers' and Sailors' Civil Rights Bill, Part III"; an article by Ferry, Rosenbaum, and Wigmore, all of whom assisted in preparing the federal moratorium, in 12 Ill. L. Rev. 449. Hoffman v. Charlestown Five Cents Savings Bank, (1918) 231 Mass. 324, 121 N. E. 15. Report of the Am. Bar Ass'n Com. on Noteworthy Changes in Statute Law 1918, p. 30.

[6] Konkel v. State, (1919) 168 Wis. 335, 170 N. W. 715; dissenting opinion of Robinson, J., in Thress v. Zemple, (N. Dak. 1919) 174 N. W. 85.

[7] Cf. Act of June 3, 1916. c. 134, sec. 111 39 Stat. 211, 1918, U. S. Comp. St. sec. 3040, 1 (federal oath for militiamen); sec. 3045 (provision for federal draft of militia); and see report of A. B. A. Com. on Noteworthy Changes, etc., 1918, p. 30; cf. State v. Holm, (1918) 139 Minn. 267, 166 N. W. 181, holding c. 463 Minn. Laws 1917 (State Espionage Act) was not superseded by Act of Congress of June 15, 1917, U. S. Comp. St. 1917 Supp. sec. 10212 c. p. 453.

of contracts.[8] The test laid down by the Supreme Court in the early case of *Bronson v. Kinzie*,[9] however, seems to afford the most accurate rule available for the definition of the constitutional requirements respecting the obligation of contracts. The court said:

"Whatever belongs merely to the remedy may be altered according to the will of the state provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself."

It is an open question whether the state moratory acts go to this extent,[10] since they purport merely to postpone the enforcement of the obligation without impairing its validity. Even if they do, it may nevertheless be possible to sustain them as an exercise of the police power in a case where "public necessity," —i. e. war,—justified an interference with private property for the protection of the citizenry as a whole.[11]

But assuming these laws valid until declared otherwise, the interesting questions for the practitioner are those touching the scope and applicability of the state and federal stay-laws as they stand. In general the subject matter which they embrace is clearly apparent from the language of the statute;[12] some of our courts, however, have already placed judicial monuments at the boundaries set by the lawmakers, and their decisions may be briefly noted.

The Minnesota court in *Taylor v. McGregor State Bank*[13] indicated an intention to restrict the scope of the federal act, by stating in a vigorous dictum that Congress intended it to apply only to "judicial proceedings instituted to enforce pecuniary and kindred obligations" and that it was doubtful whether it could have any application to the statutory foreclosure of mortgages

[8] "Constitutionality of Federal Civil Rights Bill," supra note 5, citing Coffman v. Bank, (1866) 40 Miss. 29. Breitenbach v. Bush, (1863) 44 Pa. St. 313, 84 Am. Dec. 442, held contra in a well-reasoned opinion.

[9] Bronson v. Kinzie, (1843) 1 How. (U.S.) 311, 315.

[10] See note 4 supra. For discussion of the validity of state acts see article, Moratorium and Stay Laws, 4 Va. Law Reg. N. S. 645. Of course Congress is not limited by the contract clause of the constitution.

[11] Cf. Reid v. Colorado, (1902) 187 U. S. 137, 23 S. C. R. 92, 47 L. Ed. 108; "Federal Civil Rights Bill," 12 Ill. L. R. 449. An example of the exercise of the police power in this regard is the right of public authorities to dynamite buildings in the path of a fire. Cooley, Const. Lim., 6 Ed., 739 and cases cited.

[12] The provisions of the federal act are condensed in 27 Yale Law J., 802. For state acts see note 4 supra.

[13] Taylor v. McGregor State Bank, (Minn. 1919) 174 N. W. 893.

by advertisement.[14] Action had been brought by a former soldier to extend the time of redemption from a mortgage sale. Plaintiff did not enlist until a month after the sale took place, and our court denied relief on the short ground that the act was not intended to relate back to effect a proceeding completed prior to entry into service.

In at least three recent cases arising in state courts, the discretionary power of the court in granting or denying the relief asked under the provisions of the federal act was upheld.[15] Again, an interesting procedural application of the federal act was made by the Texas court of civil appeals.[16] The plaintiff was a service man who obtained a judgment below, which on appeal was reversed and remanded. The clerk refused to issue the mandate on the ground that costs had not been paid within a period of one year as prescribed by a state statute. On motion of plaintiff's counsel the court instructed the clerk to issue the mandate. On principle it is doubtful whether Congress can control procedure in state courts to the extent allowed by the Texas court. But a far more conspicuous example of the liberality induced by the war-time spirit is contained in an opinion of a court generally notable for its sanity and judiciousness. In the first case arising under the act of March 8, 1918, the supreme judicial court of Massachusetts drew within the protection of the federal act equitable as well as legal owners of real property, and held that a soldier whose only title to mortgaged property was made out through an oral trust voidable under the statute of frauds, was entitled to enjoin the mortgage sale.[17] There was, of course, no record of plaintiff's interest, and, if the decision is correct, apparently no person can safely acquire a title based on foreclosure under a power of sale made since March 8, 1918,

[14] See 12 Ill. Law Rev. 449, 461, for the view of the drafters of the federal act, seemingly in direct conflict with the Minnesota dictum. The two Massachusetts cases cited in note 17, post, distinctly negative the Minnesota view that the act of Congress has no application to non-judicial proceedings for the foreclosure of a real estate mortgage by advertisement. See also John Hancock Mut. L. Ins. Co. v. Lester, (Mass. 1920) 125 N. E. 594.

[15] Davies v. Patterson, (Ark. 1919) 208 S. W. 592; Gilluly v. Hawkins, (Wash. 1919) 182 Pac. 958; State ex. rel. Clark v. Klene, (Mo. App. 1919) 212 S. W. 55.

[16] Kuehn v. Neugebauer, (Tex. Civ. App. 1919) 216 S. W. 259.

[17] Hoffman v. Charlestown Five Cents Savings Bank, (1918) 231 Mass. 324, 121 N. E. 15. This case was commented upon in 3 MINNESOTA LAW REVIEW 131; it is reaffirmed in Morse v. Storer, (Mass. 1919) 123 N. E. 780, where it is said the meaning of the former decision is that "the safe course for the mortgagee is to foreclose his mortgage under the order of a court of equity. It is only by pursuing that course that he gets a record title not open to successful attack."

and until three months after the end of the war without ascertaining at his peril that no person having a legal or equitable title to the land was in service at the time of the foreclosure.[18]

Where state and federal moratory legislation co-exist a conflict of authority has already arisen as to which law governs. The North Dakota court applied its own statute[19] without mentioning the federal act, though the two are squarely in conflict.[20] The Oregon statute was construed and applied in preference to the federal act in *Pierrard et ux. v. Hoch.*[21] That was an action to foreclose a mortgage on property subsequently transferred to a soldier still on active service. From a decree of foreclosure the original mortgagor appealed, relying upon Oregon General Laws 1917 chapter 275, which forbade the foreclosure of any mortgage on land owned by an enlisted man in the volunteer forces of the United States. Defendant contended that the act deprived the court of jurisdiction to entertain the suit. Plaintiff urged that the act was superseded by the federal statute and ought therefore to be disregarded. The court held that the subject-matter of the legislation embraced remedies and procedure in state courts; that the federal act therefore possessed no superiority over the state legislation; and that since the state law governed, the lower court had no jurisdiction to enter the decree of foreclosure. Wisconsin on the other hand has taken the view that its own law[22] was superseded by the passage of the Civil Relief Act.[23] Although admitting that the United States and the states have concurrent rights in respect to privileges and immunities from process in the courts, the court nevertheless felt that the matter of moratoriums in the late war was, by reason of the national character of the struggle and the necessity of uniformity, deserving of a place on the same plane with bankruptcy legislation.

Company commanders who had to do with "rainbow" organizations made up of men from many states will endorse the argument in favor of uniformity. And the advantages of such

[18] The federal act expires six months after the end of the war.

[19] N. Dak. Sp. Laws 1918 c. 10.

[20] Thress v. Zemple, (N. Dak. 1919) 174 N. W. 85; Robinson, J. dissented.

[21] (Ore. 1919) 184 Pac. 494. The Oregon law was held not applicable to one enlisting in the state guard in Gearen v. Fleckenstein, (Ore. 1918) 173 Pac. 569.

[22] Wis. Laws 1917 c. 409.

[23] Konkel v. State, (1919) 168 Wis. 335, 170 N. W. 715.

uniformity in moratory legislation affecting transfers of real and personal property by deed or assignment cannot be lost upon the enlightened bar of today. Only ten jurisdictions, however, have moratorium laws differing from the federal act, and, despite these encroachments, great good may be expected to flow from this beneficent form of relief.

INSURANCE—RELATIVE INTERESTS OF INSURED AND BENEFICIARY AS AFFECTING THE ADMISSIBILITY OF STATEMENTS MADE BY THE INSURED IN A SUIT BY THE BENEFICIARY ON THE POLICY.—An insurance company when sued by the beneficiary named in a policy of life insurance frequently seeks to prove misrepresentation or some act of forfeiture on the part of the insured by introducing evidence as to statements made by the insured before and after taking out the policy. The effect of the nature of the interest of the beneficiary upon the admissibility of such evidence was strikingly illustrated in a recent case,[1] where the insured took out a policy of insurance, payable to a designated beneficiary, with the right reserved to the insured to change the beneficiary. The insured made several statements tending to show the falsity of his representations in the application, then delivered the policy as a gift to the beneficiary, and then made several more statements of a similar nature. The court held that while the insured had control and possession of the policy the beneficiary had no interest in the policy, but a mere expectancy; that the gift changed this into a vested right; and that the statements made while the beneficiary had a mere expectancy were admissible, while the statements made after the beneficiary acquired a vested interest were inadmissible.

To what extent, however, the admissibility of the insured's statements is affected by the nature of the respective interests of the insured and beneficiary under the policy is not always easy or possible to determine from the cases, the reason being that the courts often do not clearly distinguish between the different classes of statements offered in evidence or between the different relations the insured and beneficiary bear to each other under the different kinds of policies. This confusion is due to the fact that the law of evidence is closely interwoven with the substantive law of insurance, and the courts, in applying

[1] McEwen v. N. Y. Life Ins. Co., (Cal. App. 1919) 183 Pac. 373.

the troublesome hearsay rule, with its exceptions, to one of the most peculiar and anomalous situations in our law,—that of a beneficiary under a policy of life insurance,—do not always indicate clearly the grounds upon which their conclusions are based.

The question here involved is, to what extent are the rules of evidence affected by the different interests of the insured and beneficiary? In the first place these statements may fall into several different classes: admissions, declarations against interest, statements as to state of mind or bodily health, or statements made under such circumstances as to form part of the res gestae. It is obvious, however, that the rules of evidence applicable to these classes of statements can be affected by the different interests of the insured and beneficiary only in the cases where the evidence, if admissible at all, must come in as a declaration against interest or as an admission. In these classes of statements, the interest of the declarant is the determining factor, for in the cases of admissions, the declarant must either be a party to the suit or one identified in interest with such party,[2] and in declarations against interest the statement must be against the pecuniary or proprietary interests of the declarant.[3] In order to determine when the insured and beneficiary are identified in interest and when the insured has a pecuniary or proprietary interest in the policy, it is necessary to determine what the different interests of the insured and beneficiary are under the different kinds of policies.

There are several distinctly different forms of life insurance policies. In the so-called old line policy with no right on the part of the insured to change the beneficiary, the courts are well agreed that the beneficiary has a vested interest,[4] which cannot be divested without his consent, but which can be defeated by forfeiture according to the terms of the policy as by non-payment of premiums. As to the so-called old-line policy with right reserved to the insured to change the beneficiary, there is a conflict of authority. The majority hold that the beneficiary has a defeasible vested interest, subject to be divested only by a change of beneficiary,[5] while a minority hold that the benefi-

[2] Chamberlayne, Modern Law Evidence, 1661, Secs. 1310 et seq.
[3] Ibid, Sec. 1235, and Vol. 4, Sec. 2769 et seq.
[4] Preston v. Conn. Mutual Life Ins. Co., (1906) 95 Md. 101, 51 Atl. 838; Filley v. Illinois Life Ins. Co., (1914) 93 Kan. 193, 144 Pac. 257; Condon v. N. Y. Life Ins. Co., (1918) 183 Ia. 658, 166 N. W. 452.
[5] Indiana Nat. Life Ins. Co. v. McGinnis, (1913) 180 Ind. 9, 101 N. E 289, 45 L. R. A. (N.S.) 192; Roberts v. Northwestern Nat. Life Ins.

ciary has no interest at all, but a mere expectancy.[6] In mutual benefit association certificates, the insured ordinarily has the the right to change the beneficiary, and the majority hold that the insured has a mere expectancy,[7] while a minority apply the same rule as to ordinary life policies and hold that the beneficiary has a defeasible vested interest.

In regard to those statements made before the policy was issued being receivable as admissions and declarations against interest, it would seem immaterial whether the beneficiary under a subsequently acquired policy had a vested interest or a mere expectancy, for the general rule of evidence is that statements made before the declarant has acquired title are not receivable as admissions,[9] and it seems equally clear that they cannot be received as declarations against any interest under the policy,[10] for they are made before the insured has any pecuniary or proprietary interest in it.

Where the statements are made after the policy is issued, their admissibility as admissions depends upon whether there is identity of interest between the insured and the beneficiary, i. e., whether the beneficiary claims his interest as a representative of or from or through the insured, and their admissibility as declarations against interest depends upon whether in each case the insured has any pecuniary or proprietary interest in the policy. Where the beneficiary is considered as having a vested interest or defeasible vested interest under the policy, the rule seems to be that the insured has no interest in the policy, and that the beneficiary and the insured are strangers,[11] and not identified in interest.[12] Therefore, the statements are not receivable as

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Co., (1915) 143 Ga. 780, 85 S. E. 1043; Neary v. Met. Life Ins. Co., (1918) 92 Conn. 488, 103 Atl. 667.

[6] Laudenschlager v. Northwestern Endowment and Legacy Ass'n., (1886) 36 Minn. 131, 30 N. W. 447; Hicks v. Northwestern Mutual Life Ins. Co., (1914) 166 Ia. 532, 147 N. W. 883; N. Y. Life Ins. Co. v. Daly, (1914) 25 Cal. App. 376, 143 Pac. 1033.

[7] Niblick, Benefit Societies, 2nd Ed., p. 627; Supreme Conclave K. D. v. O'Connell, (1899) 107 Ga. 97, 32 S. E. 946; Brown v. Mystic Workers, (1913) 151 Ill. App. 517.

[8] Supreme Lodge K. P. v. Schmidt, (1884) 98 Ind. 374, 380; Johnson v. Fraternal Reserve Ass'n., (1908) 136 Wis. 528, 531, 117 N. W. 1019, 1020.

[9] 2 Wigmore on Evidence, sec. 1082; Met. Life Ins. Co. v. O'Grady, (1914) 115 Va. 830, 80 S. E. 743.

[10] Valley Mut. Life Ass'n. v. Teewalt, (1884) 79 Va. 421, 423.

[11] Washington Life Ins. Co. v. Haney, (1873) 10 Kan. 525; Grangers Life Ins. Co. v. Brown, (1879) 57 Miss. 308, 34 Am. Rep. 446.

[12] 2 Wigmore on Evidence, sec 1081.

admissions[13] or as declarations against interest, even though the insured has the right to change the beneficiary.[14] But, where the beneficiary is considered as having but a mere expectancy with all right and interest in the insured, there seems to be no doubt that the beneficiary takes from and under the insured, and is therefore bound by the admissions of the insured,[15] and he has such pecuniary or proprietary interest in the policy as to make his statements receivable as declarations against interest.[16] The fact, however, that the statements are not admissible as admissions would not necessarily render them inadmissible as declarations against interest, for it is no objection to the admissibility of a statement as a declaration against interest that it was made by a stranger to the action, but the courts do not seem to have kept this distinction clear. It would seem that where the insured has the right to change the beneficiary, whether the beneficiary is considered as having a defeasible vested interest, or a mere expectancy, his pecuniary and proprietary interest would be in some respects the same, and it is hard to see why in both cases the insured has not some financial or pecuniary interest in the policy, for, by making a bank the beneficiary, he could use it as security for a loan.

Although the cases seem to have blurred all distinctions between the different rules of evidence applicable to statements made by the insured, yet in so far as admissions and declarations against interest are concerned, the cases can be harmonized with the general rules of evidence. It is to be noticed, however, that in several of the cases considered the statements which were excluded as admissions and declarations against interest would seem to have been admissible as statements as to intention[17] or statements as to bodily health.[18] But apparently unless the statements are admissible either as declarations against interest, admissions, or as part of the res gestae the courts will seldom

[13] Southern Life Ins. Co. v. Booker, (1872) 9 Heisk, (Tenn.) 606, 619, 24 Am. Rep. 344.

[14] Life Ins. Co. v. Hairston, (1908) 108 Va. 832, 62 S. E. 1057, 128 A. S. R. 989.

[15] Steinhausen v. Muutal Ass'n., (1891) 59 Hun (N.Y.) 336, 13 N. Y. S. 36; Life Ass'n. v. Winn, (1896) 96 Tenn. 224, 33 S. W. 1045.

[16] Thomas v. Grand Lodge, (1895) 12 Wash. 500, 41 Pac. 882; McEwen v. N. Y. Life Ins. Co., (1914) 23 Cal. App. 694, 139 Pac. 242.

[17] Life Ins. Co. v. Hairston, (1908) 108 Va. 832, 62 S. E. 1057, 128 A. S. R. 989.

[18] Penn. Mut. Life Ins. Co. v. Wiler, (1884) 100 Ind. 92, 50 Am. Rep. 769.

allow such evidence to be admitted against the beneficiary, perhaps because of the jealousy with which they guard the rights of beneficiaries.

RECENT CASES

ADVERSE POSSESSION—PROOF MUST BE CLEAR AND CONVINCING.—The court charged the jury that defendant must make out his claim of adverse possession by a fair preponderance of the evidence. *Held,* that this was error, and such title must be proved by "clear and convincing evidence." *Northern R. Co. of N. J. v. Demarest,* (N. J. 1919) 108 Atl. 376.

This is the law in New Jersey, *Rowland v. Updike,* (1859) 28 N. J. Law 101; *Myers v. Folkman,* (1914) 86 N. J. Law 29, 90 Atl. 1051; and similar language is generally used in other states. *Illinois Steel Co. v. Budzisz,* (1902) 115 Wis. 68, 90 N. W. 1019; *Conner v. Detroit Terminal R. Co.,* (1914) 183 Mich. 241, 150 N. W. 115; *Litchfield v. Sewell,* (1896) 97 Ia. 247, 66 N. W. 104; *Kirby v. Kirby,* (1908) 236 Ill. 255, 86 N. E. 259. There are certain elements which must always be proved to establish a claim of adverse possession, and some courts hold that there is no reason why these elements should not be proved under the same rules as to sufficiency of evidence as any other facts. *Inhabitants of Cohasset v. Moors,* (1910) 204 Mass. 173, 90 N. E. 978 holding only a fair preponderance of evidence necessary; *Chilton v. Nickey,* (1914) 261 Mo. 232, 169 S. W. 978. This seems to be the view of the Minnesota court. *Sawbridge v. City of Fergus Falls,* (1907) 101 Minn. 378, 112 N. W. 385.

CARRIERS—LIABILITY FOR LOSS OF "BAGGAGE"—TRANSFER COMPANY CARRYING TRUNKS AS GOODS.—Plantiff came from Grand Rapids to St. Paul, Minnesota, by railroad; at the station she gave her railroad baggage check for a trunk to defendant transfer company, a common carrier of passengers and baggage, and received a claim check in return. Trunk was taken to defendant's storehouse, where it was stolen. In addition to baggage worth $200, it contained wedding presents and silverware valued at $300. *Held,* plaintiff is entitled to recover total value of contents.—*McQuat v. Cook's Taxicab & Transfer Co.,* (Minn. 1920) 176 N. W.

It is well established law that a common carrier of passengers carries the baggage of its passengers as an incident to the contract of passenger carriage; and that the liability of the carrier is strictly limited to the value of the personal baggage, and does not extend to merchandise. *McKibbin v. Great Northern Ry. Co.,* (1899) 78 Minn. 232, 80 N. W. 1052; *Orange County Bank v. Brown,* (1832) 9 Wend. 85, 24 Am. Dec. 129 and note; 6 Cyc. 668. The question raised by the instant case is not one of passenger carriage but of goods carriage. From the number of cases reported it appears that the precise question has been rarely litigated. Of the cases reported, two hold that the transfer company is liable up to the full amount of the value of the goods lost.

Parmelee v. Lowitz, (1874) 74 Ill. 116, 24 Am. Rep. 276; *Morgan v. Woolverton*, (1911) 203 N. Y. 52, 96 N. E. 354. A prior New York case held that defendant was liable only for value of the contents which were baggage. *Nathan & Woolverton*, (1910) 127 N. Y. S. 442, 69 Misc. Rep. 425, affirmed without opinion in 147 App. Div. 908. The theory of the latter case is that when a baggage check is presented to the transfer company for a trunk, without explanation, "that is tantamount to a representation that it is an ordinary trunk containing ordinary baggage." P. 443. This case is no doubt overruled by the later case, *Morgan v. Woolverton*, supra, where the court distinguishes a contract between owner of a trunk and the transfer company for its carriage as goods from a contract between passenger and carrier to carry his baggage as an incident to contract of passenger carriage. It is submitted that this distinction is sound, and that the instant case decided on the basis thereof is correct for these reasons: (1) there is no relation of passenger and carrier between plaintiff and defendant in this case, wherefore the contract was not for carriage of baggage but of goods; (2) the transfer company received a consideration for the carriage of the trunk, whereas in the case of baggage no consideration beyond the fare paid for the passenger ticket is required, hence the transfer company was bound by the common law liability as an insurer, and if it desired to limit this liability it was under duty to make inquiry as to the nature of the goods. The reason for the limitation is stated by Mitchell J. in *Haines v. Chicago, etc., Ry. Co.*, (1882) 29 Minn. 160, 12 N. W. 447, 43 Am. R. 199: "The only agreement between plaintiff and defendant regarding it was simply the usual implied contract between carrier and passenger to carry the ordinary personal baggage of the passenger. Under this implied contract defendant received the valise as the ordinary baggage of plaintiff, for transportation as such, and not otherwise. The only consideration paid by plaintiff to defendant was the amount paid for his passage ticket." This being the reason for the limitation of liability, the limitation ceases with the reason.

CONSTITUTIONAL LAW—CONSTITUTIONAL PROVISION SELF EXECUTING —CONSENT OF STATE TO SUIT.—Suit is brought against a county for consequential damage to property because of the change of grade of a road, under constitutional provision that property shall not be taken or damaged for a public use without due compensation. No provision had been made by the legislature for the assessment of such damages. The county demurred on the ground that it, as a political subdivision of the state, could not be sued without the permission of the state. *Held*, that the constitutional provision is self executing, gives the necessary consent in behalf of the state, and the county may be sued even though no statute provides for compensation. *Nelson County v. Loving*, (Va. 1919) 101 S. E. 406.

The question arises under the changed constitutional provisions which include "damaging" as well as "taking" in the compensation for property clause and has seldom been raised in regard to counties. Municipal corporations have very generally been held liable for these

consequential damages in cases of changes in grade, under this clause, even where there has been no statutory provision for the assessment of damages by condemnation proceedings. *Swift & Co. v. Newport News,* (1906) 105 Va. 108, 52 S. E. 821, 3 L. R. A. (N.S.) 404; *Dickerman v. City of Duluth,* (1903) 88 Minn. 288, 92 N. W. 1119; *Sather v. City of Duluth,* (1913) 123 Minn. 300, 143 N.W. 906; *Householder v. City of Kansas City,* (1884) 83 Mo. 488. This provision has been held to apply to counties as well as to municipalities, under a slightly different constitutional provision, in *County of Chester v. Brower,* (1888) 117 Pa. St. 647, 12 Atl. 577, 2 A. S. R. 713; and in *Dallas County v. Dillard,* (1908) 156 Ala. 354, 47 So. 135, 18 L. R. A. (N.S.) 884; and under a very similar constitutional provision in *Layman v. Beeler, et al.,* (1902) 113 Ky. 221, 67 S.W. 995; *Tyler v. Tehama County,* (1895) 109 Cal. 618, 42 Pac. 240, and *Austin v. Village of Tonka Bay,* (1915) 130 Minn. 359, 153 N.W. 738. There seems to be no logical reason why the same rule should not apply to counties as well as to municipalities. As the Minnesota court says in the *Austin Case,* supra p. 363: "The constitution creates the right to redress, and the right thus given can neither be enlarged nor diminished by legislation."

CONTRACTS—DRUNKENNESS—RETURN OF CONSIDERATION RECEIVED WHILE DRUNK.—Plaintiff brought action to replevy tools and implements of a barber shop which he sold to the defendant while he was so drunk that he was unable to understand the nature and effect of his act. Defendant demanded a return of the consideration. *Held,* in an action of replevin, that the contract of sale was voidable, and that an incapable drunkard is not compelled to restore the consideration on disaffirmance if when restored to his senses he does not possess it. *Van Horn v. Persinger,* (Kan. 1919) 215 S.W. 930.

The weight of authority sustains the view that if a party to a contract is in a state of complete intoxication which made him incapable of understanding what he was doing, the contract is voidable, not void. *Matz v. Martinson,* (1914) 127 Minn. 262, 149 N. W. 370, L. R. A. 1915B 1121; *Sneed v. Scott,* (1913) 182 Ala. 97, 62 So. 36. This is not questioned by the instant case. The rule as to drunkards is held to be similar to that respecting infants. In Ohio it was held that a defendant knowing the other party to be drunk and obtaining personal property from him by contract is guilty of fraud, and a return of the consideration is unnecessary, but the measure of damages is the difference between the value of the property and the consideration received. *Baird v. Howard,* (1894) 51 Ohio St. 57, 36 N.E. 732, 22 L. R. A. 846, 46 A. S. R. 550. Similar rule, where the fraud is aided by plying the victim with liquor: *Plase v. Minneapolis, etc., R. Co.,* (1912) 118 Minn. 437, 137 N.W. 178. While the courts aim to protect the drunkard, they will not allow him to acquire property because of his weakness. A plaintiff disaffirming an agreement made during his intoxication to release a claim against a railroad must restore the consideration. *Kelly v. Louisville, etc., R. Co.,* (1908) 154 Ala. 573, 45 So. 906. Except in cases of fraud, a person seeking relief from a contract which he entered into

while intoxicated must, before relief will be granted, place the other party in statu quo. *Youn v. Lamont,* (1894) 56 Minn. 216, 57 N.W. 478. The instant case does not have the support of authorities in classifying drunkards with infants in matters of contract.

CONTRACTS—SALE CONTRACT FOR REQUIREMENTS OF GLUE DURING YEAR NOT LACKING IN MUTUALITY.—Defendant offered to furnish plaintiff, jobber, his requirements of glue for year at a certain price, and plaintiff accepted this offer. Plaintiff merely took orders from customers and turned them over to defendant. Prices advanced sharply and plaintiff secured orders greatly in excess of those secured in previous years. *Held,* that the contract was not lacking in mutuality, and hence was binding. *Schlegel Mfg. Co. v. Cooper's Glue Factory,* (N. Y. 1919) 179 N. Y. S. 271.

An agreement to furnish such goods as shall be required by an established business is generally held to be valid. *T. B. Walker Mfg. Co. v. Swift & Co.,* (1912) 200 Fed. 529, 119 C. C. A. 27, 43 L. R. A. (N.S.) 730; *Ames-Brooks Co. v. Aetna Ins. Co.* (1901) 83 Minn. 346, 86 N. W. 344; *Wells v. Alexandre,* (1891) 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218. But when the contract is to furnish, not the requirements for a factory or the like, but what a dealer may require for resale to dealers or the public, the element of mutuality is not so evident. An executory contract has mutuality if each party gives a valuable consideration for the promise of the other. Defendant in the instant case offered to sell glue to plaintiff "for your requirements" for a year. Plaintiff by accepting this offer promised to buy his requirements of glue of defendant. If plaintiff by this gave up any legal right he is bound and the contract is a valid one. Whether he did depends upon the construction to be given to the word requirements. If its meaning is such as to leave it entirely to the caprice of the plaintiff whether he should buy glue of defendant, there is no mutuality of contract. *Bailey v. Austrian,* (1873), 19 Minn. 535, G. 465; *Stensgaard v. Smith,* (1890) 43 Minn. 11, 44 N. W. 669, 19 A. S. R. 205; *Joliet Bottling Co. v. Brewing Co.,* (1912) 254 Ill. 215, 98 N. E. 263. But where the word "requirements" is used in an agreement, that meaning should be given it if possible which will make the agreement a binding contract. *Minnesota Lumber Co. v. Whitebreast Coal Co.,* (1896) 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529.

Having this in mind, can any reasonable meaning be given to the word which will have the effect of imposing some obligation upon plaintiff? Such a meaning may be found if we take it that the plaintiff bound himself to buy from defendant all glue for which he secured orders. Under this meaning if prices dropped he would not be obligated to take any orders; but if he *did* take orders, he gave up his undoubted legal right to fill them from any source he chose, and promised to place them with defendant. The following cases hold that the "requirements" of a dealer or manufacturer may bear the meaning indicated above. *Minnesota Lumber Co. v. Whitebreast Coal Co.,* supra; *Jenkins & Co. v. Anaheim Sugar Co.,* (1918) 247 Fed. 958, 160 C. C. A. 658,

L. R. A. 1918E 293 ("requirements" of a wholesaler); *Western Macaroni Mfg. Co. v. Fiore,* (1915) 47 Utah 108, 151 Pac. 984; and see *Scott v. Stevenson Co.,* (1915) 130 Minn. 151, 153 N. W. 316; *Diamond Alkali Co. v. Aetna Explosives Co.,* (1919) 264 Pa. 304, 107 Atl. 711.

CORPORATIONS—PURCHASE OF ITS OWN STOCK BY CORPORATION—ULTRA VIRES.—The president of plaintiff corporation purchased on behalf of the corporation 200 shares of plaintiff company's stock from defendant bank and executed and delivered notes in payment. Plaintiff now brings suit to have this contract set aside and notes cancelled. *Held,* under statutes purchase of stock by plaintiff was void. *E. J. Dodge Co. v. First National Bank of Portland,* (1917) 260 Fed. 758.

In this country the proposition is supported by the weight of authority that a corporation may purchase its own shares of stock unless restrained by its articles of incorporation or charter, or by statute. *Burnes v. Burnes,* (1905) 137 Fed. 781, 70 C. C. A. 357; *Marvin v. Anderson,* (1901) 111 Wis. 387, 87 N. W. 226; provided the purchase is made in good faith and without prejudice to its creditors or stockholders, *Olmstead v. Vance & Jones Co.,* (1902) 196 Ill. 236, 63 N. E. 634. See note 44 L. R. A. (N.S.) 156; for further discussion see 2 MINNESOTA LAW REVIEW 456. One court allows such a purchase of a corporation's own stock to be made only out of surplus earnings. *McGill Co. v. Underwood,* (1914) 161 App. Div. 30, 146 N. Y. S. 362. In England and some of the states it is held that a corporation, in the absence of statutory authority, cannot purchase its own shares of stock because such a transaction is a fraud upon the creditors. *Hall & Farley v. Alabama Terminal & Improvement Co.,* (1911) 173 Ala. 398, 56 So. 235; *Bear Creek Lumber Co. v. Second National Bank of Cumberland,* (1913) 120 Md. 566, 87 Atl. 1084; *Trevor et al. v. Whitcworth et. al.,* (1887) L. R., 12 App. Cas. 409. Some states by statute expressly forbid a corporation to purchase its own stock; *E. J. Dodge Co. v. First National Bank of Portland.* supra; *Schulte v. Boulevard Gardens Land Co.,* (1913) 164 Cal. 464, 129 Pac. 582. A contract to repurchase its stock made by corporation at time of subscription is distinguished in the latter case and held valid where such repurchase will not result in injury to the creditors. The instant case comes squarely within the statutory prohibition.

CORPORATIONS—PURCHASE OF STOCK OF CORPORATION BY NATIONAL BANK—COMPELLING BANK TO OPERATE STREET RAILWAY.—When the Minster & Loramie Ry. Co. was nearly insolvent it was placed in the hands of a receiver and holders of the bonded indebtedness cancelled the bonds. A new bond issue in the sum of $20,000 was made which was bought up by the First National Bank of Bremen. The receiver, upon order of the court, sold all the property of the railroad, including the franchise, as a going concern to Gress acting for the bank. The bank continued to operate the road for forty days, and when it threatened to discontinue because a purchaser could not be found, the village of Loramie brought suit to obtain an injunction to restrain the bank from discontinuing the opera-

tion of the road. *Held*, order allowing injunction must be reversed.—*Gress v. Village of Ft. Loramie*, (Ohio 1919) 125 N. E. 112.

The instant case states as a general rule that ordinarily, a purchaser of a railroad and its franchise at a receiver's sale assumes the obligation to continue its operation. A well-established exception to this rule exists where national banks purchase stocks of other corporations and hold such stocks ultra vires. The act of a national bank in buying stock of another business or banking corporation is ultra vires. *First National Bank of Ottawa v. Converse*, (1906) 200 U. S. 425, 26 S. C. R. 306, 50 L. Ed. 537; *Shaw v. National German-American Bank*, (Minn. 1904) 132 Fed. 658, affirmed in 199 U. S. 603. And though the bank may legally acquire the stock of another corporation as collateral security to an existing indebtedness, yet a national bank can not engage in speculative business enterprise by holding such stock; thus, if it be sued upon a liability attaching to such stock, which is held ultra vires, although it may have derived the benefits of dividends in the meantime, the bank is not estopped from setting up the defense of ultra vires. *Merchants' National Bank v. Wehrmann*, (1905) 202 U. S. 295, 26 S. C. R. 613, 50 L. Ed. 1036; *California Bank v. Kennedy*, (1897) 167 U. S. 362, 17 S. C. R. 831, 42 L. Ed. 198. The result of leaving the city without street car service seems unavoidable—at least the bank could not be forced to give such service. The only solution is the one suggested by the court to the effect that the receiver's sale should not have been confirmed when the question came up for confirmation. After confirmation it would be impossible to make the receiver take the road back.

EVIDENCE—PAROL EVIDENCE TO VARY WRITTEN CONTRACT—COLLATERAL AGREEMENTS.—Defendants subleased for a term of four years to plaintiff with provision that defendant might terminate lease with four weeks' notice. Prior to the execution of the lease a verbal agreement was made in which defendant promised, in consideration that plaintiff would execute the lease, that he would not exercise such right unless requested to do so by his head lessors. Defendant gave notice and terminated the lease without such request. Plaintiff sues for breach of prior agreement and defendant sets up lease. *Held*, on demurrer, that the two agreements being directly in conflict, the parol agreement could not be admitted, one judge dissenting. *Hoyt's Prop. Ltd. v. Spencer*, (1919) 19 New South Wales St. Rep. 200.

The case is in accord with the general rule that parol agreements made prior to or contemporaneous with a written contract are inadmissible to vary, contradict, or add to the written contract. *Beard v. Gooch & Son*, (1910) 62 Tex. Civ. App. 69, 130 S. W. 1022; *Fidelity & Deposit Co. of Md. v. Mansfield*, (Ia. 1920) 175 N. W. 528, inadmissible to show that bonded trustees should not be required to pay a surety company's fees as provided in written application but that third person should be looked to exclusively; *Little v. Lary*, (1913) 12 Ga. App. 754, 78 S. E. 470. All prior transactions in the making of a contract are presumed merged in the subsequent contract, *Shamberg v. Stearns*, (1913) 178 Ill. App. 587. In the absence of mistake, fraud and ambiguity, this is the

accepted rule, with slight exceptions, except in the jurisdiction of Pennsylvania. *Thomas v. Loose,* (1886) 114 Pa. St. 35, 6 Atl. 326; *Lowry v. Roy,* (1913) 238 Pa. St. 9, 85 Atl. 986; *Potter v. Grimm,* (1915) 248 Pa. St. 440, 94 Atl. 185; for criticism see 4 Wigmore on Evidence, sec. 2431. The parol evidence rule is a rule of substantive law rather than a rule of evidence and the right to rescind a contract on the ground of fraud is entirely outside the parol testimony rule. *O'Donnell v. Inhabitants of Clinton,* (1888) 145 Mass. 461, 14 N. E. 747; *Bank of Guntersville v. Webb & Butler,* (1895) 108 Ala. 132, 19 So. 14; Wigmore, "A View of the Parol Evidence Rule," 47 Am. L. Reg. 337.

In the principal case there was an attempt to justify the suit on the prior parol agreement on the ground that it was a collateral agreement. But collateral agreements are inadmissible under this rule when they are inconsistent with the contract, although numerous instances can be cited where the courts have allowed the admission of collateral parol agreements where they are not inconsistent with the principal contract. *Backus v. Sternburg,* (1894) 59 Minn. 403, 61 N. W. 335; *American Bldg. & Loan Ass'n v. Dahl,* (1893) 54 Minn. 355, 56 N. W. 47; *Bretto v. Levine,* (1892) 50 Minn. 168, 52 N. W. 525; *Graffam v. Pierce,* (1887) 143 Mass. 386, 9 N. E. 819; *Howard v. Stratton,* (1884) 64 Cal. 487, 2 Pac. 263. That the parol contract was inconsistent here admits of little doubt as there was an absolute right in one contract and only a conditional right in the other. *Berthold v. Fox,* (1868) 13 Minn. 501, G. 462, 97 Am. Dec. 243.

The mere fact that the parol agreement was the consideration for the execution of the written contract does not alter the case when the parol agreement is inconsistent. *Howard v. Thomas,* (1861) 12 Ohio St. 201; 2 Pac. 263; *Conant v. National St. Bank,* (1889) 121 Ind. 323, 22 N. E. 250.

FRAUDS, STATUTE OF—CHECK AS SUFFICIENT PART PAYMENT FOR GOODS SOLD.—Under an oral contract to purchase lambs, plaintiff gave defendant a check the proceeds of which were to be applied in part payment of the purchase price. Defendant never presented the check for payment, but a few days after the agreement notified the plaintiff that he had destroyed it. *Held,* that in the absence of an express or implied agreement that the check shall constitute an absolute payment, payment by check is presumptively conditional and is not such part payment as to take the contract out of the statute of frauds. *Gay v. Sundquist,* (S. D.1919) 175 N. W. 190.

The few decisions where this question has been considered support the instant case. In a contract for the sale of horses, the creditor accepted the check with the understanding that the check itself was an absolute payment, and later the debtor countermanded the payment of the check and refused to take the horses, *held,* that the sale was valid and the statute of frauds satisfied. *Logan v. Carroll,* (1897) 72 Mo. App. 613. But the burden is on the plaintiff to show that the parties agreed the check would be a discharge of the price pro tanto. *Groomer v. McMillan,* (1910) 143 Mo. App. 612, 128 S. W. 285. Unless there is an agreement that the creditor accepts the check in discharge of the debt and holds it at his own risk as to whether he can receive the cash for it at the bank, the pre-

sumption is that the check is merely a means of payment, not an absolute payment and the case is within the statute of frauds. *Hessberg v. Welsh,* (1914) 147 N. Y. S. 44; *Bates v. Dwinell,* (1917) 101 Neb. 712, 164 N. W. 722.

LICENSES—DISTINGUISHED FROM EASEMENTS—PARTY WALLS.—Plaintiffs and assignor of defendants made a verbal agreement whereby plaintiffs were to construct a party wall resting one half on each lot, plaintiffs to be sole owner until paid one half the cost of construction when assignor should be entitled to make use of the wall. Plaintiffs seek to enjoin defendants from making use of the wall for a building they are about to construct, no part of the cost of construction of the wall having been paid. *Held,* that the builder of the wall having fully performed, acquired property rights in the wall which equity will protect though the agreement came within the statute of frauds. Injunction granted. *Hanson v. Beaulieu,* (Minn.) 1920) 176 N. W. 178.

Defendant by this decision being excluded from his own land unless he pay the plaintiff a sum of money, the question arises, what is the nature of plaintiff's interest in defendant's land?

It has repeatedly been held that rights acquired under such oral contracts will be enforced if executed so as to take them out of the statute of frauds. *Rawson v. Bell,* (1872) 46 Ga. 19; *Rindge v. Baker,* (1874) 57 N. Y. 209, 15 Am. Rep. 475; *Pireaux v. Simon,* (1891) 79 Wis. 392, 48 N. W. 674. In these cases defendants were held liable under agreements similar to that in the instant case to pay for a share of the cost of construction of party walls. The decisions were based upon the ground of part performance of a contract being sufficient to take it out of the operation of the statute of frauds, and not upon the acquisition of any interest in defendant's land. By way of dictum it was indicated in the Wisconsin case that no question need be raised as to whether plaintiff had obtained a permanent easement of support in defendant's lot, while the Georgia court stated that when fully executed by both parties the agreement would constitute an easement running with the land. The Minnesota court in the instant case states that this wall must be considered real property, plaintiffs possessing an easement in the part of defendant's lot upon which it stands, citing two early Minnesota cases in both of which, however, the contract was made under seal. *Warner v. Rogers,* (1876) 23 Minn. 34; *Mackey v. Harmon,* (1885) 34 Minn. 168. It would seem that this result is necessary for otherwise, though the defendants might under the verbal contract be forced to pay for one half the wall when used, there would be nothing to prevent them from later removing their building and the half of the wall upon their land upon which plaintiff's building also depends for support. The creation of such an interest in land by verbal agreement partially executed is no more difficult to support than the decision that acceptance of a parol gift of land, together with taking possession and making such improvements in reliance on the gift as would work substantial injustice if the gift were held void, takes the contract out of the statute of frauds and title passes. *Lindell v Lindell,* (1917) 135 Minn. 368, 160 N. W. 1031.

While it might seem technical to call this a license instead of an easement, yet the law is well settled that an easement creating an interest in land must be founded upon grant or other writing or on prescription, while a license is bare authority to do an act upon another's land without creating an estate therein. 17 R. C. L. 566; Jones, Easements, sec. 63. But were this right called a license instead of an easement difficulty would result for Minnesota has held that a license not subsidiary to a valid grant is revocable though granted for a valuable consideration and though the licensee may have made expenditures on the faith of it. *Minneapolis Mill Co. v. Minneapolis, etc., R. Co.,* (1892) 51 Minn. 304, 53 N. W. 639. There, though the railway had built upon licensor's land in reliance upon the license, it was held revocable at will. This decision is in line with the weight of authority. "According to the prevailing view of the courts in England and a large number of the courts of the states of the United States, . . . neither the execution of the license nor the incurring of expense, nor both combined, affect the right of the licensor, and he may revoke under all circumstances. It is held that the statute of frauds prevents any act other than the giving of a deed from vesting an irrevocable interest in land." 18 Am. & Eng. Ency. of Law, 2nd ed., 1146. The reason for this view is that to bind land with restrictions arising from oral agreements easily misunderstood is not in accord with public policy and would impair the security and certainty of land titles. The famous case of *Rerick v. Kearn,* (1826) 14 S. & R. (Pa.) 267, 16 Am. Dec. 501, represents the minority view that expenditure of money or labor in consequence of an oral agreement transforms such license into an agreement which is irrevocable and which equity will enforce. This holding is supported upon two theories. Some courts hold that in case of large expenditure of money without opposition by the licensor, the license so executed becomes irrevocable and creates an interest in land amounting to a grant of a right or easement and to allow revocation would be fraudulent and unconscionable. *Pierce v. Cleland,* (1890) 133 Pa. St. 189, 19 Atl. 352, 7 L. R. A. 752. Another theory more frequently used is that of equitable estoppel, invoked on the ground that after the execution of the agreement it would be fraud on the licensee to permit revocation. *Curtis v. La Grande Hydraulic Water Co.,* (1890) 20 Ore. 34, 23 Pac. 808, 10 L. R. A. 484, note. Had Minnesota followed this line of cases holding that an executed license may become irrevocable the statement of the instant case that an interest in land was passed would be unquestionable. It is difficult to resist the conclusion that the *Minneapolis Mill Co.* case has been overruled, unless the court intends to make a special rule for party walls; otherwise the defendant after paying for one half the wall may at will remove it and consequently the support of the plaintiff's building.

MASTER AND SERVANT—LIABILITY OF WIFE FOR DEATH CAUSED BY HER AUTOMOBILE DRIVEN BY HER HUSBAND.—A wife owned and kept an automobile for family use. The car was often used by her husband to take the neighbors and his daughter riding. The husband used the car to take some squabs to his brother's place of business in another part of

the city; while returning to his home he struck and injured deceased so as to cause her death. *Held*, the wife was not liable in the absence of a showing that any negligence of the husband was in the course of her business or pleasure. *Smith v. Weaver*, (Ind. 1919) 124 N. E. 503.

The question is whether the owner of an automobile is rendered liable to one injured by the negligent driving of it at a time when it is being used by one member of the family in his own business or his own exclusive pleasure. For a discussion of the principles involved see 4 MINNESOTA LAW REVIEW 73. The doctrine of *Birch v. Abercrombie* (1913) 74 Wash. 486, 133 Pac. 1020, 50 L. R. A. (N.S.) 59, and note, has been followed by the Minnesota court which in recent decisions approved the rule that the head of a family who provides for the recreation of members thereof by furnishing an automobile for their use and pleasure, is responsible for its negligent use by any member of the family having permission to drive it. *Johnson v. Smith*, (Minn. 1919) 173 N. W. 675; *Plasch v. Fass*, (Minn. 1919) 174 N. W. 438; *Mogle v. Scott*, (Minn. 1919) 174 N. W. 832. This is upon the theory that it may properly be an element in the business of the head of the family to provide out-door recreation and pleasure for his family through the use of an automobile; the court refused to sanction liability for injuries resulting from the negligent use of a machine by a favored employee who was permitted to use it for his own pleasure. The instant case, however, is in line with *Legenbauer v. Exposito*, (1919) 176 N. Y. S. 42, 4 MINNESOTA LAW REVIEW 73, holding the opposite view to the effect that a member of the family using the parent's automobile solely for his own pleasure is not engaged in the owner's business. The principle is thoroughly considered in the case of *Hays v. Hogan*, (1917) 273 Mo. 1, 200 S. W. 286, L. R. A. 1918C 715, Ann. Cas. 1918E 1127, which overruled the doctrine of *Daily v. Maxwell*, (1910) 153 Mo. App. 415, 133 S. W. 351, cited in 4 MINNESOTA LAW REVIEW 73 in support of the Minnesota doctrine, so that Missouri is now definitely committed to the narrower rule of liability. The fact that in the instant case the liability for acts of a spouse, instead of a child, was in dispute would seem to be immaterial for most states apply the same rule for all members of the family. *Farthing v. Strouse*, (1916) 172 App. Div. 523, 158 N. Y. S. 841. It is, however, not necessarily in conflict with the Minnesota doctrine, for here the question at issue was the liability of a wife for the negligent use of her car by her husband and no intimation was given as to whether the same rule would be applied where the owner of the automobile was the head of the family. Nor does it appear from the facts of the Indiana case that the relation of master and servant was established, for it was not clearly shown that the use of the car by the husband to take dressed squabs to his brother's store was within the purpose for which the wife purchased and kept the automobile.

MORTGAGES—RENEWAL—PRIORITY NOT LOST BY RENEWAL.—In June 1910, S., owning a certain piece of property, gave a mortgage for $1600 to K. K. assigned the mortgage to the plaintiff. In 1914, P. was the owner of the mortgaged premises. One of the defendants, Wyoming

Loan and Trust Company, obtained a judgment against P. in February, 1914. On Aug. 5, 1914, the plaintiff was given a new mortgage for $1600 to take the place of the K. mortgage, which has never been paid. On Aug. 6, 1914, P. sold the premises to the defendant Hurtt. It was proved by oral testimony that it was the intention of the parties that this second mortgage was to be given for the purpose of continuing the security of the first mortgage. *Held,* the judgment did not become a prior lien to the substituted mortgage. *Bachmann v. Hurtt,* (Wyo. 1919) 184 Pac. 709.

Taking a second mortgage for the same debt does not operate to release the first mortgage so as to let in intervening liens, unless there is a clear intent to do so. *Packard v. Kingman,* (1860) 11 Ia. 219; *Geib v. Reynolds,* (1886) 35 Minn. 331, 28 N. W. 923. "It is the debt and not the mere evidence of it which is secured, and so long as the debt exists in any form, the mortgage will remain unsatisfied." Jones, Mortgages, 7th Ed., sec 927. Where the parties intend merely to renew and extend the old debt and the giving of the new mortgage and the cancellation of the old one are practically simultaneous acts or part of the same transaction, the second mortgage is considered to be given as a renewal of the first and does not give priority to intervening liens or mortgages. *Griffin v. International Trust Co.,* (1908) 161 Fed. 48, 88 C. C. A. 212; *Watson v. Bowman,* (1909) 142 Ia. 528, 119 N. W. 623; Jones, Mortgages, 7th Ed., sec. 604a and cases cited. This is clearly the majority rule. Contra, *Woolen v. Hillen,* (1850) 9 Gill (Md.) 185, 52 Am. Dec. 690. It does not apply where the new mortgage is given to a different person as one from whom the debtor borrowed money to pay off the old mortgage. Jones, Mortgages, 7th Ed., sec. 604a. In the instant case the second mortgage was given to one, not the original mortgagee, but an assignee of the first mortgage and standing in the shoes of the original mortgagee. This was not a case where the mortgagor borrows money from a third person to satisfy the mortgage. The plaintiff was clearly entitled to enforce the substituted mortgage with the same rights as if it had been given to the original mortgagee.

PARTY WALLS—CONSTRUCTIVE NOTICE.—Plaintiff and one B. made a verbal agreement whereby plaintiff might construct a party wall, one half upon each lot, B. to pay for one half of the cost of the wall upon use. B. conveyed his lot to defendant who began to construct a building making use of the party wall. Plaintiff seeks to enjoin defendant from use of the wall, no part of its cost having been paid by defendant nor by his vendor. *Held,* that the agreement was binding and that the existence of the wall standing partly upon each lot was constructive notice sufficient to put buyer on inquiry as to his rights. Injunction granted. *Hanson v. Beaulieu,* (Minn.) 1920) 176 N. W. 178.

The court distinguished this case in which the lot purchased was vacant except for the portion occupied by plaintiff's wall, from those in which vendee buys a lot upon which exists a building having a side wall in common with an adjoining building, when the only notice would be that there was a party wall with the ordinary rights and obligations of adjoining owners. It is settled law that in case of a party wall erected

partly upon each lot no implied obligation to pay for a share of it arises and any such obligation must be created by specific contract. *Dunscomb v. Randolph,* (1901) 107 Tenn. 89, 64 S. W. 21, 89 A. S. R. 95. In case such contract is made a few courts hold that the covenant is personal and does not run with the land but the majority do not regard the right as personal and hence a conveyance of the lot on which the wall is erected gives the grantee a right to recover of the adjacent owner for one half the cost of construction when the latter uses the wall. *Sandberg v. Rowland,* (1908) 51 Wash. 7, 97 Pac. 1087. Actual or constructive notice is necessary to hold the grantee upon the obligation created. As to what constitutes constructive notice the cases are in conflict. Some hold that the mere existence at the time of the purchase of a lot of a party wall resting partly thereon and used by the adjoining owner is not notice of an obligation to contribute to its cost upon using it. *Sharp v. Cheatham,* (1885) 88 Mo. 498, 57 Am. Rep. 433. These cases hold that the mere existence of the wall furnishes no reasonable ground for believing there is an obligation to pay one half the cost of the wall, for any such duty must arise out of contract and such walls are often erected, the builder paying full cost because of the additional space it will give upon his own lot *Hawkes v. Hoffman,* (1909) 56 Wash. 120, 105 Pac. 156, 24 L. R. A. (N.S.) 1038. The court in the case of *Scottish-American Mortg. Co., Ltd. v. Russell,* (1905) 20 S. D. 42, 104 N. W. 607, stated: "The only constructive notice that seems to have been recognized by the courts is that imparted by recordation of the party wall agreement." The instant case is in line with those holding contra, that the existence of the party wall constitutes an apparent sign of servitude and is sufficient to put the purchaser upon inquiry as to the nature of such servitude. *Howell v. Goss,* (1905) 128 Ia. 569, 105 N. W. 61 *Ingals v. Plamondon,* (1874) 75 Ill. 118; *McChesney v. Davis,* (1899) 86 Ill. App. 380. Dictum in the case of *Warner v. Rogers,* (1876) 23 Minn. 34, points to the same doctrine.

PRINCIPAL AND AGENT—APPARENT AUTHORITY TO COLLECT MORTGAGE NOTES.—The Freehold Mortgage Company of London loaned money to the defendant through the lender's agent in Little Rock. Upon payment of the debt the mortgagor received what purported to be a valid release of the mortgage but did not take up the notes. The release was in fact forged, and the notes had not been sent on by the mortgagee. *Held,* mortgagee is estopped to foreclose the mortgage; for the agent had apparent authority to discharge the debt, though the notes which evidenced it had not been sent for collection. *American Freehold Land Mortgage Co. v. Wood,* (Ark. 1919) 215 S. W. 696.

The common business practice of discharging mortgage debts by means of brokers, bankers, and trust companies requires a settled rule of law to govern the payment of loans through agents; and the almost universal mercantile custom of taking up and cancelling notes when they are paid, together with a long line of decisions holding that an agent with authority to make loans will not be presumed to have authority to make collections if the notes or securities therefor are not left in his possession by the principal, has established the rule that the borrower pays

at peril that the agent possesses the notes. *White v. Madigan,* (1899) 78 Minn. 286, 80 N. W. 1185; *Smith v. Kidd,* (1877) 68 N. Y. 130, 23 Am. Rep. 157; *Bartel v. Brown,* (1899) 104 Wis. 493, 80 N. W. 801; *Wolford v. Young,* (1898) 105 Ia. 512, 75 N. W. 349; *Ortmeier v. Ivory,* (1904) 208 Ill. 577, 70 N. E. 665.

The instant case must therefore be deemed a back-water of the current of authorities. Plaintiff's agent had collected other notes from the defendant, and in view of his geographical remoteness from the principal was clothed with broad powers. Specifically, however, the only indicia of agency relied on by the court to overbear the general rule was the fact that the agent had made the loan originally, and customarily discharged notes running to the principal. "It certainly cannot be true that the only legal evidence of authority to receive payment of negotiable paper is the possession thereof. The weight to be given to the possession, or lack of possession, of negotiable paper, depends upon the facts of each particular case, . . . "Shiras, J. in *Security Co. v. Richardson,* (1887) 33 Fed. 16, 21. Possession of the notes by the agent to whom payment is made is merely evidence, rebuttable by other circumstances. *Campbell v. Gowans,* (1909) 35 Utah 268, 100 Pac. 397, 23 L. R. A. (N.S.) 414. But, in the instant case, the court raised a presumption of authority to receive payment merely from the agency to negotiate the loan, the custom of sending the releases through the agent, and his possession of the notes. If such authority may be inferred in the absence of possession of the note sought to be discharged, insecurity in such business may result. The better practice seems to require production and cancellation of paper at the time of payment.

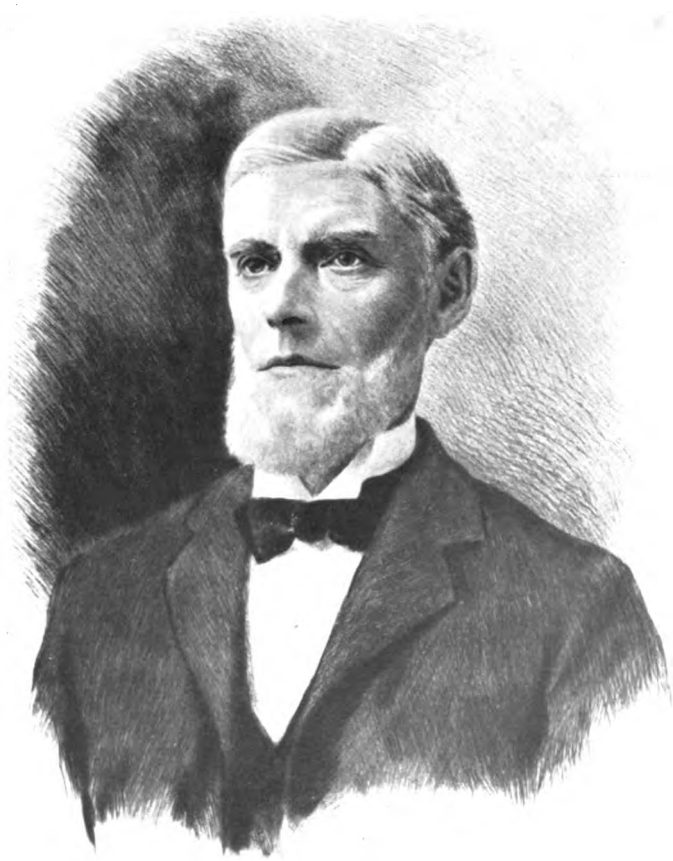
WILLS—CONSTRUCTION—GIFT OVER IF LEGATEE DIES WITHOUT CHILDREN—WHEN EVENT MUST HAPPEN.—A will directed the income of certain trust funds to be paid to beneficiaries for life. On the death of each legatee the funds deposited for his benefit became part of the residuary estate. Two-thirds of the residuary estate was given to testator's three children, provided, "if either of the children die without leaving a child or children, then share of such child to become property of survivors." *Held,* the clause construed in connection with the balance of the will means death at any time, whether before or after that of testator. Two justices dissented. *In re Peavey's Estate,* (Minn., 1920) 175 N. W. 105.

In the absence of special circumstances indicating the intention of the testator there are two prima facie rules of construction: 1. That the clause is presumed to mean a death during the life time of the testator, or 2. That the natural and literal meaning of the words, death at any time, should apply. The court hesitated to definitely adopt either rule but found from the context of the will abundant indication of testator's intention to mean a death at any time. In the English case of *Edwards v. Edwards,* (1852) 15 Beav. 357, 51 Eng. Rep. 676, the court states that a bequest to A, if he die without children, to B, means death at any time. That a bequest to X for life, remainder to A, if A die without children, to B, means death in the life time of X, whose death is taken as an intended period of distribution. This latter proposition has been expressly

overruled by *O'Mahoney v. Burdett,* (1874) L. R. 7 H. L. 388, holding it means a death at any time and the prior life estate is not sufficient to restrict the natural meaning of the words. The English and Canadian cases with the recent case of *In re Creag-Burton v. Turner,* [1920] 1 I R. 8, affirm *O'Mahoney v. Burdett,* supra, and established the English rule. Where there is a time designated for distribution and an intent manifest to give an indefeasible interest at that time, it is generally held that death means prior to that time or within the life time of the testator. The majority of the American courts adopt the rule, that death without children means, prima facie, death within the life time of the testator, with a strong minority favoring the English rule. The courts in this country have shown a persistent and usually successful attempt to get away from the natural meaning of the words, the most generally recognized rule being that the testator intended to confine the contingency to the interval preceding the time for distribution, and the minority requiring in addition an intent to give an indefeasible interest at the time. See 25 L. R. A. (N.S.) 1045, note.

The majority rule is based on a desire to accomplish an early vesting of the gift; to favor the primary objects of the testator's bounty; and against any postponing of the distribution or any subsequent divesting of the property. The English rule is in favor of giving the words used their natural and literal meaning unless clear intent is apparent to restrict them.

Probably the most important part of the *Peavey Case* is the dictum, that had the court the bald proposition of such a clause, entirely uncontrolled by context or circumstances, before it, they would much incline to follow the American majority rule, to accomplish an early vesting and avoid difficulty in distribution. The dissenting opinion was in favor of following such a rule despite the rather manifest intention of the testator to the contrary.



WILLIAM MITCHELL

MINNESOTA LAW REVIEW

VOL. IV MAY, 1920 No 4

WILLIAM MITCHELL

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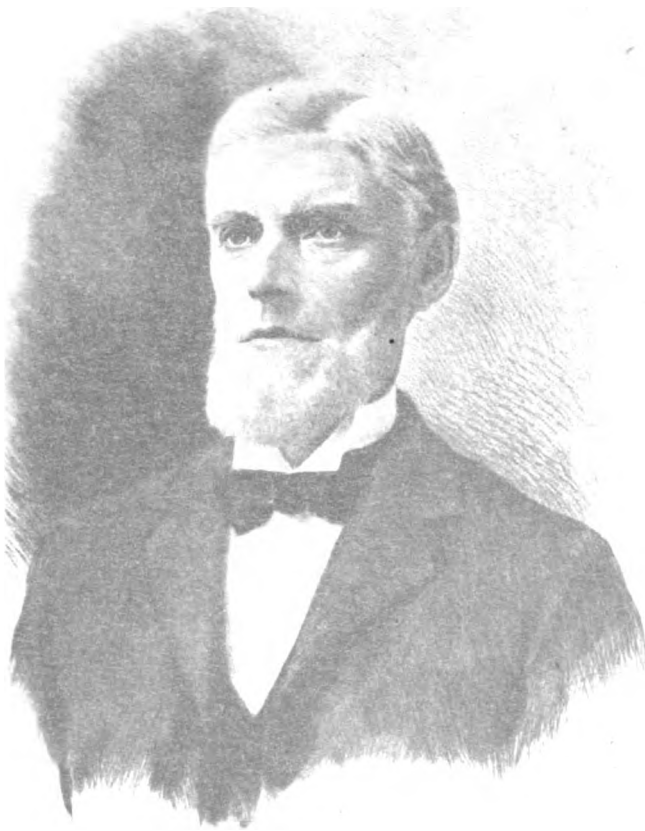

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town, then in Virginia but now in West Virginia, where his father was a lawyer. On leaving college, he went to Morgantown and read law in the office of his friend's father. He was thus occupied until 1857, with an interval of about two years when he taught in an academy at Morgantown. He was admitted to the bar in that year and, accompanied by young Wilson, left Virginia to seek his fortune in the West. In April the two young men landed at Winona, Minnesota, having journeyed up the Mississippi River on a steamboat, with many others, also on their way to Minnesota. Winona was just emerging from a boom period and, as a consequence, nearly every one found himself the owner of town lots, bought at extravagant prices in the expectation of speedily reselling them at a profit. These expectations had been disappointed, the boom had collapsed, every one was in debt, money was scarce, and the time was not a propitious one for the arrival of two young lawyers in search of their fortunes. Nevertheless they both stayed—one for nearly all the remaining years of his life, the other for a few years. The impression made by the conditions found at Winona was lasting. Years after, in one of his opinions, Judge Mitchell drew upon his early recollections, when he said:[1]

"Nothing would be more unjust than to test a man's acts in 1889, while the real estate boom still continued, by the conditions existing in 1897. No one who has not passed through one of these booms can realize how extravagant men become in their opinions as to the values of property, and how largely the judgment of even ordinarily prudent and conservative business men is influenced by the atmosphere surrounding them. After the boom has subsided, men can hardly believe that persons of ordinary business capacity and intelligence could ever have entertained such extravagant ideas of value; and hence, even when we honestly attempt to judge of their actions in the light of the conditions then existing, our judgment is liable to be unconsciously influenced by the changed conditions now existing."

The two young men engaged in practice as partners, under the firm name of Wilson & Mitchell, but the firm was soon dissolved by the former's removal to Minneapolis. Judge Mitchell continued to practice at Winona until 1874. In later years he would refer to this period as being, on the whole, the most enjoyable of his life.

He married in 1857, and established the home where he reared his family. His domestic life was happy. He lived comfortably,

[1] Wheadon v. Mead, (1898) 72 Minn. 372, 376, 75 N. W. 598.

but simply. Those who entered his home were met with the hospitality characteristic of earlier days and with an innate courtesy and cordiality which were peculiarly his own. He prized his home life and his Winona friends so highly that for many years after he became a justice of the Minnesota supreme court, it was his weekly practice to make the trip from St. Paul to Winona to spend Sunday at home, returning in time for the opening of court on Monday.

His professional life was fortunate. He soon gained an enviable standing at the bar and acquired an excellent practice. He always had a partner in business. Daniel S. Norton, afterwards United States Senator from Minnesota, succeeded Wilson, and, when Norton went to Washington, William H. Yale, at one time Lieutenant Governor of the state, became his partner under the firm name of Mitchell & Yale. His name, or that of his firm, appears frequently in the early Minnesota Reports, beginning with the case of *Bingham v. Board of Supervisors of Winona*[2] and ending with *Sherwood v. St. Paul & Chicago Railway Co.*[3]

The Winona bar, during his time, numbered among its members several men of superior ability and attainments. In addition to those already mentioned, there was Thomas Wilson, first, judge of the third judicial district, then, chief justice of the supreme court and finally engaged in private practice, where he became one of the most skillful trial lawyers the state has ever had. With him, he contracted a friendship which continued for life, although the two men were of wholly different temperaments. Another Winona lawyer who was his contemporary was William Windom, who was sent to Congress, first as a Representative, and later as Senator from Minnesota, and who died while holding the office of Secretary of the Treasury. Another was Charles H. Berry, first Attorney General of Minnesota and for a time a United States District Judge in the territory of Idaho. Contact with these men and with others of, perhaps, equal ability though less widely known, was, of itself, an education. A contest with them was a test of one's ability to survive. The years in which he was engaged in practice were those in which his habits of work were formed. It was a troubled period in our history, including the dark years of the Civil War when the country

[2] (1863) 8 Minn. 441, 443.
[3] (1875) 21 Minn. 127, 128.

was aflame with passion, the bitter ones of reconstruction after the war was over, and those of reckless speculation which came later and were followed by the great financial panic of 1873. During all of them he was occupied with his profession, though not to the exclusion of everything else. He gave freely of his time and ability to advance the interests of the community where he lived. He served one term in the State Legislature at the session of 1859-1860; one as County Attorney in 1863-1864; represented his ward in the City Council for four years; was a director of the Public Library; trustee of the Cemetery Association; a director of the LaCrosse, Trempealeau & Prescott Railroad Co., a railroad which linked Winona with the roads from the east, which then terminated at LaCrosse, Wisconsin; the first president of the Winona & Southwestern Railroad Co., when it was organized in 1872 under a special act of the legislature; and an incorporator and the first president of the Winona Savings Bank, organized in 1874. He was not fond of office, public or private, but, when pressed into service, was thorough and attentive in the performance of his duties.

He was a diligent student and keen observer and was blessed with an excellent memory. His mind was stored with solid information covering a wide field. No one who knew him well can fail to recall his extensive fund of knowledge, his shrewd wisdom, and his independence of judgment. The last characteristic is illustrated by his political connections. Originally a republican and an adherent of that party during the war, he left it owing to his disapproval of the course of its leaders during the reconstruction period, and was thereafter identified with the democratic party. In 1896, he was unable to subscribe to his party's policy with reference to the coinage of silver, and did not allow his long association with it to influence him in casting his ballot or in giving expression to his views.

By nature, he was peace-loving, and shunned conflicts, although he bore himself manfully when attacked. His coolness and self-control, his great knowledge of legal principles, his sure application of them, his ready comprehension of the vital facts in a case, his fairness in stating them, and his transparent honesty combined to make him a formidable adversary in the court room, although he never enjoyed the trial of jury cases. As a counsellor, he was of transcendent merit. After seventeen years of practice, he had an established clientage with unbounded con-

fidence in him, a solid reputation for intelligence and ability, a wide acquaintance, and no enemies except those that every good man makes if he acquits himself as he should on every occasion. His friends had long recognized in him the qualities that go to the making of a good judge, and in 1874 he was elected judge of the district court of the third district and began a judicial career which was destined to continue until only a few months before his death. For over seven years he held the office of district judge, conducting it to the entire satisfaction of every one. He was an ideal trial judge. He heard counsel attentively and patiently, made no display of his own learning, earnestly desired to get at the vital facts of the case, readily detected shams and fallacies, was singularly free from prejudices, and bent wholly on doing justice to the parties to a controversy. It has been said of him by one who knew, that no defeated litigant ever left his court room who did not go away satisfied that he had been given a fair trial or who was not convinced that his case had received the most attentive and careful consideration. He was prompt, as well as painstaking, in the dispatch of business and, hence, the work of the court was not burdensome to him. He found time to enjoy the simple wholesome pleasures that in later years want of leisure compelled him to forego. He was an out-of-door man and a confirmed fisherman. The Mississippi Valley, in the vicinity of Winona, afforded numerous opportunities for the outings he enjoyed. There were many small streams which abounded with trout. He used to relate with zest how he had enjoyed to the full many a summer's day along one of these streams until nightfall found him with a basket filled with trout and a drive homeward before him, with a keen appetite for the late supper that awaited him. The river was famous for its bass fishing and he often said there was no better test of a fisherman's skill than his ability to hook and land a three pound bass in the swift water where that fish is usually found. Years after, when his fishing trips had become less frequent, he was drawing on his own experience when he said:

"It is a matter of common knowledge that different species of fish, good and bad, those that take the hook readily, and those that do not, inhabit the same waters."[4]

He was fond of gardening, and the grounds about his home abounded with flowers and shrubbery. Books were among his

[4] State v. Mrozinski, (1894) 59 Minn. 465, 467, 61 N. W. 560, 27 L. R. A. 76.

best friends, and he is said to have had one of the habits of the true book-lover—reading in bed. He was abstemious, but charitable in his judgment of men who were not. He often remarked, that a man who had no small vices was not equipped with a safety valve for the escape of surplus energy that might become explosive if not provided with an outlet. He was reared in the Presbyterian faith and gave his life-long support to that church, although not a member. He respected churches and the clergy, among whom he numbered several special friends.

His figure was erect and slender, his features clear cut, his face bearded, his eyes dark and penetrating, his cast of countenance sober and thoughtful and apt to give an impression of austerity until his face lit up with a smile, as it usually did when he was engaged in conversation. He was a man of reserve and native dignity, not apt to make advances in forming acquaintances, but a firm and loyal friend when once he bestowed his friendship upon any one.

Possessed of these traits and with these experiences, in his forty-ninth year he was appointed by Governor Pillsbury as one of the Associate Justices of the state supreme court immediately after the legislature increased their number from two to four. He took his seat at the opening of the April Term in 1881.

His opinions while a member of that court are the principal source of his great reputation. His life theretofore was an unconscious preparation for the performance of the tasks that he was now called upon to do. The work of lawyers and trial judges is of an ephemeral nature and soon forgotten, but the opinions of judges of appellate courts are preserved in the reports. From time to time they are referred to by text writers and critics of legal literature, and are cited in the briefs prepared in other cases. This insures a sort of permanency to the reputation of a judge of a court of last resort, if he is fortunate enough to earn any reputation at all. Doubtless there have been a good many American supreme court judges who have done excellent work, worthy of the respect of those who came after them, but how few are the names that are familiar to the bench and bar of a later generation. A distinguished writer for the Harvard Law Review mentions the names of twenty judges of state supreme courts who have achieved eminence. Among them occurs the name of Judge Mitchell. Of the others, it is doubtful whether more than five are known in Minnesota, though all were

men whose reputations in their several states survive, as his has survived not only here but in other states as well.

It is proper to inquire what it is that gives him his standing as one of the great American judges. An attempt to point out some of the characteristics of his opinions may help to answer the inquiry. One of the first things that arrests the attention as these opinions are read and studied is his habit of going back to the origin of legal principles. He followed what is known as the historical method, tracing the development of a doctrine from the time when it first appeared down to the time when his opinion was written. Almost none of his notable opinions are without references to the early English authorities. There are occasional allusions to the Year Books; and Coke, Blackstone, Mansfield, Eldon, Hale, Holt, and other eminent English judges, are frequently quoted. Even during the last years of his life, when he was incessantly pressed for time by reason of the increasing volume of business the court was required to dispatch, he did not abandon the practice of approaching the study of a principle from the historical standpoint. This method of approach leads to regard for the continuity of the law and reluctance to override precedents. With him, it did not do so to the extent that he hesitated to test legal formulas for himself, although they had been generally accepted and were stamped with the appproval of eminent judges and writers. Though he greatly respected, he was never bound by the learning of the past. He regarded precedents as the guides, not the masters of the courts. He wanted to know what men in the seventeenth century thought the law should be, because their conception of it lies at the root of what men think in our own time and helps to an understanding of the present.

His attitude towards the common law is best illustrated by quotations from his opinions. The following are fairly typical:

"Courts have no more right to abrogate the common law than they have to repeal the statutory law. Lord Coke said: 'The wisdom of the judges and sages of the law has always suppressed new and subtle inventions in derogation of the common law.' The wise remark of another, peculiarly applicable to the present time, was that 'the variety of judgments and novelties of opinions are the two plagues of a commonwealth.' The great lights of the law may take some liberties with the law in the way of new applications of old principles that modesty would forbid to ordinary men; and while we are not disposed to look upon everything ancient with slavish reverence merely because it is

ancient, it would certainly be presumptuous in us to lightly discard a doctrine which has been so long approved, and which is so firmly established by authority. The principles of the common law were founded upon practical reasons, and not upon a theoretical logical system; and usually, when these principles have been departed from, the evil consequences of the departure have developed what these reasons were. The Pandora box that has been opened by the 'Texas doctrine' proves more forcibly than argument the wisdom of the common-law rule that damages of this kind cannot be recovered in actions on contract."[5]

"It is one of the great excellencies of the common law that it does not consist of inflexible statutory rules adapted to particular circumstances, which might become obsolete, but of certain comprehensive principles, founded on reason and natural justice, and adapted to the circumstances of all cases which fall within them. When new modes of doing business and new combinations of facts arise, these same principles will apply; but they must be adapted to the new situation by considerations of fitness and reason which grow out of the circumstances."[6]

"It is undoubtedly true that many of the doctrines of the common law had their origin in social or political conditions which have in whole or in part ceased to exist. But this fact alone will not usually justify courts in holding that these doctrines, when once thoroughly established, have been abrogated, any more than it would justify them in holding that a statute had been abrogated because the reason for its enactment had ceased. Any such rule would leave the body of the common law very much emasculated. . . . While, undoubtedly, the common law consists of a body of principles applicable to new instances as they arise, and not of inflexible cast-iron rules, yet where the rules of the common law have become unsuited to changed conditions, political, social, or economic, it is the province of the legislature, and not of the courts, to modify them."[7]

He sometimes took pleasure in discussing curious doctrines of the common law, apparently to disclose the arbitrary or unreal basis of some ancient rule, as witness the following:

"The doctrine that a corpse is not property seems to have had its origin in the dictum of Lord Coke, (3 Inst. 203) where, in asserting the authority of the church, he says: 'It is to be observed that in every sepulchre that hath a monument two things are to be considered, viz., the monument, and the sepulture or burial of the dead. The burial of the cadaver that is caro

[5] Francis v. Western Union Telegraph Co., (1894) 58 Minn. 252, 265, 59 N. W. 1078, 25 L. R. A. 406, 49 A. S. R. 507.

[6] Arthur v. St. Paul & Duluth R. Co., (1887) 38 Minn. 95, 101, 35 N. W. 718.

[7] Hulett v. Carey, (1896) 66 Minn. 327, 341, 69 N. W. 31, 34 L. R. A. 384, 61 A. S. R. 419.

data vermibus (flesh given to worms) is nullius in bonis, and belongs to ecclesiastical cognizance; but as to the monument action is given (as hath been said) at the common law, for defacing thereof.' If the proposition that a dead body is not property rests on no better foundation than this etymology of the word 'cadaver,' its correctness would be more than doubtful. But while a portion of this dictum, severed from its context, has been repeatedly quoted as authority for the proposition; yet it will be observed that it is not asserted that no individual can have any legal interest in a corpse, but merely that the burial is nullius in bonis, which was legally true at common law at that time, as the whole matter of sepulture and custody of the body after burial was within the exclusive cognizance of the church and the ecclesiastical courts."[8]

He never tired of tracing the expansion of the common law to meet the new conditions that human progress brings about. To him the common law was a living, growing organism, and he nowhere better shows this to be true than in the following discussion of the law relating to the proper public use of highways.

"The question, then, is, what is the nature and extent of the public easement in a highway? If there is any one fact established in the history of society and of the law itself, it is that the mode of exercising this easement is expansive, developing and growing as civilization advances. In the most primitive state of society the conception of a highway was merely a footpath; in a slightly more advanced state it included the idea of a way for pack animals; and, next, a way for vehicles drawn by animals,—constituting, respectively, the 'iter,' the 'actus,' and the 'via' of the Romans. And thus the methods of using public highways expanded with the growth of civilization, until today our urban highways are devoted to a variety of uses not known in former times, and never dreamed of by the owners of the soil when the public easement was acquired. . . .

"Another proposition, which we believe to be sound, is that the public easement in a highway is not limited to travel or transportation of persons or property in movable vehicles. This is, doubtless, the principal and most necessary use of highways, and in a less advanced state of society was the only known use, as the etymology of the word 'way' indicates. And the courts, which, as a rule, are exceedingly conservative in following old definitions, have often seemed inclined to adhere to this original conception of the purpose of a highway, and to exclude every form of use that does not strictly come within it."[9]

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[8] Larson v. Chase, (1891) 47 Minn. 307, 309, 50 N. W. 238, 14 L. R. A. 85, 28 A. S. R. 370.

[9] Cater v. N. W. Tel. Ex. Co., (1895) 60 Minn. 539, 543, 63 N. W. 111.

His humorous reference to the wilderness of American case law in *Tierney v. Minneapolis and St. Louis Ry. Co.*,[10] is entertaining. He said:

"Of course, in the multitude of cases on this subject with which the reports abound, often conflicting, and frequently not well considered, some authority can be found for almost any proposition. . . .

"The supreme court of Massachusetts is one of the few whose decisions on this question are anything like consistent, or seem to be governed by some uniform principle. . . .

"In New York the decisions are so often conflicting that the value of any particular one largely depends upon the composition of the court at the time, or the ability of the judge who wrote the opinion."

And note his biting reference to the modern text-writers:

"The 'Texas doctrine' has been favorably referred to in many of the more recent text-books, but the bench and bar will understand of how little weight as authority most of these books are, written as they very frequently are, by hired professional book-makers of no special legal ability, and who are usually inclined to take up with the latest legal novelty for the same reasons that newspaper men are anxious for the latest news."[11]

He had the ability to extract the pith from the opinions of other judges and to set forth their conclusions comprehensively and clearly. Having done so, he would proceed to state the true principle as he conceived it to be, the foundation upon which it rested and, finally, its application to the facts of the case in hand. This was his usual method and he employed it with telling effect. Few judges were his equal in power to illuminate the subject under consideration, and none was his superior. He not only saw the decisive points in a case himself, but was able to make others see and understand them also. In a recent letter to the writer, Dean Woodruff of Cornell University College of Law dwells on this quality of Judge Mitchell's mind, saying:

"It has seemed to me, as I have read Judge Mitchell's opinions, that he belongs in the group with Chief Justice Shaw of Massachusetts, Chief Justice Gibson of Pennsylvania, and the few others who mark the highest achievement of our state courts. His mind was a quick solvent for the most refractory and opaque material of legal contention. Take, as typical, his opinion in *Johnson v. Northwestern Life Insurance Company*, 56 Minn. 365. The question there involved is one which, although not of

[10] (1885) 33 Minn. 311, 320, 23 N. W. 229.

[11] Francis v. N. W. Tel. Ex. Co., (1894) 58 Minn. 252, 263, 59 N. W. 1078, 25 L. R. A. 406, 49 A. S. R. 507.

major importance, has given rise to conflict and confusion amounting to something like chaos. He saw directly the human element that caused the conflict; he reviewed, not at too great length, the diverse common law precedents and brought them into workable adjustment by the formulation of a rule which is at once equitable and pliant; and it is all accomplished with a lucidity and force of expression that reflect the working of a clear and powerful mind."

The case to which Dean Woodruff refers is one in which the plaintiff sued to rescind a contract for life insurance he had made while an infant, and the opinion contains a statement of the principles applicable to the different situations which may be presented when an infant seeks to avoid his contract.

Other men prominent in the leading law schools agree in ranking Judge Mitchell among the great judges of his time.

In a recent letter written by Dean Wigmore of Northwestern University School of Law, he says:

"My attention was originally called to the late Judge Mitchell's opinions by Professor James Bradley Thayer of the Harvard Law School, who used to speak with the highest admiration of Judge Mitchell's opinions. Afterwards I perused a great many of them in the course of my studies in the law of evidence and learned to admire them myself. I think that Judge Mitchell's opinions stand out among those of his generation as marked by accurate scholarship, lucid expression and shrewd good sense. They attain a uniform high level of clarity which is seldom found. I should count Judge Mitchell as one of the three or four outstanding judges of the American supreme courts of his generation."

Professor Thayer's opinion of Judge Mitchell was expressed in a letter, part of which appears in the report of the memorial proceedings had soon after the death of the latter.[12] Among other things, he said:

"I have long recognized Judge Mitchell as one of the best judges in this country. There is no occasion for making an exception of the Supreme Court of the United States. On no court in the country today is there a judge who would not find a peer in Judge Mitchell."

Professor Samuel Williston of the Harvard Law School recently wrote of him with equal commendation, saying that "Judge Mitchell has been regarded in this school as one of the best judges of his generation."

Professor Edmund M. Morgan of the Yale School of Law writes that:

[12] See 79 Minn. xxix.

"Every teacher of law with whom I have talked regards Judge Mitchell as one of the greatest of American jurists. His ability to analyze a case and to reduce a legal issue to its lowest terms, his power of clear statement of legal principles, and his remarkable facility in the use of concise and expressive English, make his opinions especially valuable for those teachers who attempt to give the student training in legal analysis and sound legal reasoning."

Judge Mitchell cared little for the opinions of others or for legal doctrines, no matter how orthodox they might be, if they did not square with the facts of life, were not workable when applied to business affairs, or were more concerned with form or sentiment than with substance or experience. A few quotations will serve to illustrate the point:

"We are aware that there are some eminent authorities to the contrary, but, with all due deference to them, we cannot avoid thinking that they base their conclusion upon a fallacious and somewhat sentimental line of argument as to the inviolability and sacredness of a man's own person, and his right to its possession and control free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice."[13]

"We recognize the respect due to judicial precedents and the authority of the doctrine of stare decisis; but, . . . do not feel bound to adhere to it (the rule that an action for damages for an injury to land must be brought where the land is situated) notwithstanding the great array of judicial decisions in its favor. If the courts of England, generations ago, were at liberty to invent a fiction in order to change the ancient rule that all actions were local, and then fix their own limitations to the application of the fiction, we cannot see why the courts of the present day should deem themselves slavishly bound by those limitations."[14]

In speaking of the presumption indulged in by the common law as to alterations in written instruments, he said:

"All disputable presumptions of law are based upon the experienced course of human conduct and affairs, and are but the result of the general experience of a connection between certain facts; the one being usually found to be the companion or effect of the other. Hence such presumptions ought to be conformable to the experience of mankind, and the inferences which, in the light of that experience, men would naturally draw from a given state of facts. . . . Whatever might have been the fact for-

[13] Wanek v. City of Winona, (1899) 78 Minn. 98. 100, 80 N. W. 851, 46 L. R. A. 448, 79 A. S. R. 354.

[14] Little v. Chicago, etc., Ry. Co., (1896) 65 Minn. 48, 53, 67 N. W 846, 33 L. R. A. 423, 60 A. S. R. 421.

merly, when but few men could write, and when contracts were usually drawn by skilled conveyancers or scriveners, with great care and wholly in their own proper handwriting, the rule under consideration is wholly unsuited to the business habits or usages of this country at the present day."[15]

We find him speaking of the doctrine that an action will not lie to remove a cloud from title where the instrument creating the cloud is void on its face, as follows:

"I am aware that it is supported by a long line of venerable authorities which this court has followed in several cases. . . . The rule is based wholly on what Mr. Pomeroy calls verbal logic, and not upon any principle of justice or common sense. . . . The doctrine is seriously criticised by some of the best text-writers, and has been repudiated by some respectable authorities. It serves no good purpose, but, on the contrary, often results in a denial of justice. Under these circumstances, it not being a rule of property, but merely one of practice, I think the sooner we emancipate ourselves from it the better it will be for the credit of the court, and for the proper administration of justice."[16]

Vigorous common sense was one of his marked traits. He refused to be confused by misleading phrases, in these words:

" 'There is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of facts.' "[17]

Again and again we find him expressing the practical view of things, which is too often lost sight of by men of the highest intelligence. For example, note his opinion of the paid expert witness, written in connection with a consideration of the weight to be given to expert evidence:

"Experts are nowadays often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts.' And, in these personal injury cases, so-called 'medical experts' can be found who will testify that almost any disease or ailment to which human flesh is heir was, in their opinion, caused by the injury. This evil has become so great in the administration of justice as to attract the serious consideration of courts and legislatures."[18]

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[15] Wilson v. Hayes, (1889) 40 Minn. 531, 536, 42 N. W. 467, 12 A. S. R. 754.

[16] Maloney v. Finnegan, (1887) 38 Minn. 70, 73, 35 N. W. 723.

[17] Kausal v. Minn. Farmer's Mut. Fire Ins. Ass'n, (1883) 31 Minn. 17, 21, 16 N. W. 430, 47 A. S. R. 776.

[18] Keegan v. Minneapolis, etc., R. Co., (1899) 76 Minn. 90, 95, 78 N. W. 965.

His impatience with insurance that does not insure, and his practical observations, evidently made for the benefit of the legislature, are characteristic, for he never hesitated to suggest to the law-making body any changes or improvements in the law which his experience on the bench led him to believe desirable.

"We have no patience with the prolix, obscure, and involved provisions and conditions which so many so-called co-operative, life, endowment, casualty insurance, and other similar associations usually incorporate into their policies and by-laws. The patrons of such associations are largely composed of people of limited means, neither astute lawyers nor experienced business men, whose object is to make moderate provision for their families in case of death. Whether intended to have such result or not, such provisions and conditions are calculated to mislead the insured, and entrap him into some act of omission or commission that will work a forfeiture of his insurance. It would certainly be a great boon to the public if there could be devised legislative forms of contracts and rules for all such associations, couched in clear, concise, and intelligible language, and to or from which the associations could neither add nor subtract."[19]

He occasionally indulged in sarcasm, as witness this, also written of doubtful insurance:

"We supposed that in the course of our professional and judicial experience we had met with about all the forms of contract which have been devised by the ingenuity of modern associations of this and similar kinds, but this one is entirely novel to us. It is certainly unique, and after a careful study of all its provisions it seems clear to us that it must have been contrived for the purpose of evading either the insurance laws or the usury laws, or both, of this state."[20]

Of padded records and briefs, he remarked:[21]

"A record of over 1,000 folios, and briefs with 60 assignments of error, appear formidable, but, when carefully sifted, it will be found that they contain a vast amount of chaff, and very little grain."

He was of the opinion that most records and briefs suffered from the lack of condensation and frequently said that the force of an argument was too often spent before it reached the vital issue in the case. Prolixity of statement and the indiscriminate citation of authorities tended, in his opinion, to obscure rather

[19] Schultz v. Citizens' Mut. Life Ins. Co., (1894) 59 Minn. 308, 315, 61 N. W. 331.

[20] Missouri, Kansas & Texas Trust Co., v. McLachlan, (1894) 59 Minn. 468, 473, 61 N. W. 560.

[21] Oswald v. Minneapolis Times Co., (1896) 65 Minn. 249, 250, 68 N. W. 15.

than to illuminate issues. He had been trained in appellate practice before the days of stenographers and typewriters when lawyers wrote their bills of exceptions and briefs instead of printing the transcript of the testimony and dictating their arguments.

He thoroughly believed that the law, as laid down by the courts, should conform to business usages and the understanding of men generally, and said so in the following emphatic language:[22]

"We may suggest that this entire question is one which should be determined more upon consideration of business usages and business policy than of mere theoretical logic."

"The law merchant, including the law of negotiable paper, is founded upon, and is the creature of, commercial usage and custom. Custom and usage have really made the law, and courts, in their decisions, merely declare it. The law of negotiable paper is not only founded on commercial usage, but is designed to be in aid of trade and commerce. Its rules should, therefore, be construed with reference to and in harmony with general business usages, and, as far as possible, with the common understanding in commercial circles."[23]

In the field of commercial law he advocated uniformity before the movement for statutory uniformity had fairly begun. He justly observed that:[24]

"It requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading. But on questions of commercial law it is eminently desirable that there should be uniformity. It is even more important that the rule be uniform and certain than that it be the best one that might be adopted."

He was more concerned with the practical than with the strictly logical application of legal principles. Thus we find him saying:[25]

"In strict logic and morally it may be said that he who commits a wrongful act should be answerable for all the losses which flow from that act, however remote. But, as has been said, it were infinite for the law to attempt to do this, and any such rule

[22] Northern Trust Co. v. Rogers, (1895) 60 Minn. 208, 210, 62 N. W. 273.

[23] Hastings v. Thompson, (1893) 54 Minn. 184, 189, 55 N. W. 968, 21 L. R. A. 178, 40 A. S. R. 315.

[24] Nat'l Bank of Commerce v. Chicago, etc., R. Co., (1890) 44 Minn. 224, 235, 46 N. W. 324, 560, 9. L. R. A. 263, 20 A. S. R. 566.

[25] North v. Johnson, (1894) 58 Minn. 242, 245, 59 N. W. 1012.

would set society on edge, and fill the courts with endless litigation. Hence the law has been compelled to adopt the practical rule of looking only to the proximate cause, and to the natural and proximate or immediate and direct result."

"On this state of the authorities, we feel at liberty to adopt whichever rule (permissible on principle) we think the safest, most convenient and equitable in practice; keeping in mind that it is more important to work practical justice than to preserve the logical symmetry of a rule, provided this can be done without destroying all rules, and leaving the law on the subject all at sea."[26]

He distrusted novelties in the law. One or two quotations show his attitude:

"It is true that this court has never before been called on to decide the question, and that mere assumption on the part of either bench or bar does not make a thing law; but, on the other hand, it is also true that a construction which has for a third of a century been accepted by every one as so obviously correct as never to have been questioned or doubted is much more likely to be right than a newly-discovered one, suggested at this late day by the emergencies of present litigation.[27]

"Aside from its being a novelty in the law, which is always dangerous, I do not think it rests on any sound principle."[28]

His views on the proper functions of the state, a question now agitating the minds of many men, are worth recalling. They were the views of a man of wisdom—forward looking, liberal but not radical, and conscious of the value of today's inheritance from yesterday. They were those of one who was anxious that political institutions should afford men free scope for individual growth while restraining reckless fanatics who are ever ready to destroy what society has painfully acquired through self-control learned in the hard school of experience.

Equally interesting is his conception of the functions of the different departments of government as defined in the constitution. It is what one would expect it to be in a man of his school of thought. It is worth while to compare the reasoned convictions of a man of wisdom and sound judgment whose mind had been formed during the middle years of the nineteenth century with the popular notions of today. Such a comparison makes

[26] Jordahl v. Berry, (1898) 72 Minn. 119, 122, 75 N. W. 10, 45 L. R. A. 541, 71 A. S. R. 469.

[27] Willis v. Mabon, (1892) 48 Minn. 140, 149, 50 N. W. 1110, 16 L. R. A. 281, 31 A. S. R. 626.

[28] Carlson v. N. W. Tel. Ex. Co., (1896) 63 Minn. 428, 442, 65 N. W. 914.

one aware of how far we have drifted from the moorings of less restless and unsettled days. By collecting some of the things he wrote, we get his point of view. That of the man on the street today is so familiar as to need no comment.

"The courts are not the guardians of the rights of the people, except as these rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against and remedy for, unwise or oppressive legislation, within constitutional bounds, is by appeal to the justice and patriotism of the people themselves, or their legislative representatives. Neither are courts at liberty to declare an act void merely because, in their judgment, it is opposed to the spirit of the constitution. They must be able to point out the specific provision of the constitution, either expressed or clearly implied from what is expressed, which the act violates."[29]

Of special interest is his discussion of the police power and of changes in the forms of government which were already advocated in his day, though not with the insistence of today. He held that only by direct amendments of the constitution could the powers of the state be enlarged beyond the limits fixed by its framers. He was opposed to the doctrine that anything which a passing majority of the people believe to be for the public good may be enacted in a statute which must be held valid as an exercise of the police power, although it offends a plain mandate of the constitution.

"The police power of the state to regulate a business does not include the power to engage in carrying it on. Police regulation is to be effected by restraints upon a business, and the adoption of rules and regulations as to the manner in which it shall be conducted.

"While the jurists of continental Europe sometimes include under the term 'police power' all governmental institutions which are established with public funds for the promotion of the public good, yet, as understood in American constitutional law, the term means simply the power of the state to impose those restraints upon private rights which are necessary for the general welfare of all.

"The time was when the policy was to confine the functions of government to the limits strictly necessary to secure the enjoyment of life, liberty, and property. The old Jeffersonian maxim was that the country is governed the best that is governed the least. At present, the tendency is all the other way, and towards socialism and paternalism in government. This ten-

[29] Lommen v. Minneapolis Gas Light Co., (1896) 65 Minn. 196, 208, 68 N. W. 53.

dency is, perhaps, to some extent, natural, as well as inevitable, as population becomes more dense, and society older, and more complex in its relations. The wisdom of such a policy is not for the courts. The people are supreme, and, if they wish to adopt such a change in the theory of government, it is their right to do so. But in order to do it they must amend the constitution of the state. The present constitution was not framed on any such lines."[30]

He saw the selfish interests standing behind laws enacted ostensibly to promote the public welfare, saying:[31]

"A law enacted in the exercise of the police power must in fact be a police law. . . . In this day, when so many selfish and private schemes in the way of securing monopolies and excluding competition in trade are attempted under the mask of sanitary legislation, it may be an important question whether the judiciary are concluded by the mask, or whether they may tear it aside in order to ascertain who is in it."

He did not look upon the constitution as the only source of guarantees of those inalienable rights to which reference was made in the high sounding phrases of the Declaration of Independence, for he declared that:[32]

"The guaranty of a certain remedy in the laws for all injuries to persons, property, or character, and other analogous provisions . . . are but declaratory of general fundamental principles, founded in natural right and justice, and which would be equally the law of the land if not incorporated in the constitution."

He justified governmental regulation of railroads, apparently upon the ground that it was the only alternative to governmental ownership. In his time, the latter alternative was generally considered to be quite impossible. It was then a conclusive demonstration of the propriety of regulation to show that without it public ownership would be inevitable. In the light of recent events, this statement made some thirty years ago is of more than historical interest:[33]

"In fact, it was settled in the only way that any such question can be permanently settled, viz., in accordance with public policy and public necessity, for no modern civilized community could long endure that their public highway system should be in the uncontrolled, exclusive use of private owners. The only

[30] Rippe v. Becker, (1894) 56 Minn. 100, 57 N. W. 331, 22 L. R. A. 857.
[31] State v. Donaldson, (1889) 41 Minn. 74, 82, 42 N. W. 781.
[32] Allen v. Pioneer Press Co., (1889) 40 Minn. 117, 41 N. W. 936, 3 L. R. A. 532, 12 A. S. R. 707.
[33] State v. Chicago, etc., Ry. Co., (1888) 38 Minn. 281, 37 N. W. 782.

alternative was either governmental regulation or governmental ownership of the roads.

"In fact, this must be so, if the legislature is to be permitted effectually to exercise its constitutional powers. If this was not permissible, the wheels of government would often be blocked, and the sovereign state find itself helplessly entangled in the meshes of its own constitution."

He comprehended the problems involved in the relations of capital and labor. His views were enlightened and free from prepossessions in favor of either. A few selections bring out his point of view.

"It is sometimes said that mankind will seek cessation of labor at proper times by the natural influences of the law of self-preservation; also that, if a man desires to engage on Sunday in any kind of work or business which does not interfere with the rights of others, he has an absolute right to do so, and to choose his own time of rest, as he sees fit. The answer to this is that all men are not in fact independent and at liberty to work when they choose. Labor is in a great degree dependent upon capital, and, unless the exercise of power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise."[34]

"The case presents one phase of a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century. This is the age of associations and unions, in all departments of labor and business, for purposes of mutual benefit and protection. Confined to proper limits, both as to end and means, they are not only lawful, but laudable. Carried beyond those limits, they are liable to become dangerous agencies for wrong and oppression. Beyond what limits these associations or combinations cannot go, without interfering with the legal rights of others, is the problem which, in various phases, the courts will doubtless be frequently called to pass upon. There is, perhaps, danger that, influenced by such terms of illusive meaning as 'monopolies,' 'trusts,' 'boycotts,' 'strikes,' and the like, they may be led to transcend the limits of their jurisdiction, and, like the court of king's bench in *Bagg's Case,* 11 Coke, 98a, assume that, on general principles, they have authority to correct or reform everything which they may deem wrong, or, as Lord Ellsmere puts it, 'to manage the state.' . . . It is perfectly lawful for any man (unless under contract obligation, *or unless his employment charges him with some public duty*) to refuse to work for or to deal with any man or class of men, as he sees fit. This doctrine is founded upon the fundamental right of every man to conduct

[34] State v. Petit, (1898) 74 Minn. 376, 379, 77 N. W. 225.

his own business in his own way, subject only to the condition that he does not interfere with the legal rights of others. And, as has been already said, the right which one man may exercise singly, many, after consultation, may agree to exercise jointly, and make simultaneous declaration of their choice."[35]

"Modern investigations have much modified the views of courts as well as political economists as to the effect of contracts tending to reduce the number of competitors in any particular line of business. Excessive competition is not now accepted as necessarily conducive to the public good. The fact is that the early common law doctrine in regard to contracts in restraint of trade largely grew out of a state of society and of business which has ceased to exist."[36]

There was a time in the history of Minnesota when numerous corporations were organized which were not successful. The state constitution provides that a stockholder in any corporation except one organized to carry on a manufacturing or mechanical business shall be liable to creditors to the amount of stock held or owned by him. The legislature had made some provision for the enforcement of this liability and for the sequestration of the property of an insolvent corporation, but the nature and extent of a stockholder's liability had not been clearly defined and the procedure in working it out had not been settled. In a series of cases in which the opinions were written by Judge Mitchell, the whole subject was exhaustively considered and the field it occupied thoroughly explored. This series of cases begins with *State v. Minnesota Thresher Co.*,[37] and ends with *Hospes v. N. W. Mfg. & Car Co.*[38] On reading the ten or more opinions which make up the series, one is impressed with the great amount of labor that was required to master the facts and with the clearness of statement that makes them comprehensible to the reader. He grasps the intricate methods of "high finance," perceives the ends that promoters had in view, and his sturdy common sense and innate honesty are revealed as he marshals and analyzes the facts. He formulates and demonstrates legal principles with the sureness and lucidity characteristic of a trained and logical mind and follows with a statement of the conclusions which seem to be as inevitable as those in geometry. His treatment

[35] Bohn Mfg. Co. v. Hollis, (1893) 54 Minn. 223, 231, 55 N. W. 1119, 21 L. R. A. 337, 40 A. S. R. 319.

[36] National Benefit Co. v. Union Hospital Co., (1891) 45 Minn. 272, 275, 47 N. W. 806.

[37] (1889) 40 Minn. 213, 41 N. W. 1020, 3 L. R. A. 510.

[38] (1892) 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31, A. S. R. 637.

of the "trust fund" doctrine in the *Hospes case* reveals his methods as well as anything he wrote while on the bench. There are many who assert that he never wrote a better opinion and its quality is attested by the fact that it is accepted everywhere today as the best exposition of the subject in existence.

His standard of legal ethics was high. He belonged to the old school of lawyers who believed that theirs was an honorable profession and not a commercial calling. He had scant patience with those who would forget the distinction, or with those who stir up litigation. A few quotations suffice to show his standards:

"The old common-law rules on the subject of champerty have doubtless been much modified, but the essential principle upon which those rules rested, and the evils and abuses at which they were aimed, still exist. The general purpose of the law . . . was to prevent vexatious or speculative litigation, which would disturb the peace of society, lead to corrupt practices, and prevent the remedial process of the law. All contracts or practices which necessarily and manifestly tend to produce these results ought still to be held void on grounds of public policy."[39]

"Blackstone speaks of men who are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering with other men's quarrels, as 'the pests of civil society.' This view was not peculiar to the common law. The Roman law animadverted with equal severity on this class of men and their practices. This class of men in the form of 'prowling assignees' and intermeddling speculators are unfortunately just as numerous, and their practices just as pernicious, as they ever were."[40]

"This sort of petty foraging upon the poor and ignorant is, in our opinion, one of the most reprehensible forms of professional misconduct."[41]

It is a common belief that to be a good judge a man must live a cloistered life and have a mind wholly absorbed in the study of cases and briefs to the neglect of everything else. Like many popular notions, it is largely fanciful. Judge Mitchell lived in this world and not in a world of abstractions. His study of cases and briefs did not exclude him from sharing in the common interests of ordinary men. His mind was stored with the fruits of his observations, as witness his portrayal of boyish traits in

[39] Gammons v. Johnson, (1899) 76 Minn. 76, 81, 78 N. W. 1035.
[40] Huber v. Johnson, (1897) 68 Minn. 74, 78, 70 N. W. 806.
[41] In re Temple, (1885) 33 Minn. 343, 345, 23 N. W. 463.

Twist v. Winona & St. Peter R. Co.,[42] and of the habits of Indians in *State v. Cooney*.[43]

In the first case, he said:[44]

"To the irrepressible spirit of curiosity and intermeddling of the average boy there is no limit to the objects which can be made attractive playthings. In the exercise of his youthful ingenuity, he can make a plaything out of almost anything, and then so use it as to expose himself to danger. If all this is to be charged to natural childish instincts, and the owners of property are to be required to anticipate and guard against it, the result would be that it would be unsafe for a man to own property, and the duty of the protection of children would be charged upon every member of the community except the parents or the children themselves."

And in the second, that:[45]

"The idea of these Indians buying game from those who keep it for sale will cause a smile of incredulity on the part of those who know them best; but, even if they do sometimes buy it, it is the Indian who kills and sells the game, or the trader who keeps it for sale, and not the Indian who buys it for food, who is benefited. If an Indian has the money with which to buy venison, he is able to buy beef or some other article of food with his money. I know of no more effectual method of depleting game, in both Indian reservations and the adjacent country, than to hold that Indians may kill it for purposes of barter and sale, or that traders may buy and keep it for sale, during the closed season."

Overworked judges have little opportunity for investigation. As a rule they have not the time to trace the streams of law to their fountain-head or to write elaborate and exhaustive opinions. During Judge Mitchell's time the business of the court increased rapidly. The flood of personal injury litigation had begun to come and there were no stenographers, typewriters or copyists to assist the judges in the preparation of their opinions. Evidences of the high pressure under which the court worked crop out every now and then in his opinions, and yet to the very last, in all the more important cases in which he wrote, he adhered to the same painstaking method of ascertaining and stating the law and giving it application to the case in hand that characterized his early opinions when the work of the court was far less

[42] (1888) 39 Minn. 164, 39 N. W. 402, 12 A. S. R. 626.

[43] (1899) 77 Minn. 518, 80 N. W. 696.

[44] Twist v. Winona & St. Peter R. Co., (1888) 39 Minn. 164, 167, 39 Minn. 402, 12 A. S. R. 626.

[45] State v. Cooney, (1899) 77 Minn. 518, 522, 80 N. W. 696.

burdensome. We find him referring to lack of time for further investigation or discussion in opinions which to us seem wholly adequate. When he left the bench the court was disposing of upwards of four hundred cases per year. When he went upon it, less than two hundred cases per year were on the calendars. It would be natural to assume that his earlier opinions dealt more exhaustively with the cases decided than his later ones when he was writing them more than twice as rapidly. Such is not the case however. There are no evidences of haste in the later series. Neither are there any marks of "brain fag" such as sometimes appears in the work of a man who has been employed for many years in arduous mental labor. To the very last, whenever a case out of the ordinary was assigned to him, he writes with buoyancy and evident interest. His style is as refreshing and his manner of treatment as alert and individual as ever. His opinions dealt almost wholly with cases involving private controversies. Few of great public importance came before the court while he was one of its members. There were many involving important questions of substantive law. Their decision has had a permanent influence on the jurisprudence of the state. Its framework was erected during his time. The fundamental principles of our jurisprudence having been framed, there remained the application of those principles to the ever varying facts presented by individual cases. The court had already entered upon this period in its work when he left the bench. In a way, he had completed the task he was so well qualified to do—that of giving shape to the body of the common law as it exists in this commonwealth today. In the decision of individual cases between private parties, principles of human conduct were approved or disapproved, business usages sanctioned, personal rights recognized, and a system of laws for the government of men in their relations with one another gradually built up on the solid foundation of Anglo Saxon common law. Judge Mitchell was one of the chief artificers, and how well he built is now a matter of common knowledge among lawyers, while laymen who never heard of him unconsciously enjoy the benefits of the enlightened jurisprudence he had so large a part in shaping.

Quotations from Judge Mitchell's opinions have been freely made for the reason that it has seemed that they best reveal his mind and character to those who did not know him. From them, one gets glimpses of his philosophy and his sympathies, and a

clear perception of his mental processes. However great one's admiration for him may be, it cannot but be deepened by the consecutive reading of a considerable number of his opinions. The methods of one man cannot be unconditionally recommended for the imitation of another, but young lawyers may well be guided, in dealing with legal problems, by a study of his methods. Though few men are gifted with the great natural abilities he possessed, the ordinary man may become a good lawyer or capable judge by following his practice of patient and thorough investigation of the facts and the law in each case to be dealt with, and by keeping in mind, as he did, the fact that in the pursuit of truth it is necessary to draw freely upon the learning and experience of others because of the narrowness of individual knowledge and experience.

The final factor in his successful career as a judge was the character of his associates on the bench. In this respect he was singularly fortunate. One able judge alone cannot make a great court, but when he is one of a group of able men, his and their work inevitably gains in quality, and the decisions of the court acquire a standing and authority they would not otherwise enjoy. Minnesota has produced a number of judges who ranked with the best in other states. Judge Mitchell was aware of the ability of his associates. In speaking of them at the memorial exercises for Chief Justice Gilfillan, he said:

"One of the chief inducements to my acceptance of a place on this bench, was the rare combination of talents possessed by the three judges then composing this court. There was Justice Cornell, with his remarkably clear, acute intellect, Justice Berry, with his sound judgment and great fund of practical common sense, and Chief Justice Gilfillan, with his great mental vigor and remarkable power of analysis."

His estimate, on that occasion, of Judge Gilfillan is in large measure applicable to himself. Equally applicable are the words of Chief Justice Start on the same occasion. With them, this sketch may well be concluded, for of Judge Mitchell, as well as of Judge Gilfillan, it may be truly said that:

"The special work, to which he gave long and laborious years of useful service, was the molding of the jurisprudence of our young state. To this work he brought natural abilities of a high order, the ripe experience of a learned lawyer, a keen sense of justice, an extraordinary command of the resources of reason, perfect integrity and great moral courage. His judicial opinions

are the rich fruit of that work. . . . These opinions are a monument to his fame as a jurist. That fame will widen as the years advance."

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NATIONAL POLICE POWER UNDER THE POSTAL CLAUSE OF THE CONSTITUTION

IF ONE were asked to explain and illustrate the doctrine of implied powers as it has functioned in the development of our constitutional law, there would probably be no easier way to do it than to point to the enormous expansion of the postal power of Congress.[1] The clause in the federal constitution which grants to Congress the power "to establish Post Offices and Post Roads"[2] was inserted there almost without discussion.[3] It seems to have appeared entirely innocuous even to the most suspicious and skeptical of those who feared that the new government would dangerously expand its powers at the expense of the states and the individual.[4] And yet that government had hardly been set in operation before this brief grant of authority began to be subjected to a liberal and expansive construction under which our postal system has come to be our most picturesque symbol of the length and breadth and strength of national authority.[5]

[1] The subject of the expansion of the postal power of Congress has been fully treated in a very excellent monograph by Lindsay Rogers entitled "The Postal Power of Congress," Johns Hopkins University Studies in Historical and Political Science, 1916. The writer has drawn freely upon Professor Rogers' researches in the preparation of this article.

[2] Art. I, Sec. 8, Cl. 7.

[3] In its present form it was not debated at all. In the New Jersey Plan introduced into the Convention by Paterson on June 15 it was proposed to allow Congress to raise revenue, among other ways, "by a postage on all letters or packages passing through the general Post Office." Farrand, Records of the Federal Convention, I, 243. The history of the postal clause in the convention is traced in Rogers, op. cit., 23. It throws no light on the present problem.

[4] Madison, in the 42nd number of the Federalist, dismissed the subject with the statement, "The power of establishing post roads, must, in every view, be a harmless power; and may, perhaps, by judicious management, become productive of great conveniency."

[5] "Under that six-word grant of power the great postal system of this country has been built up, involving an annual revenue and expenditure of over five hundred millions of dollars, the maintenance of 60,000 post offices, with hundreds of thousands of employees, the carriage of more than fifteen billions of pieces of mail matter per year, weighing over two billions of pounds, the incorporation of railroads, the establishment of the rural free delivery system, the money order system, by which more than half a billion of dollars a year is transmitted from person to person, the postal savings bank, the parcel post, an aeroplane mail service, the suppression of lotteries, and a most efficient suppression of fraudulent and

This expansion of national authority under the postal power given to Congress has proceeded along two distinct but related lines. There has been, in the first place, a striking expansion of what may be called the collectivist or socialistic functions carried on through the post office.[6] Here may be mentioned such enterprises as the postal money order system, the postal savings bank, the parcel post, and the use of the post office as an agency of publicity to aid in the marketing of farm products and in solving the problem of unemployment. In some countries, of course, the scope of the collectivist functions delegated to the post office is much broader than in the United States; but it seems highly probable that the American postal system has by no means reached the limit of its growth as an agency for positive service to the people.[7] This interesting subject is not, however, the one under consideration in this article. In the second place, national authority under the postal power has developed in striking measure along the line of repression and regulation effected by the denial or forfeiture of postal privileges. Acting on the theory that the hand which bestows privileges may also withhold them, Congress has wielded the power of exclusion from the mails with a vigorous arm. It has refused to carry in the mails a long list of articles injurious in themselves or destined for injurious uses, has denied the use of postal privileges in aid of fraudulent transactions, and has seriously contemplated at times denying entirely all mail privileges as a penalty for certain acts on the part of the corporation or the individual which it would have no direct authority to punish. Congress has in this way generously extended the scope of its authority over many subjects which the framers of the constitution undoubtedly assumed they had

criminal schemes, impossible to be reached in any other way." Read into the opinion of the Supreme Court from the brief for the government in Lewis Publishing Co. v. Morgan (1912) 229 U. S. 288, 57 L. Ed. 1190, 33 S. C. R. 867.

[6] Rogers, op cit., 33.

[7] Possible expansion of postal functions is suggested by the types of service rendered by the post office during the war as fiscal agent for the government through the handling of War Savings Stamps as well as other miscellaneous activities. The war-time control of the telegraph and telephone systems by the postmaster general was effected as an exercise of the war power, and no apparent effort was made to correlate the activities of those systems with those of the post office, as is done in some European countries. Whether Congress could, merely as an exercise of the postal power, acquire all the telegraph lines is a question which was referred to but left open by the Supreme Court in the case of Pensacola Telegraph Co. v. Western Union Telegraph Co., (1877) 96 U. S. 1, 24 L. Ed. 708.

succeeded in leaving to the exclusive jurisdiction of the states. In short, the national government has managed to make the seemingly matter-of-fact and innocent grant of authority to establish post offices and post roads serve as a "constitutional peg" upon which to hang a very substantial federal police power which may be employed to regulate and protect the national safety, good order, and morals. The postal power, therefore, forms a very important adjunct to the power to regulate commerce,[8] and to tax,[9] the three powers building up both by direction and indirection what, for want of a better term, may be called the police power of the national government. It is the purpose of this article to trace the various lines along which this national police power has developed under the postal clause of the constitution, to examine the conflicting views regarding the constitutional propriety of that development, and to determine, if possible, what are the true limits of the police power so derived.

The problem under consideration may be conveniently treated under four principal topics: (1) First, there are police regulations which Congress has enacted to protect the safety and efficiency of the postal system. Here may be placed such laws as those excluding poisons and explosives from the mails. (2) Second, there are those police regulations enacted to prevent the postal system from being used for purposes which are injurious to the public welfare or to encourage such uses of the postal system as are beneficial to the public welfare. The fraud order legislation and the obscene literature acts will fall into this group. (3) Third, may be mentioned those regulations which deny the right to use the mails for the purpose of violating or evading the laws of the states. The act forbidding the mailing of liquor advertisements into prohibition states exemplifies this type of statute. (4) Finally, there are proposals that conformity to general police regulations be made the price of the enjoyment of postal privileges. Here would be classed the recent proposal to deny the privileges of the United States mails to all persons employing child labor. Each of these types of police regulation under the postal power may be briefly examined.

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[8] See Cushman, The National Police Power under the Commerce Clause of the Constitution, (1919) 3 MINNESOTA LAW REVIEW 289, 381, 452.

[9] See Cushman, The National Police Power under the Taxing Clause of the Constitution, (1920) 4 MINNESOTA LAW REVIEW 247.

I. Police Regulations to Protect the Safety and Efficiency of the Mails

The right of Congress to pass such laws as are reasonably designed to protect the safety and efficiency of the postal system has at no time been seriously questioned, and is at present not questioned at all. Congress has been expressly granted the power to establish post offices; and it would be ridiculous to allege that the power to establish a governmental agency did not of necessity carry with it the power to preserve and protect it when once established.[10] Congress has, in fact, exercised such power ever since our national postal system was created. The most obvious and natural form of postal protection has been, of course, the enactment of laws punishing various acts which are criminal in themselves. Some twenty sections of the United States Criminal Code[11] are devoted to such offenses as robbing, destroying, or obstructing the mails, injuring mail property, counterfeiting money orders and stamps, or in any way defrauding the post office.[12] But a consideration of these measures would not properly be included in a discussion of the national police power[13] even if they raised, as they do not, any interesting or important questions of constitutional construction. There are, however, two types of legislation which Congress has passed for protecting the mail service and promoting its efficiency which may be classified as police regulations and upon which brief comment may be made. The first comprises the enactments designed to make the postal service a government monopoly; the second includes the laws excluding from the mails things which would imperil or

[10] In developing his doctrine of implied powers Marshall used what he thought must be regarded as an entirely obvious illustration, the right of Congress to protect the post office. He said: "Take, for example the power to establish post offices and post roads. This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post road and from one post office to another. And, from this implied power, has again been inferred the right to punish those who steal letters from the post office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post office and post road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence." McCulloch v. Maryland, (1819) 4 Wheat. (U.S.) 316, 4 L. Ed. 579.

[11] Act of March 4, 1909, 35 Stat. at L. 1088.

[12] Ibid, Secs. 189-202, 205, 218-221, 227-228.

[13] The enactment of ordinary criminal statutes is usually classified as an exercise of power outside the scope of the police power. See Freund, Police Power, Secs. 4-8.

injure the mails themselves, or postal property, or postal employees.

1. *Regulations to Insure Postal Monopoly.* The national postal system was made a government monopoly in 1792[14] and has remained so ever since.[15] Although the grant of postal power to Congress did not by its terms create a government monopoly and although there is judicial authority for the view that the monopolistic character of the postal system results not from the postal clause but from the legislation enacted under it,[16] there would seem to be some reason to believe that the framers of the constitution expected that the new post office would become a monopoly in the hands of the government. There was plenty of precedent as well as public policy[17] to support such a principle. The British post office had long been a government monopoly[18] and Blackstone had emphasized the paramount necessity for such exclusive control.[19] Thus while many questions have from time to time arisen as to the correct interpretation to be placed upon the acts of Congress penalizing the private carrying of the mails,[20] there has been no serious attack made upon the constitutional right of Congress to pass those laws.[21] The recent action

[14] Act of Feb. 20, 1792, 1 Stat. at L. 232. In 1782 the Congress of the Confederation had passed "An Ordinance for Regulating the Post Office of the United States of America." By one of the provisions of this Ordinance, Congress attempted to create and maintain a postal monopoly. 7 Journals of Congress 383. For summary of this entire act, see Rogers, op. cit., 17 ff.

[15] United States Criminal Code, Act of March 4, 1909, 35 Stat. at L. 1088, Secs. 179, 181, 186.

[16] "But the monopoly of the government is an optional, not an essential part of its postal system. The mere existence of a postal department of the government is not an establishment of the monopoly." United States v. Kochersperger, (1860) Fed. Cas. No. 15,541.

[17] "The post office monopoly is primarily an institution for the public benefit which must exclude competition from its profitable business in order to carry on the unprofitable business," Freund, Police Power, Sec. 666. If the post office were to be used as a means of raising revenue as suggested in the Convention of 1787 (supra, note 3), another ground for monopoly would exist.

[18] The development of the British Post Office as a government monopoly is traced at length by Hemmeon, The History of the British Post Office, Ch. IX.

[19] "Penalties were enacted in order to confine the carriage of letters to the public office only, except in some few cases: a provision which is absolutely necessary; for nothing but an exclusive right can support an office of this sort: many rival independent offices would only serve to ruin one another." Cooley's Blackstone, I, 323.

[20] Rogers, op. cit., 41 ff.

[21] "To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter . . ." Ex

of the federal authorities to prevent under the terms of the Criminal Code the transportation of telegraphic night letters by train instead of by wire, indicates that the statutes under consideration are adequate to cope with new and unusual forms of competition against the United States mails.[22]

2. *Exclusion of Articles Injurious to the Postal Service.* If Congress in the exercise of its power to regulate interstate commerce may exclude from that commerce commodities which would endanger or injure the agencies by which it is carried on,[23] then, a fortiori, it must follow that Congress may provide similar protection to a postal system which it not merely regulates but establishes and conducts. While it is highly desirable that Congress should require that adequate safety devices should be installed on interstate trains and that reasonable regulations be complied with in transporting explosives or other dangerous materials, the fact remains that the federal government itself does not serve as a common carrier and its responsibility for the physical safety of interstate commerce is, perhaps, a secondary responsibility.[24] The public which rides or which ships goods in interstate commerce would be loath to part with the protection guaranteed by federal laws; but their plight, were that protection removed, would be no different from that of the patrons of the wholly intrastate carriers which are not subject to federal authority. With the postal service, however, the case is very different. In respect to it Congress must assume a very definite and primary responsibility. In fact, there are at least four cogent reasons for the congressional exclusion of dangerous and injurious articles from the mails which do not apply to the exclusion of similar commodities from the channels of interstate commerce. In the first place, Congress has a proprietary interest in the postal system which it does not have in interstate commerce. In passing the laws in question Congress is but taking reasonable precautions for the protection of the property of the federal government. In the second place, in conducting its mail

parte Jackson, (1877) 96 U. S. 727, 735, 24 L. Ed. 877; United States v. Bromley, (1851) 12 How. (U.S.) 87, 13 L. Ed. 905; United States v. Thompson, (1846) 9 Law Rep. 451, Fed. Cas. No. 16,489.

[22] New York Times, June 21, 1918.

[23] Cushman, op. cit., 3 MINNESOTA LAW REVIEW 303.

[24] Persons sustaining loss by reason of the negligence of interstate carriers would, of course, have a right of action against the carrier to recover damages even in the absence of any statutory regulations insuring the safety of interstate commerce.

service the federal government offers itself as a carrier of other people's property. Letters and property are confided to its possession and control; indeed the laws, as has been seen,[25] forbid all persons to confide mail matter to any one but the postal authorities. It follows, therefore, that the government must take every reasonable precaution to insure the safety of the property it not only permits but virtually requires to be confided to its care. If it fails to guarantee such safety there is no one else to whom the person who suffers the loss or injury of his property may look for reparation. In the third place, Congress should recognize a clear responsibility to provide adequately for the safety of its postal employees and to see that they are not exposed to avoidable dangers. Finally, since Congress has created the postal system and is the author and source of all postal privileges, the exercise of the power to deny those privileges to dangerous or injurious articles could not be attacked, as the congressional exclusions from interstate commerce have sometimes been attacked, on the ground that Congress is denying a right or privilege which it did not create and which it has the authority merely to regulate and not to destroy.[26]

Enough has been said to indicate that there can be no question of the constitutional power of Congress to exclude dangerous and injurious articles from the mails. It is not only the right of Congress to pass such legislation but it is also its duty. This duty has been fulfilled by the insertion into the Criminal Code of a substantial list of articles which are declared non-mailable because of their injurious character,[27] and by the delegation to the postmaster general of the authority to expand that list.[28] Not only has the validity of this legislation never been questioned, but the courts have not infrequently alluded to these laws as examples of the legitimate exercise of the postal power delegated to Congress.[29] Needless to say, this is a type of legislation which

[25] Supra, p. 406.

[26] For discussion of this distinction see infra, p. 423.

[27] United States Criminal Code, Sec. 217, Act of March 4, 1909, 35 Stat. at L. 1131.

[28] United States Official Postal Guide, 1918, p. 19.

[29] "It [Congress] may also refuse to include in its mails such printed matter or merchandise as may seem objectionable to it upon the ground of public policy, as dangerous to its employees or injurious to other mail matter carried in the same packages. The postal regulations of this country issued in pursuance of act of Congress contain a long list of prohibited articles dangerous in their nature, or to other articles with which they may come in contact, such, for instance, as liquids, poisons, explosives and

other countries have also enacted in order to provide adequate protection to their mails.[30]

II. Classifications of Mailing Privileges to Prevent Harmful and to Encourage Beneficial Uses of Postal System

It requires no argument to prove that the vast postal system of the United States, rendering as it does its many varieties of service and reaching practically every home, is an instrumentality for promoting and spreading civilization and culture. It is an enormous agency for good. The characteristics which make it an agency for good, however, also make it an agency for evil unless measures are taken to prevent its misuse. To prevent the postal service from being used as a conduit for dumping injurious and harmful matter into millions of homes, and to keep it from serving as a means of consummating fraudulent and unlawful acts, Congress has passed a substantial body of legislation. These laws are manifestly designed for the protection of the public and not of the postal service itself. They are designed to protect the public from the misuse of the mails. They are unmistakably police regulations for they aim squarely at the protection of the public health, morals, safety, and good order. This legislation may be briefly analyzed and described before an examination of its constitutional basis and limits is entered upon.

1. *Obscene Literature.* Since the regulation of private morals is by the division of power between the nation and the states left to the latter, there was, of course, no reason why Congress should concern itself with the problem of obscene literature until it became clear that the mails or the channels of commerce were being used as a means of circulating the obnoxious matter. Federal legislation relating to obscene literature began with the Tariff of 1842, a provision of which forbade the importation into this country of obscene literature or pictures.[31]

inflammable articles, fatty substances, or live or dead animals, and substances which exhale a bad odor. It has never been supposed that the exclusion of these articles denied to their owners any of their constitutional rights." Public Clearing House v. Coyne, (1903) 194 U. S. 497, 48 L. Ed. 1092, 24 S. C. R. 789.

[30] For summary of articles, which, under the laws of foreign countries, may not be sent through the mails into such countries, see U. S. Official Postal Guide, 1919, 137 ff.

[31] Act of Aug. 30, 1842, 5 Stat. at L. 562, Sec. 28. For the development of the policy of excluding obscene literature from interstate commerce see Cushman, op. cit., 3 Minnesota Law Review 388.

It was not until 1865 that Congress took steps to exclude matter of this description from the mails;[32] and the first really effective legislation for this purpose seems to have been the Act of March 3, 1873.[33] Various amendments to this law have been passed extending its scope and strengthening its provisions.[34] At the present time there are two sections of the United States Criminal Code dealing with this subject.[35] By the first of these provisions obscene and indecent writings, letters, pictures, or printed matter of any sort are declared to be unmailable as well as all contraceptive devices and information.[36] Such matter may not be conveyed in the mails nor delivered by any post office employee. To deposit such matter in or to take it from the mails is made a criminal offense. The second provision makes non-mailable under severe penalties any mail matter on the outside cover of which is found any obscene, scurrilous, libelous, or defamatory inscriptions which would reflect injuriously upon the character or conduct of another.[37] While the postal authorities are not permitted to receive or deliver mail matter known by them to be in violation of the provisions just described, they are rigidly forbidden to open sealed matter.[38] While authority is given to exclude non-mailable matter, there is no power to prevent the subsequent circulation through the mails of later issues of the

[32] Act of March 3, 1865, 13 Stat. at L. 507. Amended June 8, 1872, 17 Stat. at L. 302.

[33] 17 Stat. at L. 599.

[34] Act of July 12, 1876, 19 Stat. at L. 90; Act of Sept. 26, 1888, 25 Stat. at L. 496; Act of May 27, 1908, 35 Stat. at L. 416; Act of Mar. 4, 1911, 36 Stat. at L. 1339.

[35] Secs. 211, 212, Act of March 4, 1909, 35 Stat. at L. 1129.

[36] "And the term 'indecent' within the intendment of this section shall include matter of a character tending to incite arson, murder, or assassination." Sec. 211, U. S. Criminal Code. The prohibitions of the act have been construed as applicable to the veiled advertisements of prostitutes. United States v. Dunlop, (1897) 165 U. S. 486, 41 L. Ed. 799, 17 S. C. R. 375.

[37] This provision is applicable to the sending of threatening or dunning inscriptions on packages or cards. United States v. Smith, (1895) 69 Fed. 971; United States v. Davis, (1889) 38 Fed. 326; United States v. Elliott, (1892) 51 Fed. 807; United States v. Simmons, (1894) 61 Fed. 640.

[38] The inviolability of sealed mail matter from government invasion is guaranteed by the fourth amendment to the United States constitution which provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ." "No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the Fourth Amendment of the Constitution." Ex parte Jackson, (1877) 96 U. S. 727, 733, 24 L. Ed. 877.

excluded publication or to forbid the subsequent use of the mails to any persons who have violated these provisions.[39]

While some persons have appeared from time to time to question the constitutionality of the obscene literature acts[40] and numerous petitions have been presented to Congress urging their repeal ostensibly on constitutional grounds,[41] there has never been any substantial body of opinion to doubt the authority of Congress to pass them. There has been a considerable number of cases in which these acts have been construed and interpreted[42] and a number of the lower federal courts have declared them to be constitutional,[43] but their validity has never been attacked before the Supreme Court.[44]

2. *Lottery Tickets and Circulars.* Although Congress as well as the state legislatures at first regarded the lottery as a legitimate method of public finance,[45] public sentiment condemning the institution soon began to make itself felt. In 1827 Congress passed its last act authorizing a lottery[46] and its first act hostile to lotteries.[47] This latter statute, however, was not a serious blow to lottery enterprises since it merely provided:

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[39] The annual report of the postmaster general for 1914 comments upon the many requests which come to the post office department for action of this sort and points out the limitations upon the power of the department in respect thereto; p. 48.

[40] Schroeder, Obscene Literature and Constitutional Law, *passim*. See also Free Speech Anthology, by the same author.

[41] On February 26, 1878, Congressman Benjamin F. Butler (Mass.) presented to the House of Representatives a petition signed by 50,000 persons protesting against the Obscene Literature Acts and asking their amendment in such a manner "that they cannot be used to abridge the freedom of the press or of conscience, or to destroy the liberty and equality of the people before the law and departments of the government on acount of any religious, moral, political, medical or commercial grounds or pretexts whatsoever." Congressional Rec. Vol. VII, p. 1340. Sixty-three petitions similar in character were presented during the first

[42] See Thomas, Non-mailable Matter, Ch. V; Rogers, op. cit., 48 ff.

[43] United States v. Wilson, (1893) 58 Fed. 768; United States v. Warner, (1894) 59 Fed. 355.

[43] Rogers, op. cit., 48 ff.

[44] "For more than thirty years not only has the transmission of obscene matter been prohibited, but it has been made a crime, punishable by fine or imprisonment, for a person to deposit such matter in the mails. The constitutionality of this law, we believe, has never been attacked." Public Clearing House v. Coyne, (1903) 194 U. S. 497, 48 L. Ed. 1092, 24 S. C. R. 789. In an earlier opinion the Supreme Court referred to the Obscene Literature Act of 1873 with apparent approval and said, "All that Congress meant by this act was, that the mail should not be used to transport such corrupting publications and articles. . . ." Ex parte Jackson, (1877) 96 U. S. 727, 736, 24 L. Ed. 877.

[45] For summary of this early legislation see Thomas, op. cit., Secs. 1-4.

[46] Act of Feb. 22, 1827, 4 Stat. at L. 105. This act authorized the city of Washington to include the lands of Thomas Jefferson within its lottery schemes.

[47] Act of March 2, 1827, 4 Stat. at L. 238.

"That no postmaster or assistant postmaster shall act as agent for lottery offices or under any color of purchase, or otherwise, send lottery tickets; nor shall any postmaster receive free of postage or frank lottery schemes, circulars, or tickets."

This mild law, however, very definitely suggests the constitutional principle upon which our present vigorous anti-lottery statutes rest: namely, that Congress may refuse to lend its postal facilities or agents in furtherance of lottery enterprises. The next congressional attack on lotteries did not occur until 1868, when an act was passed providing:

"That it shall not be lawful to deposit in a post office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts or similar enterprises, offering prizes of any kind on any pretext whatever."[48]

This act, however, provided no adequate means of enforcement and proved ineffective.[49] In 1872 an act was passed which made it unlawful to deposit in the mail or to send by mail any letters or circulars concerning *illegal* lotteries, so-called gift concerts, or other similar enterprises, and the postmaster general was authorized to issue a fraud order against any person who conducted a *fraudulent* lottery, gift concert, etc.[50] Four years later this act was amended by striking out the word "illegal" before lotteries and making the exclusion applicable to all lotteries whether forbidden by state law or not.[51] The word "fraudulent" was retained, however, in the section relating to fraud orders.[52] In 1890 the law was amended so as to include lottery advertisements in newspapers within its prohibition and to eliminate the word "fraudulent" from the clause just mentioned.[53] Under this legislation the postmaster general was authorized to prevent by the issuance of a fraud order the delivery of registered letters or the payment of money orders to persons known to be conducting lotteries or fraudulent schemes. By Act of 1895 the department was given power in such cases to withhold ordinary sealed mail matter as well as registered letters.[54] The anti-lottery legislation has never

[48] Act of July 27, 1868, 15 Stat. at L. 194.

[49] There was no penalty provided for its violation and no appropriation to cover the cost of administration.

[50] Act of June 8, 1872, 17 Stat. at L. 283.

[51] Act of July 12, 1876, 19 Stat. at L. 90.

[52] This was construed to mean that a fraud order could be issued against only such lotteries as were actually fraudulent in character. Opinion of Attorney-General McVeagh, (1881) 17 Op. Atty. Gen. 77.

[53] Act of Sept. 19, 1890, 26 Stat. at L. 465.

[54] Act of March 2, 1895, 28 Stat. of L. 964.

attempted to prohibit the operators of these enterprises from sending innocent matter through the mails.

While the constitutionality of this legislation has been bitterly attacked on various grounds,[55] it has been sustained by numerous federal courts[56] and by the United States Supreme Court in two important cases[57] the principles of which will be discussed at a later point in this article.[58]

3. *Fraudulent Matter.* The first attempt made by Congress to prevent the use of the mails for the circulation of correspondence relating to fraudulent schemes and enterprises was in 1872.[59] This act subjected to severe penalty any person who devised any scheme or artifice to defraud to be carried on by means of correspondence through the mails and who so used the mails in furtherance of such project. It authorized the postmaster general to withhold registered letters and payment on money orders from those who he had reason to believe were using the mails for the forbidden purposes mentioned. This law was expanded and strengthened by amendment in 1889[60] by elaborating the list of schemes brought within the prohibition[61] and by forbidding persons engaged in the proscribed enterprises to use the mails

[55] For a very able presentation of the case against this legislation see the argument of Mr. James C. Carter for the defendants in the case of In re Rapier, (1892) 143 U. S. 110, 113, 36 L. Ed. 90, 12 S. C. R. 353. See also brief for defendants in Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877. Also article by Mr. Hannis Taylor entitled, "A Blow at the Freedom of the Press," (1892) 155 North American Review 694. Mr. Taylor's attack is based largely on the fact that in the Lottery Act of 1890 the test of the immoral or injurious character of the matter excluded was not left to a jury but was determined by tests which Congress established in the act itself.

[56] In re Jackson (1877) 14 Blatch. (U. S. C. C.) 245, Fed. Cas. No. 7,124; New Orleans National Bank v. Merchant, (1884) 18 Fed. 841.

[57] Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877; In re Rapier, (1892) 143 U. S. 110, 36 L. Ed. 90, 12 S. C. R. 353.

[58] Infra, p. 419 ff.

[59] Act of June 8, 1872, 17 Stat. at L. 283.

[60] Act of March 2, 1889, 25 Stat. at L. 873.

[61] The prohibitions of the act were extended to apply to those who used the mails "to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use, any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence by what is commonly called the 'sawdust swindle,' or 'counterfeit money fraud' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' spurious Treasury notes; 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles."

under an assumed name.[62] In 1895 the scope of the fraud orders issued was extended to include all first class mail.[63] While post office officials have from time to time recommended the further amendment of the anti-fraud statutes to embrace within their provisions enterprises not now included,[64] the present legislation has proved adequate to put an end to thousands of cheating and swindling schemes which had used the mails as the indispensable means of getting into touch with their victims.[65]

As in the case of the acts already examined, there has been a large amount of litigation over the construction of the anti-fraud acts and their applicability to specific schemes or enterprises.[66] There have been attacks upon the constitutionality of the statutes on the ground of the procedure provided for the issuance of fraud orders and the courts have laid down certain rules respecting the scope and finality of the postmaster general's discretion in the matter.[67] Both lower federal courts[68] and the

[62] By a section of this act, the postmaster general is authorized to require the personal identification of persons receiving mail matter when he has reason to believe that the names or addresses on such matter are fictitious.

[63] Act of March 2, 1895, 28 Stat. at L. 964.

[64] The annual reports of the postmaster general in recent years have repeatedly urged the inclusion within the prohibitions of the law of all gambling devices or paraphernalia of any sort. For the text of this proposed legislation see Report of the Postmaster General for 1914, p. 81.

[65] Data regarding the operation of the law is summarized yearly in greater or less detail in the report of the postmaster general. See report for 1918, p. 58.

[66] These questions are discussed in detail in Thomas, op. cit., Ch. IV. See also Rogers, op. cit., 56. It may be noted that schemes which may be included within the prohibitions of the act as "fraudulent" are not merely those which would be held fraudulent at common law as involving actual misrepresentation as to a past or existing fact, but extend to "everything designed to defraud by representations as to the past or present or suggestions and promises as to the future. . . . It was with the purpose of protecting the public against all such intentional efforts to despoil and prevent the post office from being used to carry them into effect that this statute was passed; and it would strip it of its value to confine it to such cases as disclosed an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise." Durland v. United States, (1896) 161 U. S. 306, 314, 40 L. Ed. 712, 16 S. C. R. 508.

[67] It has been held by the Supreme Court that the judgment of the postmaster general with reference to the issuance of fraud orders must be based on facts supported by evidence as to the fraudulent nature of the enterprise concerned and may not be based merely upon his personal belief that the scheme is fraudulent. A fraud order was held unlawfully issued against a concern which claimed to cure disease by the influence of the mind because "there is no exact standard of absolute truth by which to prove the assertion false and a fraud. . . . We may not believe in the efficacy of the treatment to the extent claimed by the complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but a matter of opinion in any court." American School of

United States Supreme Court[69] have held that Congress enjoys power under the constitution to pass the legislation in question, which does not after all differ in principle from the acts relating to obscene literature and lotteries.

4. *Prize Fight Films.* By a statute passed in 1912 it is made a criminal offense to import from abroad for purposes of public exhibition pictures or moving picture films of prize fights or to send them in or to receive them from interstate commerce or the mails.[70] The only litigation to date respecting the validity of this act concerns the provision against importation.[71] There can be no doubt whatever that that portion of the act which authorizes the exclusion from the mails would be sustained by the Supreme Court should its constitutionality be questioned.

5. *Seditious and Treasonable Publications.* It will be recalled that one of the reasons which led England and other countries to make their post offices government monopolies was the desire to use the mail facilities for an official espionage on private correspondence with a view to discovering who were the enemies of the sovereign or his ministers.[72] It is quite natural that this

Magnetic Healing v. McAnnulty, (1902) 187 U. S. 94, 47 L. Ed. 90, 23 S. C. R. 33.

The problem of the finality of the action of the postmaster general in issuing fraud orders is touched upon in a general article by Professor T. R. Powell entitled, Conclusiveness of Administrative Determinations in the Federal Government, Amer. Pol. Sci. Rev., Aug. 1907, p. 583.

For criticism of the broad powers conferred upon the postmaster general by this legislation see Pierce, Federal Usurpation, p. 354.

[68] New Orleans Nat'l Bank v. Merchant, (1884) 18 Fed. 841; Hoover v. McChesney, (1897) 81 Fed. 472; United States v. Loring, (1884) 91 Fed. 881.

[69] Public Clearing House v. Coyne, (1903) 194 U. S. 497, 24 S. C. R. 789.

[70] Act of July 31, 1912, 37 Stat. at L. 240.

[71] Weber v. Freed, (1915) 239 U. S. 325, 60 L. Ed. 308, 36 S. C. R. 131. See Cushman, op. cit., 3 MINNESOTA LAW REVIEW 392.

[72] Hemmeon points out that the proclamation of 1591 making the British foreign post a monopoly was issued "in order that the government might be able to discover any treasonable or seditious correspondence," History of British Post Office, 190. Freund states: "In a royal grant of the office of postmaster to foreign parts (July 19, 1632, XIX Rymer's Foedera 385) the monopoly is justified by the consideration, how much it imports to the state of the King and this realm that the secrecy thereof be not disclosed to foreign nations, which cannot be prevented if a promiscuous use of transmitting or taking up of foreign letters and packets should be suffered.' Cromwell spoke of the Post Office as the best means to discover and prevent dangerous and wicked designs against the commonwealth," Police Power, Sec. 666, note. See also May, Constitutional History of England, II, 245 ff.

"The post office is no longer regarded in England as a means of detecting conspiracies. Letters passing through the mails may nevertheless be opened on the warrant of the secretary of state, but the occurence is

early purpose should not be entirely forgotten even in those countries in which the secrecy of the mail is now preserved, and that in critical times efforts should be taken to prevent the use of mail facilities for treasonable or seditious purposes.[73] No government can be expected to lend positive aid to those who are seeking to accomplish its destruction. It would, of course, be unnecessary to forbid specifically the use of the mails for the actual execution of a treasonable plot or conspiracy.[74] In time of war, however, the United States government has taken steps to prevent the circulation through the mails of matter which would tend even indirectly to interfere with the success of the military preparations or campaigns of the government. During the Civil War the exclusion of objectionable matter from mails was carried on by the executive arm of the government[75] without the authority of any statute but with the acquiescence of Congress.[76] While there was protest from those subjected to this treatment,[77] there seems to have been no litigation arising from these executive acts, which were apparently regarded as part of the military policy of the government.[78] When the Obscene Literature Act of 1872 was passed Congress included in its description of proscribed matter "any letter upon the envelope of which, or postal card upon which scurrilous epithets may have

very rare, and would be sanctioned by public opinion only in extreme cases." Cooley's Blackstone, Book I, 323, note.

[73] See provisions of the recent Trading with the Enemy Act establishing a censorship of foreign mail and forbidden communications to foreign countries during the period of the war except through the mails. Act of Oct. 6, 1917, 40 Stat. at L. 412.

[74] "The overt act of putting a letter into the post office of the United States is a matter that Congress may regulate. . . . Intent may make an otherwise innocent act criminal, if it is the step in a plot." Badders v. United States, (1916) 240 U. S. 391, 36 S. C. R. 367.

[75] These exclusions do not seem to have been carried out by the post office department exclusively. This power was exercised by the secretary of state on some occasions. This officer withdrew mail privileges from the New York Staats Zeitung and from the National Zeitung (New York) in 1861. Official Records of War of Rebellion, 2nd Series, Vol. 2, 494, 501. For instances of such exclusion of newspapers from the mails by military authority see Sen. Doc. No. 19, 37 Cong., 3d Sess. The writer is indebted to Professor James G. Randall for this data.

[76] An investigation into the alleged arbitrary acts of the postmaster general was conducted in 1862 and 1863 by the Judiciary Committee of the House of Representatives. The power claimed by the postmaster general was sustained by the committee and no action was taken. Burgess, The Civil War and the Constitution, II, 222-3.

[77] An editorial in the New York World for August 18, 1864, denounced the espionage upon private correspondence by postal authorities.

[78] See the valuable article by Professor James G. Randall, "The Newspaper Problem in Its Bearing upon Military Secrecy During the Civil War, (1918) 23 Am. Hist. Rev., 303.

been written or printed or *disloyal* devices printed or engraved thereon."[79] When this act was amended and broadened in scope the next year, however, the phrase relating to "disloyal devices" was omitted.[80] The first effective legislation which Congress enacted dealing with this problem is found in the Espionage Act of 1917.[81] In addition to its general prohibitions the law provides that any mail matter which is in violation of any provisions of the statute is non-mailable, that any matter "urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared non-mailable." A heavy penalty is inflicted upon those who use or attempt to use the mails for the transmission of any matter thus declared non-mailable.[82] In 1918 this act was amended so as to extend to the postmaster general during the period of the war authority to order all mail matter to be withheld from persons who, "upon evidence satisfactory to him," he concludes are using the mails in violation of any of the provisions mentioned above.[83]

This legislation has been much discussed both from the standpoint of public policy and from that of constitutional law. It seems clear, however, that most of the attacks which have been made upon it have been directed in reality not so much at the validity of the statute itself as at the administration of it and its proper applicability to concrete cases. On the point of constitutional power to pass the acts in question there can be no serious disagreement. The Obscene Literature Acts and the Anti-Fraud Acts afford clear precedents; and the lower federal courts which have passed upon the constitutionality of these clauses of the Espionage Act have uniformly upheld them.[84]

6. *Denial of Postal Facilities Used for Violating Federal Law.* In at least two of the statutes which have been mentioned, Congress has legislated upon the theory that it was proper to refuse to allow the postal facilities to be used as an agency in the violation of federal law. The Anti-Fraud Act at the present time includes within its prohibitions the use of the mails to dis-

[79] Act of June 8, 1872, 17 Stat. at L. 302.
[80] Act of March 3, 1873, 17 Stat. at L. 599.
[81] Act of June 15, 1917, 40 Stat. at L, 230.
[82] The provision in the Trading with the Enemy Act for the licensing by the postmaster general under direction of the president of foreign language newspapers is not primarily a postal regulation, since the right was denied to unlicensed papers not merely to mail but to publish or circulate in any other way. Act of Oct. 6, 1917, 40 Stat. at L. 425.
[83] Act of May 16, 1918, 40 Stat. at L. 553.
[84] Masses Publishing Co. v. Patten, (1917) 244 Fed. 535; same, (1917) 245 Fed. 102; Jeffersonion Publishing Co. v. West, (1917) 245 Fed. 585.

pose of, circulate, or procure counterfeit money or securities of the United States.[85] Congress possesses, of course, adequate power to punish the counterfeiting of its own currency and securities and those of foreign countries and has long since exercised this power.[86] By the provision dealing with the transmission of counterfeit money or securities through the mails, Congress has merely refused to permit the United States Post Office to act as an unwitting accomplice of those committing or intending to commit a crime against the laws of the United States. In the same way it will be recalled Congress made it unlawful to transmit through the mails any matter which was in violation of any provision of the Espionage Act.[87] Upon the same theory rests the statutory provision declaring non-mailable any publication which violates any copyright granted by the United States.[88]

It would, of course, be possible to expand very greatly the amount of this type of legislation and there have been proposals from time to time to that effect.[89] It would be entirely possible to penalize the use of the mails as an aid in the violation of the prohibition amendment, the Sherman Act, or for the purpose of soliciting unlawful campaign contributions in congressional elections. It is difficult to imagine any offense against the United States government in the furtherance of which the criminal might not make use of the facilities of the postal service. The power of Congress to punish the use of the mails for these unlawful purposes seems to be quite unassailable. As a matter of practical expediency, however, this sort of legislation is not apt to be resorted to unless the systematic use of the postal facilities is so vital to the accomplishment of the crime that under normal circumstances the post office affords a more or less effective means for its detection or prevention.[90]

[85] Supra, note 61.

[86] These prohibitions are to be found in Chapter VII of the United States Criminal Code, Act of March 4, 1909, 35 Stat. at L. 1115.

[87] Supra, p. 417. It is also made a criminal offense to send through the mails any threats against the life of the president of the United States. The same provision penalizes the making of such threats orally or in any other way. Act of Feb. 14, 1912, 39 Stat. at L. 919.

[88] Act of March 3, 1879, 20 Stat. at L. 359. Section 320 of the Criminal Code makes it a penal offense to import from abroad through the mails any publication which violates copyright laws or infringes rights accruing thereunder. Act of March 4, 1909, 35 Stat. at L. 1083.

[89] It has been proposed, for example, to penalize the use of the mails for the purpose of securing false witnesses, suborning perjury and like offenses. A bill to this effect was introduced in the Senate in 1917. See Sen. bill 2523, Cong. Rec., June 27, 1917, Vol. 55, p. 4337.

[90] No useful purpose would be served by making it a crime to mail a letter in furtherance of such an offense against the criminal laws of the

The Question of Constitutionality

The foregoing analysis has sketched briefly the principal types of statutes by which Congress has sought to prevent the federal postal system from being used as a means of distributing injurious matter or of aiding the consummation of injurious and illicit transactions. In every case in which the constitutionality of any of these acts has been passed upon by a court it has been sustained; and there can be no doubt but that those acts which have not been subjected to judicial scrutiny rest upon the same or equally firm constitutional grounds. The very unanimity with which the courts have declared that Congress has not gone too far in enacting these laws has, of course, precluded the making of any authoritative judicial pronouncement as to just how far Congress may still go in the exercise of this power. The question whether Congress has exhausted its authority in this particular legislative field remains open for speculation. It is a question which may conveniently be dealt with under two headings: first, the constitutional basis for the power now under consideration; this will involve a review of the various theories advanced in support of that power; and second, the constitutional limitations within which the power must be exercised. Consideration of these two problems may aid in reaching a conclusion as to whether Congress may go still further in prohibiting the use of the mails as an agency for evil or undesirable ends, or in encouraging such use for purposes beneficial to the public welfare.

1. *Constitutional Basis of Legislation.* Opinions regarding the power of Congress to exclude different classes of things from the mails range all the way from the view that Congress has no power to exclude anything which was mailable at the time the federal constitution was formed[91] to the equally extreme view that Congress may exclude from the mails anything it pleases.[92] But the theories on which the right of exclusion has most commonly been sustained are two in number.

United States as peonage, or piracy, or other crimes where the use of postal facilities would form a rare or very minor means of criminal accomplishment.

[91] "So long as the duty of carrying the mails is imposed upon Congress, a letter or a packet which was confessedly mailable matter at the time of the adoption of the constitution, cannot be excluded by them, provided the postage be paid and other regulations be observed." Brief for defendants in Ex parte Jackson, (1877) 96 U. S., 727, 24 L. Ed. 877. The view was expressed, however, that matter which had become mailable since that time could be excluded.

[92] See infra, p. 421.

(a) In the first place, there has been a general recognition of the fact that a very special duty and responsibility rests upon Congress to protect the public from certain types of evils or injuries to which the very existence of an efficient postal system would otherwise expose them. As has been pointed out elsewhere, Congress has long since recognized and assumed a similar responsibility in respect to foreign and interstate commerce.[93] If Congress possesses such police power by reason of its authority over a commerce which it does not create but merely regulates, it cannot be doubted that equal or even greater authority would be derived from the power to "create" or "establish" a postal system. It may be urged, in fact, that while the constitutional authority arising from the commerce and postal clauses is ample in both cases to support this type of legislation, a much stronger moral obligation rests upon Congress to protect the public health, morals, safety, and general welfare from the misuse of the mails than from the misuse of the facilities of interstate commerce. Two considerations support this view. The first is that the responsibilities arising from the fact of creation, ownership, and operation of an institution may be reasonably regarded as greater than those arising from a power merely to "regulate" a system or institution which Congress did not create, does not own nor operate, and cannot destroy. The second is that the ordinary individual is in a much better position to protect himself from the misuse of interstate commerce than from the misuse of the mails. This is due to the essential differences between the two systems. Under normal circumstances the participation of the individual in the transactions of interstate commerce and his relations to interstate carriers result from a voluntary contractual relationship. Spurious or even harmful products may be sent to him, but rarely without his having bargained for the shipment of any products at all. A very different situation exists with respect to the postal system. At practically negligible cost to the sender, grossly indecent letters or papers could be brought several times a day to the door of any person by an employee of the United States government and this without the previous knowledge and against the wishes of the recipient. Without depriving himself of all the conveniences arising from the regular visits of the postman a person might be quite unable to protect himself against this sort of abuse. It is not unreasonable to

[93] Cushman, op. cit., 3 MINNESOTA LAW REVIEW 381 ff.

assert that the governmental authority which thus penetrates daily the very homes of the people must recognize a commensurate duty of protecting those homes from the distribution of noxious matter. Even those who have been solicitous that the national government should not attempt to extend its authority over subjects commonly left to state control have looked upon the sort of national police regulations now under consideration as not only harmless but highly desirable.[94] Assuming for the sake of argument that every citizen enjoys a well-protected constitutional right to the unrestricted and equal use of the mails, it would be useless to argue that the regulations in question unconstitutionally abridge that right, since no one can be said to have a right to circulate matter which is injurious to the public health, morals, or safety.[95] Most of the court decisions in which the validity of this type of legislation has been considered have laid strong emphasis upon the right and duty of Congress to protect the public welfare from the abuse of mail privileges.[96]

(b) There are those, however, who go beyond this admittedly conservative view of the power of Congress to exclude various types of matter from the mails which has just been discussed. They take the position that Congress may not only make it unlawful to send through the mails such things as are dangerous to health, morals, or safety, either intrinsically or in the use to which they are to be put, but may also deny mail privileges to things or to transactions which do not conform to congressional views of public policy. In other words, the power of exclusion is held to extend not only to things which are actually or potentially injurious or dangerous but to those the circulation of which in the judgment of Congress would be undesirable or unwise.[97]

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[94] See discussion of Mr. Bryan's views on this point, infra p. 436.

[95] Lottery Case, (1903) 188 U. S. 321, 23 S. C. R. 321, 47 L. Ed. 492; Hoke v. United States, (1913) 227 U. S. 308, 33 S. C. R. 281, 57 L. Ed. 523.

[96] United States v. Journal Co., (1912) 197 Fed. 415; Knowles v. United States, (1909) 170 Fed. 409; In Jeffersonion Publishing Co. v. West, (1917) 245 Fed. 585, the court said in respect to the exclusion of mail matter in violation of the Espionage Act, "Had the postmaster general longer permitted the use of the postal system which he controls for the dissemination of such poison, it would have been to forego the opportunity to serve his country afforded by his lofty station."

[97] An extreme statement of this view is found in the argument for the government in Lewis Publishing Co. v. Morgan, (1913) 229 U. S. 288, 57 L. Ed. 1190, 33 S. C. R. 867.

It was stated in substance that the postal power is one which "conveys an absolute right of legislative selection as to what shall be carried in the mails, and which therefore is not in any wise subject to judicial control,

The considerations advanced in support of this position may be briefly reviewed.

At the outset it must be admitted that Congress in establishing a postal system must of necessity determine what is to be regarded as mail matter and what is not. Obviously not everything need be transmitted through the mails unless the post office is to perform all the functions of a common carrier. This necessity of determining what shall constitute mail matter carries with it the power and duty of setting up classifications as to various types of matter. No positive obligation rests upon the government to carry any particular class of articles. Should Congress decide that nothing but sealed letters of a certain size and weight may be sent through the mails, there could be no doubt of its constitutional authority so to legislate. The Supreme Court has recognized that Congress in establishing a postal system may properly set up classifications of matter in respect to mailing privileges.

"In establishing such a system, Congress may restrict its use to letters and deny it to periodicals; it may include periodicals and exclude books; it may admit books to the mails and refuse to admit merchandise; or it may include all of these and fail to embrace within its regulations telegrams or large parcels of merchandise, although in most civilized countries of Europe these are also made a part of the postal service."[98]

This power of classification arises from the fact that Congress creates, owns, and operates the postal system and that in exercising this power of classification Congress may properly give effect to its own conceptions of public policy. Its position is that of a proprietor; and it is under no obligation to lend the use of its property for purposes which it regards as unwise and undesirable, nor is it prohibited from extending the use of its mail facilities on especially favorable terms to those who will make use of them for the promotion of constructive ideas of public policy. In short, Congress may not only discourage certain uses of the mails which it deems contrary to public policy but it may also stimulate and encourage other uses of the mails which it regards as helpful or beneficial to the national welfare. From the practical point of view, the latter method would of the two seem to

even although in a given case it may be manifest that a particular exclusion is but arbitrary, because resting on no discernable distinction, nor coming within any discoverable principle of justice or public policy."

[98] Public Clearing House v. Coyne, (1903) 194 U. S. 497, 48 L. Ed. 1092, 24 S. C. R. 789.

be easier of execution as well as less open to criticism; and Congress has employed it in numerous instances. The most conspicuous examples are the special privileges extended to periodical literature under the statutes creating second class mailing privileges,[99] the extension of the franking privilege to the speeches of members of Congress printed in the Congressional Record,[100] and the act providing for the free transmission through the mails of reading matter printed in raised characters for the use of the blind.[101]

If it is true that the relationship of the government to the post office partakes largely of proprietorship, it would follow that the use of the mail service by the individual is a privilege rather than a constitutional right.[102] This seems to be recognized by the decisions of the courts either directly or by implication.[103] It constitutes an important difference between the rights of the individual to engage in interstate commerce and to use the mails. There is without question a constitutionally protected right of the citizen to engage in interstate commerce, subject, of course, to such rules and provisions as Congress may impose by virtue of its power to regulate that commerce.[104] Congress may control the exercise of that right; but it may not destroy it entirely.[105] The postal facilities, however, come into being only at the discretion of Congress; and neither the refusal of Congress to create them or expand them nor its complete withdrawal of them would violate an affirmative right guaranteed by the constitution.[106] It was this distinction between the relation of the individual to the postal service and to interstate commerce which the Supreme

[99] Act of March 3, 1879, 20 Stat. 359 and subsequent amendments.

[100] Act of March 3, 1875, 18 Stat. at L. 343.

[101] Act of April 27, 1904, 33 Stat. at L. 313 permits the free transmission of literature in raised characters to and from public institutions or libraries. Act of Aug. 24, 1912, 37 Stat. at L. 551 extended the privilege to all periodicals in raised characters irrespective of destination.

[102] For valuable theoretical discussion of distinction between "rights" and "privileges," see Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, (1913) 23 Yale Law Journal 16.

[103] People's U. S. Bank v. Gilson, (1905) 140 Fed. 1, 5; Missouri Drug Co. v. Wyman, (1904) 129 Fed. 623.

[104] United States v. Del. & Hudson Co., (1908) 164 Fed. 215, reversed on other grounds in 213 U. S. 366.

[105] There is no decision of the Supreme Court squarely on this point since Congress has never tried to exercise such power of destruction. The reasoning of the Supreme Court in United States v. Del. & Hudson Co., supra, certainly lends support to this view.

[106] "A citizen of the United States as such has a right to *participate in foreign and interstate commerce*, to have the *benefit of the postal laws* . . . Cooley, Principles of Constitutional Law, 273. Italics are the writer's.

Court apparently had in mind in the *Jackson* case, when, after upholding the authority of Congress to exclude lottery circulars from the mails, it declared:[107]

"But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails."

This important distinction between a privilege and a right is one which is clearly recognized in our constitutional law; and there is plenty of precedent and authority for the view that in dispensing privileges which it has a right to withhold entirely the government may classify the recipients in order to give effect to its views respecting public policy, even though such classifications would be open to constitutional attack if applied to those enjoying a constitutional right. In the disposal of public lands Congress may properly pursue a constructive policy of encouraging homestead development.[108] Aliens seeking admission to the United States or seeking the privileges of American citizenship may be classified by Congress in ways which would seem arbitrary if the persons subjected to such discriminations had any constitutional right to demand of this government the thing they were seeking.[109] It is well established that since no one has a right to perform work for the United States government Congress may provide that those who do enjoy that privilege may be subjected to the requirement of the eight-hour day for employees,[110] although the right of a state to establish a general eight-hour day for all labor as an exercise of the police power must still be regarded as open to the most serious question.[111] The establishment of similar classifications by the various states in respect to public work has been sustained.[112] The United States Supreme Court has held, in fact, that while a state may not under its

[107] (1877) 96 U. S. 727, 735, 24 L. Ed. 877.

[108] See the Homestead Act of May 20, 1862, and subsequent legislation of similar nature.

[109] See pamphlet, "Naturalization Laws and Regulations" revised to October 10, 1919, published by United States Dept. of Labor. It is not intended to suggest, however, that aliens applying for citizenship may not be classified along lines much more arbitrary than would be permissible if they were citizens applying for some other privilege.

[110] Act of Aug. 1, 1892, 27 Stat. at L. 340, upheld in Ellis v. United States, (1906) 206 U. S. 246, 51 L. Ed. 1047, 27 S. C. R. 600.

[111] This would seem to be suggested by the fact that regulations of the hours of labor are still upheld, if at all, mainly upon grounds of protection to health. See Bunting v. Oregon, (1917) 243 U. S. 426, 37 S. C. R. 435, 61 L. Ed. 830 upholding the Oregon Ten Hour Law. It is doubtful if an eight hour law could be sustained on this basis.

[112] Atkin v. Kansas, (1903) 191 U. S. 207, 24 S. C. R. 124, 48 L. Ed. 148.

police power prevent the employment of aliens by private employers of labor,[113] it may discriminate against aliens when it comes to work done for the state itself.[114] The right to contract freely with other persons for the performance of labor is a right which cannot be denied by the state; but the right to be employed on the public work of the state itself is not a right at all, but a privilege.

Enough has been said to make clear that the power of Congress over the postal system is broader and more complete than over an institution or a system in respect to which its relation is not that of creator, owner, and operator. It is equally obvious that the so-called right of the individual to use the mails is not a right guaranteed to him by the constitution, such as the right to engage in interstate commerce or the right to be tried for crime only by a jury of his peers; it is a privilege the length and breadth of which is determined by a congressional discretion broad enough to allow general considerations of public policy to dictate the terms upon which it may be enjoyed.

It would, however, be entirely erroneous to assume that because Congress may for reasons of public policy set up classifications as to the purposes for which it is willing to allow the postal service to be used, it may make any and all classifications it chooses, no matter how arbitrary. The fact that Congress is under no constitutional compulsion to create a postal system at all does not mean that it may refuse to transmit in the system it has created the literature of one religious sect, or a particular political party. If it allowed the mailing of letters at all, it could not exclude love-letters and admit letters relating to the business of coal-mining. This is, of course, merely to say that although in the exercise of its power over the postal system Congress may give effect to its views of public policy, it must at all times keep its legislation within certain constitutional limits. The character and operation of those constitutional limits may now be examined.

Constitutional Limitations Upon Legislation[115]

In classifying the uses and purposes to which it is willing to extend the privileges of the mails, Congress is subject to two im-

[113] Truax v. Raich, (1915) 239 U. S. 33, 36, S. C. R. 7, 60 L. Ed. 131.

[114] Heim v. McCall, (1915) 239 U. S. 175, 60 L. Ed. 200, 36 S. C. R. 78.

[115] The constitutional prohibition in the fourth amendment against unreasonable searches and seizures (supra, p. 410) is of course a limitation

portant constitutional limitations. One of these is the prohibition against the passing of any law abridging the freedom of religion or the press;[116] the other is the more general prohibition against deprivation of liberty or property without due process of law.[117]

1. *Freedom of Religion and the Press.* It must be borne in mind that Congress is forbidden by the first amendment to the constitution not merely to interfere by direct and positive action with freedom of religion and of the press, but it is forbidden also to use its granted powers in such a way as to abridge those fundamental rights.[118] It does not matter, therefore, how absolute or unlimited the power of Congress over the postal service might be, that power cannot be exercised to abridge religious freedom or to limit the freedom of the press. It does not, however, follow that no restraint may be placed upon the circulation of matter through the mails because of a possible abridgment of these rights. Neither freedom of religion nor freedom of the press is an absolute and unqualified right which may be set up against every conceivable governmental encroachment. They are both alike subject to reasonable restrictions in the interests of the public safety and morals and general welfare.[119] Religion may not act as a cloak to protect polygamy from being attacked as subversive of public morals; and the exclusion from the mails of matter designed to promote the spread of polygamy on grounds of religion could no more be attacked as an abridgment of religious freedom than could a direct law which suppressed polygamy entirely as immoral be attacked as such an abridgment.[120] So also the same power which justifies the penalizing of treasonable or seditious utterances or publications would naturally extend to the denial of mail facilities to matter of this character, nor could there be alleged any interference with the freedom of the press.[121]

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upon every exercise of the postal power. This point need not be further discussed as it has no peculiar bearing upon the topic under consideration.

[116] "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. . . ." U. S. Const. Amendment I.

[117] "Nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U. S. Const. Amend. V.

[118] Monogahela Navigation Co. v. United States, (1893) 148 U. S. 312, 336, 13 S. C. R. 622, 37 L. Ed. 463.

[119] Freund, Police Power, Secs. 467, 468; Willoughby, Constitution, II, 841; Hall, Constitutional Law, 90.

[120] Reynolds v. United States, (1878) 98 U. S. 145, 163, 25 L. Ed. 244.

[121] In Schenck v. United States, (1919) 249 U. S. 47, 39 S. C. R. 247, the Espionage Act was upheld by the Supreme Court as against the criti-

If, however, Congress should attempt to exclude from the mails the literature devoted to the propagation of Christian Science or Catholicism, or if it should enact that sectarian journals should be transmitted free or at lower rates than other religious periodicals, there is no doubt but that such legislation would be held to violate the freedom of religion.[122] In like manner, if a Republican Congress should exclude Democratic campaign literature from the mails or refuse to carry it on equal terms with other matter of the same class, there would no less certainly be a denial of freedom of the press. What the precise outside limits may be on the power of Congress to make postal regulations affecting the two fundamental rights under discussion is a question which is not easy to answer. It is a question, however, a detailed discussion of which is beyond the limits of this article.[123] It may in general be said that postal regulations excluding matter from the mails or establishing a preferred class of mail matter and founded upon a sound basis of public policy cannot be successfully attacked under the first amendment unless there is manifest in such legislation an intention unjustifiably to abridge the freedom of religion or of the press or unless such would be the natural result of its operation.[124]

2. *Due Process of Law.* While the declaration in the fifth amendment that Congress shall not deprive any person of life, liberty, and property without due process of law is less definite in meaning than the prohibitions upon congressional power which have just been discussed, it is a no less effective limitation upon Congress in the exercise of all its delegated powers including the postal power. It might on casual thought be urged that since the government is under no obligation to provide any mail facilities at all for the use of the people, no person could conceivably

cism among others that it unduly abridged freedom of speech. No case involving the exclusion of seditious publications from the mails has thus far been decided by the Supreme Court.

[122] "There is not complete religious liberty where any one sect is favored by the state and given an advantage by law over other sects." Cooley, Constitutional Limitations (7th Ed.) 663.

[123] Cooley, Constitutional Limitations, Ch. 12; Rogers, op. cit. 98 ff. See also Rogers, "Federal Interference with the Freedom of the Press," 23 Yale Law Journal 559. A valuable discussion of this point is also contained in Chafee, Freedom of Speech in War Time, (1919) 32 Harvard Law Review 932.

[124] "In excluding various articles from the mails, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals." Ex parte Jackson, (1877) 96 U. S. 727, 24 L. Ed. 877.

claim that he had been deprived of liberty or property by a statute which forbade him the right to use the mails for a specified purpose. This theory rests upon the supposed axiom that the greater power must include the lesser; and that the power to withhold all mail privileges must therefore include the power to withhold some or all of those privileges for any reason whatsoever or for no reason at all. There is a certain plausibility to this argument which arises from the fact that a private person engaged in a purely private business certainly does possess exactly this power and may discriminate amongst his patrons or among those to whom he desires to extend any privilege in any manner which seems to him desirable.[125]

It is hardly necessary to point out, however, that the government as a dispenser of privileges which may constitutionally be withheld does not enjoy the arbitrary and uncontrolled discretion just alluded to. While a person may not be in a position to compel the government to extend a privilege at all, he does have a constitutional right to enjoy it on equal terms with others who stand in the same general relation to the government as he does. It may not be a "liberty" within the meaning of the due process clause to be able to mail a letter or a book provided nobody else can do so. But if the government has created facilities for mailing letters and books it is a "liberty" within the meaning of the due process clause to use those facilities on equal terms with other persons in the same class.[126] It is in this sense of the word that the use of the postal system has been declared to be part of the "liberty" secured by the fourteenth amendment against deprivation without due process of law.[127] In short, the due process clause operates as a limitation upon the power of Con-

[125] A soon as a business comes to take on a public character or becomes "affected with a public interest" this arbitrary power of the proprietor to discriminate amongst his patrons ceases to exist.

[126] It seems clear that the "equal protection of the law" or protection against arbitrary discrimination is an essential part of the guarantee of due process of law. "Due process of law within the meaning of the Amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." Giozza v. Tiernan, (1893) 148 U. S. 657, 13 S. C. R. 721, 37 L. Ed. 599. Freund, Police Power, Sec. 611. See 6 Ruling Case Law, Sec. 367, 437; 12 Corpus Juris 1190.

[127] Allgeyer v. Louisiana, (1897) 165 U. S. 578, 41 L. Ed. 832, 17 S. C. R. 427. Cf. Statement in Hoover v. McChesney, (1897) 81 Fed. 472, "We think the right to use the mails though in degree much less valuable than the use of the transportation lines, would be equally a property right, and one which could not be taken away without due process of law."

gress to make classifications which are arbitrary in character in respect to the enjoyment of mail privileges.[128]

This calls for a brief discussion of what sort of classification is to be regarded as arbitrary; for quite obviously many classifications are not only legitimate but necessary. While there has been a great deal of difficulty in deciding in concrete cases the precise character of the equality of treatment to which persons are constitutionally entitled, there is substantial agreement with reference to certain tests by which the validity of statutory classifications is to be judged. No one will question, in the first place, that no classification would be constitutional in which the members of the class singled out for distinctive treatment did not differ in some substantial manner from those not included in such class.[129] Congress is not apt to violate this principle in classifying mailing privileges. But if one could imagine a requirement that letters going from New York to Chicago should pay three cents postage while those going from Chicago to New York should pay two cents postage, or a requirement that morning newspapers should enjoy postal privileges denied to evening papers, there would be no hesitancy in concluding that such classifications rested upon no discernible differences between those inside and outside the class created. In the second place, there is equally unanimous agreement that when a class is created by law, the basis of classification must bear some reasonable relation to the object sought to be accomplished by the act which creates it.[130] Congress could not, for example, provide that newspapers printed in foreign languages should be forbidden to circulate obscene matter but that papers printed in English should be exempt from such prohibition. Such discrimination would be void because the basis of the classification, namely, the language

[128] This view is supported by analogy in the rule which restricts the right of states or municipalities to discriminate in favor of union labor employed on public work. This is held a denial of the equal protection of the law even though no one has a right to work for the state. Miller v. Des Moines, (1909) 143 Ia. 409, 122 N. W. 226, 21 Ann. Cas. 207, 23 L. R. A. (N.S.) 815; Fiske v. People, (1900) 188 Ill. 206, 58 N. E. 985, 52 L. R. A. 291.

[129] Seaboard Air Line Ry. v. Seegars, (1907) 207 U. S. 73, 52 L. Ed. 108, 28 S. C. R. 28; Deyol v. Superior Court, (1903) 140 Cal. 476, 74 Pac. 28, 98 A. S. R. 73; Ritchie v. Wyman, (1910) 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N.S.) 994.

[130] American Sugar Refining Co v. Louisiana, (1900) 179 U. S. 89, 45 L. Ed. 102, 21 S. C. R. 43; Atchison, etc., R. Co. v. Matthews, (1899) 174 U. S. 96, 105, 43 L. Ed. 909, 19 S. C. R. 609; Kane v. Erie R. R. Co., (1904) 133 Fed. 681, 67 C. C. A. 653, 68 L. R. A. 788; Chicago, etc., R. Co. v. Westly, (1910) 178 Fed. 619, 102 C. C. A. 65.

in which newspapers are printed, bears no relation whatever to the purpose which the statute seeks to serve, the suppression of the circulation of indecent matter through the mails. It is not enough that the distinction which marks the line of classification is one which may properly be made the basis of class legislation; there must be a relevancy between the basis of the classification and the particular purpose of the statute which creates that classification.[131]

These two protections against arbitrary class legislation have, however, a broader application to the classification of mailing privileges than the somewhat extreme illustrations used above would suggest. It must at all times be borne in mind that the power which Congress is exercising in setting up these classifications is, after all, the power derived from the clause authorizing the establishment of post offices and post roads. Statutes which aim to protect the national health, safety, and morals by excluding various things from the mails are postal regulations first and police regulations second. It follows, therefore, that when a person is forbidden to use the postal service for a certain purpose, he has a right to demand that the basis of classification bear a reasonable and substantial relationship not primarily to the general welfare of the country but to such aspects of the general welfare of the country as may properly be affected by Congress in the exercise of its postal power. When the Supreme Court declared that a postal regulation in order to be constitutional must treat alike "those who stand in the same relation to the government,"[132] it meant the "same relation" in respect to the power of the government to exercise the postal authority and not in respect to liability to military service, the payment of federal taxes, or any other irrelevant consideration.

This leads, then, to a brief consideration of what the tests of relevancy must be between the postal power of Congress and the classifications of postal privileges which Congress may set up for the purposes of formulating national public policy and exercising a national police power. There can be no doubt that any classification which aimed at the protection of the postal system from injury or obstruction or was designed to promote its efficiency would rest upon a basis intimately and immediately

[131] State v. Loomis, (1893) 115 Mo. 307, 22 S. W. 350, 21 L. R. A. 789; State v. Currens, (1901) 111 Wis. 431, 87 N. W. 561, 56 L. R. A. 252.

[132] Public Clearing House v. Coyne, (1903) 194 U. S. 497, 48 L. Ed. 1092, 24 S. C. R. 789.

connected with the postal power. It is equally certain that discriminations which sought to protect the public from the circulation through the mails of noxious or dangerous matter or from the consummation of injurious transactions which thrive on postal facilities would also bear a definite relation to the postal power. In neither of these cases could one complain that he had been subjected to discrimination the basis of which was irrelevant to the postal power. It is the belief of the writer that Congress may go still further and may set up classifications in respect to the use of postal facilities which are based merely upon congressional ideas of public policy when that public policy is one which is related to the development of functions which a postal system may naturally and reasonably be expected to perform or of interests which it may properly be used to promote. The postal service must be regarded not merely as an agency which exists for the purpose of performing messenger boy service for individuals but as an institution which actively and positively promotes the spread of intelligence as to current affairs, as well as to other matters of general interest. This is the basis upon which the special second class mail privileges are to be justified, although the Supreme Court has expressed its belief that the conferring of these privileges was "at least in form, a discrimination against the public generally."[133] In other words, the discrimination rested upon a basis definitely related to a public policy or benefit which it was natural and proper for Congress to promote through its postal system. It was in this light that the Supreme Court viewed the regulations imposed upon newspapers and periodicals by the Newspaper Publicity Act of 1912.[134] One of the provisions of this statute will be discussed at a later point;[135] but it may be noted here that the prohibitions placed upon publications enjoying second class mailing privileges against printing editorial or other reading matter for which money is received without marking it "advertisement" are regarded by the Court as part and parcel of the congressional policy that the privileges thus extended to publications should be used primarily

[133] Lewis Publishing Co. v. Morgan, (1913) 229 U. S. 288, 304, 57 L. Ed. 1190, 33 S. C. R. 867.

It is on this basis that the special mailing privileges accorded literature for the blind (supra p. 1423) may be sustained: They serve to aid the dissemination of intelligence amongst a group otherwise restricted in respect to such advantages.

[134] Act of August 24, 1912, 37 Stat. at L. 553.

[135] Infra, p. 438.

for the "dissemination of information regarding current events" and only incidentally for the circulation of advertising matter. It is, therefore, the kind of requirement that may properly be imposed.[136] But should Congress attempt to promote in this manner a public policy unrelated to the natural and customary functions and purposes of the postal system, a classification so founded would be arbitrary and unreasonable and would in consequence violate due process of law,—as well as be an exercise by Congress of a power not conferred by the constitution.

By way of summary it may be suggested that by classifying the uses to which it will allow the mails to be put, Congress exercises a generous police power for the protection of the public welfare from such evils as would be fostered and promoted by an entirely unrestricted use of postal privileges. It also enables Congress to promote a constructive public policy in respect to such matters as fall within the range of national interests which the postal system may properly be expected to serve. In short, these classifications may be established to prevent the misuse and to promote the most beneficial use of the postal service. But any discrimination in respect to mail privileges, no matter how commendable in purpose, which is not based upon some actual difference between the classes created in their relation not to the national welfare but to the postal service, would be arbitrary and unconstitutional.

III. Regulations Denying the Use of Mails for Purposes of Violating or Evading State Law

It would seem fairly clear that if Congress may with propriety classify the uses to which the postal system may be put for the purposes which have just been examined, it would be equally legitimate to provide that those facilities should not be used for the purpose of evading or violating state law. Legislation analogous in character has been sustained as a proper exercise by Congress of the power to regulate interstate commerce,[137] upon principles applying with equal or greater force to postal power.

The first proposal to adopt such a regulation of the mails seems to be that made by Calhoun at the time of the famous

[136] Cf. statement of Cooley: "The power to establish postoffices includes everything essential to a complete postal system under federal control and management, and the power to protect the same by providing for the punishment as crimes of such acts as would tend to embarrass or defeat the *purpose had in view in their establishment.*" Principles of Constitutional Law, 95.

[137] The Webb-Kenyon Act. See Cushman, 3 Minnesota Law Review 406 ff.

controversy in 1836 as to the power of Congress to exclude from the mails incendiary and abolitionist publications.[138] Believing that the absolute exclusion from the mails of the objectionable matter would abridge the freedom of the press, Calhoun proposed it should be made unlawful for any postmaster to receive and send on through the mails any publication addressed to a destination in which its circulation was unlawful. It was made a penal offense to deliver such mail matter to any person not authorized by the local authorities to receive it.[139] This bill was amended so as to make it unlawful for any postmaster to deliver publications the circulation of which was forbidden by local law.[140] The bill failed of passage; but the discussions in Congress upon its constitutionality were long and interesting.[141]

It has already been seen that the second statute excluding matter relating to lotteries from the mails confined its prohibition to "letters or circulars concerning *illegal* lotteries, so-called gift concerts, or other similar enterprises."[142] The purpose here seems to have been to make the illegality of the transmission of this matter contingent upon the illegality under state law of the enterprise to which it related. Such transmission would be unlawful even though lotteries might not be prohibited either in the state in which the circulars were mailed or in the state into which they were sent. In other words, the law would be violated by sending from one state to another in both of which lotteries were lawful, matter relating to a lottery in a remote state where such an enterprise was forbidden. This is not a case, therefore, in which matter is excluded from the mails because of the illegality of its origin[143] nor because it is to be used for unlawful purposes at its destination,[144] but because the enterprise which

[138] On December 2, 1835, President Jackson had sent a message to Congress urging the passing of legislation to prevent the circulation through the mails in the slave states of abolitionist literature. It was felt that such reading matter might stir up slave insurrection. Richardson, Messages and Papers of the Presidents, III, 177. This called forth extended discussion of the entire problem.

[139] 12 Debates of Cong. 383.

[140] 12 Debates of Cong. 1720.

[141] 12 Debates of Cong. 26-23, 1103-1108, 1136-1153, 1155-1171. For a summary of this discussion see Rogers, op. cit., 103-115, Willoughby, op. cit., II, 786.

[142] Act of June 8, 1872, 17 Stat. at L. 283.

[143] For legislation based on this principle see the Lacey Act of May 25, 1900, 31 Stat. at L. 188, which excludes from interstate commerce game killed in violation of state law. See Cushman, op cit., 3 MINNESOTA LAW REVIEW 408.

[144] As is the case in the Webb-Kenyon Act and the act excluding liquor advertisements from the mails when addressed to states forbidding their circulation. See note 146 infra.

certain states have forbidden is of such a character that it thrives definitely and immediately upon the circulation through the mails of matter advertising and promoting it, no matter what the precise locality may be in which that circulation takes place. The act would, therefore, seem to fall squarely within the general principle of the legislation aimed to prevent the mails being used as an agency for the violation of state law.

Finally Congress has applied this same principle in its recent act making unlawful the sending by mail of liquor advertisements into states in which it is unlawful to advertise or solicit orders for intoxicating liquor.[145] While this act differs somewhat from the Webb-Kenyon Act, the question of its constitutionality probably would be settled by the doctrine of the case in which the earlier legislation was sustained.[146] Its constitutionality has not thus far been questioned.[147]

IV. Proposals that Conformity to General Police Regulations Be Made Price of Enjoyment of Mail Facilities

In the discussion thus far there have been considered the various classifications of postal privileges based upon the nature of the matter excluded or the character of the uses to which the postal facilities were to be put. A discussion of the police power which Congress may exercise under the postal clause would be incomplete without some comment upon the proposals which have sometimes been made that postal facilities should be withheld entirely or in large part from persons who would not conform to various congressional mandates in respect to public policy and national welfare. It is perfectly obvious that there is a great difference between forbidding any person to send obscene literature through the mails and forbidding any person who publishes

[145] Act of March 3, 1917, 39 Stat. at L. 1069.

[146] The Webb-Kenyon Act made it unlawful to ship intoxicating liquors in interstate commerce which are "intended, by any persons interested therein, to be received, possessed, sold, or in any manner used" in violation of the laws of the state of their destination. There was no penalty, however, for violation; violators merely being placed at the mercy of the state authorities. Violation of the Liquor Advertisement Act is made a crime against the United States punishable by fine or imprisonment. The validity of the Webb-Kenyon Act was upheld by the Supreme Court in Clark Distilling Co. v. Western Maryland Ry Co., (1917) 242 U. S. 31, 61 L. Ed. 326, 37 S. C. R. 180. See, Cushman, op cit., 3 Minnesota Law Review 406 ff.

[147] For discussion of power of states to pass laws preventing various uses of the United States mails, see Rogers, op. cit., Ch. 5.

obscene literature to use the mails for any purpose whatsoever. In the first case Congress prevents a misuse of postal facilities; in the second case Congress withholds postal privileges as a sort of penalty for non-compliance with the congressional policy for the suppression of obscene literature. It makes conformity to certain police requirements a condition precedent to the enjoyment of the use of the mails.

While no statute of this type has yet been passed by Congress, the desirability of enacting such laws has more than once been urged in recent years by those whose views as to the constitutional propriety of such legislation should be accorded respectful consideration. Perhaps the most conspicuous of these proposals and the one most widely discussed was the one made by the Pujo Money Trust Committee in 1913. This congressional committee proposed as a means of regulating and controlling stock exchange speculation "that Congress prohibit the transmission by the mails or by telegraph or telephone from one state to another of orders to buy or sell quotations or other information concerning transactions on any stock exchange, unless such exchange shall be a body corporate of the state or territory in which it is located" and unless it comply with other specified conditions.[148] While the denial of mail privileges herein proposed was not absolute, it was nevertheless very substantial. The substance and effect of the proposed law was to penalize stock exchanges which refused to incorporate under the laws of any state by denying them mail privileges which were accorded to others. One writer has proposed a law similar in principle which would exclude from the mails papers of any corporation which refused to make full reports to the federal government respecting those aspects of its affairs in regard to which Congress desired full publicity.[149] Dean J. P. Hall expresses the view that "as a last resort, Congress might deny the privileges of the mails to businesses, which, though operating wholly within a state, persisted in practices that Congress within a reasonable discretion saw fit to disapprove."[150]

[148] Majority Report of the Committee to Investigate the Concentration of Money and Credit (February 28, 1913).
See Rogers, op. cit., 161 ff.

[149] Pamm, Powers of Regulation Vested in Congress, (1910) 24 Harv. L. Rev. 77.

[150] This view is based on the authority of the Lottery Cases which Dean Hall says rested upon the ground that "Congress could regulate interstate commerce for any purpose not forbidden by the constitution, not merely for purposes granted by the constitution," (1912) 20 Journal of Political Economy 473.

Mr. Bryan, in a newspaper debate with Senator Beveridge in 1907, in which he appeared as the champion of states rights, expressed the belief that Congress could properly deny all mail privileges to monopolistic corporations or trusts.[151] In the autumn of 1918 two bills were introduced into Congress providing for a similar denial of postal privileges to those who employed children below a certain age.[152]

At the outset of any discussion of the constitutionality of this type of legislation, it would probably be admitted that Congress could deny mail privileges to persons as a penalty for crime. If Congress may constitutionally punish a criminal by depriving him of his citizenship, surely it could impose the lesser penalty of taking away a specific incident to that citizenship. It would make no difference what the offense was which was so punished, provided only that Congress had the constitutional authority to prohibit it and provided the denial of mail privileges was imposed as other criminal penalties are imposed after conviction in a court having jurisdiction. The imposition of such a penalty in any other manner would, of course, be a denial of liberty and property without due process of law. It would clearly be a type of authority which could not be delegated to an administrative officer.[153] It may have been this rule which prompted the cautious language of the Supreme Court in sustaining the power conferred upon the postmaster general to refuse to deliver registered mail matter to persons shown to be using the mails for fraudulent purposes. The law authorized the withholding of all such mail, and not merely such as pertained to the fraudulent transactions. After commenting on the practical impossibility of determining whether sealed mail matter is innocent or not, the court went on to say:[154]

"It is true it may occasionally happen that he [the postmaster general] would detain a letter having no relation to the

[151] "Congress has power to control interstate commerce, and the decision of the Supreme Court in the Lottery Case leaves little doubt that that power can be so exercised as to withdraw the interstate railroads and telegraph lines and the mails from the corporations which control enough of the product of any article to give them an actual monopoly." The Reader, Vol. 9, p. 356.

[152] Sen. bills 4732, 4760, June 27, 1918, introduced by Mr. Kenyon. Cong. Rec., Vol. 56, 8341.

[153] Interstate Commerce Commission v. Brimson, (1894) 154 U. S. 447, 485, 38 L. Ed. 1047, 14 S. C. R. 1125, 155 U. S. 3, 39 L. Ed. 49; Wong Wing v. United States, (1896) 163 U. S. 228, 234, 41 L. Ed. 140, 16 S. C. R. 977; Whitcomb's Case, (1876) 120 Mass. 118, 21 Am. Rep. 502.

[154] Public Clearing House v. Coyne, (1903) 194 U. S. 497, 48 L. Ed. 1092, 24 S. C. R. 789.

prohibited business; but where a person is engaged in an enterprise of this kind, receiving dozens and perhaps hundreds of letters every day containing remittances or correspondence connected with the prohibited business, it is not too much to assume that, prima facie, at least, all such letters are identified with such business. . . . Whether, in case a private registered letter was thus seized and detained, and damage was thereby occasioned to the addressee, an action would lie against the postmaster general, is not involved in this case."

The Court seemed to view with disfavor a construction of the law which would place in the hands of an administrative officer the power to deny to a person the right to receive innocent mail matter because he was found to be using the mails for forbidden purposes. Such a power would savor of the imposition of a penalty for crime by the postmaster general, whereas crime can legally be punished only by a court of law.[155] It is the belief of the writer that the power exercised by the postmaster general to exclude permanently from second class mail privileges publications in the issues of which he has found non-mailable matter within the meaning of the Espionage Act, is open to various serious questions on the grounds just mentioned. It is one thing to allow an administrative officer the power to exclude non-mailable publications; it is a very different thing to allow him to keep on excluding the subsequent issues of such publications when in actual fact they might prove to be innocent in character.[156] Such procedure raises, to say the least, a very close question of due process of law.

With such legislative proposals as those mentioned at the beginning of this section, however,—laws in which the denial of mail privileges is imposed as a penalty for acts of omission or commission which Congress has no power to punish directly,—the

[155] A like construction would presumably apply to the clause of the Espionage Act conferring similar authority upon the postmaster general.

[156] The grounds upon which the postmaster general bases the propriety of his action in these cases are set forth by him as follows: "To be a 'newspaper or other periodical publication' within the meaning of the law governing second-class matter a publication must among other requirements, be composed in its entirety of mailable matter. A publication containing matter which is nonmailable is not a 'newspaper or other periodical publication' within the meaning of the law and therefore is not entitled to the second-class mail privilege. In administering the law governing second-class matter it has been found necessary to revoke the second-class mail privilege of some publications for the reason that their contents consisted more or less of matter which was nonmailable and which, therefore, removed them from the class of publications entitled under the law to that privilege." Report of the Postmaster General, 1917, p. 65.

question of constitutionality assumes a very different form. This is not so much the imposing of a penalty in the technical sense of the word as the setting up of an antecedent or even a continuing condition as the price of the enjoyment of mail privileges. The price of the privilege of using the mails is the abandonment of child labor, or the cessation of monopolistic practices, or the filing of reports regarding corporate business and activities. The test in the light of which the validity of these acts must be judged is, in the last analysis, the relevancy of the conditions thus imposed to the postal power and the interests and functions for the promotion of which that power may be used. This seems to be the test applied by the Supreme Court to the provision of the Newspaper Publicity Act of 1912 which denies the privileges of the mails to publications which fail to comply with the requirements of the law in respect to printing semi-annually certain facts respecting their ownership and control.[157] In passing upon the validity of this act, the Supreme Court, after holding that the denial of mail privileges mentioned should be construed to mean second class privileges only, pointed out that the condition imposed on the publishers was intimately connected with the purposes for which second class mail privileges had been created and that it was within the scope of the postal power to extend those privileges "upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded."[158] The implication is clear that if the condition thus imposed had not been thus related to the public policy which Congress under the postal power could properly promote, it would have been void.[159]

If the conditions thus imposed as the price of the enjoyment of mail privileges are not thus relevant to the purposes of the postal power, as would seem to be the case with the proposed child labor law, the statutes creating them could be attacked

[157] Act of August 24, 1912, 37 Stat. at L. 553.

[158] Lewis Publishing Co. v. Morgan, (1913) 229 U. S. 288, 57 L. Ed. 1190, 33 S. C. R. 867.

[159] The brief for the government had alleged that Congress possessed the most arbitrary power to classify mail privileges. See supra, note 197. The court concludes its opinion in this case with the following statement: "Finally, because there has developed no necessity of passing on that question, we do not wish even by the remotest implication to be regarded as assenting to the broad contentions concerning the existence of arbitrary power through the classification of the mails, or by way of condition, embodied in the proposition of the government which we have previously stated."

upon two grounds. It could be urged, in the first place, that such laws were not in reality exercises of the postal power at all because the use of the mails has nothing whatever to do with the evil of the child labor which it is the object of the legislation to remedy.[160] In the second place, such a statute would fail to meet the tests of due process of law. What has already been said upon the subject of due process of law in its application to arbitrary classifications of mail matter[161] would apply with equal force to the classifications established by the acts now being considered. When persons are classified in respect to their privileges in the mails upon the basis of their employment or non-employment of children, they may properly urge that that classification is arbitrary and a denial of due process of law. It may further be suggested that the Supreme Court has declared in a well known case[162] that a person is deprived of due process of law by being obliged to sacrifice a constitutional right as the price of securing a privilege which the government might withhold entirely in its discretion. This principle would seem to be applicable by way of analogy to the case of one who, as a condition of enjoying the privileges of the mails which Congress need not extend to any one, is required to do something which Congress could not make him do, or cease doing something which Congress could not forbid.[163] It is the belief of the writer that the Supreme Court would not hesitate to declare such legislation unconstitutional on either or both of the grounds which have been mentioned.

Conclusion

It seems clear from the foregoing analysis that the postal power is one which may be wielded very effectively by Congress for the police purposes. That power extends to the adequate protection of the postal service from injury; it extends to the protection of the public from the various dangerous or harmful

[160] It was urged by the proponents of the Keating-Owen Act that there was a substantial relationship between child labor and interstate commerce for the reason that child labor "feeds" on interstate commerce and is stimulated thereby. For discussion of this point, see Cushman, op. cit., 3 Minnesota Law Review 471 ff. The connection between child labor and interstate commerce and the postal system is certainly much less substantial than between child labor and interstate commerce.

[161] Supra, p. 427.

[162] Western Union Telegraph Co. v. Kansas, (1910) 216 U. S. 1, 54 L. Ed. 355, 30 S. C. R. 355.

[163] For development of this point, see Green, The Child Labor Law and the Constitution, Illinois Law Bulletin, April, 1917, p. 17; also Beck, Nullification by Indirection, (1910) 23 Harv. L. Rev. 441.

uses to which mail privileges may be put; it extends to the promotion of positive public policies related to the broad purposes for which the postal system exists; it extends to the withholding of postal privileges as a means of inducing persons to conform to reasonable requirements and regulations incidental to the privileges of the mails. But as soon as Congress begins to use its postal power as a lever or a club to compel people to do things or refrain from doing things which have no real or intimate relation to the postal system or any of the larger purposes which may properly be promoted by it, the line of constitutionality has been crossed and Congress has exceeded its powers. In exercising a police power under the postal clause, as under the powers to tax and to regulate commerce, the ultimate test of constitutionality must be, not whether the police regulation established is necessary or desirable for the protection of the national health, safety, or morals, but whether the evil which Congress is combatting has any real and practical connection with the particular delegated power which Congress is employing. Any other construction of the authority of Congress to exercise a police power would destroy the whole force of the doctrine of delegated national powers and allow Congress by a process of the most obvious indirection to deal with problems of purely local welfare.

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Minnesota Law Review

Published monthly, December to June inclusive, by the Faculty and Students of the Law School, University of Minnesota.

Subscription Price, $2.50 per annum. Forty cents per number.

DISCHARGE OF AN ATTORNEY WITHOUT CAUSE AS A BREACH OF CONTRACT.—It is universally stated that a client may discharge his attorney at any time with or without cause.[1] Where the discharge is without cause the question arises as to whether the attorney may recover damages as for a breach of contract, or is limited to a recovery in quantum meruit for the reasonable value of the services already rendered. If the attorney is employed for a definite period of time the courts seem well agreed that a discharge without cause before the expiration of that time is a breach of contract,[2] and the damages are presumptively the

[1] Thornton, Attorneys at Law Sec. 138.
[2] Horn v. Western Land Ass'n, (1875) 22 Minn. 233; Dixon v. Volunteer Co-Op Bank, (1913) 213 Mass. 345, 100 N. E. 655.

sum agreed on for the services.[3] Where the contract is for a specified suit, however, there is a conflict. The majority hold that discharge without cause is a breach of contract, and the damages are presumed to be the price agreed upon for the services.[4] A contrary minority view has developed within the past ten years,[5] and is adopted by Minnesota in a recent case[6] in which the Minnesota court seemingly, if not expressly, overrules an earlier Minnesota decision,[7] and holds, that where the contract is for a specified suit, whether the fee is contingent or otherwise, unless the attorney has changed his position or incurred expense in entering into the contract, a discharge without cause does not constitute a breach of contract, and the attorney's only remedy is to sue in quantum meruit for the reasonable value of the services performed up to the time of the discharge. This sharply raises the question, to what extent does a contract between attorney and client differ from other contracts of employment?

The relation existing between attorney and client is a form of agency and in its general features is governed by the same rules applicable to other agencies.[8] Agency is a representative relation,[9] and it is a well settled principle of agency that unless this power of representation is coupled with an interest it can be revoked at any time by the principal at his will, with or without cause, even though it be expressly agreed that the agency shall continue for a certain period.[10] It does not follow, however, that because the principal has the *power* to terminate the agency that he has the *right* to do so, for he is liable in damages if such termination is made contrary to the terms of the contract.[11] The basis of the minority rule, supra, in holding that a premature discharge is not a breach of the contract, is that there is an implied term in such contracts between attorney and client that the client may terminate the relation at any time, and that it follows, there-

[3] Horn v. Western Land Ass'n, (1875) 22 Minn. 233.

[4] Sessions v. Warwick, (1907) 46 Wash. 165, 89 Pac. 482; Scheinsohn v. Lemonek, (1911) 84 Oh. St. 424, 95 N. E. 913, Ann. Cas. 1912C 737; Dorshimer v. Herndon, (1915) 98 Neb. 421, 130 N. W. 417.

[5] Martin v. Camp, (1916) 219 N. Y. 170, 114 N. E. 46, L. R. A. 1917F 402. See also "Right to Discharge an Attorney" by W. A. Estrich, in 24 Case and Comment 563.

[6] Lawler v. Dunn, (Minn. 1920) 176 N. W.—Two judges dissenting. Contra, Dolph v. Speckart, (Ore. 1920) 186 Pac. 32.

[7] Moyer v. Cantieney, (1889) 41 Minn. 242, 42 N. W. 1060.

[8] Mechem, Agency, 2nd Ed. Sec. 2150.

[9] 31 Cyc. 1189.

[10] Mechem, Agency, 2nd Ed. Secs. 563, 566.

[11] Mechem, Agency, 2nd Ed. Sec. 568.

fore, as a necessary consequence, that the client is not guilty of a breach of contract in exercising this right given him under the contract. In so far as the client, in terminating the relation, is considered as exercising a contract *right* and not merely a *power,* the contract between attorney and client must differ materially from other contracts of agency, since in such cases the right of termination is considered as being only a power, the exercise of which, if contrary to the terms of the contract, constitutes a breach thereof. So the minority courts are not applying the general rules of contracts applicable to agency, but are laying down a special rule in regard to contracts between attorneys and clients, in allowing these contracts to be rescinded at the option of the client.

The reason for this special rule seems to be one of public policy. The relationship between attorney and client, being one of the highest trust and confidence,[12] gives to contracts between them certain distinct and peculiar features not to be found in ordinary contracts of employment. The Colorado court, as obiter dicta, quotes with approval the following:[13]

" It is against public policy to allow either lawyer or client to hold the other against his will. So sacred is this right in both that it cannot be overcome by contract. Public policy stands in the way."

The minority rule, as already pointed out, is limited to cases where the contract is for a specific suit. It does not include contracts for a general period of time, nor is it to be applied to cases where the attorney has changed his position or incurred expense in reliance upon the contract. It is difficult to perceive any logical reasons for these exceptions, but since the courts have laid down no test as to what would constitute a sufficient change of position or the incurring of sufficient expense, it is conceivable that the seeming harshness of the minority rule may receive much modification in a proper case through the development of this latter exception. Certainly, the client should never be permitted to gain the substantial benefits of the contract and then designedly discharge his attorney and force him to forego his valuable rights under the contract for the less remunerative "reasonable value of his services."

[12] Thornton, Attorneys at Law Sec. 152.
[13] Mesa County Bank v. Berry, (1913) 24 Colo. App. 487, 135 Pac. 129.

ADMIRALTY—APPLICATION OF STATE WORKMEN'S COMPENSATION LAWS TO MARITIME TORTS.—A development of considerable interest and importance is taking place in the application of state workmen's compensation statutes to cases of injuries normally falling within the jurisdiction of admiralty.

The Judicial Code of the United States originally conferred upon the federal courts exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, saving to suitors the right of a common law remedy where the common law was competent to give it. It was held by the Supreme Court of the United States in *Southern Pacific Co. v. Jensen*[1] that under the federal statute the rights conferred by a state workmen's compensation law could not be extended to cover the case of a maritime tort. The result of this case was to hold that the exclusive remedy of one injured by a maritime tort was in the admiralty courts, under rules entirely unaffected by any state workmen's compensation statute. The court said:[2]

"The remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."

This decision materially limited the scope of the compensation statutes and visited a certain injustice upon persons injured under circumstances such as to give admiralty jurisdiction.[3] To remedy this, Congress by Act of Oct. 6, 1917,[4] amended the Judicial Code, granting exclusive jurisdiction to admiralty courts as before, but "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." The last clause was new.

An interpretation of the law as amended appears in a recent decision of the district court for the district of Oregon.[5] A person was injured while working upon a vessel in navigable waters of the state of Oregon. He brought a libel in personam in admiralty, and it was held that the remedy of the libelant under the Oregon compensation act is not exclusive, and he may if he elects pursue his remedy in admiralty, whereupon the rights and

[1] (1917) 244 U. S. 205, 37 S. C. R. 524, 61 L. Ed. 1086, L. R. A. 1918C 451, Ann. Cas. 1917E 900.
[2] (1917) 244 U. S. 205, 218.
[3] For a discussion of this case see 2 MINNESOTA LAW REVIEW 145.
[4] 40 Stat. 395, Comp. St. 1918, sec. 991, sub. sec. 3, and sec. 1233.
[5] Rohde v. Grant, Smith, Porter Co., (1919) 259 Fed. 304.

liabilities of the parties are to be measured by maritime law, and cannot be barred, enlarged, or taken away by any state statute. This decision impliedly recognizes that the attempt to confer jurisdiction of maritime torts upon the states through their compensation laws has been successful, but holds that the amendment does not deprive the federal courts of jurisdiction.

In the case of *The Howell,*[6] decided by Judge Hand in the federal district court for the southern district of New York, March 6, 1919, a quite different conclusion was reached. Here there was a libel in admiralty for personal injuries. The employer had taken out the insurance necessary to come under the workmen's compensation law of New York, and by the terms of that statute his liability was limited to the compensation allowed by the statute. The federal court held that the remedy under the compensation law of New York was exclusive and dismissed the libel in admiralty. The court reasoned that the amendment to the Judicial Code by reference incorporated into itself all applicable state compensation laws, including the New York statute, and since this had made the remedy exclusive, Congress by necessary intent made the same provision for exclusive remedy a part of the Judicial Code.

The original portion of the Judicial Code, "saving to suitors, in all cases, the right of a common law remedy where the common law is competent to give it," is interpreted to secure to suitors the right to make use of the *remedies* peculiar to the common law but not the substantive rights of one suing for a tort, which, when the tort was committed under the jurisdiction of admiralty, are fixed absolutely by admiralty law.[7]

The amendment of October 6, 1917, might be expected to attempt a similar thing with regard to the remedies of the compensation laws. But if it had been so framed as to save the right to the *remedies* only, under that statute, it would have been of little or no effect, for these remedies relate for the most part to a set of brand new rights,[8] since the compensation laws abolish many old defenses, fix new measures of recovery, and even make

[6] (1919) 257 Fed. 578.

[7] Chelentis v. Luckenbach, (1918) 247 U. S. 372, 38 S. C. R. 501, 62 L. Ed. 1171.

[8] "The workmen's compensation act . . . is not an amendment to the common law, but the establishment of heretofore unknown obligations, compensations and methods of procedure, all differing from and in place of those afforded by the common law." Duart v. Simmons, (1918) 231 Mass. 313, 318, 121 N. E. 10, 12.

the claim to compensation no longer contingent upon the negligence of the employer. All these being matters of substantive right, unknown to admiralty law, upon the reasoning of the *Chelentis Case* are consequently not saved by saving the right to this particular kind of remedy. But it will be observed that Congress by the new amendment did a radically different thing and saved *"the rights and remedies* under the workmen's compensation law of any state." It seems clear that it was the intention of Congress by the amendment of Oct. 6, 1917, to confer upon persons injured through maritime torts, a considerable body of substantive rights not heretofore possessed by this class of litigants.

It is difficult to escape the logic of Judge Hand's reasoning and his conclusion that the effect of the amendment must be to make the remedy under the state compensation act exclusive. If this view prevails, perhaps the most serious practical and constitutional objection to the amendment disappears. The practical objection is that if a claimant has a strong case he will sue in admiralty and recover damages with no statutory limit, while if he has a weak case he will elect his remedy under the compensation statute. There is, possibly, no reason why he may not, if he fails in admiralty, still pursue his remedy under the compensation law.[9] But if the remedy of the state law is exclusive, then this difficulty is avoided. The constitutional objection to the amendment, if it is construed to confer a concurrent jurisdiction, is this: the New York law, like that of many states, requires the employer to insure; if, having done so, he is still subject to liability in the admiralty courts, it would appear that he is being deprived of his property without due process of law.

Even if interpreted to confer exclusive jurisdiction under the state statute, the amendment is still open to constitutional attack. The states before the passage of the act did not have the power thus to affect the rights of one injured by a maritime tort.[10] The cases which sustain state legislation affecting the general maritime law as to liens not existing in admiralty,[11] pilotage fees,[12] and

[9] See 52 American Law Review 169.

[10] Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 S. C. R. 524, 61 L. Ed. 1086; The Key City, (1872) 14 Wall. (U.S.) 653, 20 L. Ed. 896; Union Fish Co. v. Erickson, (1919) 248 U. S. 308, 39 S. C. R. 112, 63 L. Ed. 143. The local decisions of a state court cannot, as a matter of authority, abrogate maritime law. Workman v. Mayor, (1900) 179 U. S. 552, 21 S. C. R. 212, 45 L. Ed. 314.

[11] The J. E. Rumbell, (1893) 148 U. S. 1, 13 S. C. R. 498, 37 L. Ed. 345.

[12] Ex parte McNiel, (1871) 13 Wall. (U.S.) 236, 20 L. Ed. 624.

actions for death by wrongful act,[13] upon whatever theory they are upheld,[14] evidently represent a view which is not now finding favor. The *Jensen*[15] and *Union Fish Co. v. Erickson*[16] cases make it plain that the power to change the maritime law is vested in the federal government. The whole tendency of these decisions is to make effective the frequently repeated declaration of the Supreme Court that the constitution contemplates a uniform system of admiralty law throughout the whole country.

"One thing, however, is unquestionable: the constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states."[17]

If the amendment to the Judicial Code here considered should be interpreted as ousting the admiralty courts of their jurisdiction, and upheld upon such interpretation, it would in effect completely destroy all uniformity in this particular department of maritime law, and might create as many different sets of rights as there were states to legislate. It is plain that the same constitutional question which the Supreme court considered but did not decide in the *Jensen Case,* lies at the root of the matter.

The case of *The Howell*[18] has been appealed to the United States Supreme Court and was argued during the winter. A decision which may be expected to clear up the matter is awaited with a great deal of interest.

USE OF INFORMATION OBTAINED BY UNREASONABLE SEARCH AND SEIZURE.—The extent to which the fourth amendment secures the immunity of the individual from unreasonable searches and seizures is greatly enlarged by the decision of the United States Supreme Court in the recent case of *Silverthorne Lumber Co. v. United States.*[1] In contemplation of criminal proceedings against defendant corporation and its officers, the government agents without warrant or authority had searched the offices of the defendants and seized certain papers. Upon

[13] The Hamilton, (1907) 207 U. S. 398, 28 S. C. R. 133, 52 L. Ed. 264.
[14] See comment in 8 California Law Review 114, 117.
[15] Note 1, supra.
[16] Note 10, supra.
[17] The Lottawanna, (1874) 21 Wall. (U.S.) 558, 575, 22 L. Ed. 654.
[18] Note 6, supra.
[1] (1920) 40 S. C. R. 182, U. S. Adv. Ops. 1919-20, 208.

the defendants' demand to the court these papers were returned to them. A subpoena was then issued calling upon the defendants to produce these same papers, and upon their failure to do so they were punished for contempt of court. Upon appeal, the Supreme Court of the United States held that the subpoena was a violation of the defendants' immunity against unreasonable search and seizure, because the subpoena was issued solely upon *knowledge gained* by invasion of the defendants' constitutional rights in regard to search and seizure.

In the earlier case of *Weeks v. United States*,[2] the Supreme Court took the position that where the evidence had been obtained by unreasonable search and seizure and defendant had made a reasonable demand for its return, it was prejudicial error, as being a violation of defendant's constitutional rights for the court to refuse an order for the return of the papers or to allow their admission in evidence after such refusal. The emphasis placed on, and the necessity for this seasonable demand was illustrated in the case of *Rice v. United States*[3] where no demand had been made before the trial for the return of the evidence wrongfully seized, and the evidence was admissible. The effect of these two cases was to establish the rule that the mere fact that the evidence had been seized in violation of the defendant's rights under the fourth amendment, did not of itself render the evidence inadmissable; that the protection of this amendment must be made effective by the defendant himself; by making a seasonable demand for the return of the evidence, and that where papers are in fact in court, they may be used in evidence, even though the party who offers them in evidence procured them illegally, since the court will not permit a collateral issue to be raised to ascertain the source of competent evidence where no application has been made by the accused for its return before trial.[4]

The facts in the *Silverthorne* case are very similar to those of the *Weeks* case, yet the court uses language broad enough to indicate that the fourth amendment is to be given new force and vigor, and that it is something more than merely a shield whose protection is lost unless invoked by the defendant in a certain

[2] (1914) 232 U. S. 383, 34 S. C. R. 341, 58 L. Ed. 652, L. R. A. 1915B 834, Ann. Cas. 1915C 1177.

[3] (1918) 251 Fed. 778, 164 C. C. A. 13. Writ of certiorari denied, 248 U. S. 574, 39 S. C. R. 12, 63 L. Ed. 111.

[4] Adams v. New York, (1904) 192 U. S. 585, 24 S. C. R. 372, 48 L. Ed. 575; Lyman v. United States, (1917) 241 Fed. 945, 154 C. C. A. 581.

manner, eg. g. by a seasonable demand. The court speaking through Justice Holmes said:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like others, but the knowledge gained by the government's own wrong cannot be used by it in the way proposed."

This language was not strictly necessary to the decision, since the point decided was simply that where the government has procured evidence by an illegal seizure, and the accused has compelled its return, the government cannot then use the knowledge gained by the illegal seizure to institute a new and lawful seizure, and accomplish in two steps what it could not lawfully do in one. But the opinion indicates clearly the intention of the court to make the fourth amendment a very real protection to the individual.

RECENT LEGISLATION FORBIDDING TEACHING OF FOREIGN LANGUAGES IN PUBLIC SCHOOLS.—A comparatively new form of legislation is shown in the recent tendency of state legislatures to require the more or less exclusive use of the English language in the public schools. Prior to the world war Arizona and California had statutes providing that "all schools must be taught in the English language,"[1] while many other states applied such a provision to the public schools.[2] Due to the apparent need of Americanization disclosed when the draft law began operation and manifested among foreign language speaking communities during the war, a variety of state legislation resulted. Many states passed laws making it unlawful to teach in any other than the English language in any public, parochial, denominational or private school or institution,[3] while some states specifically excepted the teaching of a foreign language from this provision.[4]

[1] Ariz. Rev. Stat. 1913, sec. 2769; Cal. Pol. Code, sec. 1664, Deering 1915.

[2] Tex. 2 Civ. Stat. 1914 Vernon's Sayles,' art. 2782.

[3] Okla. Laws 1919, ch. 141, p. 201, sec. 1; W. Va. Laws 1919, ch. 2, sec. 9; S. D. Laws 1918, ch. 42, sec. 1; Ill. Laws 1919, p. 917.

[4] Oregon Laws 1919, p. 34, ch. 19, sec. 1; Wis. Stat. 1917, sec. 40; Idaho, Laws 1919, p. 493, ch. 153, sec. 1; Me. Laws 1919, ch. 146, amending R. S. ch. 16, sec. 122, par. 7; Nev. Laws 1919, p. 247, ch. 133, sec. 1.

Other states permitted exemption from compulsory attendance at the public schools, as required by state law, only upon approval of a private school where instruction was in the English language.[5] German alone was singled out for exclusion in some states.[6] Minnesota made a change in her law in 1919 and required all common branches taught in public or private schools to be taught in English from English text books, though it still permitted the teaching of a foreign language not to exceed one hour per day.[7]

The Nebraska law in prohibiting the teaching of any foreign language until after the eighth grade has been passed, is perhaps the most far reaching legislation enacted upon this subject.[8] The object of this together with the compulsory education act of Nebraska was the creation of an enlightened American citizenship in sympathy with the ideals and principles of this country and its government. The state court in a recent decision upheld the law, holding that it was neither discriminatory nor an unreasonable interference with liberty or property.[9] It considered the law as merely extending the regulations of the compulsory education act,[10] and hence held that if the child had attended school the required length of time it was not intended to prevent the parent from teaching it such subjects as were desired. The second section was interpreted to mean that, although in the schools no other language than English should be taught, it did not prohibit the giving of moral and religious instruction outside of school hours in the child's native language. The court admit-

[5] N. H. Laws 1919, ch. 84, amending Pub. Stat. ch. 93, sec. 14. Massachusetts and Rhode Island already had similar laws: Mass. 1 Rev. Laws 1902, p. 478, ch. 44, sec. 2; R. I. Gen. Laws 1919, p. 281, ch. 72, sec. 2.

[6] Ind. Laws 1919, p. 50, ch. 18, sec. 1.

[7] Minn. Laws 1919, ch. 320, amending Gen. Stat. 1913, sec. 2979.

[8] Neb. Laws 1919, ch. 249. The first two sections provide:

"Section 1. No person individually or as a teacher, shall in any private, denominational, parochial or public school teach any subject to any person in any language than the English language."

"Section 2. Languages other than the English language, may be taught as languages only after the pupil shall have attended and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides."

Delaware prohibits the use or teaching of any other language than English in the first six grades of any public or private school. Del. Laws 1919, ch. 157, p. 356, sec. 11, Rev. Code 2283. Iowa prohibits the use of any foreign language in secular subjects in public and private schools.

[9] Nebraska Dist. of Evangelical Lutheran Synod, etc., v. McKelvie, (Neb. 1919) 175 N. W. 531.

[10] Neb. Laws 1919, ch. 155.

ted that if the act were construed as prohibiting the teaching at all times of any foreign language unless one possessed a certificate of graduation from the eighth grade it would be void as an unreasonable and discriminatory exercise of the police power, but held that it was a remedial statute and to be reasonably construed in the light of the conditions which the legislature wished to remedy. The mere fact that the statute might be unreasonble would not necessarily make it unconstitutional, unless property and personal rights were unnecessarily and arbitrarily infringed or destroyed without due process of law.[11]

While the Nebraska law is drastic, it is no more difficult to sustain under the police power than the guaranty of bank deposits or the workmen's compensation acts.

"The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community."[12]

RECENT CASES

ATTORNEY AND CLIENT—DISCHARGE OF ATTORNEY WITHOUT CAUSE—DAMAGES.—Defendant being charged with murder employed plaintiff, an attorney, to defend him, the agreement being that plaintiff was to receive $3000 for defending the defendant in the lower court and the reasonable value of his services on appeal, if an appeal became necessary. Plaintiff defended the defendant in the lower court, and after defendant's conviction, took some steps towards appealing the case. Before the appeal was completed, defendant discharged plaintiff without cause. Plaintiff sued defendant for breach of contract, and in the lower court recovered the sum he would have earned had he not been discharged. *Held,* the discharge of plaintiff without cause was not a breach of contract, and plaintiff could only recover the reasonable value of the services performed up to the time of the discharge. *Lawler v. Dunn,* (Minn. 1920) 176 N. W.—. Contra, Dolph v. Speckart, (Ore. 1920) 186 Pac. 32.

For discussion, see NOTES, p. 441.

CARRIERS—CONSIGNEE LIABLE FOR FREIGHT CHARGES.—Plaintiff railway company delivered a carload of lumber to defendant consignee upon payment of $98.44 freight and demurrage charges, which was an undercharge of $10. Several months later the error was discovered and the

[11] Gundling v. Chicago, (1900) 177 U. S. 183, 20 S. C. R. 633, 44 L. Ed. 725.

[12] Crowley v. Christensen, (1890) 137 U. S. 86, 89, 11 S. C. R. 13, 34 L. Ed. 620.

carrier sued consignee for the additional charges. *Held*, that consignee is primarily liable for payment of undercharges on freight and that acceptance and removal of the goods with the knowledge that carrier is giving up its lien creates an obligation to pay such charges. *Mobile & O. R. Co. v. Laclede Lumber Co.*, (Mo.1919) 216 S. W. 798.

It is well settled that the shipper is liable for undercharges with respect to interstate shipments. *Central R. Co. of N. J. v. Mauser*, (1913) 241 Pa. 603, 88 Atl. 791. The same rule applies for intrastate shipments under state regulation of rates. *New York etc., R. Co. v. Smith*, (1909) 62 Misc. 526, 115 N. Y. S. 838. But acceptance by consignee of goods shipped under a bill of lading containing a stipulation, consignee paying the freight, or any similar provision, clearly raises an implied contract that consignee will pay the freight. *Taylor v. Fall River Iron Works*, (1903) 124 Fed. 826; Hutchinson, "Carriers," 3rd Ed. sec. 807. The reason for this is that carrier's lien is waived in reliance on this implied promise. The same reasoning applies in the absence of any such bill of lading so that consignee is still held liable on an implied promise to pay. *Union Pacific R. Co. v. American Smelting & Refining Co.*, (1912) 202 Fed. 720, 121 C. C. A. 182. A railway, having collected from the consignor less than the fixed rate through error of a clerk, has been permitted to collect the balance from consignee after the goods were delivered, though there was an agreement between consignor and consignee that the former should pay the freight. *Louisville etc., R. Co. v. Magnus Co.*, (1910) 32 Ohio C. Ct. R. 682. That no implied contract by consignee to pay charges in excess of those stated is raised by acceptance of the goods has been held in a few instances. *Central R. Co. of N. J. v. MacCartney*, (1902) 68 N. J. L. 165, 52 Atl. 575; this case commented on and disapproved by Sanborn J. in *Union Pac. R. Co. v. Am. Smelting etc., Co.*, supra.

The implied contract by which consignee becomes liable on receipt of the goods does not relieve consignor for it is not an inconsistent contract; each is an original contract based on sufficient consideration. *No. German Lloyd v. Heule*, (1890) 44 Fed. 100, 10 L. R. A. 814. Contra, *Van Spack v. King*, (Mich. 1916) 159 N. W. 157. The majority hold that the consignor is primarily liable whether or not he is the owner of the goods. *Baltimore & O. R. Co. v. Luella Coal & Coke Co.* (1914) 74 W. Va. 289, 81 S. E. 1044, 52 L. R. A. (N.S.) 398, 10 Corpus Juris, sec. 699, though there are some contra cases. *Union Freight R. Co. v. Winkley*, (1893) 159 Mass. 133, 34 N. E. 91, 38 Am. St. Rep. 398.

The doctrine that the carrier may be estopped to later collect an undercharge has been repudiated. *Central of Ga. R. Co. v. Willingham*, (1911) 8 Ga. App. 817, 70 S. E. 199; *Baltimore & O. S. W. R. Co. v. New Albany Box & Basket Co.*, (1911) 48 Ind. App. 647, 94 N. E. 906. However there are certain exceptional cases in which consignee is not liable after acceptance of the goods. Thus if he is only a factor and the carrier has knowledge of this fact there is no implied agreement from acceptance of the goods. *St. Louis Southwestern R. Co. v. Gramling* (1911) 97 Ark. 353, 133 S. W. 1129. But if the fact that consignee is a mere agent of consignor is unknown to the carrier consignee may be held liable for

undercharges even though he has already sent the proceeds of the goods to the owner. *Cornelius & Co. v. Central of Ga. R. Co.*, (1915) 13 Ala. App. 553, 69 So. 331. It has been held that if consignee on receipt of the goods has paid the charges per agreement with consignor and these are less than the lawful rate the consignee is not liable for the balance. *New York Central etc., R. Co., v. Butler*, (1914) 145 N. Y. S. 918. And consignee is not liable for freight in case of delivery of the goods to an indorsee of the bill of lading unless indorsee is a mere agent of consignee. *St. Louis Southwestern R. Co. v. Browne Grain Co.*, (Tex. 1914) 166 S. W. 40.

CONTRACTS—ENFORCEMENT OF CONTRACT BY PERSON FOR WHOSE BENEFIT IT IS MADE—CONSIDERATION—PRIVITY OF CONTRACT.—Defendants, father and mother of plaintiff, made an agreement in the presence of the plaintiff, a blind girl, the mother agreeing to sign a certain deed if the father would give the mother and the daughter each one thousand dollars, give plaintiff a home with them during their lives and the home property when they, the defendants, died. *Held*, plaintiff may enforce the agreement, it having been made directly with her. *Preston v. Preston*, (Mich. 1919) 175 N. W. 266.

The court seems to confuse the real grounds of the decision by discussing the contract as one involving the rights of third parties thereto, and upholding the suit of the plaintiff as a case coming under an exception to the general rule that third parties cannot sue because of the lack of privity. If, as the court held, the promise of the father was made directly to the plaintiff, there was no lack of privity and the rule regarding third parties was not involved. The cases of a contract for the benefit of third parties and those where the plaintiff is a party to the contract but a stranger to the consideration are distinguishable. *First Nat. Bank v. Chalmers*, (1895) 144 N. Y. 432, 439, 39 N. E. 331; *Furbish v. Goodnow*, (1867) 98 Mass. 296.

When the promise is direct though the consideration moves from a third party the contract is binding. The doctrine that the consideration for the contract must move from the promisee has not been generally recognized by the courts. *Van Eman v. Stanchfield*, (1865) 10 Minn. 255 G. 197; *Rector v. Tweed*, (1890) 120 N. Y. 583; *Palmer Bk. v. Insurance Co.* (1896) 166 Mass. 189, 44 N. E. 211, 32 L. R. A. 615, 55 A. S. R. 387; *Gardner v. Denison*, (1914) 217 Mass. 492, 105 N. E. 359. The rule and exceptions regarding the suit of a third party to the contract are generally the same whether the suit is in law or equity. *Jefferson v. Asch*, (1893) 53 Minn. 446, 55 N. W. 604, 25 L. R. A. 257, 39 A. S. R. 618; *Modern Maccabees v. Sharp*, (1910) 163 Mich. 449, 128 N. W. 786, 33 L. R. A. (N.S.) 780; but see *Phalen v. U. S. Trust Co. of N. Y.* (1906) 186 N. Y. 178, 78 N. E. 943, 7 L. R. A. (N.S.) 734 where it was intimated that the rule in equity might be otherwise.

Some courts have allowed the suit as in the principal case when the consideration is one of close blood relationship as husband and wife, or parent and child. See *Seaver v. Ransom*, (1918) 224 N. Y. 233, 120 N.

E. 639, 2 A. L. R. 1187 with note, which gives an excellent discussion of this doctrine and extends it to the limit, saying of an earlier case, "It was, however, the love and affection or the moral sense of the husband and the parent that imposed such obligations in the case cited rather than any common-law duty of husband and parent to wife and child." See 18 Mich. Law Review 318 for a note on this case discussing the law in Michigan.

CRIMINAL LAW—MENTAL UNSOUNDNESS FROM INTOXICATION AS A DEFENCE.—Mariner after a five or six weeks' debauch in which he had been more or less drunk all of the time assaulted his wife and was charged with atrocious assault and battery. He was convicted on instructions that intoxication, no matter how extreme or long continued was no defence against such a charge. *Held,* that such instructions were correct. *State v. Mariner,* (N.J. 1920) 108 Atl. 306.

Atrocious assault and battery is not specifically defined in the New Jersey code but is listed with crimes which require a specific intent, 2 Compiled St. N. J. 1709-1910, p. 1782. In the same section are assault with intent to kill, to commit rape, and to burglarize. The general rule in these cases of intoxication is undoubtedly, as stated in the instant case, that intoxication is no excuse for the commission of crime. This is supported by the cases cited by the court, *Flanigan v. People,* (1881) 86 N. Y. 554, 40 Am. Rep. 556; *Wilson v. State,* (1897) 60 N. J. L. 171, 37 Atl. 954, 38 Atl. 428. The rule is based on the theory that a sane man who voluntarily puts himself in such a condition as to have no control over his will or actions must be held to intend the consequences springing therefrom and applies in all cases where there is no specific intent involved. But where the existence or non-existence of a malicious or felonious intent is the principal question for the jury it is the Minnesota and general holding that "insanity of any kind, or from any cause, which renders the party incapable of forming any intention, and which is not voluntarily induced with a view to the commission of the crime while in that state, may be given in evidence to show that he is not guilty of the specific crime with which he is charged." *State v. Garvey,* (1866) 11 Minn. 154, 165 (G. 95, 103); *State v. Grear,* (1881) 28 Minn. 426, 10 N. W. 472; *State v. Corrivau,* (1904) 93 Minn. 38, 100 N. W. 638; *Wood v. State,* (1879) 34 Ark. 341, 36 Am. Rep. 13; *Booher v State,* (1901) 156 Ind. 435, 60 N. E. 156, 54 L. R. A. 391; *State v. Rumble,* (1909) 81 Kan. 16, 105 Pac. 1, 25 L. R. A. (N.S.) 276. If the crime of atrocious assault and battery requires a specific intent, as would seem to be indicated by its position in the New Jersey code, the question immediately arises whether in the instant case the court has not overlooked the exception in applying the rule. The two cases cited by the court in support of their position involve the question of the degree of the crime in homicide cases, *Flanigan v. People,* and *Wilson v. State,* supra. Both decide that as to premeditation, intoxication can not be considered, but in the *Wilson* case the court expressly rules that as to intent to kill, the defendant was entitled to an instruction that the jury might find that he was too drunk to form such an intent, while the *Flanigan* case specifically holds that an intent to kill

was shown. It seems therefore that the court intends to harmonize its decision with the general rule as amended in regard to crimes requiring a specific intent. Intoxication is not a complete exoneration in these cases, however, but simply prevents conviction for a crime which carries with it a necessity for a specific intent. *State v. Rumble,* supra.

DAMAGES—PROVISION FOR LIQUIDATED DAMAGES FOR BREACH OF CONTRACT.—Plaintiff brought action to recover stipulated damages for breach of contract by defendant to purchase 205 barrels of flour. The stipulated damages were to include the difference between the price of No. 1 northern wheat at date of contract and date of termination times 4½ bushels of wheat per barrel, 1 cent per bushel for each thirty days between date of contract and date of breach, and 4 cents per bushel for each bushel. *Held,* that plaintiff could recover at the stipulated rate in view of the intent of the parties to fix this as liquidated damages and the uncertainty of the market and the difficulty of ascertaining actual damages. *Sheffield-King Milling Co. v. Jacobs,* (Wis. 1920) 175 N. W. 796.

As a general rule the intent of the parties is controlling as to whether a provision is for liquidated damages or a penalty, *Williston v. Mathews,* (1893) 55 Minn. 422, 56 N. W. 1112; *United States v. Bethlehem Steel Co.,* (1907) 205 U. S. 105, 27 S. C. R. 450, 51 L. Ed. 731, but the agreement will also be construed with respect to the surrounding circumstances, the difficulty of measuring damages and whether the sum named is entirely out of proportion to actual damages. *Case Threshing Machine Co. v. Fronk,* (1908) 105 Minn. 39, 117 N. W. 229. The test is given by the United States Supreme Court: "Where that intention is clearly ascertainable from the writing, effect will be given to the provision, as freely as to any other, where damages are uncertain in nature or amount or are difficult of ascertainment or where the amount stipulated for is not so extravagant, or disproportionate to the amount of property loss, as to show that compensation was not the object aimed at or as to imply fraud, mistake, circumvention or oppression." *Wise v. United States,* (1919) 249 U. S. 361, 365, 39 S.C.R. 303. The rule is easily stated but the difficulty lies in its application. Formerly the courts were inclined to resolve doubts in favor of construing provisions for liquidated sums as penalties. Sedgwick, Damages, 9th ed., sec. 392; *Chicago House-Wrecking Co. v. United States,* (1901) 106 Fed. 385, 45 C. C. A. 343, 53 L.R.A. 122. The instant case seems to be in line with a modern tendency to construe these stipulations liberally, *Montague v. Robinson,* (1916) 122 Ark. 163, 182 S. W. 558, and to "allow the parties to make their own contracts, and to carry out their intentions, even when it would result in recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained." *United States v. Bethlehem Steel Co.,* supra, p. 119. This tendency to recognize the expressed intention of the parties, as shown by the instant case, considers that men who are competent to contract should in general be allowed to do so knowing the results which will follow if a breach occurs and but for the certainty of which they might perhaps have been unwilling to enter the

contract. But as the dissenting opinion shows the decision is open to the objection that the sum stipulated is grossly disproportionate to actual damages. As computed it gave four dollars per barrel profit in contrast with twenty-five cents per barrel allowed by the regulation of the U. S. Food Administration published Aug. 24, 1917, which was between the date of contract and the breach. And the actual damage was ascertainable for if plaintiff bought no wheat there was no damage, while if it did manufacture the flour contracted for, which is not shown, it should have sold it at the market price and if this was below the contract price recover that amount which was the legal damage.

DIVORCE—FULL FAITH AND CREDIT CLAUSE—FINALITY OF A MINNESOTA ALIMONY OR MAINTENANCE DECREE.—The plaintiff on October 20, 1913, secured a divorce from the defendant in Minnesota. The decree provided that the defendant pay the plaintiff $25 dollars per month for the maintenance of their child, payments to be made twice a month, the first payment to be made on October 20, 1913. None of these installments were paid, and in 1918, the plaintiff brings suit in Oregon for the accrued installments amounting to $1300. The defendant demurred. *Held*, that the plaintiff had a cause of action only as to the $12.50 payable Oct. 20, 1913, the Minnesota decree as to the rest not being sufficiently final and conclusive. *Levine v. Levine*, (Oregon 1920) 187 Pac. 609.

A state will give full faith and credit only to such foreign judgments as are final and conclusive in the state in which they were rendered. 1 R. C. L. 958. The only objection raised to the Minnesota decree in the instant case was as to its finality and conclusiveness. An alimony or maintenance decree in Minnesota is subject to be revised or altered. G. S. Minn. 1913, Sec. 7123, 7129, and as the court in the instant case points out, a decree for the maintenance of children is, as regards its finality or conclusiveness, on the same basis as a decree for alimony.

A decree for alimony is entitled to full faith and credit in other states as to accrued installments, unless such accrued installments are subject to modification by the court that rendered the decree. *Sistare v. Sistare*, (1910) 218 U. S. 1, 30 S. C. R. 682, 54 L. Ed. 905, 28 L. R. A. (N.S.) 1068, 20 Ann. Cas. 1061. The court in the instant case held that the decree was not final or conclusive as to the accrued installments, because in Minnesota the court which renders an alimony decree can modify it not only as to future installments, but also as to accrued installments and gross awards, citing in support of this proposition, *Holmes v. Holmes*, (1903) 90 Minn. 466, 97 N. W. 147; *Haskell v. Haskell*, (1911) 116 Minn. 10, 132 N. W. 1129.

In holding that the complaint stated a cause of action as to the $12.50 payable on Oct. 20, 1913, if Oct. 20, 1913, was the date of the decree, as to which there was some doubt, the Oregon court followed a rule laid down by it in the case of *DeVall v. DeVall*, (1910) 57 Ore. 128, 109 Pac. 755. The basis of this rule is that even though the court which renders the decree can modify the sums already due under it, yet, these sums

can only be modified where there has been a change of conditions, and if at any time a sum is adjudged to be presently payable, it is res judicata as to the conditions as they existed at that time and sufficiently final to be given full faith and credit. This is true, either where upon application to the original court the accrued installments are adjudged to be presently payable, *DeVall v. DeVall,* supra, or as in the instant case, contemporaneously with the decree a sum is decreed to be presently payable.

This rule of the Oregon court does not seem to have been adopted by other courts, and is open to the grave objection that even though a sum may be decreed to be presently payable, it may nevertheless be subsequently modified. The Oregon court, however, seems to feel that some way must be provided for the enforcement of foreign alimony and maintenance decrees, or else as the court says in the instant case "the sister state becomes an asylum for marital and parental slackers."

INSURANCE—EXEMPTION FROM LIABILITY WHERE INSURED ENTERED MILITARY OR NAVAL SERVICE.—Insured enlisted in the Navy and was sent to the Dunwoody Institute in Minneapolis for technical training. He contracted influenza and died in the city hospital. His policy limited the liability of the insurer to the cash premiums paid if "his death occurs while he is engaged in military or naval service." *Held,* the provision applies only where the death was caused by extra hazard incident to the service, and the insurer is liable for the face value of the policy. *Myli v. Am. Life Ins. Co.,* (N.D.1919) 175 N. W. 631.

There is no question about the exemption of the insurer in case the insured is killed by the enemy. *La Rue v. Kansas Mut. Life Ins. Co.* (1904) 68 Kans. 539, 75 Pac. 494. There is, however, a difference between military service and active military service. The latter refers to operations conducted in the presence of the enemy during the actual hostilities. *Redd v. Am. Central Life Ins. Co.,* (1918) 200 Mo. App. 383, 207 S. W. 74. A policy which clearly states that it covers the risk only when the insured's status is that of a civilian and ceases to protect him during the continuance of his military or naval service exempts the company from liability for death occurring while in the service. *Miller v. Illinois Bankers' Life Ass'n,* (Ark. 1919) 212 S. W. 310. Where the clause exempts the company if death occurs while engaged in military service, the word "engaged" implies performing some duty of a military nature, not the period of service. Death must be in consequence of performing such duty. *Benham v. American Central Life Ins. Co.,* (Ark.1919) 217 S. W. 462. The cause of the death must be peculiar to military service and not common to civil life as well, even though the insured was near the zone of actual warfare at the time of his death. *Kelly v. Fidelity Mut. Life Ins. Co.,* (Wis.1919) 172 N. W. 152. It is not enough that the service furnish the occasion of the death, such as an accidental gunshot wound from a fellow soldier. Insurer must show that the service was the proximate cause of the death. *Malone v. State Life Ins. Co.,* (Mo. App. 1919) 213 S. W. 877. These decisions are in accord with the general rule

that stipulations exempting the insurer from liability are construed most strongly against the insured.

MASTER AND SERVANT—NEGLIGENCE—RES IPSA LOQUITUR.—During a flood, defendant ordered plaintiff to go upon a bridge to dislodge quantities of driftwood which were accumulated against the center pier. While he was on the bridge, it collapsed, and plaintiff received serious injuries. *Held,* the doctrine res ipsa loquitur does not apply between master and servant. Plaintiff must show that the negligence averred was the proximate cause of the injury. *Wyman v. Chicago, R. I. & P. Ry. Co.,* (Okla. 1919) 184 Pac. 758.

The cases are conflicting, and it is difficult to determine the weight of authority. Many decisions absolutely repudiate the doctrine in actions between master and servant. *Spees v. Boggs,* (1901) 198 Pa. 112, 49 Atl. 875, 52 L. R. A. 933, 82 A. S. R. 792; *Greely v. Foster,* (1904) 32 Colo. 292, 75 Pac. 351; *Chicago Tel. Co. v. Schulz,* (1905) 121 Ill. App. 573. There seems to be an increasing disposition in favor of a limited application of the maxim as between master and servant. But the mere fact of the accident alone does not put on the defendant the burden of disproving negligence. *Johns v. Penn. R. Co.,* (1910) 226 Pa. 319, 75 Atl. 408. The thing causing the injury must be under the exclusive control of the defendant and even then it is not certain the rule would apply. *McGillivray v. G. N. Ry. Co.,* (1917) 138 Minn. 278, 164 N. W. 922. If the employee has as much knowledge of the place and instrumentalities with which he works as the employer and if all the facts are susceptible of direct and positive proof by living witnesses, the rule does not apply. *Klebe v. Parker Distilling Co.,* (1907) 207 Mo. 480, 105 S. W. 1057, 13 L. R. A. (N.S.) 140. Evidence showing the accident to be such as in the ordinary course of things does not happen unless through some negligence of the master brings the case within the principle. *Ristau v. Coe Co.,* (1907) 104 N. Y. S. 1059, 120 App. Div. 478. When the proof shows the accident might have happened from some cause other than the negligence of the defendant, the presumption is not against the defendant. *Robinson v. Consolidated Gas Co.,* (1909) 194 N. Y. 37, 86 N. E. 805, 28 L. R. A. (N.S.) 586; *Snow v. Harris,* (Cal.1919) 181 Pac. 676; *McAller v. Gillett,* (Mass. 1919) 123 N. E. 349. See *Hunt v Chicago, etc., Co.,* (Iowa 1917) 165 N. W. 105, L. R. A. 1918B 369, and note.

Before the Federal Employers' Liability Act, the courts refused to apply the doctrine res ipsa loquitur where an employee sues his employer on the ground that the fellow servant rule may be involved. *Patton v. Texas & Pac. Ry. Co.,* (1901) 179 U. S. 658, 45 L. Ed. 361, 21 S. C. R. 275. The statute changed the situation, and now the maxim is well recognized. *Southern Ry. Co. v. Derr,* (1917) 240 Fed. 73, 153 C. C. A. 109; *Moore v. Grand Trunk Ry. Co.,* (Vt. 1919) 108 Atl. 334. Also under the Safety Appliance Act, the courts place on the defendant the burden of disproving his negligence. *Minneapolis etc., R. Co. v. Gotschall,* (1917) 244 U. S. 66, 61 L. Ed. 995, 37 S. C. R. 595.

MECHANICS' LIENS—STIPULATIONS AGAINST IN PRINCIPAL CONTRACT—EFFECT UPON RIGHTS OF SUBCONTRACTORS.—The contract between owner and contractor contained a stipulation that no contractor, subcontractor or materialman should have the right to file a mechanics' lien on the premises. Plaintiff, a subcontractor, now seeks to enforce a mechanics' lien. *Held,* that the plaintiff was deemed to have knowledge of the stipulations in the principal contract and was bound by them and could not enforce his lien. *Baldwin Locomotive Works v. Hines Lumber Co.,* (Indiana 1919) 125 N. E. 400.

The courts seem to consider that there is no sound reason of public policy against allowing a person to waive his right to a mechanics' lien, and some have declared unconstitutional statutes which have attempted to nullify stipulations similar to the one in the instant case. *Spry Lumber Co. v. Sault Sav. Bank Loan & Trust Co.,* (1889) 77 Mich. 199, 43 N. W. 778, 6 L. R. A. 204, 18 A. S. R. 396; *Kelley v. Johnson,* (1911) 251 Ill. 135, 95 N. E. 1068, 36 L. R. A. (N.S.) 573. See 25 Harv. L. Rev. 274. The courts differ, however, as to what extent the subcontractor's right to a lien is waived by such a stipulation in the principal contract. Where the lien given by statute is derivative, i. e., where the subcontractor's lien is given by way of subrogation to the rights of the principal contractor, it is held that such a stipulation is absolutely binding on the subcontractor. *Schroeder v. Galland,* (1890) 134 Pa. 277, 19 Atl. 632, 7 L. R. A. 711, 19 A. S. R. 691; *Seeman v. Biemann,* (1900) 108 Wis. 365, 75 N. W. 79. Where, however, the statute gives a direct lien to the subcontractor and not by way of subrogation to the rights of the principal contractor, it is held that the subcontractor is not bound by such a stipulation, at least in absence of actual notice thereof. *Cost v. Newport Builders' Supply & Hdw. Co.,* (1908) 85 Ark. 407, 108 S. W. 509, 14 Ann. Cas. 142; *Hume v. Seattle Dock Co.,* (1914) 68 Ore. 477, 137 Pac. 752, 50 L. R. A. (N.S.) 153; *Arizona Eastern R. Co. v. Globe Hdw. Co.,* (1913) 14 Ariz. 397, 129 Pac. 1104. Mere existence of a contract between owner and contractor is not such notice as will bind a subcontractor. *Stewart Cont'g. Co. v. Trenton & N. B. R. R. Co.,* (1904) 71 N. J. L. 568, 572, 60 Alt. 405, 406. Some courts, without regard to whether lien is direct or derivative, require both notice and assent on the part of the subcontractor. *Norton v. Clark,* 85 Me. 357, 27 Atl. 252. But, it has been held sufficient assent on the part of the subcontractor if he furnishes labor or materials with notice of such stipulation. *Bates Mach. Co. v. Trenton & N. B. R. R. Co.,* (1904) 70 N. J. L. 684, 58 Atl. 935, 103 A. S. R. 811.

The instant case, however, goes to the extreme and holds that even where the lien is direct, the subcontractor is deemed to have notice of the stipulations in the principal contract and is bound thereby. The Montana mechanics' lien statute gives subcontractor a direct lien. *Merrigan v. English,* (1889) 9 Mont. 113, 22 Pac. 454, 5 L. R. A. 837; but in passing upon the question raised by the instant case the Montana court in *Miles v. Coutts,* (1897) 20 Mont. 47, 49 Pac. 393, reached the opposite conclusion, upon the ground that to hold otherwise would be to defeat the purpose of the statute.

The question raised by the instant case does not seem to have been squarely passed on in Minnesota, but since a subcontractor in Minnesota is considered as having a direct lien, *Laird v. Moonan,* (1884) 32 Minn. 358, 20 N. W. 354, *Bardwell v. Mann,* (1891) 46 Minn. 285, 48 N. W. 1120, it is probable that the court would hold that no contract between the owner and contractor intended to deprive a subcontractor of his lien would be effective, at least without actual notice.

MUNICIPAL CORPORATIONS—LIABILITY FOR NEGLIGENCE IN THE OPERATION OF FIRE DEPARTMENTS.—Plaintiff's intestate was run over and killed by a motor hose-cart belonging to defendant city, which was being driven in a negligent manner in returning from a fire. *Held,* that the city was liable. *Fowler v. City of Cleveland,* (Ohio 1919) 126 N. E. 72.

One of the best settled rules of municipal corporation law is, that a city in the operation and maintenance of a fire department is engaged in a governmental function, and is not liable for negligence in carrying out this function. *Miller v. City of Minneapolis,* (1898) 75 Minn. 131, 77 N. W. 788; *Saunders v. City of Fort Madison,* (1900) 111 Iowa 102, 82 N. W. 428; *Engel v. City of Milwaukee,* (1914) 158 Wis. 480, 149 N. W. 141; 5 McQuillin, Municipal Corp. Sec. 2432. The Ohio court in the instant case seems to be among the first to break away from the rule, and it expressly overrules several of its former decisions in which it was held that a city is not liable for the negligence of its fire department, because it is a governmental function. *Frederick v. City of Columbus,* (1898) 58 Ohio St. 538, 51 N. E. 35. The court in the instant case takes the position that the operation of a fire department is a purely ministerial act for the negligent performance of which the city is liable. But the reasons given do not seem very clear and satisfactory. The real basis of the decision would seem to be found in these words: "We think it may be fairly said that there has been a growing dissatisfaction with any comprehensive rule (and its unsatisfactory and unjust results) which exempts municipalities from liability for all acts which have been loosely classed as governmental."

SALES—SELLER'S MISTAKE AS TO IDENTITY OF VENDEE AS AFFECTING PASSING OF TITLE.—Where the purchaser of chattels bought under an assumed name, giving a note and mortgage, and after obtaining possession transferred the property by chattel mortgage to innocent persons, *held,* the seller was entitled to judgment in replevin against such transferees of the fraudulent buyer, for, in case of a misrepresentation of identity, no title passes which is available even to a bona fide purchaser for value. *Windle v. Citizens' Nat. Bank,* (Mo.1919) 216 S. W. 1023. See also *Windle v. Citizens' Nat. Bank,* (Mo.1919) 216 S. W. 1020.

In these and analogous cases the question whether a good title was passed to a bona fide purchaser depends upon whether there was any contract at all with the original seller by which title passed to the buyer, which in turn depends upon whether buyer was or was not the person with whom the seller apparently intended to contract. 24 Am. & Eng.

Encyc. of Law 1166; See Dean Ashley's article on Mutual Assent in 3 Col. L. R. 71. It is well settled law that no title passes when delivery is made to one who fraudulently represents that he is purchasing as the agent of another. *Smith Premier Typewriter Co. v. Stidger,* (1903) 18 Colo. App. 261, 71 Pac. 400; *Rogers v. Dutton,* (1902) 182 Mass. 187, 65 N. E. 56, principal was undisclosed; *Rodliff v. Dallinger,* (1886) 141 Mass. 1, 4 N. E. 105, 50 Am. Rep. 439; *Edmunds v. Merchants' Dispatch Transp. Co.,* (1883) 135 Mass. 283; or as a member of and on behalf of a firm, *Wyckaff v. Vicary,* (1894) 75 Hun 409, 27 N. Y. S. 103; *Alexander v. Swackhamer,* (1885) 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; *Barker v. Dinsmore,* (1872) 72 Pa. St. 427, 13 Am. Rep. 697, for in these cases the fraudulent buyer was clearly not the one with whom seller intended to contract. 35 Cyc. 359-361. When the buyer purports to buy for himself but under a false name, and has no personal dealings with seller, transacting all the business by mail, since the celebrated English case of *Cundy v. Lindsay,* (1878) L. R. 3 App. Cas. 59, 47 L. J. Q. B. N. S. 481, 38 L. T. N. S. 573, 26 Week. Rep. 406, 14 Cox C. C. 93, 6 Eng. Rul. Cas. 211, it has been held that the contract is void and no title passes, since here seller's apparent, primary intention is to deal with the owner of the falsely assumed name rather than with the writer. *Newberry v. Norfolk, etc., Co.,* (1903) 133 N. C. 45, 45 S. E. 356; see criticism in 3 Col. L. R. 71 at 74, and comment on this criticism in 16 Harv. L. R. 381. But when the buyer in person obtains the assent of the seller to a sale to him, by pretending to be some one else, title should pass, because seller intended to contract with the personality before him, though he was mistaken as to his identity. This is the better view and the great weight of authority. *Phelps v. McQuade,* (1917) 220 N. Y. 232, 115 N. E. 441, L. R. A. 1918B 973 and note; *Hickey v. McDonald Bros.,* (1907) 151 Ala. 497, 44 So. 201, 13 L. R. A. (N.S.) 413 and note; *Edmunds v. Merchants' Dispatch Transp. Co., supra.*

The instant case in holding that because plaintiff thought he was selling to another individual than the fraudulent vendee no sale was made, ignored the fact that it was the apparent, primary intention of plaintiff to contract with the person who stood before him. The opinion quotes and follows the rule that no title passes as announced in Mechem on Sales, which, it must be admitted is stated in language sufficiently broad to cover this case. 2 Mechem, Sales, secs. 887 and 888. That author, however, ignores the distinction between dealings in person and dealings by mail, and none of the cases which he cites support the particular point at issue in the instant case. On the other hand, Williston points out this distinction. Williston, Sales of Goods, sec. 635. Of the cases cited in the instant case, only one supports this particular point. *Loeffel v. Pohlman,* (1891) 47 Mo. App. 574. This case, previously decided by the same court, ignores the point of personal dealings between the parties and cites cases all of which may be distinguished. It is submitted that the instant case is wrong and against the weight of authority, though it follows the rule previously laid down in the jurisdiction where decided.

TAXATION—SIXTEENTH AMENDMENT—INCOME—STOCK DIVIDENDS.—The Federal Revenue Act of 1916, 39 Stat. 756 et seq., c. 463, Comp. St. 633 36a et seq. imposes a tax on stock dividends as income. Plaintiff, stockholder in a certain corporation, received a number of shares of stock issued by the corporation out of profits, and paid, under protest, an income tax on the shares so received. Action brought against tax collector to recover the amount of income tax paid. *Held,* four justices dissenting, that the tax is invalid. Stock dividends are not income within meaning of sixteenth amendment; and the Revenue Act of 1916, insofar as it provides for taxation of them, without apportionment of the tax according to population, violates the constitution. *Eisner v. Macomber,* (1920) 40 S. C. R. 189, U. S. Adv. Ops. 1919-20, p. 248.

The court holds that the question in issue is controlled by the case of *Towne v. Eisner,* 245 U. S. 418, 38 S. C. R. 158, 62 L. Ed. 372, L. R. A. 1918D 254 (2 MINNESOTA LAW REVIEW 284, at 289) where the conclusion was reached that the essential nature of a stock dividend necessarily prevents its being regarded as income in any true sense. That case turned upon the construction of the Income Tax Law of 1913, and did not directly raise any question under the sixteenth amendment. In the instant case, however, the Court examines at length the true meaning of the word "income" in the sixteenth amendment. After stating that, in the definition of income, the essential matter is that it is "*not* a gain *accruing to* capital; not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value, *proceeding from* the property, *severed from* the capital, however invested or employed, and *coming in,* being *'derived'*—that is, *received* or *drawn by* the recipient (the taxpayer), for his *separate* use, benefit and disposal—," the Court declares, reaffirming *Towne v. Eisner,* supra, that a stock dividend cannot be brought within the definition. "A 'stock dividend' shows that the company's accumulated profits have been capitalized, instead of distributed to the stockholders or retained as surplus available for distribution in money or in kind. . . . The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the sixteenth amendment."

MINNESOTA
LAW REVIEW

VOL. IV . JUNE, 1920 No. 7

BOUNDARY CONTROVERSIES BETWEEN STATES BORDERING ON A NAVIGABLE RIVER

THE MINNESOTA-WISCONSIN CASE

THE controversy between Minnesota and Wisconsin as to the boundary line between the two states in the waters which separate Duluth and Superior is one of long standing, and one that is rife with points of interest in the development of the north country at the head of the Great Lakes. The unanimous opinion of the Supreme Court in the case of *Minnesota v. Wisconsin*[1] delivered on March 8, 1920, by Mr. Justice McReynolds is noteworthy not only because it settles once and for all the various questions of law and fact involved in this dispute, but because it gives the latest view of the Supreme Court on the much mooted question of what constitutes the boundary line between states of the Union which border on a navigable river, and, in at least one respect, qualifies and defines the rules of law previously laid down.

I. THE JURISDICTION OF THE COURT.

The constitution of the United States provides:[2]

"The judicial power shall extend . . . to controversies between two or more states; between a state and citizens of another state; between citizens of different states; . . . and between a state, or the citizens thereof, and foreign states, citizens or subjects."

[1] (1920) U. S. Adv. Ops. 1916-20, p. 345, 40 S. C. R. 313.
[2] Art. III, Sec. 2.

"In all cases . . . in which a state shall be a party, the Supreme Court shall have original jurisdiction."

The 13th Section of the Judiciary Act of 1789 provides:[3]

"The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, or between a state and citizens of other states, or aliens, in which latter cases it shall have original, but not exclusive, jurisdiction."

While the language of the clause conferring jurisdiction is general, disputes between states as to their boundaries would seem plainly to be included thereunder. The soundness of this conclusion is confirmed by the fact that when the constitution was framed and adopted there were existing controversies between eleven states respecting their boundaries,[4] a situation which furnishes an interesting sidelight on the ineffective congressional method of settling boundary disputes provided by the Articles of Confederation,[5] and which obviously required the establishment of some procedure more adequate than that theretofore in effect. Although doubted at times by men whose names are written large in the history of American law, the jurisdiction of the Supreme Court in this type of cases has been upheld uniformly. The first case to come before that court having to do with the question of boundaries between states was that of *New Jersey v. New York*,[6] which involved one of the disputes pending at the time the constitution was adopted. The opinion of the court in that case, though written by the most eminent of its chief justices, is of the routine type. The court, however, is held to have jurisdiction, largely on the authority of the noted case of *Chisholm v. Georgia*,[7] the decision in which was nullified by the passage of the eleventh amendment before the judgment following that decision could be put into effect.

The next case is that of *Rhode Island v. Massachusetts*,[8] decided in 1838. In spite of the earlier decision sustaining the court's jurisdiction, counsel for Massachusetts, including Daniel

[3] This section has been successively re-enacted and is now known as Section 233 of the Judicial Code.

[4] Rhode Island v. Massachusetts, (1838) 12 Pet. (U.S.) 657, 724, 9 L. Ed. 1233.

[5] The ninth Article of Confederation provided: "That the United States in Congress assembled, shall be the last resort on appeal in all disputes and differences now subsisting, or which may hereafter arise between two or more States, concerning boundary, jurisdiction or any other cause whatever."

[6] (1831) 5 Pet. (U.S.) 284, 8 L. Ed. 127.

[7] (1793) 2 Dall. (U.S.) 419, 1 L. Ed. 440.

[8] (1838) 12 Pet. (U.S.) 657, 9 L. Ed. 1233.

Webster, argued earnestly that the constitutional provisions quoted supra were limited to questions involving property only, and did not extend to political matters such as boundaries between states. Although Chief Justice Taney dissented, the majority opinion of Mr. Justice Baldwin sustained the court's jurisdiction in a positive and exhaustive fashion. The precedents and historic facts are presented in a manner and order altogether convincing, and there can be no question as to the soundness of the court's conclusion that it has "undoubted jurisdiction" in cases of this type.

In the case of *Florida v. Georgia*,[9] Chief Justice Taney, apparently having changed his opinion in the matter, says:

"It is settled, by repeated decisions, that a question of boundary between states is within the jurisdiction conferred by the constitution on this court."

The question of jurisdiction in this type of cases was raised seriously as late as 1870, however, when the case of *Virginia v. West Virginia*[10] was before the court. In that case counsel for West Virginia, of whom Reverdy Johnson was one, argued much the same question as that raised by Webster thirty-two years before. The conclusion of Mr. Justice Miller is almost as positive as that of the court in the earlier cases:

"We consider, therefore, the established doctrine of this court to be, that it has jurisdiction of questions of boundary between two states of this Union, and that this jurisdiction is not defeated, because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those states; or because the decree which the court may render, affects the territorial limits of the political jurisdiction and sovereignty of the states which are parties to the proceedings."

The Supreme Court, therefore, has exclusive original jurisdiction to determine boundary controversies between states, though of course, as impliedly provided in the constitution,[11] the states themselves, with the consent of the Congress, may enter into an agreement as to their boundaries.

II. The Procedure.

Neither the constitution nor the precedents prescribe the procedure to be followed in this type of cases. The court's

[9] (1854) 17 How. (U.S.) 478, 15 L. Ed. 181.
[10] (1870) 11 Wall. (U.S.) 39, 20 L. Ed. 67.
[11] Art. 1, Sec. 10.

dilemma in the early cases is thus stated by Chief Justice Taney in the case of *Rhode Island v. Massachusetts*:[12]

"The case to be determined is one of peculiar character, and altogether unknown in the ordinary course of judicial proceedings. It is a question of boundary between two sovereign states, litigated in a court of justice; and we have no precedents to guide us in the forms and modes of proceeding, by which a controversy of this description can most conveniently, and with justice to the parties, be brought to a final hearing."

Without going into this phase of the question with any degree of minuteness, it may be stated that the following general rules of procedure were laid down by the Supreme Court in the early cases and have been followed without serious question in those cases which came up thereafter:

(1) The rules and usages of equity practice are followed, omitting, however, any niceties of chancery pleading or procedure, so as most expeditiously to bring the case to an issue on its real merits.[13]

(2) If the defendant state does not appear process will be issued for its appearance, which process must be served on both the governor and attorney general of such state.[14]

(3) "If the state shall refuse or neglect to appear, upon due service of process, no coercive measures will be taken to compel appearance; but the complainant or plaintiff will be allowed to proceed ex parte."[15]

(4) An appearance once made by a defendant state may be withdrawn upon due application, but in such case the complainant state may proceed ex parte, as if no appearance had been made on the part of the defendant.[16]

(5) Ordinarily in these cases the costs are divided equally between the states concerned, for the reason that, as stated by Mr. Justice Brewer, in the case of *Nebraska v. Iowa*:[17]

"The matter involved is one of these governmental questions in which each party has a real and vital and yet not a litigious interest."

III. The Development of the Law

Considering the varied and diverse interests involved, the number of boundary controversies which have come before the

[12] (1840) 14 Pet. (U.S.) 210, 256, 10 L. Ed. 423.
[13] Ibid. 257.
[14] New Jersey v. New York, (1830) 3 Pet. (U.S.) 461, 7 L. Ed. 741.
[15] Grayson v. Virginia, (1796) 3 Dall. (U.S.) 320, 1 L. Ed. 619.
[16] Massachusetts v. Rhode Island, (1838) 12 Pet. (U.S.) 755, 761, 9 L. Ed. 1272.
[17] (1891) 143 U. S. 359, 370, 36 L. Ed. 186, 12 S. C. R. 396.

United States Supreme Court is surprisingly small. Some of them involve questions of fact only, and as such, though they may contain much of historic or political interest, add nothing to the principles of law involved. No attempt will be made in this article to analyze or codify all the cases, and reference will be made only to those decisions which seem most pertinent in the development of the law of the phase of the question stated in the title herein, or which contain matters particularly relevant on their facts to the Minnesota-Wisconsin controversy.

The case of *Missouri v. Kentucky*[18] is in the nature of a pioneer case of its type. By the treaty between France, Spain and England in February, 1763, the middle of the Mississippi River was the boundary between the British and French territories, and became the boundary between Missouri and Kentucky when the former became a part of the Union in 1820. Both states apparently admitted that the true line was in the middle of the main channel of the river. The court assumes that the question must be determined as of the time that Missouri was admitted into the Union, or at least as of no later date, and analyzes the evidence at some length. The opinion of Mr. Justice Davis contains little of law, but several of his comments on the facts are so apt and trenchant as to warrant their quotation:

"In a controversy of this nature, where state pride is more or less involved, it is hardly to be expected that the witnesses would all agree in their testimony."

"But it is said the maps of the early explorers of the river and the reports of travelers prove the channel always to have been east of the island. The answer to this is, that evidence of this character is mere hearsay as to facts within the memory of witnesses, and if this consideration does not exclude all the books and maps since 1800, it certainly renders them of little value in the determination of the question in dispute. If such evidence differs from that of living witnesses based on facts, the latter is to be preferred. Can there be a doubt that it would be wrong in principle to dispossess a party of property on the mere statements—not sworn to—of travelers and explorers, when living witnesses, testifying under oath and subject to cross-examination, and the physical facts of the case, contradict them?"

Both quotations apply with full force to the facts in the case of *Minnesota v. Wisconsin.*

[18] (1870) 11 Wall. (U.S.) 395, 20 L. Ed. 116.

The case of *Nebraska v. Iowa*[19] is of interest because it first applied the well recognized doctrines of accretion and avulsion in determining the boundary line between states bordering on a navigable river. The line between the two states was "the middle of the main channel of the Missouri River." Between 1851 and 1877 in the vicinity of Omaha there were marked changes in the course of the river's channel. Out of these changes the litigation arose, both states claiming jurisdiction over the same tract of land.

In suits between private riparian owners it had been held generally that where the banks of a stream are changed by the gradual process known as accretion the line still remains the stream, including the accummulated soil. It had been equally well settled that where a stream suddenly abandons its old and seeks a new bed, in other words, where an avulsion occurs, the boundary line between riparian owners remains in the old channel. These principles are applied by the court to the boundary line between the two states; the "muddy" Missouri is held to be no exception to the general rule; and the law of accretion is found to obtain at all the places involved, except in one instance where the river "had pursued a course in the nature of an ox-bow," and "suddenly cut through the neck of the bow and made for itself a new channel," in which case the boundary is held to remain in the abandoned channel.

The opinion of the court, written by Mr. Justice Field, in *Iowa v. Illinois*[20] is undoubtedly the most important of all the decisions in the cases involving this question. The words "middle of the Mississippi River," were used in the Enabling Acts of the two states. Iowa contended that the boundary was the middle line between the two banks or shores, while Illinois claimed that the boundary was the channel upon which the commerce of the river by steamboats usually was conducted.

The old theory that the boundary line between states separated by a river is the medium filum aquae—a line drawn through the center of the river—is held not applicable to cases in which the evidence shows there is "a channel of commerce," "one usually followed," "a channel of traffic," "one which is best suited and ordinarily used" for the purposes of navigation. In such cases the channel of commerce or the navigable and navigated channel is held to be the boundary line between the states. The reason

[19] (1891) 143 U. S. 359, 36 L. Ed. 186, 12 S. C. R. 396.
[20] (1893) 147 U. S. 1, 37 L. Ed. 55, 13 S. C. R. 239.

for this rule is stated by the court to be obvious, because "the right of navigation is presumed to be common to both."

The court's conclusion is positive and decisive:

"When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates, is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest."

Clear and determinative as is the opinion in the case of *Iowa v. Illinois*, the point was reargued before the Supreme Court in the case of *Arkansas v. Tennessee*,[21] decided in 1918, on the basis of a decision of the supreme court of Tennessee reaching a contrary conclusion. The opinion, written by Mr. Justice Pitney, is a clear affirmance of the earlier doctrine and its conclusions:

"The true boundary line between the states, aside from the question of the avulsion of 1876, is the middle of the main channel of navigation as it existed at the Treaty of Peace concluded between the United States and Great Britain in 1783, subject to such changes as have occurred since that time through natural and gradual processes."

The question of acquiescence sometimes becomes of controlling importance in this type of cases. Though relied upon by both Minnesota and Wisconsin in the controversy recently decided the Court referred only inferentially to this point in its opinion, and apparently considered that the facts supporting the claims of both states in this connection fell short of the rules applicable, a conclusion which, under the facts of the case, seems clearly correct. Several brief quotations from the decided cases will show the general rules of law as to the effect of acquiescence on the boundary line between two states:

"Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And he pointed out that every age, every century and every decade this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this

[21] (1918) 246 U. S. 158, 62 L. Ed. 638, 38 S. C. R. 301.

great principle may be involved with greater justice and propriety than in a case of disputed boundary."[22]

"It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."[23]

"The question is one of boundary, and this court has many times held that, as between the states of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it should be accepted as conclusive, whatever the international rule may be in respect of the acquisition by prescription of large tracts of country claimed by both."[24]

IV. The Minnesota-Wisconsin Controversy.

The Wisconsin Enabling Act, approved August 6, 1846, described the boundary of the proposed state in part as follows:[25]

"Thence down the main channel of the Montreal River to the middle of Lake Superior; *thence through the center of Lake Superior to the mouth of the St. Louis River; thence up the main channel of said river to the first rapids in the same, above the Indian Village, according to Nicollet's map;* thence due south to the main branch of the River St. Croix."

With the boundaries stated in the Enabling Act Wisconsin entered the Union May 29, 1848.

The Minnesota Enabling Act, approved February 26, 1857, describes the boundary in part thus:[26]

"Thence east along the northern boundary of said state [Iowa] to the main channel of the Mississippi River; thence up the main channel of said river, and following the boundary line of the State of Wisconsin, until the same intersects the Saint Louis River; *thence down said river to and through Lake Superior, on the boundary line of Wisconsin* and Michigan until it intersects the dividing line between the United States and the British possessions."

With boundaries thus described, Minnesota became a state on May 11, 1858.

The controversy arises from diverse interpretations of the italicized portions of the Wisconsin Enabling Act. Nicollet's

[22] Rhode Island v. Massachusetts, (1846) 4 How. (U.S.) 591, 639, 11 L. Ed. 1116.

[23] Indiana v. Kentucky, (1889) 136 U. S. 479, 34 L. Ed. 329, 10 S. C. R. 1051.

[24] Louisiana v. Mississippi, (1905) 202 U. S. 1, 53, 50 L. Ed. 913, 26 S. C. R. 408.

[25] Chap. 89, 9 Stat. at L. 56.

[26] Chap. 60, 11 Stat. at L. 166.

map, published three years before the passage of that Act, is drawn on a very small scale and does not indicate definitely either the mouth of the St. Louis River or the main channel of that river. Nor were they located definitely until the decision of the Supreme Court on March 8th. A brief statement of the peculiar geographic and hydrographic conditions involved may serve to clarify the matter.

At the westerly end of Lake Superior there are three pairs of points or projections extending out from the opposite shores of Minnesota and Wisconsin. The most easterly of these are known as Minnesota and Wisconsin Points, the former about six miles in length and 200 to 800 feet in width, the latter about as wide but only approximately half so long. Between these points there is a natural opening of approximately a quarter of a mile in width known as the "Entry" or "Superior Entry." A canal through Minnesota Point near the Minnesota mainland was cut about 1870, and is known as the Duluth Ship Canal. Through these openings the traffic from Lake Superior to the cities of Duluth and Superior enters.

About a mile to a mile and a half westerly from Minnesota and Wisconsin Points there is another pair of points, the one reaching out from the Minnesota shore being known as Rice's Point and that from the Wisconsin shore as Connor's Point. The intervening water between these two pair of points is known as Superior Bay, and is, as has been indicated, about nine miles long and a mile and a half wide.

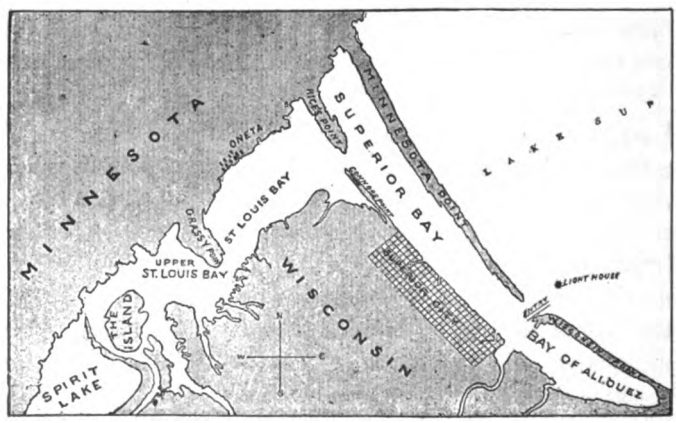
A narrow channel between Rice's Point and Connor's Point leads into what is known as St. Louis Bay, or Lower St. Louis Bay, approximately a mile and a half wide and three miles long, at the westerly end of which another pair of points is reached, the larger of which extends from the Minnesota mainland and is known as Grassy Point. The opening between Grassy Point and the corresponding point extending from the Wisconsin shore is about a quarter of a mile in width. Beyond these points the waters again widen out to a width of more than a mile in what is known as Upper St. Louis Bay, with Big Island at its southwesterly end, more than two miles from Grassy Point. From here on the waters have well defined banks and the admitted characteristics of a true river. Up the river southwesterly from Big Island a distance of several miles is the Village of Fond du Lac, formerly a trad-

ing post of the Hudson Bay Company and the Indian Village referred to on Nicollet's map and in the Enabling Acts.

The various depths and channels of these waters are thus tersely stated in the opinion of the Supreme Court:

"Meade's Chart indicates: A depth of not over eight feet across the bar at "The Entry." A deep channel through Superior Bay; rather shallow water with a ruling depth of eight feet in Lower St. Louis Bay; eight feet of water on a fairly direct course, about a mile in length, from the deep channel south of Grassy Point and east of Fisherman's Island to the deep water immediately westward of the bar, about seven-eighths of a mile northeast of Big Island. It further discloses a curving channel along the west side of Grassy Point and thence close to the Minnesota shore and around Big Island, with a depth of fifteen or more feet except at the bar, where there are only ten, possibly eight, feet. To the South of Big Island lies the well-known and formerly much used course indicated on Lieutenant Bayfield's Map."

Meade's Chart, referred to by the Court, was made in 1861 under the direction of George Gordon Meade, then a Captain of Engineers. It shows soundings taken with apparent care and correctness throughout the waters in question, these soundings being indicated on the map by figures and depth contour lines. A rough outline of the whole situation sketched from Meade's Chart follows:



Fisherman's Island, also referred to by the Court, is a small piece of land not indicated on the sketch from Meade's Chart. This island has been largely obliterated by the government improvements in the channels of these waters, but before those im-

provements were made this island was about 100 feet long by 50 feet wide, and was located in Upper St. Louis Bay, approximately midway between Grassy Point and Big Island. As to the Bayfield Map the court says:

"During 1823-1825 Lieutenant Bayfield of the British Navy surveyed and sounded the westerly end of Lake Superior and the lower waters of St. Louis River. A chart compiled from data so obtained (1:49,300,—4108 feet to the inch) and published in 1828, shows the general configuration and lays the proper sailing course southward of Big Island. Prior to 1865 this was the only available chart and navigators often used it."

The court, with entire correctness and incisive brevity, further says:

"The level of the water within all the bays is substantially the same as in Lake Superior; such current as exists flows in opposite directions according to the wind and movement within the Lake. The shores are irregular and much indented.

"Since 1893 the United States have dredged a twenty-two foot channel through Upper St. Louis Bay and around Grassy Point; thence through Lower St. Louis Bay (where there are two branches) and between Rice's and Connor's Points; thence through Superior Bay to "The Entry" and into the Lake. Extensive docks have been constructed from the Minnesota shore in both the upper and lower bays; those extending southwest from Grassy Point across the boundary claimed by Wisconsin. The general situation of 1846 continued until long after 1861, but during the last thirty years extensive improvements required for a large and busy harbor have produced great changes."

The line called in question is in Upper St. Louis Bay between Grassy Point and Big Island, that in Superior Bay and Lower St. Louis Bay having been settled by tacit agreement for many years. Docks worth millions of dollars have been built out from the Minnesota shore on the westerly side of Grassy Point and crossing the boundary claimed by Wisconsin, but wholly on the Minnesota side of the center of the waters, and also on the Minnesota side of the dredged channel referred to by the court. For some seven years both Wisconsin and Minnesota have taxed large portions of these docks claimed to be in both states. Tax sales followed and the titles became inextricably confused. Indeed at one time some person (claimed by neither state nor its adherents) went so far as to paint the state line on one of these docks at the point claimed by Wisconsin.

In 1911 an attempt was made to settle the dispute by a joint boundary commission appointed by the respective states. This commission convened in August, 1911, at Superior, and in

August, 1912, at the Minnesota capitol in St. Paul. The report of the commission from each state supports thoroughly the contentions of that state, but the joint report reads:

"The controversy existing between the two states concerning the boundary line is fundamental and substantial, and we find and determine that there is no opportunity to an adjustment of this controversy which does not involve a complete surrender by one or the other of the states of its position and contention with reference thereto. We therefore agree that this commission can arrive at no satisfactory adjustment of these differences."

Various suits between private persons owning property on the shores of the respective states in the disputed locality were commenced in the succeeding years, and finally in October, 1916, the attorney general of Minnesota made a motion for leave to file a bill of complaint against the state of Wisconsin in the Supreme Court of the United States. A subpoena in due form was served thereafter on the governor and attorney general of Wisconsin, and on March 6, 1917, Wisconsin's answer and counterclaim was filed, followed six weeks later by Minnesota's reply. Thereafter a commissioner was appointed by stipulation to take the testimony, which was heard in Duluth and Superior throughout the months of August and September, 1917. The case was briefed at length, and argued before the Supreme Court on October 16 and 17, 1919.

As has been stated, the controversy comes from conflicting interpretations of two portions of the Enabling Acts. Minnesota has always contended (at times, as in the report of its boundary commission in 1912, as the only reason for its claims) that the mouth of the St. Louis River is southeast of Big Island, where the physical characteristics of a true river end and the features of a lake begin, and that the boundary through the disputed waters, they being part of the lake, was therefore in the center of those waters.

Although the supreme court of Wisconsin[27] and the lower federal courts[28] had come to the conclusion that the mouth of the St. Louis River was between Minnesota and Wisconsin Points, the United States Supreme Court, at two different times, had refused to decide this question. In the Duluth ship canal case, *Wisconsin v. Duluth*,[29] the court said:

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[27] Bright v. Superior, (1916) 163 Wis. 1, 156 N. W. 600.

[28] Norton v. Whiteside, (1911) 188 Fed. 356; Whiteside v. Norton, (1913) 205 Fed. 5.

[29] (1877) 96 U. S. 379, 24 L. Ed. 668.

"Whether these bays are considered as parts of Lake Superior or as mere expansions of the river, is in our view immaterial."

Again, in the case of *Norton v. Whiteside*,[30] the court said:

"The question whether the stretch of water and the channel through it be treated as a part of Lake Superior, as asserted by the complainant, or be considered at the point in issue as a mere continuation of the St. Louis River, as asserted by the defendant (a view held by both the courts below), is wholly negligible."

This question therefore was an open one before the Supreme Court and was argued strenuously by counsel for both states.

Minnesota's evidence on this point substantially proves:

(1) That the waters of Lake Superior and not those of the St. Louis River are dominant at the locality in question; (2) That if the water coming down the St. Louis River should be diverted or dried up, the disputed waters would still remain at approximately the same level as they now are; (3) That the oscillations and changes in the lake's surface affect the waters as far as the end of Big Island, but not substantially above that point; (4) that the waters in the disputed locality flow in both directions rather than in one direction as in the case of a river; (5) That the waters of these bays are subject to the ebb and flow of the true tide of the lake.

Though Wisconsin offered the expert testimony of certain professors from its state University which tended to lessen in some respects the effect of Minnesota's position on this point, the sole reliance of its attorney general before the Supreme Court, so far as this phase of the case is concerned, was that the mouth of the St. Louis River was an unambiguous term, definitely understood and intended to describe the space between Minnesota and Wisconsin Points, this understanding being indicated by historical data both before and after 1846.

Wisconsin's counsel summarize the position of that state in this connection thus:[31]

"The mouth of the St. Louis River, as will be amply proven, was so fundamental a term that it did not require location. The mass of haphazard conjecture; the poor stock of oral tradition and hearsay based on the uncertain memory of living witnesses seeking to recreate and reestablish the mental content of a legislative body that wrote the language in question three-quarters of a century before this record was made up, is overwhelmed by the long line of witnesses, of whose utterances and writings this court must take judicial notice. With something of splendid pageantry they throng to its attention from every rank and station and from most diverse quarters of the land. Savage and

[30] (1915) 239 U. S. 144, 60 L. Ed. 249, 36 S. C. R. 54.
[31] Brief of Wisconsin, page 3, in case of Minnesota v. Wisconsin.

scientist, courtier and coureur du bois, combine to weave a strand of narrative in which the golden threads of heroic legend are woven with the coarser fibre of a sometimes bestial commonplace. Grenville, John Jay, John Quincy Adams, Clay, Webster, Benton, Calhoun, and Lewis Cass appear; the ascetic figure of Nicollet with his ribbon of the Legion of Honor, burning out the slender stock of his vitality in his zeal for scientific attainment and coveted admission to the Academy of France; David Thompson, gone to his too little distinguished grave, leaving a continent his debtor by the magnitude and accuracy of his scientific exploration; David Dale Owen, Schoolcraft, James D. Doty, now being honored as the "founder of Wisconsin," Alexander Ramsey, first governor of Minnesota Territory; Mackenzie, voyager to the frozen northern seas and discoverer of the mighty river that bears his name,—all pause to register confirmation of its long standing significance and bring to a converging focus from their diverse angles, one continuous, undeviating, historic meaning of the phrase."

While one may doubt whether the court was required to take judicial notice of all the writings of the statesmen and explorers on which Wisconsin relied, (practically none of which were introduced in evidence), and while the positiveness and vividness of the conclusions quoted may be a bit exaggerated, those conclusions are borne out substantially by the facts. Minnesota's contention on this point was based almost exclusively on the physical aspects of the situation: where the mouth of the river actually was; while Wisconsin's position was based on the historical data: where Congress must have intended to locate the mouth of the river, taking into consideration the information which must have been called to its attention.

The other phase of the controversy is the more important, not only as indicative of the development of the principles of law involved in this type of cases, but in the decision itself, though until the bringing of the action it was largely neglected by Minnesota's adherents. Wisconsin took the position that the "curving channel along the west side of Grassy Point" was the main channel of the St. Louis River and hence the state line. Minnesota claimed that the shallower but more direct course also described by the court in the above quotation, was the main channel within the contemplation of the Enabling Acts, assuming that the disputed waters were part of the river and not of the lake. On this point almost all of the early navigators in these waters were called. Their testimony contains much of the early history of the development of a new country, and, coming as it does from

the very men who in a large measure made that history, it bears an added interest. Indeed it is almost an autobiography of the country at the head of the Lakes.

Only a summary of the evidence adduced and positions taken by the two states on this point can be included herein. No evidence of navigation in 1846 was obtainable. Admittedly, as stated by the court, "such vessels as plied there in 1846 and long thereafter, moved with freedom in different directions." But Wisconsin contended with great earnestness,—and this contention was very much the corner stone of its argument on this point,—that in the absence of navigation the line of deepest soundings determined the boundary. Notwithstanding this insistence that the line of deepest water controlled, Wisconsin took issue with Minnesota as to the actual line of navigation when navigation came to these waters and in this connection called many elderly navigators who testified in substance that the deep water channel through these waters was used exclusively in the navigation of the early days, except in going on the so-called cut-off course south of Big Island. (Neither state contended that the cut-off course was the boundary, whatever rights Minnesota may have had so to contend admittedly having been lost years before the beginning of the action.) The number of Wisconsin's witnesses on this point was larger than that of those for Minnesota, but on the whole they did not disclose so much experience in navigation as did the witnesses for Minnesota. But Wisconsin's case in this connection was supported by the more or less uniform understanding of the officers and employees of the corps of engineers stationed at Duluth to the effect that the channel contended for by Wisconsin was the main channel of the St. Louis River. On one of the maps published by the corps of engineers (1886) the words "main channel of the St. Louis River" are superimposed on the channel contended for by Wisconsin, and in later maps the words "channel of the St. Louis River" are so superimposed. In a survey of Fisherman's Island made for the General Land Office of the Department of the Interior the words "main channel of St. Louis River" are clearly marked on the Wisconsin channel, and, finally, in 1903, Captain Gaillard, the officer then in charge of Duluth office, at the request of the chief of engineers, wrote to the governors of Minnesota and Wisconsin that the line contended for by Wisconsin was thought to be the boundary between the states, and suggested that a new line be

agreed upon in view of the changes made by the government improvements and by industrial developments.

Minnesota took issue with Wisconsin squarely on its deepest soundings theory, and argued that the navigation which first came to these waters and continued up to the government improvements in the early nineties was determinative of the main channel of the river (if it was a river), and that this navigation, in so far as it went north of the Island, was on the shorter course near the middle of the bay. Minnesota's witnesses, including many of the living early navigators of these waters, testified positively that, while the southern channel was largely used, the boats that went north of the Island followed the course contended for by Minnesota because it was shorter, broader and of sufficient depth for the boats of that day, and that the only time the deep water channel was used was in going to a small sawmill on Grassy Point. Minnesota argued that the corps of engineers had no power to determine the boundary line between states, that the maps relied on by Wisconsin were made at times and under circumstances which indicated clearly that the engineers had no appreciation of the criteria going to determine a boundary line between states bordering on a navigable river,—an argument that was illustrated by the evidence of the only government engineer called by Wisconsin, whose testimony showed that his idea of the boundary was the line of deepest water, and who admitted that Minnesota's witnesses were better qualified than he to determine as to the actual navigability and navigation of these waters.

Such were the claims of the two states. Minnesota: that the mouth of the river was at Big Island, generally supported by the physiographic and hydrographic conditions; Wisconsin: that the mouth of the river was at the Superior Entry, supported by historic and biographic references indicating an understanding that such was the fact; Minnesota: that the main channel of the river through the waters in question was on the short course near the middle of the bay, based on actual navigation thereon when such navigation came to these waters, but somewhat lessened in effect by the fact that the larger portion of the traffic went not to the north of Big Island, but to the south thereof, and on a course not claimed as the boundary line by either state; Wisconsin: that the line of deepest soundings controlled in the absence of navigation, but that the actual navigation of the early

days was in fact on the deep water channel, and that the corps of engineers, in a more or less decisive manner, had always regarded such channel the main channel of the river.

V. The Decision of March 8, 1920.

The court decided the location of the mouth of the river in two short paragraphs:

"The complainant maintains that within the true intendment of the statute the 'mouth of the St. Louis river' is southeast of Big Island, where end the banks, channel, and current characteristic of a river and lake features begin. On the other hand, the defendant insists, and we think correctly, that such mouth is at the junction of Lake Superior and the deep channel between Minnesota and Wisconsin points,—'The Entry.'

"It is unnecessary to specify the many facts and circumstances, historical and otherwise, which lead to the conclusion stated. They seem adequate notwithstanding some troublesome objections based upon the peculiar hydrographic conditions."

No law was involved in this point and its determination without discussion is probably as satisfactory as if the reasons inducing the court to come to its conclusion had been outlined in detail. The decision, in this connection, when the arguments of both states are considered, can be taken to mean that the court is concerned more with what must have been in the mind of the Congress than what the actual conditions were,—a conclusion that is hardly in line with the theory of the *thalweg*,—but the point is narrow and the court has put its decision in such form that the general proposition remains open,—it may be that Minnesota's evidence as to the actual conditions was not thought convincing.

As to the second point the court says:

"The doctrine of thalweg, a modification of the more ancient principles which required equal division of territory, was adopted in order to preserve to each state equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water.

"As we view the whole record, the claim of Wisconsin cannot prevail unless the doctrine of thalweg requires us to say that the main channel is the deepest one. So to apply it here would defeat its fundamental purpose. The ruling depth in waters below Upper bay was 8 feet and practically this limited navigation to vessels of no greater draft. For these there was abundant water near the middle line. Under such circumstances Minnesota would be deprived of equality of right both in navigation and to the surface if the boundary line were drawn near its shore.

"A decree will be entered declaring and adjudging as follows: That the boundary line between the two states must be ascertained upon a consideration of the situation existing in 1846, and accurately disclosed by the Meade Chart. That when traced on this chart the boundary runs midway between Rice's point and Connor's point, and through the middle of Lower St. Louis Bay to and with the deep channel leading into Upper St. Louis bay, and to a point therein immediately south of the southern extremity of Grassy point; thence westward along the most direct course, through water not less than 8 feet deep, eastward of Fisherman's island, and, as indicated by the red tract "A, B, C" on Minnesota's exhibit No. 1, approximately 1 mile, to the deep channel and immediately west of the bar therein; thence with such channel north and west of Big island up stream to the falls."

The decision, therefore, was wholly in Minnesota's favor, though on a point that was not much argued in the many years the question had been at issue prior to the bringing of the action. As a practical result of the decision the Minnesota shore line is rendered vastly more valuable than if a contrary conclusion had had been reached, and in all probability the Minnesota owners who have paid taxes to Wisconsin (in one case more than $40,000) will be able to recover the sums so paid.

The decision definitely determines that the deep water channel is not necessarily the main channel of a navigable river constituting the boundary line between states, either in the absence or presence of navigation at the time the states were formed. The basic purpose of the doctrine of the *thalweg*, it seems, clearly justifies this holding, though there are some statements in the textbooks and in the decisions which indicate a contrary understanding. In definitely settling this question, so earnestly argued by counsel for Wisconsin, the decision in this case adds distinctly to the body of law applicable to cases of its type, and defines the rules theretofore laid down in such cases.

Wisconsin's deep channel theory out of the way, the difficulty with Minnesota's case lay not in the strength of Wisconsin's evidence but in the weakness of Minnesota's own testimony. As

has been indicated, Minnesota's evidence showed that the bulk of the early traffic was to the south of Big Island in a channel concededly not the state line. After stating that the south channel was never accepted as the line, the court says:

"The evidence convinces us that as navigation gradually increased prior to 1890, the northerly course in Upper St. Louis Bay commonly followed by vessels going to or coming from points above Big Island was not along the narrow curving channel skirting Grassy Point, but over the shorter one near the middle of the bay."

The conclusion to be drawn is not that the court thought the main channel shifted from one channel to another, but that the northerly course argued for by Minnesota satisfied the underlying theory of the principles of law applicable, and accomplished a solution that was not only practical but altogether just. The course determined upon by the court may not, to him who reads the evidence in detail, seem to have borne the largest amount of the early commerce, but it did bear more than the channel contended for by Wisconsin, and the underlying reasons supporting the doctrine of the *thalweg* seem fairly to require its application to the course chosen in the absence of a claim that the south course was the main channel. The decision, in this connection, shows the court is interested keenly in the real justice of the matter, possibly even more so than in the technical application of the precedents, a conclusion which, at least in cases of this type, must commend itself generally.

One further point may be mentioned in connection with the case. It was argued in the case of *Whiteside v. Norton*,[32] that when the federal government, under its reserved power to improve navigation, has straightened and deepened the navigable channel within the original banks, the boundary line should follow the channel so deepened and straightened. The circuit court of appeals directly disapproved this argument and held the changes caused by the government analogous to avulsion. The same point was argued, though only briefly and somewhat parenthetically, by counsel for Minnesota in this case, but it was not referred to directly in the court's opinion. The opinion, however, does contain the following sentence:

"It seems appropriate to repeat the suggestion made in *Washington v. Oregon*, 214 U. S. 217, 218, 55 L. Ed. 971, 972, 29 Sup. Ct. Rep. 631, that the parties endeavor, with consent of Congress, to adjust their boundaries."

[32] (1915) 239 U. S. 144, 60 L. Ed. 249, 36 S. C. R. 54.

On authority which cannot be questioned it may be stated that the court in the portion of the opinion last quoted had in mind the advisability of both states' agreeing that the dredged channel should be the state line, and to this extent at least the point must have impressed the court. Indeed it seems not inconceivable, in view of the court's general attitude in this case, that this argument might be adopted in a case where no other solution accomplishing justice could be reached. Perchance, too, the man who first suggested that "the constitution follows the dredge," taunted though he has been by his friends for his argument based thereon, may one day be taken to have been something of a prophet.

Although the decision was in Minnesota's favor the costs of the action were divided equally between the two states, in accordance with the rule in this type of cases above indicated. In its opinion the court failed to follow the usual practice of appointing or providing for the appointment of a commission to survey the line determined upon, and for that reason no decree has been entered up to the present time. But a joint commission is being agreed upon by the states, and after a survey by that commission, the line stated in the opinion will be adjudged and decreed to be the boundary between Minnesota and Wisconsin. Probably in no future case will so much of the early history of the two states be available; certainly it will not be available in the form used in this case. The opinion is not only a scholarly statement of the facts and law on a series of questions not entirely clear on either side, but extends and defines the principles of law previously laid down in cases of this type in a manner which accords that high measure of justice which should obtain in all controversies between sovereign states.

HARVEY HOSHOUR.

DULUTH, MINNESOTA.

INDUSTRIAL COURTS:

WITH SPECIAL REFERENCE TO THE KANSAS EXPERIMENT

EMPLOYERS and employees often fail to realize that their objects, while not identical, are mutual. Neither can exist without the other, but despite the necessity for co-operation and good working methods, first one party and then the other attempts to dominate. The struggle between these two contending forces is not new but dates well back in history. For example, as early as 1349 England regulated the rate of wages in the first of a long series of Statutes of Laborers,[1] because the Black Death had reduced the numbers of workers, thus increasing the demand for laborers with a corresponding increase in wages. But it should be noted that the wage set by these laws was a maximum and not a minimum. Henry VIII destroyed the guilds which had performed many acts of helpfulness for workers, such as loaning them money without interest and assisting in favorable apprenticing and pensioning.[2] Elizabeth carried the degradation of the laborers one step further by the passage of the Statutes of Apprentices,[3] but she attempted to atone for the havoc done by the enactment of the Poor Laws which brought government assistance to the most poorly paid workers.[4] Enough examples have been cited to show that attempts at legal regulation are not new experiments. These acts for the most part were repressive as far as labor was concerned. They were passed in the interests of the landed, employing gentry. With the Industrial Revolution in England class consciousness was still further emphasized. The employers became a distinct set of capitalists while the employees without capital had nothing to sell but personal service. Manufacturing changed from a domestic to a factory system, thus building up the great modern city. The early repressive legislation against labor remained in force until 1802 when the first Factory Act which was distinctly in favor of the laborer was passed but it was not until 1825 that the most obnoxius laws against labor were repealed. Finally with the extension of suf-

[1] Thorold Rogers, "Work and Wages," 223; 227.
[2] Ibid., 346. [3] 5 Eliz., cap. 4. [4] 43 Eliz., cap. 3.

frage and the extra-legal formation of workers, trade unions were legalized and the practice of collective bargaining established. The Factory Acts of England gave the cue for the early legislation in the United States and Australasia which took such forms as improvement of working conditions, employers' liability, hours of labor and compensation, but the most recent tendency in state regulation is to provide machinery for the settlement of industrial disputes between employer and employee. The state in the interest of industrial peace has been compelled to interfere in behalf not only of the two contending parties, but also the general public. The employers have organized gigantic combinations insisting on the sanctity of vested interests, freedom of contract, etc., which have brought about frequent resort to lockouts and black lists. The laborers in turn as a matter of self defense have organized huge labor unions whose methods of industrial warfare are strikes, boycotts and picketing. The present activity of the state is directed toward a settlement of industrial disputes and it is this phase that is to be dealt with in this and following articles. The discussion which follows will deal with (1) The Australasian Acts on industrial conciliation and arbitration; (2) the Canadian Disputes Act; (3) The British Industrial Court and Courts of Inquiry and (4) the Kansas Court of Industrial Relations. If the chronological order were observed, the Australasian acts with their adjudication should receive first treatment, but the situation in Kansas has aroused such widespread interest and the recently enacted law has such novel and drastic features as to justify devoting the present article to it, reserving the other acts for later treatment.

The Kansas Court of Industrial Relations

I. Steps Leading to Passage of the Kansas Law

Kansas with her accustomed initiative and energy is trying an experiment with the settlement of industrial disputes that may prove to be the solution of the warfare between capital and labor. The people of Kansas are courageous and far visioned, whether it be furnishing the prelude to the Civil War, prohibiting the manufacture and sale of intoxicating liquors, providing for the guaranty of bank deposits, curbing the railroads, furnishing a model for "Blue Sky" legislation, providing state mined coal in the face of opposition from both coal operators and

striking miners or creating a court of industrial relations which looks toward the settlement of industrial disputes.

By the enactment of this last law, Kansas is running true to form. She now occupies the center of the stage. The plot was a strike of coal miners just as winter was coming on, to frighten the people into compelling the coal operators to grant the miners' demands; the dramatis personae included coal operators, high officials of the labor unions, striking miners, judges of the courts, volunteer coal miners, members of the state legislature, state and federal troops and a doughty governor, Henry J. Allen. The scenes shifted rapidly; the time included only a few weeks; the action was fast and at times melodramatic. Then come the denouement, a law bottomed on the principle that grovernment has the same power to protect society against the ruthless offenses of an industrial strife that it has to protect against recognized crime.

The steps leading to the enactment of the new industrial legislation may now be traced. During the world conflict the struggle between capital and labor, although ominous at times, was held somewhat in leash by appeals to patriotism and by strong governmental restraint, but as soon as the war was closed and the fuel ban lifted, the coal operators began raising the price of coal. The coal miners countered by contending that if the war was over for the operators, it was over for the miners, and insistently demanded a sixty per cent increase in wages and a reduction in working time to six hours a day five days a week. Upon being denied their demands, a coal strike was called in the dead of winter while the two sides to the controversy took the position that the public might freeze while they somewhat leisurely attempted to settle their quarrel by the old methods. Governor Allen discussing the situation before the League of Industrial Rights, said:[5]

"The idea that government could do anything about it was new. Ever since the episode of the Adamson Law, when the four Brotherhoods of American Railway Trainmen issued orders to Congress and held the stop watch while intimidated statesmen passed the Adamson Law, there has been a feeling that this country would have a recurrence of government by coercion whenever organized labor in any craft gained a solidarity sufficient to threaten the public with a general calamity."

The bewildered and frenzied public, threatened with the tragedy of a prolonged strike, closed the damper in the furnace

[5] Saturday Evening Post, March 6, 1920, p. 6.

and anxiously scanned the papers for reports on the progress made in Washington between the debating representatives of the coal operators and the United Mine Workers of America. While these negotiations dragged on, Attorney General Palmer filed a bill with Judge Anderson of the federal bench in Indianapolis praying for a writ of injunction under the Lever Act to restrain the officials of the United Mine Workers of America from continuing the strike, and Judge Anderson, acting upon the technical assumption that the war was not over, issued the writ and then committed the officials of the labor unions to jail for contempt of court for disregarding the writ, when finally the officials, in order to secure release from jail, went through the form of calling off the strike, but the strike went on in most places. The Kansas miners were 100 per cent unionized and in open defiance of Judge Anderson's order continued the strike. It was at this juncture that the Kansas state officials under the leadership of Governor Allen, decided that the people of Kansas had rights that must be respected.

The writer surmises that the determination of Governor Allen to resort to extraordinary methods rests upon the theory that the public is entitled to a continuous and sufficient supply of the necessaries of life, and to uninterrupted, efficient and reasonable service in certain employments, and that employers' lockouts and laborers' strikes, while presumably directed primarily at a warring enemy, in reality are directed at the public that had nothing to do with the cause of the quarrel.

The heroic method decided upon was to petition the supreme court of the state of Kansas to appoint receivers to take over the mines, operate them with volunteer workers and furnish coal temporarily to the people of Kansas. In other words, the state of Kansas was to act as parens patriae for the people. Accordingly Richard J. Hopkins, Attorney General of Kansas, appeared as relator against the coal operators of southeast Kansas, defendants.[6] In the petition the relator states that practically all the coal mines in the state of Kansas and all the coal available in the state were owned and controlled by the defendants, a corporation organized and doing business under the laws of the state of Kansas;[7] that by reason of the general strike nearly all of the coal mines in the United States had been closed, thus making it im-

[6] The Kansas Coal Case—State of Kansas, ex rel. Richard J. Hopkins Attorney General v. Mallams-Halsted Coal Company et al., No. 22700.

possible for the people, the public utilities and the state of Kansas to obtain a supply of coal necessary for the general welfare unless the mines owned and controlled by the defendants were operated to the full extent of their capacity;[8] that the defendants, acting through an association called the "Southwest Interstate Coal Operators' Association" had allowed the mines to remain closed since the first day of November, 1919, with no prospect of work being resumed at an early date;[9] that the public need was so great and the magnitude of the work so apparent as to justify the appointment of a receiver or receivers at once.[10] The petition of Attorney General Hopkins closed as follows:[11]

"Wherefore, your relator now prays that a receiver or receivers be at once appointed by this court and be instructed to take immediate possession of all of the mines owned or controlled by said defendants and each of them, within the counties of Cherokee and Crawford in this state, and all machinery, implements, supplies and all other property, real and personal, used in connection therewith and useful in the operation of said mines and the production and distribution of coal therein and therefrom, and that said receivers be directed at once to operate said mines to their full capacity, so far as practicable, and to produce coal therefrom and sell and distribute the same in the state of Kansas, for the use of the inhabitants of the state of Kansas, and for that purpose be empowered and directed to employ all labor and agents necessary, and enter into and perform all contracts and furnish all material necessary and appropriate to the purpose of producing, selling and distributing coal, and to do all other things necessary to be done for said purpose; and that all of the corporation defendants herein be ousted from continuing and exercising any powers in pursuance of the agreement referred to herein and that all other defendants herein be forever enjoined from participating with said corporation defendants in carrying out and exercising said combination and agreement."

On November 17, 1919, the supreme court entered an order appointing three receivers, one an operator, one a miner and the third a business man not connected with the mining industry. The operator and the miner declined to serve and the court upon application appointed another receiver, fixing the bond of each at $25,000. After the two receivers had qualified, the supreme court gave them authority to borrow not to exceed $100,000 for current expenses and issue receivers' certificates to bear six per cent interest.[12]

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[7] Ibid., 1-2.
[8] Ibid., 2.
[9] Ibid., 3.
[10] Ibid., 3.
[11] Ibid., 3-4.
[12] Ibid., 5.

On the same day the first receivers were appointed, Governor Allen went to Pittsburg, Kansas and spent a week endeavoring to induce the miners to resume work and prevent a coal famine. He asked them to work for the state at the old wage, with the state's guarantee that any benefits the miners might gain from the settlement at Washington would be retroactive; he also pledged that if the strike were not settled by January 1, 1920, the state would fix a satisfactory wage which should be retroactive. Many of the individual miners wished to accept the proposal and return to work but all the union officials, in open defiance of federal Judge Anderson's order, insisted that the strike should continue.[13] All resources having been exhausted, Governor Allen called for volunteers to dig coal, and the so-called socialistic experiment in Kansas began.

When Governor Allen issued the call for volunteers to dig coal, the response was emphatic and instant. Within a few hours more than ten thousand men from every walk of life enrolled and waited for a summons to the coal fields. The first crew of volunteer miners went into the strip pits December 1. Along with them went a regiment of Kansas National Guardsmen and a detachment of federal troops to guard the mines and preserve law and order. The local striking miners were sullen and had assumed an unsympathetic attitude toward the public request for coal, taking the position that it is better that the public suffer from cold than that miners be treated unjustly by the operators. One incident that had wide circulation in the state and that had a marked influence on the determination of the volunteer coal diggers was the story of the deplorable situation at Mount Carmel Hospital, in Pittsburg, the center of the coal strike. This institution's coal supply being exhausted an appeal was made to the city officials who pointed out that the sick in the hospital would suffer for lack of fuel and asked the union officials to give permission for a few union miners to return to work in order that a sufficient supply of coal might be furnished to the hospital. The request was promptly refused. Upon hearing of the refusal, Simon Brothers, two business men who owned a coal mine and operated it for their own retail trade and who were old miners themselves, put on mining clothes, dug fifteen tons of coal and delivered it to the hospital at night. But spies informed the union officials and these two local business men were ordered

[13] Saturday Evening Post, op. cit.

not to furnish another pound of coal to the hospital upon threat of being boycotted. Such stories maddened the arriving volunteer workers and made them grimly determined to prevent a coal famine. Moreover, they were a vigorous type of men. Many of them were members of the American Legion and most of them wore khaki. Army uniforms were in evidence everywhere. One of the striking miners said: "We seem to be up against the uniform proposition all around." The temper of these miners who went into the coal pits without union cards was well expressed by a volunteer who wore the insignia of the Rainbow Division upon his shoulder, as follows: "We are here to settle this thing up and get back home as soon as we can. Bring on your mines."

The first day in the mines produced coal which was mined in freezing weather. At night the men slept in tents and on the morning of December 2 washed their faces in ice-cold water, and ate their breakfasts muffled up in overcoats, ear muffs and gloves. But the college boys, and many of them were present, said: "We wouldn't think of postponing a football game a day like this, and it is easier to dig coal than it is to play football." They then gave their college yells and shouted the volunteer slogan "Lets go!" These inexperienced workers imbued with a dauntless spirit furnished coal and the second day the first car of coal was billed to the mayor of Coldwater, Kansas.[14]

On December 3 a Santa Fe switching crew at Frontenac, a mining camp near Pittsburg, refused to move a crew of volunteers, saying they feared physical violence at the hands of the miners, but on December 4 these switchmen were transferred and the railroads announced that satisfactory arrangements had been made for handling the volunteer workmen's trains and for switching coal cars hauling coal. Thus a sympathetic strike was averted.

Governor Allen on December 5 sent for a force of clerks and stenographers and established a temporary office in Pittsburg where he could be on the scene of action. He called for volunteer physicians and began the erection of community houses to care for the physical and social welfare of the volunteers. Every day saw an increase in the production and distribution of coal. On December 9 telegrams came from the east saying that the general coal strike was practically settled on the basis of President Wilson's propositions. December 11 and 12 representatives

[14] Kansas City Star, Dec. 1, 2.

of District 14, United Mine Workers of America, met Governor Allen and Judge J. W. Finley representing the receivers of the supreme court and signed an agreement by which 13,000 union miners who had been on a strike since November 1, were to resume work under the state receivership temporarily and on December 13 the volunteer miners began returning to their homes. In the settlement Governor Allen would not consider the old dispute of the last summer. He said: "I came here to mine coal and am not going back to last July to settle labor troubles." Further he stated: "Not a word about withdrawing the troops before the men go to work. The movement of troops is a matter of government. The troops will move when the governor gives the order;" also, "The receivers represent the supreme court. It remains entirely with the court when the receivers are to be discharged."

What was accomplished during the two weeks' state receivership? More than 2,000 men—soldiers and volunteers—were in Pittsburg and vicinity and there was not a riot or disturbance, not even a street fight between any of the volunteers and the miners. The volunteers found machinery to work, trains to run, engines to switch, hoisting gauges to operate, powder to explode for blasting purposes and dynamite to be touched off, but there was not a single serious accident and but little sickness.[15]

Governor Allen in his message to the special session of the Kansas legislature touching the two weeks' receivership said:[16]

"Under state operation, in two weeks, the mines that had been lying idle in the dead of winter, with the machinery out of repair and the pits flooded with water, were placed in working condition by inexperienced men, many of whom had never seen a coal mine. Under weather conditions so severe that in normal times these pits would not have been operated at all, a quantity production of coal was reached. During the first ten days of the receivership, two hundred cars of coal were mined through volunteer effort in Crawford, Cherokee and Linn counties. During the entire period of the receivership something like seven hundred cars were produced, but the two hundred cars accredited to the first efforts of the volunteers do not give any adequate measure of the practical value of their services in the mines. It was necessary to expend very much time and effort to get the idle mines back into condition for operation. The work they did in restoring these mines to productivity was at least equal, in value, to the produc-

[15] Kansas City Star, Dec. 5th to 19th.

[16] Message of Gov. Allen to special session of Kansas legislature, printed in "The Court of Industrial Relations," p. 7.

tion of two hundred additional cars of coal. When the volunteers went out and the union miners returned the latter found the pits in better shape than had characterized these mines for a long time. The water had been pumped out, new drainage conditions established and the machinery placed in better condition; in some mines better equipment provided and the possibility of increased productivity established. That the action of the state, in entering the situation, not only warded off the danger of famine, but hurried forward the settlement of the strike, no thoughtful person doubts. I am told by the receivers that the proceeds from the sale of coal will take care of the cost of mining operations. On the surface these volunteer lads had but one purpose and that was to dig coal to relieve a fuel famine, but the motive that animated them was more fundamental than that. They proved that the government of the state still has power to protect the people of the state."

On December 7 Governor Allen decided to call a special session of the legislature for January 5 to deal with industrial disputes. He frankly stated that no civilization is safe when the welfare of the people is made the subject of arbitration; that we must not take from any man his personal rights or deprive men in industry of the privilege of organizing for their own benefit, but above all must stand the government and it alone must have the power of final judgment. He frankly disavowed calling the special session to enact a law against either labor or capital, but to enact a law to protect each against the other and the public against both. [17]

The special session convened January 5, 1920 and Governor Allen delivered his message in person to a joint session of the two houses. The industrial court bill which had been prepared by Judge W. L. Huggins at Governor Allen's suggestion, was introduced in both houses as companion bills. The rules were suspended and the bill advanced to second reading. In the House the bill was referred to the committee of the whole, the hearings being open to the public and the Senate. Glen Willets, chairman of the joint state labor legislative committee presided at all the meetings. In the Senate the bill went directly to the judiciary committee and was reported out nine days later. On the 11th legislative day the bill passed the Senate on the third reading by a vote of 33 to 5. The Senate bill then went to the House and was substituted for the House bill, where after a few minor amendments it was passed by a vote of 106 to 7 and became effective as a law January 24, 19 days after the convening of

[17] Kansas City Star, Dec. 7, 1919.

the special session.[18] There was a thorough discussion of the bill by representatives of labor, capital and the general public. The leading arguments advanced by these representatives will be presented after the bill as it became a law is summarized.

II. Leading Provisions of the Kansas Law

1. *Composition and Procedure of the Court of Industrial Relations.* The law creates a court of industrial relations composed of three judges to be appointed by the governor with the consent of the Senate. The term is three years and one judge is appointed each year. The annual salary of each judge is $5,000, payable monthly. The judge longest in service presides over the court.[19] The court has offices at Topeka, the capital of the state; is a court of record, which record is open to inspection, the same as the public records of the state;[20] determines its own procedure subject to the limitation that the rules of evidence recognized by the supreme court of the state are binding upon it in the taking of testimony, one copy of which must be filed among the permanent records of the court and another copy submitted to the supreme court;[21] employs a competent clerk, marshal, reporter and such expert accountants, engineers, stenographers, attorneys and other employees as may be needed to conduct all necessary investigations, inspections and hearings;[22] reports annually to the governor all its acts and proceedings, including a financial statement of all expenses;[23] gives notice to all parties interested by United States registered mail if residence or business of the parties is known, and if not known by publication in some newspaper of general circulation in the locality before any hearing, trial or investigation; appoints, when in its opinion it is necessary, a person or persons having technical knowledge of the subject under investigation, as a commissioner for the purpose of taking evidence with relation to such subject.[24]

2. *Business Affected With a Public Interest; Declaration of Purpose.* "Sec. 3. (a) The operation of the following named and indicated employments, industries, public utilities and common carriers is hereby determined and declared to be affected with a public interest and therefore subject to supervision by the state as herein provided for the purpose of preserving the public peace, protecting the public health, preventing industrial

[18] The Court of Industrial Relations, p. 31.
[19] The Industrial Court Law, Sec. 1.
[20] Ibid., Sec. 4.
[21] Ibid., Sec. 5.
[22] Ibid., Sec. 11.
[23] Ibid., Sec. 27.
[24] Ibid., Secs. 10 and 22.

strife, disorder and waste, and securing regular and orderly conduct of the businesses directly affecting the living conditions of the people of this state and in the promotion of the general welfare, to wit: (1) The manufacture or preparation of food products whereby, in any stage of the process, substances are being converted, either partially or wholly, from their natural state to a condition to be used as food for human beings; (2) the manufacture of clothing and all manner of wearing apparel in common use by the people of this state whereby, in any stage of the process, natural products are being converted, either partially or wholly, from their natural state to a condition to be used as such clothing and wearing apparel; (3) the mining or production of any substance or material in common use as fuel either for domestic, manufacturing, or transportation purposes; (4) the transportation of all food products and articles or substances entering into wearing apparel, or fuel, as aforesaid, from the place where produced to the place of manufacture or consumption; (5) all public utilities as defined by section 8329, and all common carriers as defined by section 8330 of the General Statutes of Kansas of 1915.

(b) Any person, firm or corporation engaged in any such industry or employment, or in the operation of such public utility or common carrier, within the state of Kansas, either in the capacity of owner, officer, or worker, shall be subject to the provisions of this act, except as limited by the provisions of this act."

The law declares that it is necessary for the public peace, health and general welfare of the people that the industries . . . be operated with reasonable continuity and efficiency in order that the people may live in peace and security and be supplied with the necessaries of life; nor may any person, firm, corporation or association of persons wilfully hinder, delay, limit or suspend such continuous and efficient operation except as provided by the act.[25]

3. *Jurisdiction and Power of the Court.* All the powers, authority and jurisdiction of the Public Utilities Commission as defined in sections 8329 and 8330, General Statutes of Kansas for 1915, are transferred to the court and the Commission is abolished.[26]

In case a controversy arises between employers and workers, or between groups or crafts of workers engaged in any of said industries . . . and it appears to the court that the controversy many endanger the continuity or efficiency of the industries . . .

[25] Ibid., Sec. 6. In this and the succeeding paragraphs the summary adopts as nearly may be the words of the Act but without quoting, verbatim. Where important omissions occur they are indicated.

[26] Ibid., Sec. 2.

or affect the production or transportation of the necessaries of life affected or produced by said industries . . . or produce industrial strife, disorder or waste, or endanger the orderly operation of such industries . . . the court has full power and authority upon its own initiative to summon all necessary parties before it and to investigate the controversy, temporarily protecting the status of the parties, property and public interests involved pending the investigation . . . and to investigate the conditions surrounding the workers and to consider the wages paid to labor and the return accruing to capital and the rights and welfare of the public and all other matters affecting the conduct of said industries . . . and to settle and adjust all such controversies . . . The court is further empowered to investigate and determine controversies upon complaint of either party to the controversy, upon the complaint of any ten citizen taxpayers of the community in which said industries . . . are located, or upon complaint of the attorney general of the state. After the investigation and as expeditiously as possible the court serves upon all interested parties its findings, stating specifically the terms and conditions upon which the industries . . . may be conducted insofar as the matters determined by the court may be concerned.[27] The court orders such changes, if any such are necessary, to be made in and about the conduct of said industries . . . in the matters of working and living conditions, hours of labor, rules and practices and a reasonable minimum wage or standard of wages . . . with the proviso that all such terms, conditions and wages must be just and reasonable and such as to enable these industries . . . to produce or transport their products or continue their operations in such a manner as to promote the general welfare. The terms ordered by the court continue for such reasonable time as may be fixed or until changed by the parties with the approval of the court; but if the party complies in good faith with the terms of the order for sixty days or more and finds the order unjust, unreasonable or impracticable, he may apply to the court for a modification.[28]

For guidance in the exercise of the court's powers, the law declares that it is necessary for the promotion of the general welfare that workers in any of the industries . . . should receive at all times fair wages and have healthful and moral surroundings while engaged in such work. The capital invested in such iudus-

[27] Ibid., Sec. 7. [28] Ibid., Sec. 8.

tries . . . should produce a fair return to the owners. The right of every person to make his own choice of employment and make his own just and reasonable contracts of employment is recognized, but if during the continuance of any such employment the terms or conditions of the contract hereafter entered into be found to be unfair, unjust and unreasonable by the court in any action properly brought before it, the court may modify the terms and conditions so as to make the contract fair, just and reasonable.[29]

The court has full power and authority to issue summons and subpoenas and compel the attendance of witnesses and the production of books, correspondence . . . of any industries . . . and to make all investigations necessary to ascertain the truth of any controversy. In case any person refuses or fails to obey any summons or subpoena after due service, then the court is empowered to take proper proceedings in any court of competent jurisdiction to compel obedience.[30] Further, in case of the failure or refusal of either party to the controversy to be governed by the order of the court, then the court may bring proper proceedings in the supreme court of Kansas to compel obedience to said order; moreover, in case either party to a controversy feels aggrieved at any order made and entered by the court, the party may within ten days after service of such order, bring proper proceedings in the supreme court of Kansas to compel the court to make and enter a just, reasonable and lawful order in the premises. In such proceedings in the supreme court the evidence in the case before the Court of Industrial Relations may be considered, but either party may introduce such other evidence as the supreme court may deem necessary. Such a proceeding in the supreme court is given precedence over other civil cases and the same is to be expedited as fully as possible, keeping in mind a thorough consideration of the matter.[31] Any proceeding in law or equity to set aside a decision of the Court of Industrial Relations must be brought within thirty days from the time the decision is rendered.[32]

4. *Collective Bargaining.* Any union or association of workers engaged in the operation of such industries . . . and incorporated under the laws of the state of Kansas is regarded as a legal entity and may bargain collectively; moreover, the individual members of unincorporated associations desiring to bargain

[29] Ibid., Sec. 9. [30] Ibid., Sec. 11. [31] Ibid., Sec. 12. [32] Ibid., Sec. 13.

collectively may appoint in writing a person or persons with authority to represent them and the written appointment must be made a permanent record of the union or association.[33]

5. *Unlawful Acts.* It is unlawful for any person, firm or corporation to discharge or discriminate against an employee who testifies as a witness before the court or signs a complaint or does any other thing to bring the attention of the court to any controversy; or for any two or more persons to combine or conspire to boycott, picket, advertise or carry on propaganda against any person, firm or corporation because of any action taken under the direction of the court or because the jurisdiction of the court has been invoked.[34]

It is unlawful for any person, firm or corporation wilfully to limit or cease operations for the purpose or limiting production or transportation to affect prices or to avoid the provisions of the law; but any person . . . so engaged may apply to the court for permission to cease operation; and if the application be found in good faith and meritorious, it is granted by the court; but in all such industries . . . in which operation may be ordinarily affected by changes in season, market conditions or other reasons or causes inherent in the nature of the business, the court may upon application, notice and investigation, make orders fixing rules, regulations and practices to govern the operation of such industries . . . for securing the best service to the public consistent with rights of employers and employees engaged in the operation of such industries[35] . . .

It is unlawful for any person, firm, corporation or association of persons to do any act with the intent to hinder, delay, limit or suspend the operation of any of the industries . . . or delay, limit or suspend the production or transportation of the products of such industries . . . However, it is not unlawful for any individual engaged in the operation of such industries . . . to quit his employment at any time, but he must not conspire with other persons to quit their employment, induce others to quit, engage in picketing, intimidate by threats for the purpose of inducing others to quit such employment, deter or prevent others from accepting employment for the purpose of limiting, delaying or suspending the operation of any industries . . . governed by the act.[36]

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[33] Ibid., Sec. 14.
[34] Ibid., Sec. 15.
[35] Ibid., Sec. 16.
[36] Ibid., Sec. 17.

6. *Penalties.* Any person wilfully violating the act or any valid order of the court is guilty of a *misdemeanor* and upon conviction thereof in any court of competent jurisdiction in the state is fined not to exceed $1,000 or imprisoned in the county jail for not to exceed one year or both fine and imprisonment may be imposed.[37] Moreover, an officer of any corporation engaged in any of the industries . . . named and specified or any officer of any labor union, association or persons engaged as workers in any such industries . . . or any employer of labor coming within the act who wilfully uses the power or influence incident to his official position and by such means intentionally influences, impels or compels any other person to violate the act or a valid order of the court, is guilty of a *felony* and upon conviction thereof is punished by a fine of not to exceed $5,000 or by imprisonment in the state penitentiary at hard labor for not to exceed two years or by both fine and imprisonment.[38]

7. *Emergency State Operation.* In case of the suspension, limitation or cessation of any of the industries . . . affected by the act contrary to the provisions thereof or to the orders of the court and the court is satisfied such action will seriously affect the public welfare by endangering the public peace or threaten the public health, the court takes proper proceedings in any court of competent jurisdiction in the state to take over, control, direct and operate such industries . . . during the emergency, but a fair return must be paid to the owners of the industry and also a fair wage to the workers engaged therein during the time of such operations[39] . . .

8. *Minimum Wage; Reciprocity.* The orders of the court as to minimum or standard of wages are deemed prima facie as reasonable and just and such minimum takes effect as of the time the investigation by the court began. Either party having a balance from the other may sue for it in any court of competent jurisdiction.[40]

9. *Extension to Industries not Specifically Mentioned.* An industrial controversy in any industry not specifically mentioned may, by mutual consent of the parties, evidenced by writing and by the permission of the court, be submitted to the court whose findings and orders have the same effect and force as the decisions in the industries . . . specifically mentioned in the act.[41]

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[37] Ibid., Sec. 18.
[38] Ibid., Sec. 19.
[39] Ibid., Sec. 20.
[40] Ibid., Sec. 23.
[41] Ibid., Sec. 21.

10. *Miscellaneous Provisions.* The judges of the court with the consent of the governor and at state expense may make or cause to be made within the state or elsewhere such investigations as to industrial conditions as may be necessary for the purpose of familiarizing themselves with industrial problems.[42]

The rights and remedies in the act are to be construed as cumulative of all other laws on the subject and not as a repeal except when the same are inconsistent with the act.[43]

Liberal construction of all incidental powers necessary to carry out the provisions of the act is provided for;[44] and the entire act is not to be regarded as invalid because one or more sections may be declared invalid by any court of competent jurisdiction.[45]

III. Arguments For and Against the Bill in the Kansas Legislature

The main provisions of the law having been presented, the reader is now in a position to understand the arguments advanced for and against the bill.

At the opening of the special session of the Kansas legislature, employers, labor, and the general public manifested the keenest interest. The chief arguments of labor against the bill were made by Messrs. Alexander Howatt, president of District 14, United Mine Workers of America, W. J. Lauck, statistician for the railway brotherhoods, J. I. Sheppard, special attorney for labor, Glen Willets, chairman of the joint state labor legislative committee, and Frank P. Walsh, general attorney for labor in the Middle-West and formerly a member of the War Labor Board. The different bodies represented were: Order of Railway Conductors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen, State Federation of Labor and the United Mine Workers of America.

Alexander Howatt sent out a letter to the miners in his district urging them to file protests with members of the legislature against the enactment of the bill. In the course of the letter he stated that the enactment of the bill would mean slavery for the coal miners and all other classes of labor in the state; that there is a provision in the bill for compulsory arbitration and a prohibition against calling a strike under any circumstances regardless of any injustice imposed by an employer

[42] Ibid., Sec. 24. [43] Ibid., Sec. 25. [44] Ibid., Sec. 26. [45] Ibid., Sec. 28.

upon labor. He insisted that the right to strike is the only weapon labor has by which to compel employers to listen to reason. When this right is taken away, labor is rendered helpless.[46]

Mr. Glen Willetts argued that the interests of all producers of the state, whether in field, mine, workshop, railroad or mercantile establishment, would be injuriously affected, as the bill strikes at every fundamental right that labor holds dear; that the bill has the term "collective bargaining," but as a matter of fact it destroys every vestige of collective bargaining; that it attempts to impose involuntary servitude upon the great masses of the producing people of Kansas; that organized labor in Kansas is highly patriotic and will proceed in the future as it has in the past along the lines laid down in the constitution of Kansas and of the United States but he warned the legislature that organized labor will protest to its last breath against losing its God-given right of free action.[47]

Mr. J. I. Sheppard warmly commended Governor Allen for his recent action in the coal strike and shamed labor for not not allowing a hospital in Pittsburg to be supplied with coal. He pleaded for labor to have the right to strike unimpaired until it could get a square deal, then co-operation and love in his opinion will take the place of coercion. He insisted that the bill does not need more teeth, as the tooth and claw business should stop, but if a prison sentence as the penalty is put into the law, the teeth are in another place. He insisted that depriving labor of the right to use force by the state itself using force against labor is inconsistent; that it is impossible to allay unrest with threats of jail. He argued that coal miners had a right to break contracts because the courts had permitted the public service corporations to break their contracts with the public.[48]

Mr. W. J. Lauck, statistician for the Railway Brotherhoods, admitted the public's right should be first, but pointed out that the fundamental assumption that strikes can be prevented by legal coercion is contrary to the experience of all leading commercial nations of the country, pointing out that the only effective coercion had been military in France and Russia. Legal coercion with jail penalty is practically impossible because large numbers of men cannot be put in jail and the state cannot attach trade

[46] Kansas City Star, Jan. 7, 1920.
[47] Ibid., Jan. 4, 1920. [48] Ibid., Jan. 9, 1920.

union funds. He claimed that the fundamental theory underlying the bill is unsound and unjust and urged the legislature to enact a law establishing a tribunal composed of one representative of labor, one of employers and one of the public to act as a board of conciliation and arbitration similar to the Whitely councils in Australia.[49]

Mr. Frank P. Walsh, the general attorney for labor in the Middle-West made a seven-hours speech against the bill. Mr. Walsh sketched the formation and growth of labor unions and dwelt at length upon the great benefits that had come out of the right to strike, a right which he called an industrial weapon for coercing, if need be, a reluctant employer into granting an approximate measure of justice to laborers. He pointed out that the struggle of labor has been cotemporaneous with the development of human freedom as against economic oppression. It is a struggle "toward a higher goal of living and a more fair and beautiful life." The strife of modern industry is a struggle not between those who have and those who have not, but between the actual producer of the commodity and those who live off the actual producer of the commodity. He insisted that the bill contains all the bad features of compulsory arbitration and none of the good ones, arguing that it is un-American and violates the constitution both of Kansas and the United States. It provides a so-called court which is nothing but an administrative commission with the power of life and death given to a body of three men who can scourge labor with a cat-o-nine tails. It, in his opinion, provides an iron band around the state of Kansas and attempts to wipe organized labor off the map. It is undemocratic as the judges are to be appointed by the governor and not elected by the voters. He pointed out that jokers in the bill would permit industrial atrocities as employers might operate in a chosen season and under favorable conditions, then having a large supply of commodities on hand, close down and throw labor out of employment during the dull months. He charged that the employers of labor had brought the Bolsheviki into this country, in order to get cheap labor. But he was not afraid of Sovietism in this country, especially between the Ohio river and the Rocky Mountains. He insisted that organized labor is patriotic and pointed to the fact that not a single day of production of war materials was lost because of labor's attitude during the war.

[49] Ibid., Jan. 13, 1920.

Further he stated that organized labor did not wish to incorporate because it is inexpedient to do so, that it is impossible to hold labor to strict terms of a contract because labor cannot barter away human relations such as "the laughter and the tears, the joys and sorrows of human beings, the efforts of human beings to make the world more beautiful and advance the human race." He said organized labor is opposed to every section and every utterance of the bill except the object to be obtained through its passage, namely, continuous operation of industries and such settlements as will produce industrial peace, but the methods provided in the bill would not produce these results. He characterized the unrest of labor as a divine unrest and insisted that democracy will find a way to settle its labor disputes through co-operation rather than the exercise of autocratic powers.

Mr. J. S. Dean speaking against the bill in behalf of the employers, said that they opposed it because it gives the court of industrial relations power to control not only wages but also the hours of labor and the living conditions of the workmen, and further because in case of labor disputes upon the failure to submit to the court's orders, the state may take over and operate an industry pending the settlement of the trouble. This action amounts to state socialism. He said the employers are chiefly opposed to that part of the bill which declares the manufacture of food, fuel and clothing to be under state control. He then made an argument against the constitutionality of the bill and asked for amendments. He closed by saying that not all strikes are for higher wages or shorter hours, but these demands are sometimes made merely to camouflage the real purpose of many laborers, which is to destroy capital and private ownership.[51]

The leading proponents of the bill were Messrs. E. J. Kulp, pastor of the First M. E. Church, Topeka, Kansas, William Allen White, the Emporia editor, Judge W. L. Huggins, and Governor Allen.

Mr. Kulp stated: "If it is not true that the right of the whole is greater than the right of any part, no matter how powerful or well organized, then there is an end of government." He did not question the right of labor to strike, but said there is a limit

[50] Mimeographed transcript of hearings before Special Session of Kansas Legislature, pp. 1-91.
[51] Kansas City Star, Jan. 10, 1920.

to this right and the point of this limitation is reached when the effect of the strike is transcended by the well-being of the whole people. In his opinion the main question is whether or not we continue to settle industrial disputes by a struggle of groups or by using a body of distinguished men who after full investigation make an honest and just decision concerning the matter in controversy.[52]

Mr. White spoke in behalf of the public and pointed out that as civilization grows it becomes more complex and will never return to its simple form. He said the bill proposes that Kansas take a step which must be taken throughout the civilized world to affect with a public interest those things which are concerned with productive industry. Reviewing the subject historically he pointed out that every age, every century and every decade sees some business or interest formerly considered a private business or interest taken over in the public interest. Formerly if two persons had a private quarrel it was settled by the duel, but too many innocent bystanders were injured and duelling was stopped. The time was when a person's money invested in bank stocks and railroads was considered private money but government affected all such investments with a public interest and now controls it in the interest of the public. Now if labor and capital engage in a brawl, this bill says the dispute must be settled in the interest of the public. The court in establishing wages will be interested not in labor as a commodity but in labor as a citizen. The public is interested in capital chiefly to see that it gets justice and a sufficient return to encourage enterprise. In other words, the object of the bill is not to throttle either capital or labor but to emancipate them from their own strangle hold upon each other, and to establish an equitable and living relation between them.[53]

Judge W. L. Huggins who wrote the first draft of the bill at Governor Allen's request, spoke in behalf of the general public. He replied to the arguments of the representatives of organized labor and then warmly defended the bill. He emphasized the proposition that we must have government not by a class or small group but government of all the people, by all the people, that the will of the majority must be expressed in a legal way. He cited Chief Justice White's opinion interpreting the Adamson Law[54] as showing that Congress was compelled to pass this act

[52] Ibid., Jan 12, 1920. [53] Ibid.,
[54] Wilson v. New, (1918) 243 U. S. 332, 61 L. Ed. 755, 27 S. C. R. 298.

to prevent a nation-wide strike which would have paralyzed the industry of the country. This, he declared, is not democracy, but legislation by coercion. Further, the refusal of the union coal miners to dig coal at the request of Governor Allen was a similar act. Continuing the discussion, he said that the bill offers a tribunal where labor in the industries included can go and nobody says: "Where is your bond for costs?" It is a court in which the poor man has a chance because the state of Kansas provides him with all the expert advice and legal assistance necessary to make investigations and develop his case with no expense to himself and when the matter comes on for trial he does not have to hire a lawyer. Further, the evidence taken in shorthand by the court reporter is paid for by the state and a transcript is furnished for the supreme court. All this is without cost to the litigant. In deference to labor the state provides a court where industrial justice is administered to the penniless man on the same terms as to the millionaire.

Taking up the charge that the bill is an anti-union measure, the judge denied that the bill throws an iron ring around the state of Kansas and declared there is not a word in it that penalizes labor unions as such. It does prohibit a strike which is a coercive measure relying on force, but an individual worker may quit his work at any time. It is only when he quits for the purpose of hindering . . . any of the industries . . . included in the act he is punished. In other words, it is the intent that makes the crime. There is not a line in the bill that penalizes laborers for holding a meeting for discussing their wrongs. He said:

"No right is taken away from union labor except the right to violate the law. That is all. The bill does say when you quit your employment you have to quit your job. You can't eat your cake and have it. When you quit, you quit, and if someone else wants to come and work in your place you can't prevent him from doing it."

The bill provides a court in a general not a technical sense. It is not a mere commission. It is a court much the same as the court of industry in New Zealand and Australia is a court, where a case is approached in a judicial frame of mind, where there is taking of evidence, finding of facts and the entering of an order. Further, there is a penalty for the violation of the law

because you cannot make bad people obey law unless there is punishment attached.[55]

Governor Allen advocating the bill in his message before the special session of the legislature showed that from April, 1916, to December 31, 1918, there had been 364 strikes in the Kansas coal mines, or an average of 11 strikes a month, most of them called upon the most trivial grounds; that the amount gained by the strikers was $784.84, with a total loss in wages amounting to $1,600,454.41; that union labor's bill for industrial warfare in Kansas the past year amounted to $157,000. He charged that the miners are not left to form their own judgment in the matter but are being urged by a lot of professional labor officials to oppose this measure and to fight this bill because if passed it will render their particular form of leadership unnecessary. He explained that the strongest fight against the bill is being made by the officials of the four railway brotherhoods who constitute "the aristocracy of organized labor" and are leading this fight because they have received orders from their national leaders to kill any bill that looks toward depriving organized labor of that club called a strike. He argued for a court that would meet industrial discontent in such a way as to prevent injustices which breed class hatred and strife, a court that would mete out equal and exact justice for employers, employees and the public. Continuing, he said:

"Any minority which has secured control of a product upon which life depends and which undertakes for the purpose of affecting wages or profit to withhold that product from the public until the public shall freeze or starve has in effect superseded government and has arrogated to itself the control of the destinies of human life which government alone may have the power to safeguard."

Replying to the contention that labor is not a commodity such as merchandise or capital may be, Governor Allen admitted that labor problems involved humanitarian considerations that are vital but he vigorously argued that in dealing with a supply of the necessaries of life for the public we deal with humanitarian considerations also and said that fair-minded laborers would admit that the rights of women and children and the general public to an adequate supply of the necessaries are paramount to the right of labor and employer to stop production while a selfish

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[55] Printed transcript of hearings before the Special Session of Kansas Legislature, pp. 1-19.

quarrel is being settled. He closed his discussion of the settlement of labor disputes as follows:

"By means of such legislation I believe we will be able—

"1. To make strikes, lockouts, boycotts and blacklists unnecessary and impossible, by giving labor as well as capital an able and just tribunal in which to litigate all controversies.

"2. To insure to the people of this state, at all times, an adequate supply of those products which are absolutely necessary to the sustaining of the life of civilized peoples.

"3. That by stabilizing production of these necessaries we will also, to a great extent, stabilize the price to the producer as well as the consumer.

"4. That we will insure to labor steadier employment, at a fairer wage, under better working conditions.

"5. That we will prevent the colossal economic waste which always attends industrial disturbances.

"6. That we will make the law respected, and discourage and ultimately abolish intimidation and violence as a means for the settlement of industrial disputes."[56]

IV. Activities Under the New Law

The Kansas industrial bill became a law January 24, 1920, and Governor Allen at once appointed W. L. Huggins, Clyde M. Reed and George Wark as the judges of the new court. In selecting these particular men, Governor Allen announced that he was guided by the desire to avoid selecting one representative of labor, one representative of capital and one representative to act as an umpire. He said he did not want men to act as a board of conciliation or arbitration but rather men who would render justice to all.

Judge W. L. Huggins, the author of the bill, was formerly a member of the Public Utilities Commission. He was raised on a farm, was a country school teacher, then county superintendent of schools and finally a lawyer in Emporia, Kansas. His son was one of the volunteer coal miners who answered Governor Allen's call for emergency work in December, 1919.

Judge Reed was the governor's private secretary. He was formerly in the railway mail service but resigned to run his own newspaper, The Parsons Sun.

Judge Wark is a graduate of the University of Kansas Law School. During the war he organized a machine gun company and was cited for bravery following the Argonne Forest en-

[56] Message of Gov. Allen to the Special Session of the Kansas Legislature, printed in "The Court of Industrial Relations," pp. 3-15.

gagement. In announcing Mr. Wark's appointment, Governor Allen said:

"George Wark is the man who left his business to get into the fight. A man can't go through with what Senator Wark has as a soldier and not be broadened to a great extent. We want not only brains in this court; we want heart, for it is to deal with human relations. He is a lawyer, but he is a man and a soldier first."[57]

Before the Court was fully organized, 400 union miners in the Pittsburg district went on a protest strike in defiance of the law. As soon as the attorney general heard of the strike, he started for the scene of action, called the strike leaders before him and asked them to explain their actions. They were taken off their feet by the quick work of the authorities and promised to return to work and obey the law.[58] The new law was at once invoked. A coal company was closing down one of its mines and other companies served notice of suspending operations that would have thrown several hundred men out of employment. But the new law says that coal mines and other industries supplying the necessaries of life may not cease operations without permission of the court following a hearing. By direction of Governor Allen the attorney-general brought suit against the owners of the mines to prevent them from closing. The mines at once reopened and the men were restored to their employment.[59] The meat-packers in Kansas City, Kansas, discontinued work in several departments because of the switchmen's "outlaw" strike, but were reminded at once of the Kansas law and representatives of the packers journeyed to Pittsburg, Kansas, for the purpose of explaining their action. The proposed nation-wide strike of the United Brotherhood of Maintenance of Way and Railway Shop Laborers threatened to test the interstate character of the new Kansas law, but the Kansas officials took the position that in case a strike should be called by national, state and local officials of labor unions, they would be subject to criminal prosecution for violation of the Kansas law. Governor Allen contended that if someone outside of Kansas should order someone within Kansas to violate the law and it is done, then those persons are subject to extradition proceedings to bring them within the jurisdiction of the Kansas courts. But the

[57] Kansas City Star, Jan. 24 and 26, 1920.
[58] Ibid., Jan. 26, 27, 1920.
[59] Ibid., Feb. 1, 1920.

national officials weakened and promise was made that Kansas should be exempt from the strike order.[60]

The first complaint on wages to be brought against the railways after their return to private ownership and the first to be brought with the approval of an international union was filed in the court March 1 by the International Brotherhood of Stationary Firemen, Oilers, etc. The International Board met in St. Louis and authorized the filing of the complaint by the union in the state of Kansas. It was resolved if a strike is ordered by the board the locals in Kansas should be entirely eliminated from either a vote or a call for a walk-out. This was done because of the conviction that Kansas had an unbiased court for the settlement of industrial controversies.[61]

A recent letter to the writer from Judge W. L. Huggins describing the activities of the Court of Industrial Relations says:

"We have just recently finished a three-weeks' investigation into the coal mining situation in southeastern Kansas. This was an investigation simply and has resulted in the accumulation of very much valuable information. Although it was undertaken purely as an investigation, we did make some minor orders. These orders were made informally and orally from the bench. I might say, that, in substance, they were as follows:

"1. An order requiring the coal operators to furnish powder and other pit supplies at the same price as heretofore until an agreement could be reached between the miners' and operators' committees.

"2. An order reducing the discount heretofore charged where miners draw wages already earned but before pay day. The evidence developed the fact that the operators had been charging a flat ten per cent discount, which in many cases would amount to 520 per cent per annum. By order of this court the charge hereafter is in no case to exceed two per cent flat discount with a minimum charge of 25c on the smaller amounts, for the purpose of covering the actual book-keeping and cashier expense.

"3. We ordered the 'check-off system' modified. Under this system the union dues, sick and death benefits, union fines, and all special assessments, were 'checked off' by the operators and taken out of the miners' pay checks and turned over directly to the union. The evidence developed the fact that grievous and burdensome fines have been imposed by the union officials for the most trivial causes, that by recent amendments to the consti-

[60] Ibid., Feb. 12, 1920. This contest was before the railroads were returned to private ownership and the Attorney-General explained that it would be a one-sided contest because of the control by the federal government.

[61] Ibid., March 1, 1920.

tution a fine of $50 was to be imposed upon any miner who undertook to invoke the assistance of the Court of Industrial Relations in any controversy that he might have either with his union or with his employer, with a fine of $5,000 for the same reasons to be levied upon any officer of any local union who might do likewise.

"The evidence developed the further fact that the funds of the miners collected in this way have been used for unlawful purposes, such as financing a socialist paper, the defense of men charged with violation of the federal laws such as the recent I. W. W. cases, furnishing a cash bail to persons in prison charged with violation of the federal laws, etc. The temporary order of the court is aimed at these evil purposes."

In addition to the investigation and the informal orders made by the court, two industrial cases have been decided and orders entered.[62] In the "Topeka-Edison" case[63] the complainants prayed the court to make an investigation and prescribe such rules and regulations, wages and hours of labor as may be just and reasonable. The respondent instead of the usual answer in such cases, stated that it "respectfully submits and tenders the issues here presented and welcomes the good offices of the court in a judicial determination of that which is equitable and just in the premises." The court pointed out that originally the matter was filed as action upon a controversy under the compulsory features of the industrial law, but it was really in its present form more in the nature of a voluntary submission by mutual agreement under section twenty-one of the Kansas industrial act. The court took jurisdiction because the controversy was of such a character as to endanger the public peace, health and general welfare, and the continuity and efficiency of the service of furnishing electric current to the people in the city of Topeka and held: Section 9 of the industrial act requires for the promotion of the general welfare that workers engaged in said industries . . . should receive at all times a fair wage while engaged in such labor and that capital invested therein should receive a fair rate of return to the owners thereof. After examining the evidence as to (1) scales of wages paid for similar kinds of work in other industries; (2) the relation between wages and the cost

[62] State of Kansas ex rel. Richard J. Hopkins, Attorney-General et al. v. The Topeka Edison Company, a corporation. Docket No. 3254-1-2, printed transcript; also Clyde Davidson, Secretary . . . members of Amalgamated Association of Street and Electric Railway Employees of America v. The Joplin and Pittsburg Railway Company, a corporation. Docket No. 3283, carbon transcript.

[63] "The Topeka-Edison Case," op. cit., p. 4.

of living; (3) the hazards of the employment; (4) the training and skill required; (5) the degree of responsibility; (6) the character and regularity of the employment; (7) the inequalities of increases in wages or of treatment the result of previous wage orders or adjustments; and (8) the skill, industry and fidelity of the industrial employee; the court granted essentially the contentions of the workers and set the date when the minimum wage should begin with a basic eight-hour day, time and a half for over time and double time for Sundays, and directed the continuance of the order for six months unless changed by agreement of the parties with the approval of the court.[64]

In the Joplin and Pittsburg Railway case,[65] the wage paid workers by a common carrier was considered. The complaint of the workers cites the fact that a controversy existed between the respondent and employees regarding the matter of wages which were unfair, and not sufficient to provide a reasonable living for the employees; that if the controversy remains unsettled it would endanger the continuous operation and efficiency of the service rendered by the respondent; that the controversy if not speedily settled would endanger the public peace, the public health and general welfare of a large section of the state of Kansas. To the complaint the respondent answers that the court had no jurisdiction because the service rendered by respondent included inter-state as well as intra-state business; but the court took jurisdiction and granted the prayer of the workers following the same line of reasoning as in the Topeka-Edison case. Touching the point that respondent was not financially able to pay an increased wage, the court said:

"However, it must be admitted that wages to labor should be considered before dividends to the investor and that business which is unable to pay a fair rate of wages to its employees will eventually have to liquidate."[66]

The court made its order apply only to such employees of the respondent as are actual bona fide residents of the state of Kansas and whose work is located wholly or principally within the state.[67]

The leading opponent of the new Kansas legislation is Mr. Alexander Howatt, President of District 14, United Mine Workers of America. He was committed to jail by Judge A. B.

[64] Ibid., pp. 5-10.
[65] "The Joplin Pittsburg Railway Case," op. cit.
[66] Ibid., p. 6.
[67] Ibid., p. 7.

Anderson of the federal court at Indianapolis December 22, 1919, because he did not promptly call off the coal strike in Kansas in compliance with the court's order, but after having been in jail a short time he was released on probation when Mr. Warum, his counsel, satisfied Judge Anderson that President Howatt would comply with the court's order.

Upon returning to Kansas, Mr. Howatt immediately assumed a belligerent attitude toward the new Kansas legislation. On March 12, 1920, under his leadership, the convention of delegates from District 14, United Mine Workers of America, amended the constitution to empower the placing of a fine of $50 on any member who should appeal a case to the Kansas Industrial Court over the head of district officials and a fine of $5,000 for any district official who appealed a case to the Court. Further in a speech before the representatives of the Illinois Coal Miners' Union, Mr. Howatt on March 20 announced a program for launching a general miners' strike in Kansas early in April in defiance of the law. In the course of his speech he said:

"But come what will and whether or not my bones rot in a prison cell, I am going to fight this law with the force of 12,000 miners in Kansas and regardless of consequences give Governor Allen cause to remember that organized labor must and will have the right to cease work at its will."[68]

Because of these threats Attorney-General Richard J. Hopkins and Fred S. Jackson, attorney for the Court of Industrial Relations, filed a petition with Judge Andrew J. Currant of the Crawford County district court praying for an injunction against Alexander Howatt and forty-seven officials to restrain them from calling a strike early in April. The petition stated that these officials were engaged in a conspiracy to defy the industrial law and occasion economic waste, loss of wages to labor and suffering to the people of Kansas. On March 30 Judge Curran granted the prayer and issued a temporary order to restrain the mining officials from interfering with the production of coal.[69]

Early in April, 1920, some of the conservative members of the coal miners' union requested the Industrial Court to come to Pittsburg and make a thorough investigation of conditions in this district. The court went to Pittsburg and subpoenaed President Howatt and several other union officials to appear and testify. Mr. Howatt declined to appear and testify, whereupon the

[68] Kansas City Star, March 12, 1920.
[69] Ibid., March 30, 1920.

Industrial Court requested Judge Curran to compel him to do so, and the judge ordered Mr. Howatt to appear forthwith before the Kansas Court of Industrial Relations to testify in the investigation that was instituted in compliance with the request from various members of the union. This Mr. Howatt again indignantly refused to do, saying:

"We officials of the United Mine Workers of District 14 do not recognize this Industrial Court. Let its members go down into the mines and learn the business the same as we did. We may be dragged into court but we will absolutely refuse to answer any questions as we do not recognize the court's authority or existence. Since it is not a court, it has no power to summon us."

On April 7 Judge Curran cited President Howatt for contempt of court and on April 9 committed him to the Crawford County jail. In the course of his decision Judge Curran said:

"The judgment of this court is that you be confined in the Crawford County jail until such time as you consent to appear before the Court of Industrial Relations of Kansas and answer such questions as the court may ask you."[70]

On April 12 a big demonstration was held in Girard for Mr. Howatt where he was in jail for contempt of court. Sheriff G. C. Webb so far forgot his official duty as to allow Mr. Howatt to make a one-hour speech to the assembled crowd of miners from the balcony of the jail. In the course of the speech Mr. Howatt said: "We will not recognize the court. It is no court." He paid his respects to Governor Allen and Judge Curran, saying: "People talk about them as sturdy Americans. Sturdy Americans who send men to jail who have committed no crime!" After the speech he held a reception for the crowd. As a result of Sheriff Webb's neglect of official duty, ouster proceedings were filed in the supreme court, and rather than face the charges, Mr. Webb resigned.

On April 16 President Howatt through his attorney filed a motion with Judge Curran for a new trial. The motion was denied, whereupon an appeal was taken to the supreme court of Kansas and President Howatt and other union officials were released from jail on bond.

Judge Andrew J. Curran on April 29 overruling the demurrer to the application for a temporary writ of injunction to restrain the officials of the Kansas miners' union from calling a

[70] Ibid., April 9, 1920.

strike, held the Kansas law creating the Court of Industrial Relations constitutional. This prepared the way for an appeal to the supreme court of Kansas and finally an appeal to the Supreme Court of the United States. Judge Curran in the course of his opinion holding the act constitutional said:

"Counsel for defense have had much to say about the divine right to quit work, but they have had nothing to say about the divine right to work. Their talk about the divine right to quit work should be relegated to the realm to which has been relegated the divine right of kings."

Judge Curran did not find the act in conflict with the constitution of Kansas or the federal constitution. He said the legislature had expressed the will of the people and any doubt as to the motives of the legislature or the economic reasons for its action must necessarily be resolved in favor of the legislature.[71]

In this article the writer has attempted to do nothing more than give the steps leading to the passage of the new Kansas legislation on industrial disputes; set forth the leading provisions of the law; give the arguments for and against the bill as it was discussed at the hearings of the special session of the Kansas legislature; and finally detail the activities of the new Kansas court of industrial relations. In the next article the constitutionality of the Kansas statute will be examined.

(To be continued.)

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[71] Printed transcript of Judge Curran's decision.

CORPORATION'S RIGHT TO PROFITS MADE BY DIRECTORS

JUST how far a director's duty to his corporation operates to prevent him from entering into private transactions which might have been advantageously entered into by his corporation, is not only an interesting legal question but one ever recurring and of grave importance in modern business. Undoubtedly there is a large field for individual activity lying outside the duty of the director and still within the scope of the corporate business.[1] A recent Illinois decision goes into this "No Man's Land" lying between the director's duty to his corporation and his right as an individual to promote his own interests, and seems at first glance to restrict materially the director's personal business freedom. A corporation had entered into a contract with certain persons under which the corporation secured a license to manufacture and sell certain patented articles, paying as royalties therefor a per cent of the gross receipts from sales. Certain directors of the corporation privately purchased the licensor's royalty rights for their own benefit, without disclosing to the corporation the opportunity to make the purchase although the corporation was financially in a position to take advantage of it. The court held that the directors were not entitled to collect from the corporation any royalties beyond the amount necessary to reimburse them for the purchase price, apparently on the ground that they were to be deemed as having purchased the contract rights in trust for the corporation.[2]

It is everywhere agreed that a director occupies a fiduciary relation to his corporation.[3] But although the courts and writers speak of the director as a trustee for his corporation and for the body of the stockholders,[4] they are not in accord as to the extent

[1] See note 13 Col. L. R. 431, 432; 4 Fletcher, Cyc. Corp., sec. 2282.

[2] Farwell v. Pyle-National Electric Headlight Co., (Ill. 1919) 124 N. E. 449.

[3] 2 Machen, Modern Law of Corp., sec. 1564; Perry on Trusts, 6th ed., sec. 207.

[4] Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co., (1860) 16 Md. 456, 77 Am. Dec. 311; Taylor v. Mitchell, (1900) 80 Minn. 492, 83 N. W. 418; Hooker v. Midland Steel Co., (1905) 215 Ill. 444, 451, 74 N. E. 445, 106 A. S. R. 170; 10 Cyc. 787.

of the trusteeship or of the duty this imposes upon him with respect to transactions where his individual interests may rival the interests of his corporation. It was contended in the recent Illinois case that the mere fact that an investment would be beneficial to the corporation, the corporation being in a position to take advantage of it, raises a duty in the director to offer it to his company before taking it for himself. Statements in text-books[5] and dicta of judges[6] appear to support this contention, but the cases therein cited do not bear them out. For in each of the cases cited there was not only an investment which would have been to the interests of the corporation, but the corporation, by its nature or otherwise, had been actually committed to the investment, to the director's knowledge, so that he was under a specific duty to procure it for his corporation or at least to give it the first opportunity to make the investment.[7] In one of these cases the distinction is clearly brought out by the peculiar facts of the case. A quarrying corporation which held an undivided one-third interest in certain quarry lands and a lease of another third of the same lands, secured a contract for the conveyance of the leased one-third as soon as good title could be given. Two directors of the corporation purchased for themselves the outstanding one-third interest and also the title to the leased one-third. The court declared the directors trustees for the benefit of the corporation as to the leased one-third but refused to do so as to the remaining one-third although it would have been to the corporation's interest to buy it, and although the corporation had previously tried to purchase it, and the directors gained an appreciation of its value through their position as directors, the court saying:

[5] 2 Machen, Modern Law of Corp., sec. 1620; 3 Pomeroy's Equity Jur., 4th ed., sec. 1077; Cook, Corp., 6th ed., sec. 660.

[6] Kavanaugh v. Kavanaugh Knitting Co., (N. Y. 1919) 123 N. E. 148; Leader Pub. Co. v. Grant, etc., Co., (1915) 182 Ind. 651, 108 N. E. 121.

[7] These cases in which directors were held as trustees for the company, were of directors purchasing or leasing for themselves when commissioned to purchase or lease for the corporation; claiming investments for themselves when made as corporate officers in corporate employ and apparently with corporate money; acquiring for themselves property known to be essential to the existence of the corporation, or to carry out its objects; acquiring property for themselves and thereby ousting the corporation of a valuable property right, or of a valuable expectancy of acquisition or of renewal of a lease. See cases cited in footnote 5, (p. 1340) to sec. 1620, Machen, II, supra; and in footnote 1, (p. 1340) to sec. 660, Cook, II, supra. When the corporation has resolved to make a certain investment, the director cannot go out and secure it for himself. Kroegher v. Calivada Coloniz. Co., (1902) 119 Fed. 641; Acker, etc., Co. v. McGraw, (1907) 106 Md. 536, 68 Atl. 17.

"Good faith to the corporation does not require of its officers that they steer from their own to the corporation's benefit enterprises or investments which, though capable of profit to the corporation, have in no way become subject to their trust or duty."[8]

This, though perhaps an extreme case, illustrates the prevailing tendency which the court in a later case thus expressed:

"Whether in any case an officer of a corporation is in duty bound to purchase property for the corporation, or to refrain from purchasing property for himself, depends upon whether the corporation has an interest, actual or in expectancy, in the property, or whether the purchase of the property by the officer or director may hinder or defeat the plans and purposes of the corporation in the carrying on or development of the legitimate business for which it was created."[9]

Some writers have gone so far as to say that the director will be held to have taken the property in trust for the corporation only when he was under a present specific duty to purchase the property for the corporation.[10] It is submitted that this inaccurately states the question, which is rather whether he was under a duty to offer the investment to his corporation and give it the opportunity to accept or refuse before taking it for himself;[11] and that the test as to whether there was such a duty depends upon whether, as between the director and the corporation, the opportunity belonged to the corporation, on account of the necessities of its business, or some definite action already taken by it or by another in proposals to it. If the transaction is not so appropriated to the corporation, it would seem that the director may legally take it for himself.[12] Although he is always required to use the utmost good faith when dealing with his corporation, a director certainly should not be required to become a self-sacrificing "Good Samaritan" in handing business over to it, simply because such business would be beneficial to it.

Before proceeding to a discussion of transactions where the director has purchased rights under an assignment of a con-

[8] Lagarde v. Anniston, etc., Co., (1900) 126 Ala. 496, 502, 28 So. 199.

[9] Zeckendorf v. Steinfeld, (1909) 12 Ariz. 245, 262, 100 Pac. 784; see also a very similar statement in Lagarde v. Anniston, etc., Co., (1900) 126 Ala. 496, 502, 28 So. 199.

[10] See note 13 Col. L. R. 431 at 432; also 4 Fletcher, Cyc. Corp., sec. 2282.

[11] When the corporation is clearly unable to enter upon the transaction, the reason for the rule is gone and the director's specific duty does not arise. Crittendon & Cowler Co. v. Cowler, (1901) 66 N. Y. App. Div. 95; see McDermott Mining Co. v. McDermott, (1902) 27 Mont. 143, 69 Pac. 715.

tract to which the corporation is a party, it is necessary to notice a difference often apparent between the basis for raising a constructive trust where the director has purchased a contract right against his corporation and the basis for the trust where he has merely purchased property which would have been beneficial to the corporation. The constructive trust, of course, arises in both cases from the breach of some duty growing out of the fiduciary relationship. But where the circumstances are not such as to have entitled the corporation to priority, the basis for raising the constructive trust must arise, if at all, from other considerations, and must rest in the principle that equity will not permit a director to place himself in a position where his personal interests are adverse to the best interests of his corporation and where those interests may lead him to take advantage of his official position as a director to advance his own interests to the prejudice of the corporation. He is under a duty to refrain from engaging in transactions which will so place him. It must be apparent, however, that this doctrine ordinarily cannot be invoked in the case of purchases of real or personal property, while it often can and should be invoked where the director has, by assignment, become a party to an executory contract with his corporation.

Transactions involving the assignment to the director of a contract with his corporation may be divided for the purposes of this discussion into two general classes: (1) liquidated claims, and (2) valuable executory contracts and unliquidated claims. The courts regard the former, at least, in the same light as purchases of property, which in fact they are, and where a constructive trust is imposed, allow the director to realize from his venture no more than is necessary to reimburse him for what he has actually paid.[12] The cases of this type usually arise where the director has purchased a claim against his corporation at a discount and is attempting to enforce it at its face value. Since the situation is practically the same as where he has purchased property which he desires to realize a

[12] In such case the fact that the director gained an appreciation of his bargain because of his connection with his company raises no such duty. Lagarde v. Anniston, etc., Co., (1900) 126 Ala. 496, 28 So. 199; Zeckendorf v. Steinfeld, (1909) 12 Ariz. 245, 100 Pac. 784; although this should be carefully distinguished from the use for personal advantage of corporate knowledge entrusted to him as a corporate officer. See Du Pont v. Du Pont, (1907) 242 Fed. 98, 136.

[13] Kroegher v. Calivada Coloniz. Co., (1902) 119 Fed. 641; The Telegraph v. Lee, (1904) 125 Ia. 17, 98 N. W. 364.

profit upon, it would seem that he should be permitted to enforce the claim at par when due, unless facts are shown to have existed which appropriated the investment to the corporation and imposed upon the director in the exercise of good faith the duty to offer it to his corporation before buying it in personally. In line with this view, the weight of authority supports the purchase by directors of corporate securities from third persons at a discount and their enforcement against the corporation at par, provided the directors owed no present duty to discharge or buy them;[14] and the better text writers[15] and a majority of the courts support the purchase by directors of general debts of the corporation under the same conditions.[16]

The contrary view is stated by Cook in his work on Corporations, in which he limits the rule to bonds, saying:

"It is a fraud on the corporation and corporate creditors for directors to buy up at a discount outstanding debts of the corporation and compel it to pay the full face value thereof."[17]

A majority of the cases he cites to sustain this statement were of directors who bought up claims against their corporation when it was insolvent.[18] It is, of course, well settled that a director of an insolvent corporation cannot buy up outstanding obligations at a discount and enforce them at par, thus working a preference in his behalf to the prejudice of creditors for whom he then stands as a quasi-trustee.[19] A few early cases, however, hold squarely that whenever a director buys obligations against his corporation at a discount, the purchase inures to the benefit of the corporation;[20] and the reasoning of

[14] Seymour v. Spring Forest Cemetery Ass'n., (1895) 144 N. Y. 333, 344, 39 N. E. 365, 26 L. R. A. 859; Camden Safe Deposit & Trust Co. v. Citizens Ice & Storage Co., (1905) 69 N. J. Eq. 718, 61 Atl. 529, aff'd 71 N. J. Eq. 221, 65 Atl. 980. Yet contrary intimations are sometimes found. See 10 Cyc. 798.

[15] Morawetz, Priv. Corp., sec. 521; Machen, Modern Law of Corp., sec. 1623.

[16] Inglehart v. Thousand Is. H. Co., (1884) 32 Hun (N.Y.) 377, 383; St. Louis, etc., R. Co. v. Chenault, (1886) 36 Kan. 51, 22 Pac. 303; Glenwood Mfg. Co. v. Syme, (1901) 109 Wis. 355, 85 N. W. 432; McIntyre v. Ajax Min. Co., (1904) 28 Utah 162, 171, 77 Pac. 613; Martin v. Chambers, (1914) 214 Fed. 769.

[17] 2 Cook, Corp., 6th ed., sec. 660.

[18] As Bulkley v. Whitcomb, (1890) 121 N. Y. 107, 24 N. E. 13. See cases cited in footnote, (p. 1949) to sec. 660, Cook, supra.

[19] Bulkley v. Whitcomb, (1890) 121 N. Y. 107, 24 N. E. 13; Bonney v. Tilley, (1895), 109 Cal. 346, 42 Pac. 439. See Martin v. Chambers, (1914) 214 Fed. 769 (dictum), and Morawetz, Corp., sec. 787.

[20] Hill v. Frazier, (1853) 22 Pa. St. 320; Moses v. Ocoee Bank, (1878) 1 Lea (Tenn.) 398, follows strict rule but disapproves; Davis v. Rock Creek, etc., Co., (1880) 55 Cal. 359, 36 Am. Rep. 40; Bramblett v. Com.

these cases would seem to apply as well to bonds as to other obligations. They are based on the principle to which reference has already been made, that a director is a trustee and cannot be allowed to acquire interests adverse to his cestuis.[21] The reason for the application of the principle was that equity would not allow a director to take part in a transaction which might tempt him to make use of the power of his official position to injure his corporation for the advancement of his personal interests. As more and more of the business of the country has come to be carried on by corporations, it has become evident that the application of this strict trust accountability rule unwisely limits the activities of directors and is impracticable. And since the reason for the rule can hardly be said to be present where the corporation is solvent and the claim is a liquidated amount fixed before the director purchased it, the courts have gradually relaxed the rule[22] in such cases to the end that the directors be given the greatest possible freedom compatible with strict fairness to the corporation.[23]

& Lumber Co., (1904) 26 Ky. L. Rep. 1176, 83 S. W. 599; (1905) 27 Ky. L. Rep. 156, 84 S. W. 545, is the only late case found which clings to the strict trustee view.

[21] "A trustee . . . cannot buy up a debt or encumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself." Perry, Trusts, 6th ed., sec. 428. See Davis v. Rock Creek, etc., Co., (1880) 55 Cal. 359, 36 Am. Rep. 40; Bramblett v. Com. & Lumber Co., (1904) 26 Ky. L. Rep. 1176, 83 S. W. 599; 27 Ky. L. Rep. 156, 84 S. W. 545; 10 Cyc. 798.

[22] This gradual relaxation from strict trustee accountability is evidenced by the changed view taken by the courts toward direct contracts by directors with their corporations. Thus it was originally held that such contracts were voidable regardless of their fairness; Munson v. S. G. & C. Ry. Co., (1886) 103 N. Y. 58, 8 N. E. 355; see leading Scotch case of Aberdeen Ry. Co. v. Blaikie Bros., (1886) 1 Macqueen 461; later such contracts while prima facie voidable when proved fair have been held valid in the United States, if the director's vote was not necessary to procure the corporation's acceptance; Schnittger v. Old Home, etc., Co., (1904) 144 Cal. 603, 78 Pac. 9; and the modern tendency is that even though the interested directors' votes are necessary to procure its acceptance, such a contract, if proved fair, is valid. Minn. Loan & Trust Co. v. Peteler Car Co., (1916) 132 Minn. 277, 156 N. W. 255. The last case is a far cry from the early view.

[23] In the recent Illinois case it was stated that, "If it is for the interest of the corporation to buy its bonds at a discount, and it is financially able to do so, a director will not be permitted to buy those bonds at a discount and enforce payment in full against the corporation." This statement was supported by reference to two previous Illinois cases in which there were dicta to this general effect, but in both cases there were other circumstances which clearly raised the specific duty to offer the corporation first chance. Higgins v. Lansingh, (1895) 154 Ill. 301, 40 N. E. 362; Harts v. Brown, (1875) 77 Ill. 226. No reason is seen here why the bare fact that the purchase of the obligation might be beneficial to the corporation which is in a position to make it should raise a duty in the

It should be noticed, however, that where the claim has reached maturity before the director has purchased, there are strong reasons for holding that the purchase is appropriated to the corporation and that the director therefore violates a present specific duty when he purchases for himself without first offering the opportunity to his corporation, since the corporation is under a present existing obligation to pay the claim.[24]

The purchase by directors of valuable executory contracts and unliquidated claims against their corporation, on the other hand, creates a relationship in which the rights and duties of the parties are not always definitely fixed beyond the power of the director to change. That the contract in the recent Illinois case was of this nature is evidenced by the fact that the case arose over a dispute between the directors and the corporation as to the amount of money as royalties due the directors under the contract. Does a director's position permit him to purchase such a contract against his corporation? For some reason this appears to be an obscure point upon which little is said in the texts and in adjudication of which we have comparatively few cases. One text states that if a director may purchase bonds of the company and enforce them, he may presumably purchase from a contractor a supposedly valuable contract with the company.[25] But the one case cited in support of this passage, though not strictly in point, states in dictum that the director in such case would not be permitted to make a profit from the contract. Another text affirms that when an officer of a corporation has made a contract on behalf of his corporation with a third person, he will not be allowed afterwards to take an assignment of the contract from the latter or otherwise acquire an interest therein adverse to the corporation, without its consent.[26] It is submitted that the cases[27] and correct reasoning

director first to offer it to the corporation, any more than in the case of the purchase of other property.

[24] Some cases clearly recognize this point. Seymour v. Spring Forest Cemetery Ass'n, (1895) 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859; Glenwood Mfg. Co. v. Syme, (1901) 109 Wis. 355, 85 N. W. 432. Yet other cases appear to ignore it. Inglehart v. Thousand Is. H. Co., (1884) 32 Hun (N.Y.) 377; McIntyre v. Ajax Min. Co., (1904) 28 Utah 162, 77 Pac. 613.

[25] 2 Machen, Modern Law of Corp., sec. 1623.

[26] 4 Fletcher, Cyc. of Corps., sec. 2284.

[27] The cases though few and not recent are not conflicting. Paine v. Lake Erie, etc., R. Co., (1869) 31 Ind. 283; European, etc., Ry. Co. v. Poor, (1871) 59 Me. 277; Risley v. Ind. B. & W. R. Co., (1875) 62 N. Y. 240; Gilman, C. & S. R. Co. v. Kelly, (1875) 77 Ill. 426, directors breached duty in becoming shareholders in contractor company; Barnes v. Brown, (1880) 80 N. Y. 527, (dictum).

go even farther and preclude a director from receiving, without the consent of his corporation, profits derived from the assignment of any contract which would place him in such a position that he might have the power as a director to injure his corporation in the pursuit of his own interests. Such injury, we have seen, would not ordinarily be possible in the case of the purchase of liquidated claims against the corporation, wherein the rights and duties of the parties are in no way subject to the judgment of the director. But it would be possible in the case of purchases by directors of executory contracts and contracts involving unliquidated claims, because in such cases a further exercise of judgment is necessary on the part of the corporation, respecting the enforcement of the contract, the fullness of performance, and other considerations; and the director's position is such that he might, in the pursuit of his own interests, induce his corporation to act against its best interests. And it is a sound equitable principle that no one occupying a fiduciary position of any kind has the right, without the permission of his beneficiary, to place himself in such a position that he may have an incentive together with a power to injure his beneficiary.[28]

The true rule governing all the transactions herein considered would then seem to be this: If the transaction, under all the circumstances, is in no way appropriated to the corporation so that the director is under a specific duty to offer it to the corporation before taking it for himself, he may legally enter upon it personally for his own benefit, unless in so doing he will place himself in such a position that he will have an incentive together with the power to induce his corporation to act against its best interests in order to promote his adverse personal interests.

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[28] 3 Pomeroy's Eq. Juris., sec. 1077, (p. 2473).

Minnesota Law Review

Published monthly, December to June inclusive, by the Faculty and Students of the Law School, University of Minnesota.

Subscription Price, $2.50 per annum. Forty cents per number.

RIGHT OF ASSIGNEE OF CHATTEL MORTGAGE TO SUE FOR ANTECEDENT CONVERSION.—Where personal property, covered by a chattel mortgage, in the possession of the mortgagor, is converted by a third person, and thereafter the mortgagee assigns the mortgage, does the cause of action for the conversion pass to the assignee? Until recently it seemed to be practically the unanimous rule that the cause of action did not pass.[1] The Colorado court, however, in a recent case, refused to follow the rule and held that the cause of action did pass.[2]

[1] Bowers v. Bodley, (1879) 4 Ill. App. 279; Gobbert v. Wallace, (1889) 66 Miss. 618, 5 So. 394; Gaskill v. Barbour, (1898) 62 N. J. L. 530, 41 Atl. 700; First Nat. Bank v. McCreary, (1913) 66 Ore. 484, 132 Pac. 718, Jones, Chattel Mortgages, 4th Ed., Sec. 510; Pingrey, Law of Chattel Mortgages, Sec. 788; 2 Cobbey, Chattel Mortgages, Sec. 646.

[2] Zinn v. Denver Live Stock Comm. Co., (Colo. 1920) 187 Pac. 1033.

The majority rule strikingly illustrates how far a rule of law can be established by a single decision. In 1879, the Illinois court of appeals, in the case of *Bowers v. Bodley*,[3] held that a cause of action for an antecedent conversion of the mortgaged property did not pass by the assignment of the mortgage. Upon this decision of an intermediate appellate court, several text-writers[4] and cpclopedias[5] formulated the general rule which the later cases followed.[6] The reason given for the decision in *Bowers v. Bodley* was that a cause of action for conversion was not assignable. The common law rule was, of course, that a cause of action for torts to property was not assignable, and such was the rule in Illinois at that time.[7] It is now well settled, however, that a cause of action for conversion is assignable,[8] and since the seeming overwhelming weight of authority rests principally on the one case, and the reason for the decision in that case no longer exists, the question may be properly considered de novo, applying the present well established principles applicable to personal property, chattel mortgages and torts.

The majority rule is that the mortgagee has legal title to the mortgaged property, defeasible by the payment of the sum or instrument it is given to secure.[9] A rapidly increasing minority, largely as a result of statutory enactment, hold that the chattel mortgage is merely a lien on the property.[10] The mortgagee can maintain an action for conversion of the mortgaged property if he is in possession or entitled to possession.[11] Where the mortgagee is considered as having legal title the right to possession vests in him upon the execution of the mortgage, unless there is an express or implied stipulation to the contrary.[12] Where the mortgagee is considered as having merely a lien, he is not

[3] (1879) 4 Ill. App. 279.

[4] Jones, Chattel Mortgages, 4th Ed., Sec. 510; Pingrey, Law of Chattel Mortgages, Sec. 788; 2 Cobbey, Chattel Mortgages, Sec. 646.

[5] 7 Cyc. 60.

[6] First Nat. Bank v. McCreary, (1913) 66 Ore. 484, 132 Pac. 718.

[7] The Chicago & Alton R. R. Co. v. Maher, (1878) 91 Ill. 312.

[8] 5 C. J. 889, 890.

[9] 11 C. J. 399; Klinkert v. Fulton. etc., Co., (1902) 113 Wis. 493, 89 N. W. 507; Tiedt v. Boyce, (1913) 122 Minn. 283, 142 N. W. 195; Barrett Mfg. Co. v. Van Ronk, (1914) 212 N. Y. 90, 105 N. E. 811.

[10] 11 C. J. 399; Citizens Nat. Bank v. Osborne-McMillan Elev. Co., (1911) 21 N. D. 335 131 N. W. 266; Northwestern Port Huron Co. v. Iverson, (1908) 22 S. D. 314, 117 N. W. 372, 133 A. S. R. 920; Enfield v. Stewart, (1918) 24 N. Mex. 472, 174 Pac. 428, 2 A. L. R. 196.

[11] 5 R. C. L. 473; Nichols & Shepard Co. v. Minn. Thresher Mfg. Co., (1897) 70 Minn. 528, 73 N. W. 415.

[12] Jones, Chattel Mortgages, 4th Ed., Sec. 426.

entitled to possession, even in case of default,[13] but must await the foreclosure of the mortgage. There are, however, cases holding that even in such a case the mortgagee may maintain an action for conversion before foreclosure.[14] But if the original mortgagee was not entitled to possession, and so could not maintain an action for conversion, it is obvious that the assignee could have no greater rights. The question therefore limits itself to those cases where the assignor might have maintained the action.

The question as to the right of a transferee to sue for an antecedent conversion frequently arises in the case of sales of personal property. Where an owner purports to sell personal property after it has been converted by a third party, it would seem clear that the vendor at the time of the purported sale has two rights which he might transfer. He has title to the property, which is a property right in the goods, i. e., a right in rem. He has also a cause of action for conversion, which is a right in personam.[15] Which of these two rights he passes by a purported sale of the goods seems to be largely a question of intention, for where the goods are still in existence at the time of the sale the courts regard the transaction as a sale of the goods themselves,[16] i. e., a sale of the right in rem, and not of the cause of action,[17] while in cases where the goods are no longer in existence, it is held that, since the parties must have intended something to pass, the cause of action passes.[18]

These rules in regard to the sales of personal property which has been converted, would seem to apply with even more force in the case of assignments of chattel mortgages. In the case of an assignment of a chattel mortgage, the debt is the principal thing, the mortgaged goods are the security.[19] The assignment of a debt carries with it the security.[20] Furthermore an assign-

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[13] 11 C. J. 557.

[14] Grove v. Wise, (1878) 39 Mich. 161.

[15] See Ames, Disseisin of Chattels, 3 Harv. L. R. 23, 313, 337, where the author contends that the early common law rule, that one dispossessed of chattels had nothing to transfer but a cause of action, should still prevail.

[16] Tome v. DuBois, (1867) 6 Wall. (U.S.) 548, 554, 18 L. Ed. 943; Cartland v. Morrison, (1850) 32 Me. 190; Howe v. Johnson, (1897) 117 Cal. 37, 48 Pac. 978.

[17] The Sarah Ann, (1835) 2 Sumn. (U.S. C.C.) 206, 211, Fed. Cas. No. 12,342.

[18] Waldron v. Willard, (1858) 17 N. Y. 466.

[19] Schouler on Personal Property, 5th Ed., Sec. 433.

[20] Jones on Chattel Mortgages, 4th Ed., Sec. 503.

ment of debt, in equity at least, carries with it every remedy or security available to the assignor, as an incident thereto, even though not specially mentioned, and regardless of the assignor's knowledge, or lack of knowledge, as to their existence.[21] Where mortgaged property, which has been converted, is no longer in existence, it would certainly seem that the same principle should apply and the cause of action for the conversion, which is then the only practical security for the debt, should pass by the assignment of the debt. Otherwise the assignee would have nothing by way of security. Where the converted goods are still in existence, the reasons are not so strong for considering the cause of action as the security for the debt, for the assignee by making a demand upon the wrongdoer for the return of the goods can make the wrongdoer guilty of a conversion as against him.[22] If the goods are no longer in existence it would seem all the more necessary that the cause of action pass, for it is held that the original mortgagee after the assignment of the mortgage cannot maintain the action.[23]

In conclusion, it would seem that the question should be in each case, not whether the cause of action *can* pass but whether the intention of the parties requires that it should pass. This seems to be the modern tendency, for in the Colorado case[24] where the converted property seemingly was no longer in existence, and the cause of action was the only security for the debt, it was held to pass, and in a Kansas case,[25] where there was an express assignment of the cause of action by the mortgagee, the assignee was allowed to sue and the question was not even raised.

NECESSITY OF APPOINTMENT OF GUARDIAN AD LITEM FOR MINOR DEFENDANT IN A DIVORCE SUIT.—The rule of the great majority of states seems well settled either by statute or by judicial decisions, that it is the duty of the court to appoint a guardian ad litem for infant defendants, especially when the minority of the defendant has been called to the court's attention, and when the personal or property rights of the infant are involved. No steps in an action can be taken until this is done, and the minor

[21] Edwards v. Bay State Gas Co., (C.C.A. 1911) 184 Fed. 979, 982.
[22] Hull v. Bernatz, (1895) 106 Mich. 551, 553, 64 N. W. 473, 474.
[23] 11 C. J. 670; Horne v. Briggs, (1868) 98 Mass. 510.
[24] Zinn v. Denver Live Stock Comm. Co., (Colo. 1920) 187 Pac. 1033.
[25] Rudolph v. Nat. Live Stock Comm. Co., (1907) 76 Kan. 189, 92 Pac. 1103.

can make no legal defense.[1] Whether this rule should apply in divorce suits was the question before the Georgia court in the recent case of *Bentley v. Bentley*.[2] The precise question of course can only arise where infants are permitted to contract marriage, and the cases in which the question is discussed are few. In the recent Georgia case the court decided, against defendant's motion, that a guardian ad litem need not be appointed for an infant defendant in a divorce suit.[3] The court rested its decision upon the proposition that it had already decided that an infant plaintiff might bring suit for divorce in his own name,[4] and that it would be illogical to hold that a minor defendant could not likewise act without a guardian.

The New York court in the early case of *Wood v. Wood*[5] takes exactly the opposite view, holding a decree ineffective because it had been granted against a minor defendant not represented by a guardian ad litem. New York has reaffirmed this stand indirectly.[6] It should be noted, however, that New York holds that an infant plaintiff in a divorce suit must be represented by his next friend,[7] so that these decisions would not affect the conclusion of the Georgia court in the recent case.

There is, however, a distinction, recognized by the Georgia court, between minor plaintiffs and defendants. Courts have generally been more liberal in upholding decrees as to infant plaintiffs than they have when the decrees involved the rights of infant defendants, even when in the infant's favor.[8] So the reasoning of the court in the recent case is not altogether con-

[1] Peak v. Shasted, (1859) 21 Ill. 137, 74 Am. Dec. 83; Lehen v. Brumell, (1890) 103 Mo. 546, 15 S. W. 765, 23 A. S. R. 895, 11 L. R. A. 828; Johnson v. Waterhouse, (1891) 152 Mass. 585, 26 N. E. 234, 23 A. S. R. 858, 11 L. R. A. 440; Woods v. Montevallo Coal, etc., Co., (1894) 107 Ala. 364, 18 So. 108; Easton v. Eaton, (1914) 112 Me. 106, 90 Atl. 977, 52 L. R. A. (N.S.) 799; Bunting v. Bunting, (1917) 87 N. J. Eq. 20, 99 Atl. 840; Mechling v. Meyers, (1918) 284 Ill. 484, 120 N. E. 542.

[2] (Ga. 1920) 102 S. E. 21.

[3] See Delpit v. Young, (1899) 51 La. Ann. 923, 25 So. 547, citing the provision of the Civil Code which expressly provides that a minor emancipated by marriage could appear without a next friend in a divorce suit.

[4] Besore v. Besore, (1873) 49 Ga. 378; accord, Jones v. Jones, (1841) 18 Me. 308, 36 Am. Dec. 723.

[5] (1830) 2 Paige Ch. (N.Y.) 108.

[6] E. C. v. E. C. B., (1858) 8 Abb. Pr. (N.Y.) 44; Fishbein v. Fishbein, (1917) 179 App. Div. 883, 165 N. Y. S. 936 where the decision is placed directly upon a statute providing that "a judgment by default shall not be taken against an infant defendant until twenty days has expired since the appointment of a guardian ad litem for him."

[7] Anderson v. Anderson, (1914) 164 App. Div. 812, 150 N. Y. S. 359.

[8] Coalson v. Tooke, (1885) 18 Ga. 742; Foley v. California Horseshoe Co., (1896) 115 Cal. 184, 47 Pac. 42, 56 Am. St. Rep. 87.

clusive. As an abstract proposition it sounds distinctly more reasonable to hold that, if an infant may contract marriage, and may also sue for divorce without next friend, he ought also to be able to defend a suit for divorce.

It is hard to escape the conclusion, however, that the court in the Georgia case did what practically amounts to judicial legislation.[9]

The true solution of the question may perhaps be found in the fact that divorce proceedings, "while civil in their nature, as distinguished from criminal, are ecclesiastical in their origin, are regulated entirely by statute, and cannot be classed as civil actions or cases."[10] In this view, the provisions for appointment of guardian ad litem in civil actions have no application.

POWER OF PUBLIC UTILITY COMMISSIONS TO ALTER RATES OF PUBLIC SERVICE CORPORATIONS FIXED BY CONTRACT BETWEEN THE MUNICIPALITY AND THE PUBLIC SERVICE CORPORATION.—The inability of public utility corporations to operate successfully under their long-term contracts fixing maximum rates, so as to pay a reasonable compensation[1] on the capital investment when costs become high or to defray the increased costs of operating expenses and replacement of equipment, calls in question the power of public service commissions to alter rates which have been so fixed. The powers of some commissions are limited by concurrent municipal control,[2] but generally, and for the pur-

[9] It should also be noted that Georgia has a statute which makes the recent case somewhat analogous to the Fishbein case, supra, note 6. The Georgia Code provides that a return of service should be made, a guardian ad litem appointed, and an acceptance of the appointment made, "all of which must be shown in the proceedings of the court," before a minor should be considered a party to the proceedings. This statute had previously been strictly applied and the rule laid down that no exceptions would be allowed except through statutory enactment. Maryland Casualty Co. v. Lanham, (1905) 124 Ga. 859, 53 S. E. 395; Douglas et al. v. Johnson, (1908) 130 Ga. 472, 60 S. E. 1041.

[10] Simpson v. Simpson, (Me. 1920) 109 Atl. 254; citing Lucas v. Lucas, (1854) 3 Gray (Mass.) 136.

[1] Public utility investors are entitled to a fair return on their capital investment. Smyth v Ames, (1898) 169 U. S. 466, 526, 42 L. Ed. 819, 18 S. C. R. 418; Atlantic Coast Electric Ry. Co. v. Board of Public Utility Commission, (1918) 92 N. J. L. 168, 104 Atl. 218; Columbus Ry. Light & Power Co. v. Columbus, (1919) 249 U. S. 399, 39 S. C. R. 349 raises the question in case of long-term contracts whether the excess of expenses over receipts at any time during the term ought to be a ground for a new trial when the utility had previously earned a good return.

[2] Interurban R. & Terminal Co. v. Public Utilities Commission, (1918) 98 Ohio St. 287, P. U. R. 1919B 212, 120 N. E. 831; Com. ex. rel. Clifton Forge v. Virginia Western Power Co., (1918) P. U. R. 1918F 791.

poses of this article, it is assumed that the public service commissions are vested by the state with the exclusive power to control, regulate, and fix rates of public service utilities.[3]

The cases naturally divide themselves into two classes:

(1) Where the commission seeks to lower the rates against the consent of the utility, or the utility seeks to raise the rates against the consent of the commission.

(2) Where the utility seeks to increase the rates with the consent of the commission.

A notable case illustrating the principle applied to the first class is *Minneapolis v. Minneapolis Street Railway Co.*,[4] in which the city of Minneapolis sought by ordinance to decrease rates of fare from five to four and one-quarter cents. The company had a contract entitling it to collect five cents for each fare for fifty years. The enforcement of the regulatory ordinance was enjoined on the ground that the fifty-year term contract was valid, and that the ordinance was unconstitutional because it would impair the obligation of the contract[5] and take the company's property without due process of law.[6] Although the case involves the validity of such contracts rather than the power of a public service commission to fix rates, yet it decides the rule which governs the power of the commission to lower rates in such cases, for the commission is the authorized agent of the state.[7] The case announces the general principle, (1) that the regulation of rates is an exercise of the police power;[8] (2) that this power is inherent in the state;[9] (3) that it cannot be bargained away; but, (4) that the state may effectually suspend the exercise thereof for a time not unreasonable.[10] Thus a municipality, when authorized by the state, may make an inviolable contract fixing

[3] People ex rel. South Glens Falls v. New York Public Service Com., (1919) 225 N. Y. 216, P. U. R. 1919C 374, 121 N. E. 777; Robertson v. Wilmington & P. Traction Co., (Del. 1918) 104 Atl. 839.

[4] (1910) 215 U. S. 417, 54 L. Ed. 259, 30 S. C. R. 118.

[5] Art. I, Sec. 10, par. 1, U. S. Const.

[6] XIV Amend. U. S. Const

[7] Borough of North Wildwood v. Board of Public Utility Commission, (1915) 88 N. J. L. 81, 95 Atl. 749.

[8] See also In Re Guilford Water Co.'s Service Rates, (Me. 1919) 108 Atl. 446.

[9] See note 8.

[10] See note 8; Lenawee Gas & Electric Co. v. City of Adrian, (Mich. 1920) 176 N. W. 590; Home Tel. & Tel. Co. v. Los Angeles, (1908) 211 U. S. 265, 53 L. Ed. 176, 29 S. C. R. 50; Vicksburg v. Vicksburg Water Co., (1907) 206 U. S. 496, 508, 51 L. Ed. 1155, 27 S. C. R. 762; State ex rel. City of St. Louis v. Laclede Gas Light Co., (1890) 102 Mo. 472, 15 S. W. 319; Col. Ry. Light and Power Co. v. Columbus, (1919) 249 U. S. 399, 39 S. C. R. 349.

rates to continue for a reasonable time, and the necessary result will be that the rate so fixed can be changed neither by regulation by the municipality[11] or a public utility commission,[12] nor by the utility itself, against the will of the other contracting party.

There exists, however, one great limitation upon the power of a municipality to make inviolable contracts for a definite term. There is implied in a legislative grant of authority to a city to contract for utility service the reservation of police power in the state to regulate rates.[13] The great mass of authority holds that no presumption of a surrender of police power will be indulged unless the legislative intention is clearly, unequivocally, and unmistakably expressed.[14] It has been held by the majority of courts that neither an authorization in the municipal charter to fix rates for utility service for a definite period,[15] nor an authorization to make a charge for such service,[16] constitutes a surrender by the state of its right to regulate. The recent cases, especially in Maine[17] and Illinois,[18] show a strong tendency on the part of the courts to hold uniformly that the power to regulate has not been surrendered. Wherever this power is thus reserved in the state, the commission as the lawfully authorized

[11] Vicksburg v. Vicksburg Water Co., (1907) 206 U. S. 496, 508, 57 L. Ed. 1155, 27 S. C. R. 762, where court states: "That a state may in matters of proprietary rights, exclude itself from the right to make regulations of this kind, or authorize municipal corporations to do so, when the power is clearly conferred, has been too frequently declared to admit of doubt."

[12] Lenawee Gas & Electric Co. v. City of Adrian, (Mich. 1920) 176 N. W. 590, where it is stated that the commission has not power to fix rates where the contract is inviolable under the constitution except by mutual consent of the municipality and the public utility.

[13] In Re Searsport Water Co., (Me. 1919) 108 Atl. 452; In Re Guilford Water Co.'s Service Rates, (Me. 1919) 108 Atl. 446; Northern Pacific Ry. Co. v. North Dakota, (1914) 236 U. S. 585, 59 L. Ed. 735, 35 S. C. R. 429; Woodburn v. Public Service Commission, (1916) 82 Ore. 114, 166 Pac. 391, L. R. A. 1917C 98; Salt Lake City v. Utah Light & Traction Co., (Utah 1918) 173 Pac. 556. See note 3 A. L. R. 732.

[14] Woodburn v. Public Service Commission, (1916) 82 Ore. 114, 166 Pac. 391, L. R. A. 1917C 98, where court says: "unless the right to exercise the police power of regulating rates is referable to an unmistakable grant, the prices specified in the franchise are not exempt from interference by the legislative assembly."

[15] Chicago Ry. Co. v. City of Chicago, (Ill. 1920) 126 N. E. 585; Stone v. Farmer's Loan & Trust Co., (1885) 116 U. S. 307, 29 L. Ed. 636, 6 S. C. R. 334.

[16] Tallassee Falls Mfg. Co. v. Commissioner's Court, (1909) 158 Ala. 263, 48 So. 354; State ex. rel v. Columbus Gaslight & Coke Co., (1878) 34 Ohio St. 572, 32 Am. Rep. 390.

[17] In Re Guilford Water Co's Service Rates, (Me. 1919) 108 Atl. 446; In Re Searsport Water Co., (Me. 1919) 108 Atl. 452.

[18] Chicago Ry. Co. v. City of Chicago, (Ill. 1920) 126 N. E. 585.

agent of the state may in its discretion lower or increase the rates for utility service.[19]

The second class of cases where the utility seeks to increase the rates with the consent of the public service commission is the most frequent today. In nearly all of the cases which have come before the commission for consideration and where the increase in rates has been granted by the commission the courts have upheld the power of that body to regulate on the ground that the increase in rates was a valid exercise of the reserved police power. Conceding that in all such cases the legislature had reserved the right to exercise the police power, the validity of such increases is indisputable. But has the public service commission the power to increase rates under an inviolable contract where the state has surrendered the exercise of the police power for a reasonable time? This situation is presented in *City of Salem v. Salem Water, Light & Power Co.*,[20] where the commission set aside the contract rates, and granted an increase in water rates for service furnished to both the municipality and its inhabitants. On suit brought by the water company to recover the additional charge, the city contended that the order of the public service commission impaired the obligation of its contract and was unconstitutional. The order of the commission was upheld,[21] on the ground that the original contract executed by the municipality and the utility was one between the state and the utility, wherein the municipality acted as agent of the state, and the state, having the power to contract, necessarily had the power to waive that contract, by its duly authorized agent the public service commission.[22] Where by mutual consent the old

[19] Winfield v. Public Service Com., (Ind. 1918) 118 N. E. 531; In Re Searsport Water Co., (Me. 1919) 108 Atl. 452.

[20] (1919) 255 Fed. 295, P. U. R. 1919C 956, 960.

[21] Salem v. Salem Water, Light & P. Co., (1919) 255 Fed. 295, P. U. R. 1919C 956. "But as the municipal corporation is but a political subdivision of the state through its legislative department, it is our opinion that the city had no absolute property right to demand continued hydrant service at a given rate as against the right of the state to modify such rates of service with the consent of the water company, notwithstanding the fact as to the water company itself, the contract might be unalterable except with its consent."

[22] City of Portland v. Public Service Com. of Ore., (1918) 89 Ore. 325, 173 Pac. 1178; Winfield v. Public Service Com., (Ind. 1918) 118 N. E. 531; Sandpoint Water & Light Co. v. Sandpoint, (1918) 31 Idaho 498, 173 Pac. 972.

In the case of Borough of North Wildwood v. Board of Public Utility Com. (1915) 88 N. J. L. 81, 95 Atl. 749, the court uses the following language: "For while the municipality itself has not assented to a change in rate, the state, its creator and parent, has done so through a specially

rate is abrogated by rescission of the contract, there is nothing to prevent the commission from fixing a reasonable rate in the exercise of the police power vested in it. It is submitted that all cases involving the power of the public service commission to increase rates, where the company consents to such increase might be settled upon this basis: that the contract is between the utility and the state; that the public service commission as an agent of the state may consent to the abrogation of the contract, and the utility and the commission having both consented, the abrogation is complete and free from constitutional objection on the part of the municipality. The adoption of this theory will prevent a great amount of public inconvenience and will preclude the result reached in *Lenawee Gas & Electric Co. v. City of Adrian,*[23] to the effect that the public service commission could not increase rates except by the mutual consent of the muncipality and the public utility.[24]

What is the status of the utility with respect to its contract rights after it has applied for and obtained an increase of rates from the commisssion? It is submitted that a logical result of the cases is: that the original contract is completely abrogated; that the new rate is the result not of a new and substituted contract but of a fresh exercise of its police power; and that there is nothing to prevent a further exercise of the police power by a reduction of the rates, even below the old level, if and when the commission shall be of the opinion that such reduction will be in furtherance of justice. By submitting itself to the jurisdiction of the commission the utility represents that the contract no longer is just and consents to its abrogation. Once gone, there is no power which can make a new one except the state

constituted agency. If the water company were here complaining that its contract rights were being impaired, a different question would be presented, but the right of one of the state creatures may be waived by the creator."

[23] (Mich. 1920) 176 N. W. 590. A similar result has been reached in a few other states, especially Ohio and West Virginia.

Art. 18, par. 4 of the const. of Ohio is as follows: "Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility, the product or service of which is to be supplied to the municipality and its inhabitants and may contract with others for any such product or service."

Sec. 9113 General Code of Ohio: provides "council or the commissioners as the case may be, shall have the power to fix the terms and conditions upon which such railways may be constructed, extended and consolidated." See also Interurban R. & Terminal Co. v. Public Utilities Com., (1918) 98 Ohio St. 287, 120 N. E. 831; Com. ex rel. Clifton Forge v. Virginia Western Power Co., (1918) P. U. R. 1918F 791.

[24] Lenawee Gas & Electric Co. v. Adrian, (Mich. 1920) 176 N. W. 590.

itself, or its duly authorized representatives, and the evidence of its having done so must be clear and convincing.

RECENT CASES

ABATEMENT AND REVIVAL—FORMER ACTION INSTITUTED BY DEFENDANT. —In an action to recover damages resulting from a collision of automobiles, defendant moved to dismiss on the ground that there was then pending another action for damages resulting from the same collision begun by defendant in another county of the same state. *Held*, that the action should be dismissed. *Allen v. Salley*, (N. C. 1919) 101 S. E. 545.

This decision is sustained by the authority of *Alexander v. Norwood*, (1896) 118 N. C. 381, 24 S. E. 119. It has the salutary effect of avoiding multiplicity of actions, and rests upon the principle that parties must assert their rights at the first opportunity. *Bank v. Leonard*, (1860) 20 How. Prac. (N.Y.) 193, 197. At the common law it was settled that the plea of former action pending was not good in reference to an action begun by the present defendant. *New England Screw Co. v. Bliven*, (1854) 3 Blatch. (U. S. C. C.) 240, Fed. Cas. No. 10,156. The theory of the instant case is that the Code has substituted a different rule. So it has been held that the pendency of an action by a buyer for breach of a contract of sale is a bar to a subsequent action by the seller for the price of the goods. *Bartholomay Brewing Co. v. Haley*, (1897) 44 N. Y. S. 915, 16 App. Div. 485. A bill to have a deed declared void bars an action to have the deed sustained. *Troy Fertilizer Co. v. Prestwood*, (1896) 116 Ala. 119, 22 So. 262. But on the other hand it is held that an action for malpractice does not bar an action by the physician defendant to recover for his services. *Goble v. Dillon*, (1882) 86 Ind. 327, 44 Am. Rep. 308. The following cases hold that the defence of prior suit pending applies only where the plaintiffs in both suits are the same. *Rodney v. Gibbs*, (1904) 184 Mo. 1, 82 S. W. 187; *Paul v. Hubart*, (1878) Fed. Cas. No. 10,841, (construing the Minnesota Code); *Walsworth v. Johnson*, (1871) 41 Cal. 61; *Pratt v. Howard*, (1899) 109 Ia. 504, 80 N. W. 546; see *Disbrow Mfg. Co. v. Creamery Package Mfg. Co.*, (1911) 115 Minn. 434, 132 N. W. 913, L. R. A. 1918A 3 and note. But the cases for the most part recognize an exception to this rule where the defendant in the second action might without prejudice have had complete relief by making a defence in the former action. *Pratt v. Howard, supra*. That view brings the instant case within the rule, and seems the best solution, if the courts will not insist upon saying that the cause of action is the same in both cases, which manifestly is open to objection where the parties are reversed.

BANKS—IMPAIRED CAPITAL—ASSESSMENTS.—Plaintiff brought action to recover the value of his stock sold by defendant bank for non-payment of an assessment. The assessment of 40 per cent on the capital stock was levied by the board of directors in response to a notice from the super-

intendent of banks that the capital was impaired to that extent by the holding of worthless paper. *Held,* that when the capital of a state bank becomes impaired, the power to elect whether the bank shall go into liquidation or make up the deficiency by levying an assessment on its capital stock rests with the stockholders, and such an assessment levied by the board of directors is void for lack of power to make it. *Deveney v. Harriet State Bank,* (Minn. 1920) 177 N. W. 460.

An assessment to repair depleted capital and enable a bank to continue doing business must be distinguished from an assessment to enforce the stockholders' double liability in insolvency proceedings. *Northwestern Trust Co. v. Bradbury,* (1912) 117 Minn. 83, 134 N. W. 513; *Delano v. Butler,* (1886) 118 U. S. 634, 7 S. C. R. 39, 30 L. Ed. 260. The question of whether the right to levy an assessment to make up the deficiency in capital lies within the power of the directors or of the stockholders has seldom been raised. General Stat. Minn. 1913, sec. 6365 provides: "Every bank. . . . whose capital shall have become impaired, within ninety days after receiving notice thereof from the public examiner, shall make up the deficiency by a pro rata assessment on the capital stock or go into liquidation . . . but, with the consent and approval of the examiner, such bank may reduce its paid-up capital stock as hereinafter provided, pay in any remaining deficiency, and thereupon continue business upon such reduced capital." In *Slette v. Larson,* (1914) 125 Minn. 263, 126 N. W. 1093, the point of the present case was not considered and the court permitted the enforcement of an assessment levied by the board of directors upon informal direction of the bank examiner that the amount of a prior irregular assessment be collected and applied to restore the depleted capital, the alternative being to go into liquidation. This case is in effect overruled by the decision of the instant case which follows the holding of the United States courts that such an assessment on the stock of national banks on notice from the comptroller of the currency that the capital was so impaired as to require it, could be made only by the shareholders and not by the board of directors. *Hulitt v. Bell,* (1898) 85 Fed. 98; *Com'l Nat. Bank v. Weinhard,* (1904) 192 U. S. 243, 24 S. C. R. 253, 48 L. Ed. 425. The bank has the option to levy the assessment required or to go into voluntary liquidation and a decision so to do is an extraordinary matter not within the usual business of the directors, for the stockholders do not agree to continue to pay assessments at the will of the directors and perhaps continue what they might consider to be a losing business. The Minnesota court holds that since the statutes permit two of the options available to the bank, namely voluntary liquidation, Gen. Stat. Minn. 1913, sec. 6374, and the reduction of the capital stock, Gen. Stat Minn. 1913, sec. 6365 and 6372, to be carried into effect only by the stockholders, the assessment to restore the depleted capital can be made only by vote of the stockholders. Kentucky under a statute similar to Minnesota's, enforced against a pledgee an assessment made by the directors to repair the capital in response to an order from the secretary of state, but the precise point at issue was not raised in that case, *Corbin Banking Co. v. Mitchell,* (1910) 141 Ky. 172, 132 S. W. 426, 31 L. R. A. (N.S.) 446.

CHARITABLE CORPORATIONS—LIABILITY TO PATIENT—NEGLIGENCE OF SERVANTS.—Defendant operated a charitable hospital. Plaintiff's testator was a patient therein, suffering from delirium, and needed watching. While the nurse in charge was absent from the room, he jumped out of a second story window, and was killed. *Held,* defendant is liable in damages for the death due to the employee's negligence. *Mullinex v. Evangelischer, etc.,* (Minn. 1920) 175 N. W. 699.

This precise point is new in Minnesota, although the court has decided that a charitable hospital is liable to a servant injured in consequence of the defendant's negligence. *McInery v. St. Luke's Hospital Association,* (1913) 122 Minn. 10, 141 N. W. 837, 46 L. R. A. (N. S.) 548. The great weight of authority holds that a patient who receives an injury from the acts of a servant in such an institution cannot recover, provided due care in selecting the servants was used. *Duncan v. Nebraska etc., Ass'n,* (1912) 92 Neb. 162, 137 N. W. 1120, Ann. Cas. 1913E 1127 41 L. R. A. (N.S.) 973; *Schloendorff v. Society of N. Y. Hospital,* (1914) 211 N. Y. 125, 105 N. E. 92, 52 L. R. A. (N.S.) 505; see 5 R. C. L. 375. There are three grounds for the majority holding. First, the public policy is to exempt charitable corporations from the operation of the rule respondeat superior, for they derive no private benefit from the work of the servants. *Hearns v. Waterbury Hospital,* (1895) 66 Conn. 98, 33 Atl. 595, 31 L. R. A. 224; *Taylor v. Protestant Hospital Assoc.,* (1911) 85 Ohio St. 90, 96 N. E. 1089, 39 L. R. A. (N.S.) 427. Second, to hold the corporation liable would be a diversion of charitable funds from the purpose intended by the donors. *Downes v. Harper Hospital,* (1894) 101 Mich. 555, 60 N. W. 42, 45 A. S. R. 427, 25 L. R. A. 602. Third, one who accepts the benefit of charity impliedly waives the liability of the institution for injuries caused by the negligent acts of servants if they have been carefully selected, and assumes the risk himself. *Powers v. Massachusetts Homeopathic Hospital,* (1901) 109 Fed. 294, 47 C. C. A. 122, 65 L. R. A. 372.

Only a few cases place the liability upon the charitable corporations. The doctrine that the charitable purpose of the donors exempts the organization from the law holding a master liable for the acts of his servant permits the will of the individuals to nullify the will of the people. If public policy demands exemption from this liability, the legislature, not the courts, shall grant it. *Tucker v. Mobile Inf. Ass'n.,* (1915) 191 Ala. 572, 68 So. 4, L. R. A. 1915D 1167. Donors know that servants of a charitable hospital are as likely to commit acts of negligence as servants of a non-charitable hospital, and authority to hire the necessary employees includes the power to respond in damages for their acts. *Hewett v. Women's Hospital Aid Ass'n.,* (1906) 73 N. H. 556, 64 Atl. 190, 7 L. R. A. (N.S.) 496. In the instant case, the court points out that the argument as to diversion of funds applies with equal force in cases against churches and charitable corporations for injuries to employees and third persons and for consequences of negligence in selecting employees. Yet no such exception is recognized. The court also sees no reason why the assumption of risk should be imposed on a patient who has no thought of assuming it when he enters the

hospital. The more reasonable view of the minority is adopted that a policy of responsibility on the part of such institutions "best subserves the beneficent purposes for which they are maintained."

CONTRACTS—AGREEMENT OF SERVANT NOT TO ENGAGE IN BUSINESS VALID.—Defendant agreed that for a period of two years after his discharge by plaintiff, his employer, he would not enter the employ of any other film company anywhere in the United States except Alaska. He had become possessed of valuable trade secrets while in the plaintiff's employ. *Held*, that the contract is valid and not contrary to public policy. *Eastman Kodak Co. v. Powers Film Products, Inc.*, (1919) 179 N. Y. S. 325.

The rule is generally stated that contracts by employes in restraint of future employment are valid only if the restraint is reasonable and not against public policy. *Taylor Iron & Steel Co. v. Nichols*, (1908) 73 N. J. Eq. 684, 69 Atl. 186, 24 L. R. A. (N.S.) 933. In the instant case the restraint was probably not too great to afford more than a reasonable protection to plaintiff's business, but it did impose a restraint upon defendant which, when considered from his point of view, the policy of the law might fairly condemn. But many courts, especially those of England, have gone a long way in holding such contracts valid. *Lamson Pneumatic Tube Co. v. Phillips*, (1904) 91 L. T. Rep. 363; *White, etc. v. Wilson*, (1907) 23 Times L. R. 469. Such restrictions when ancillary to the sale of a business are now generally upheld. *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, (1894) A. C. 535, 6 Eng. Rul. Cas. 413. The rule is not so liberal when the agreement is ancillary to a contract of employment merely. *Kinney v. Scarborough Co.*, (1912) 138 Ga. 77, 74 S. E. 772, 40 L. R. A. (N.S.) 473, and note. Some courts, however, consider the rule to be the same in both cases. *Eureka Laundry Co. v. Long*, (1911) 146 Wis. 205, 131 N. W. 412, 35 L. R. A. (N.S.) 119. And where there is a legitimate object in view in the keeping of secret processes out of the hands of competitors, the strong tendency is to enforce such restrictoins. *McCall Co. v. Wright*, (1910) 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N.S.) 249; *Harrison v. Glucose Sugar Refining Co.*, (1902) 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915.

DAMAGES—TROVER AND CONVERSION—COMPENSATION FOR LOSS OF USE.—Defendant, by premature foreclosure of a chattel mortgage, converted two work horses, two milch cows, and a stump machine, and then disposed of them by sale. The trial court instructed the jury to give special damages for the loss of use of the chattel from the time of conversion. *Held*, that the charge of the court, in so far as it allowed damages for the loss of use, was erroneous. *Maycroft v. The Jennings Farms*, (Mich. 1920) 176 N. W. 545.

In the case of ordinary chattels of non-fluctuating value, the majority of American decisions, with which the instant case is in accord, hold that where the chattels are not returned in mitigation of damages, the proper measure of damages is the market value of the property at the

time and place of conversion with interest to the time of the trial, and that the plaintiff cannot also recover for the loss of use. *Martinez v. Vigil,* (1914) 19 N. Mex. 306, 142 Pac. 920, L. R. A. 1915B 291. The denial of damages for the loss of use is generally based on one or more of three grounds: (1) most courts support their view with the legal fiction that the plaintiff by choosing this form of action elects to treat the title of the chattel as being in the defendant from the moment of conversion, and that consequently the plaintiff has no right to the use. *Martinez v. Vigil,* supra; *Bowers,* The Law of Conversion, Sec. 672; (2) several courts, in those jurisdictions where interest is given not as a matter of right but as a matter of damages, 38 Cyc. 2090, hold that the interest allowed represents the loss of use, and that therefore special damages for the loss of use cannot be recovered in addition to the interest. *Lynch v. McGhan,* (1907) 7 Cal. App. 132, 93 Pac. 1044; (3) still other courts hold that damages resulting from loss of use are merely speculative and too remote. *Drennen v. Charles,* (1900) 12 Pa. Super. Ct. 476; and see *Cushing v. Seymour, Sabin & Co.,* (1883) 30 Minn. 301, 15 N. W. 249. The Texas courts have reached a compromise position by holding that where the value of the use exceeds the amount of interest allowed by the general rule, the plaintiff may elect as damages the value of the use. *Moore v. King,* (1893) 4 Tex. Civ. App. 397, 23 S. W. 484. On the other hand, a leading English case holds that special damages for the loss of use are recoverable in an action of trover, provided they are properly averred and flow as a natural and probable consequence from the defendant's wrongful act. *Bodley v. Reynolds,* (1846) 8 Q. B. 779, 15 L. J. Q. B., 219, 10 Jur. 310. This view has received some support in this country. *Schley v. Lyon,* (1849) 6 Ga. 530; see also *Jones v. Rahilly,* (1870) 16 Minn. 320 (283), and *Sherman v. Clark* (1877) 24 Minn. 37.

It would seem that the fiction of the relating back of the title should not deprive the plaintiff of damages proximately sustained from the loss of use, because such loss is frequently a hardship, as in the instant case, and a real damage for which the market value of the chattel plus interest is not an adequate compensation. It is submitted that the view of the Texas courts, supra, is the more equitable, subject to the qualification that damages for the loss of use, where proximate and properly alleged and proved, should be allowed only for a reasonable time after the conversion and not necessarily to the time of the trial, in order to prevent the plaintiff from enhancing the damage by unduly postponing the bringing of his action. See *Cutler v. James Goold Co.,* (1887) 43 Hun. (N.Y.) 516.

DEATH—REMARRIAGE OF SURVIVING SPOUSE CANNOT BE CONSIDERED IN MITIGATION OF DAMAGES.—In an administrator's action for his wife's death under the New York statute allowing actions for death by wrongful act, it was *held,* that remarriage of the plaintiff could not be considered in mitigation of damages. *Lees v. New York Consol. R. Co.,* (1919) 180 N. Y. S. 546.

The New York statute states specifically that "the damages awarded the plaintiff may be such a sum as the jury . . . the court, or the referee deems to be a fair and just compensation for the pecuniary injuries, resulting from the decedent's death to the person or persons for whose benefit the action is brought." N. Y. Code Civ. Prac., sec. 1904. Although the Minnesota statute is worded differently, it is construed as authorizing the same measure of damages except that the damages awarded must not exceed the $7500, the statuory limit. Minn. G. S. 1913, sec. 8175; *Faulk v. Chicago, etc. R. Co.*, (1916) 133 Minn. 41, 157 N. W. 904; *Bremer v. Minneapolis, etc. R. Co.*, (1905) 96 Minn. 469, 105 N. W. 494. It is the general rule that under such statutes creating a new cause of action for wrongful death, the damages must be limited to the pecuniary loss which is to be measured by the standard of the pecuniary value of the life of the decedent to the person entitled to damages. 17 C. J. 1318 *et seq.*

The question is whether, in application of the above rule, the remarriage of a surviving spouse may be considered by the jury in mitigation of the damages for the pecuniary loss sought to be recovered by that spouse. It might appear that since the theory of the recovery is to compensate the injured party for the pecuniary loss suffered by the death of deceased, if by remarriage this loss has been recouped, so to speak, the extent of the recoupment should be considered in mitigation of the damages recoverable. But the rule is general throughout the United States that in such cases the subsequent remarriage of the survivor is not to be considered. *St. Louis. etc., R. Co., v. Cleere*, (1905) 76 Ark. 377, 88 S. W. 995; *Chicago, etc., R. Co., v. Driscoll*, (1903) 207 Ill. 9, 69 N. E. 620, (affg. 107 Ill. App. 615); *Gulf, etc., R. Co. v. Younger*, (1897) 90 Tex. 387, 38 S. W. 1121; Davis v. Guarnieri, (1887) 45 Ohio St. 470, 15 N. E. 350, 4 A. S. R. 548; *Georgia, etc., R. Co. v. Garr*, (1876) 57 Ga. 377, 24 A. R. 492; See note 67 L. R. A. 95; 17 C. J. 1343; 4 *Sutherland*, Damages, 3d Ed., pp. 3714, 3718.

EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATES—NON-CLAIM STATUTES.—The relator was a creditor of an estate. An order of court was duly published giving notice to all creditors to present their claims. Relator in due time handed her claim to the administrator, believing that by so doing she had complied with the law, but she relied also on the assurance of the administrator that nothing more need be done with reference to presenting the same to the court. More than eighteen months later, the relator filed a petition in probate court asking that the time for presenting claims be extended. Her petition was denied. On appeal it was *held;* (1) filing a claim with the administrator is not a compliance with the statute requiring claims to be filed with the probate court; (2) the probate court has no power to extend the time when more than eighteen months have elapsed since the order to present claims was published; (3) even though the administrator was guilty of fraud, the bar of the non-claim statute cannot be waived or lifted after once closed. *State ex rel. Scherber v. Probate Court of Hennepin County*, (Minn. 1920) 177 N. W. 354.

The case is of interest in showing the distinction between the statute of non-claim and the statute of limitations. The latter can be waived and an old debt, barred by the statute, will be sufficient consideration to support a promise to pay the debt. *Spilde v. Johnson,* (1906) 132 Ia. 484, 109 N. W. 1023, 119 A. S. R. 578, 8 L. R. A. (N.S.) 439. But a non-claim statute cannot be waived and once the statute has run the bar is complete. *Gilman v. Maxwell,* (1900) 79 Minn. 377, 82 N. W. 669; *Nagle v. Ball,* (1893) 71 Miss. 330, 13 So. 929. The statute gives the creditor a right to present his claims within limited time. The time limit is a condition precedent which must be complied with or the right cannot be exercised. *Pulliam v. Pulliam,* (1881) 10 Fed. 53. In this way it differs from the statute of limitations which merely bars an existing right, whereas the non-claim statute provides a remdy, but lays down conditions as to how and when it may be exercised. The two kinds of statutes are clearly distinguished in *Pulliam v. Pulliam,* supra. In this connection it should be mentioned that a similar question arises in connection with the statutes which create a cause of action and prescribe a time limit within which the action may be brought. For example, the statutes giving a right to the children or spouse of a deceased person to sue for wrongful death. In an action of this kind in *Sharrow v. Inland Lines,* (1915) 214 N. Y. 101, 108 N. E. 217, L. R. A. 1915E, 1192, it was held that a complaint filed to recover damages for wrongful death is not demurrable for failing to state that the action was brought within the period prescribed, after death by the statute. There was a strong dissenting opinion by two judges who maintained that the weight of authority is overwhelmingly in favor of the contrary doctrine. The subject is discussed in a note in L. R. A. 1915E, 1192.

GIFTS—JOINT BANK ACCOUNT—Plaintiff's intestate deposited her own money in the defendant's bank to the account of herself and her sister. Both signed the following statement at the bank :"This account is our joint property, and is payable on the individual receipt of either of us, and in case of death of either to the survivor." There was evidence showing the intention of the depositor was to make her sister joint owner with the right of sole ownership if she survived. *Held,* that the deposit was an executed gift inter vivos; that upon the death of the decedent, the deposit belongs to the survivor; and that the administrator cannot recover of the bank. *McLeod v. Hennepin County Savings Bank,* (Minn. 1920) 176 N. W. 987.

The instant case is the first in Minnesota involving a joint savings bank deposit. The bearing of Minnesota G. S. 1913, Sec. 6390 on the question was not determined. In some cases in other states the title of the survivor is based on the trust theory. *Mathias v. Fowler,* (1915) 124 Md. 655, 93 Atl. 298. The use of the words "trust" or trustee" is not necessary if the intention to create a trust is indicated with reasonable certainty. *Carr v. Carr,* 1911) 15 Cal. App. 480, 115 Pac. 261. In most cases the courts test the right of the survivor by the requirements of a gift, the majority of them holding that if the intention of the donor is to make the donee joint owner, the deposit is a gift inter vivos. *Blick v.*

Cockins, (1916) 252 Pa. 56, 97 Atl. 125; *New Jersey Title Guaranty & Trust Co. v. Archibald,* (N. J. 1919) 108 Atl. 434. The delivery of the bank book is not a prerequisite to the passing of the joint title. *Martinson v. Industrial Trust Co.,* (R.I. 1919) 107 Atl. 88. A change from an individual to a joint account confers prima facie title upon the surviving donee in the absence of facts showing that the change was made for some other purpose than to pass title. *Hallenbeck v. Hallenbeck,* 1905) 93 N. Y. S. 73. There is no gift if the joint account is manifestly for convenience only, so that either may draw as occasion requires, the donor not parting with present dominion over the property. *Lufkin v. Lufkin,* (1914) 111 Me. 588, 90 Atl. 493; or if it is for the purpose of enabling the survivor to draw from the account as an agent of the owner, *In Re Behring's Estate,* (1912) 80 N. J. Eq. 165, 82 Atl. 931; of if the depositor does not intend to deprive himself of the right to dispose of deposit by his will, *Barlow v. Tetlow,* (1916) 115 Me. 96, 97 Atl. 829; or if the surrounding circumstances do not raise a presumption of gift. *Hayes v. Claussens,* (1919) 179 N. Y. S. 153. Other cases treat the question not as one of trust or gift, but regard the deposit to joint credit as creating a contract relation between the bank and the two joint depositors, under which the amount of the credit becomes the property of the survivor. *Deal's Adm'r v. Merchants and Mechanics Savings Bank and Others,* (1917) 120 Va. 297, 91 S. E. 135, L. R. A. 1917C 548, annotated at p. 550; *Chippendale v. North Adams Sav. Bank,* (1916) 222 Mass. 499, 111 N. E. 371. See 3 MINNESOTA LAW REVIEW 349.

HUSBAND AND WIFE—ACTION BY HUSBAND AGAINST WIFE—PERSONAL TORT.—Plaintiff husband, alleging a systematic campaign on the part of his wife, the defendant, of cruel and inhuman treatment causing a separation and threatening plaintiff's health and comfort, seeks to restrain the defendant by injunction from further acts and conduct of the kind. The defendant demurred. *Held,* that the Married Women's Act, G. S. Minn. 1913, Sec. 7142 gives neither husband nor wife a right of action to enjoin the commission of acts by the other which amount to nothing more than a series of personal torts, commonly known as "nagging." *Drake v. Drake,* (Minn. 1920) 177 N. W.—

This decision, applying the rule in *Strom v. Strom,* (1906) 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N.S.) 191, 116 A. S. R. 387, is in accord with the view of a majority of the courts,—that neither spouse can maintain a civil action against the other for a personal tort. The minority show a tendency to liberally construe the so called Married Woman's Acts to a contrary holding. See I MINNESOTA LAW REVIEW 82, for a discussion and summary of cases to 1917. *Johnson v. Johnson,* (Ala. 1917) 77 So. 335, allowing the wife to sue her husband for assault and battery; contra, *Heyman v. Heyman,* (1917) 19 Ga. App. 634, 92 S. E. 25, allowing the wife no recovery for the negligent tort of her husband, and *Keister's Adm'r v. Keister's Ex'rs,* (1918) 123 Va. 157, 96 S. E. 315, 1 A. L. R. 439, allowing the personal representative of the wife no action against the husband for wrongfully causing her death, under a statute permitting married women to sue in the same manner as if unmarried. The latter case, dis-

tinguishing between those statutes which, like its own, merely grant "remedies" for existing rights, and those which confer "substantive civil rights" upon married women, reconciles its decision with the opposing view of the Arkansas court in *Fitzpatrick v. Owens,* (1916) 124 Ark. 167, 186 S. W.. 832, 187 S. W. 460, L. R. A. 1917B 774, decided under a statute falling in the latter class, in a similar comment upon the Oklahoma statute, which is in this respect identical with the Minnesota statute G. S. 1913, Sec. 7142. The Virginia court, in *Keister's Adm'r. v. Keister's Ex'rs.* supra, indicates that in its hands, *Strom v. Strom,* supra, would receive a decision contrary to the Minnesota and prevailing view.

The instant case is an interesting application of the doctrine consistently followed in Minnesota and its facts furnish a striking example of the ground upon which is based the majority holding, namely, that a contrary policy would, in the words of the Minnesota court, "mar and disturb the tranquillity of family relations by dragging into court for judicial investigation, matters of no serious moment which would otherwise be forgiven or forgotten." Moreover, it is obvious that a court would encounter practical difficulties of definition and enforcement, should it grant a decree enjoining "nagging."

INSURANCE—"MILITARY SERVICE" WITHIN EXCEPTION OF POLICY CONSTRUED.—Insured passed the examination as a soldier, took the oath, was enrolled, entered a military training camp in Louisiana and while in such training camp died of pneumonia. Under a policy excepting from risks assumed "military service in time of war," *held,* insured was within the exception—*Ruddock v. Detroit Life Ins. Co.,* (Mich. 1920) 177 N. W. 242.

This case is contra to the position taken by the North Dakota court, *Myli v. American Life Ins. Co.,* (N. D. 1919) 175 N. W. 631, and to the current of recent authority. For discussion see 4 MINNESOTA LAW REVIEW 457.

MASTER AND SERVANT—SECURING EMPLOYMENT BY FRAUD—DEFEATS RECOVERY FOR INJURY.—Defendant company had certain established rules governing the employment of brakemen. They had to be within a certain age and pass a physical examination. Plaintiff, knowing these rules, and being over the required age and physically unable to pass the required examination, secured one Reardon to assume his name, be examined, and secure the medical certificate for him. Plaintiff then presented the certificate to defendant company's employing officer and secured the position of brakeman, in which employment he was injured. *Held,* that securing employment by fraud defeats recovery as employee, for injury incurred during such employment. *Stafford v. Baltimore & O. R. Co.,* (D.C. 1919) 262 Fed. 807.

The question is as to the effect of fraud on the status of the parties. In *Lake Shore & M. S. R. Co. v. Baldwin,* (1900) 19 Ohio C. C. 338, 10 O. C. D. 333, the court held that fraudulent misstatement of age by an infant, whereby he gains employment, will not bar him from recovering damages for injury incurred during such employment, which does not

result from such infancy, on the ground that plaintiff's fraud made him liable only to be judged by the same rules of negligence as an adult. The court allowed a recovery in the case of *Kirkham v. Wheeler-Osgood Co.*, (1905) 39 Wash. 415, 81 Pac. 869, supporting its decision on the theory that infants are not liable for torts connected with or growing out of contracts, and the doctrine of estoppel in pais does not apply to them. Recovery has also been allowed on the ground that the relation of master and servant exists by virtue of the one party performing valuable services which are accepted and paid for by the other. *Lupher v. A. T. & S. F. Ry. Co.*, (1910) 81 Kan. 585, 106 Pac. 284, 25 L. R. A. (N.S.) 707; *Hart v. N. Y. etc., R. Co.*, (1912) 205 N. Y. 317, 98 N. E. 493.

In direct opposition to the above, a minority of courts have held that under such circumstances the status of master and servant does not exist, and that an infant who obtains service by falsely representing himself to be of age, stands in the position of a bare licensee, at the most, to whom the company stands in no contractual relation. *Norfolk etc., R. Co. v. Bondurant's Administrator*, (1907) 107 Va. 515, 59 S. E. 1091, 15 L. R. A. (N.S.) 443, 122 A. S. R. 867. This decision was based largely on the precedent of *Fitzmaurice v. N. Y. etc., R. Co.*, (1906) 192 Mass. 159, 116 Am. St. Rep. 236, 78 N. E. 418, 7 Ann. Cas. 586, 6 L. R. A. (N.S.) 1146, which held that one who uses a railroad ticket obtained by fraud, is not a passenger, in the sense of being entitled to protection as such, and stands in no better position than a trespasser. The validity of this analogy was seriously questioned in the *Lupher case*, supra.

The instant case resolves itself into an instance of a contract which, because of the plaintiff's fraud the court holds voidable at the option of the employer. The plaintiff is barred from recovering as an employee but might recover as a licensee or trespasser.

MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCE PROHIBITING PUBLIC GARAGE WITHOUT CONSENT OF ADJOINING OWNERS.—A city ordinance provided that no public garage should be erected in a residence district within forty feet of adjoining land, without the consent of the owners of such land. A bill for an injunction to prevent the erection of a garage without this consent was brought by property owners. *Held*, that the ordinance was invalid as an unreasonable exercise of the police power and amounted to a delegation of arbitrary authority to adjacent property owners. *Myers v. Fortunato*, (Del. 1919) 108 Atl. 678.

The problem involved is to be distinguished from that of the validity of an ordinance which confers upon a board or administrative official power to grant or refuse permits to erect certain kinds of buildings or engage in a particular occupation. 2 Dillon, Municipal Corporations, 5th ed., sec. 598. As a general rule it is conceded not to be within the power of the city to condition the right to engage in a business which otherwise would be lawful, but might be regulated or prohibited by public authority, upon the approval of the owners of surrounding property. 19 R. C. L. 815. Such regulations constitute an unreasonable and discriminatory exercise of the police power and are an unwarranted delegation of legislative power to private persons. In certain instances, however,

the law is unsettled as to the interpretation of the above stated rule. Texas upheld a requirement for the consent of three fourths of the neighboring owners as a prerequisite for the granting of a permit for a business house in a residence district. *Spann v. Dallas,* (Tex. 1916) 189 S. W. 999. Ordinances prohibiting the use of property for certain purposes unless the consent of adjacent owners has been secured, have been upheld when applying to a quarry within 300 feet of a residence, *St. Louis v. Frein,* (1881) 9 Mo. App. 590; a junk yard in a residence district, *Smolensky v. Chicago,* (1918) 282 Ill. 131, 118 N. E. 410; industrial district within a residence district, *Sam Kee v. Wilde,* (Cal. App. 1919) 183 Pac. 164. In *State v. Dauben,* (Ohio 1919) 124 N. E. 232, an ordinance prohibiting gasoline filling stations under similar conditions was strictly construed, though its validity was not directly questioned. Ordinances prohibiting the location of livery stables in a residential block unless the majority of the property owners assent in writing, have been held valid. *Chicago v. Stratton,* (1896) 162 Ill. 494, 44 N. E. 853, 53 A. S. R. 325, 35 L. R. A. 84; *Spokane v. Camp,* (1908) 50 Wash. 554, 97 Pac. 770, 125 A. S. R. 913. The leading case contra is *St. Louis v. Russell,* (1893) 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, but here the ordinance related to the entire city so that under it the livery business might be suppressed within the city limits. An ordinance prohibiting bill boards, unless first consented to by a majority of the property owners of the block, was upheld on the theory that it permitted one half the property owners to remove a restriction which was an absolute prohibition until this was done, and hence was not a delegation of legislative power. *Cusack Co. v. Chicago,* (1917) 242 U. S. 526, 37 S. C. R. 190, 61 L. Ed. 472, L. R. A. 1918A 136, Ann Cas. 1917C 594. The case of *Eubank v. Richmond,* (1912) 226 U. S. 137, 33 S. C. R. 76, 57 L. Ed. 156, 42 L. R. A. (N.S.) 1123, Ann. Cas. 1914B 192, was distinguished on the ground that there two thirds of the property owners were permitted to impose a restriction of a building line which would not otherwise exist. On the other hand, ordinances prohibiting the establishment of a particular business or structure, unless the consent of a proportion of the adjacent property owners was obtained, have been held void in the following cases: laundries, *Ex parte Sing Lee,* (1892) 96 Cal. 354, 31 A. S. R. 218; gas tank within the city limits, *State v. Withnell,* (1907) 78 Neb. 33, 110 N. W. 680; wooden buildings within fire limits, *Hayes v. Poplar Bluff,* (1915) 263 Mo. 516, 173 S. W. 676; frame buildings, *Tilford v. Belknap,* (1907) 126 Ky. 244, 103 S. W. 289, 11 L. R. A. (N.S.) 708; slaughter house, *St. Louis v. Howard,* (1893) 119 Mo. 41, 41 A. S. R. 630. The basis of these decisions is stated in *Ex parte Sing Lee,* supra: ". . . . The right of an owner to use his property in the prosecution of a lawful business, . . . cannot be thus made to rest upon the caprice of a majority, or of any number, of those owning property surrounding that which he desires to use." As to garages there is a square conflict. Some states have decided that an ordinance may forbid the construction of a garage within a city block unless the consent of a majority of the property owners is obtained. *People v. Ericsson,* (1914) 263 Ill. 368, 105 N. E. 315, Ann. Cas. 1915C 183, L. R. A. 1915D 607. To the same effect are *Maynard v. Vigeant,* (R.I. 1919) 108 Atl. 61, and *People v. Oak Park,*

(1914) 266 Ill. 365, 107 N. E. 636. Wisconsin has held in accord with the instant case, that a similar ordinance is void as an attempt to delegate legislative power from the common council to private persons and give them power to say, not on grounds of public health, welfare. or safety, but as a matter of arbitrary discretion, that a particular property owner may not use his property in a certain way. *State v. Harper,* (1916) 162 Wis. 589, 156 N. W. 941.

RAILWAY—RESTORATION AND MAINTENANCE OF HIGHWAY.—When the paving on a bridge over defendant railway company's tracks became out of repair the defendant refused to repave. The city of St. Paul repaved the bridge and sued the railway for the cost. *Held,* that a railway, which in the exercise of the police power is compelled to bridge its tracks, is obliged, when the pavement becomes so worn that public safety and convenience require its replacement, to replace it without compensation. *St. Paul v. Great Northern R. Co.,* (Minn. 1920) 177 N. W. 492.

It is well settled that a railroad may be required by the state or a municipality acting under authority of the state to construct bridges or viaducts over its tracks and that this is not a taking of property without due process of law under the 14th amendment unless it is clearly and unmistakably an arbitrary abuse of power, *Missouri Pac. R. Co., v. Omaha,* (1914) 235 U. S. 121, 35 S. C. R. 82, 59 L. Ed. 157; that such construction is required under the police power and is not an exercise of the taxing power, *Chicago, B. & Q. R. Co. v. Chicago,* (1896) 166 U. S. 226, 17 S. C. R. 581, 41 L. Ed. 979. Thus a railway was required to construct at its own expense a sidewalk across its 300 foot right of way, though this was exempt from taxation for public improvements under the gross earnings statute, for this was a duty imposed by the police power. *State v. Great Northern R. Co.,* (1915) 130 Minn. 480, 153 N. W. 879. The great majority of modern cases hold that it is immaterial that the street or highway which requires bridging was opened after the construction of the railroad. *Ill. Cent. R. Co. v. Swalm,* (1904) 83 Miss. 631, 36 So. 147; *Northern Pac. R. Co. v. Duluth,* (1908) 208 U. S. 583, 28 S. C. R. 341, 52 L. Ed. 630. A railway was required to build a bridge on its right of way over a canal subsequently built to connect two lakes within a park devoted to public recreation. *Chicago, Mil. & St. Paul R. Co. v. Minneapolis,* (1914) 232 U. S. 430, 34 S. C. R. 400, 58 L. Ed. 671. The few cases contra usually turn upon the absence of proper legislative enactment and not upon a want of inherent power in the state. *Northern C. R. Co. v. Baltimore,* (1876) 46 Md. 425; *Cincinnati H. & D. R. Co. v. Troy,* (1903) 68 Ohio St. 510, 67 N. E. 1051.

This exercise of the police power is continuing and cannot be contracted away. *Northern Pac. R. Co. v. Duluth,* supra. And the duty of the railroad is continuous so that it must maintain as well as construct. A railway must rebuild worn out structures over its tracks. *Dyer Co. v. Chesapeake, etc, R. Co.,* (1889) 87 Tenn. 712, 11 S. W. 943; *St. Paul v. Chicago, etc., R. Co.,* (1918) 139 Minn. 322, 166 N. W. 335. The rule is stated by the United States Supreme Court: ". . . Railroad companies may be required by the states in the exercise of the police

power to make streets and highways crossed by the tracks of such companies reasonably safe and convenient for public use, and this at their own expense." *Great Northern R. Co. v. State,* (1918) 246 U. S. 434, 436, 38 S. C. R. 346. It is settled law in Minnesota and some other jurisdictions that a railway must respond to an increased public need even to the extent of strengthening a bridge, which is sufficient for ordinary travel, so that it will support street railway traffic, though such traffic was not upon the street when the bridge was built. *City of St. Paul v. Great Northern R. Co.,* (1917) 138 Minn. 25, 163 N. W. 788; *Missouri Pac. R. Co. v. Omaha,* supra. There are some cases contra. *People v. Adams* (1895) 88 Hun 122, 34 N. Y. S. 579; *Carolina Cent. R. Co. v. Wilmington Str. R. Co.,* (1897) 120 N. C. 520, 26 S. E. 913; *Briden v. New York, etc., R. Co.,* (1905) 27 R. I. 569, 65 Atl. 315. In fulfilling this obligation to provide a reasonably safe and convenient bridge over its right of way, the duty of the railway to repave, as held in the instant case, would seem as clear as its duty to repair, for it must not only build a structure sufficient to support a roadway but it must furnish the roadway.

SALES—IMPLIED WARRANTY OF FITNESS FOR USE INTENDED—LATENT DEFECTS.—Plaintiff, manufacturer, sued for the purchase price of a carload of binding twine sold to defendant, retailer, which when used by defendant's customers was eaten by grasshoppers. There were no express warranties and the twine was not in existence for the vendee's inspection at time of sale. *Held,* the plaintiff could not recover, for a vendor impliedly warrants the goods to be reasonably fit for the purpose for which they were sold. *Plymouth Cordage co. v. Phelps,* (Neb. 1920) 175 N. W. 603.

In the instant case the goods proved useless, though the latent defect was unusual, but the doctrine applied is well established. A warranty of fitness for the use intended is implied where there is (a) an executory contract to supply goods not yet ascertained (b) a disclosure by the vendee of the purpose to be subserved (c) a reliance upon the vendor's skill, judgment, or experience since inspection at time of bargain is impossible and no specifications are expressly or impliedly agreed upon. 2 Mechem, Sales, Sec. 1340 et seq., 2 Benjamin Sales, Sec. 988 et seq.; 24 R. C. L. 178 et seq.; 35 Cyc. 399; And where a retailer purchases from a manufacturer under these conditions, as in the instant case, this warranty includes a stipulation that the goods are of merchantable quality. 35 Cyc. 397; *Loxtercamp v. Lininger,* (1910) 147 Iowa 29, 125 N. W. 830, 33 L. R. A. (N.S.) 501; *Bierman v. City Mills Co.,* (1897) 151 N. Y. 482, 45 N. E. 856. That the latent defect was unknown to the vendor is no defense. *Moore v. Koger,* (1915) 113 Mo. App. 423. 87 S. W. 602; *League Cycle Co. v. Abrahams,* 58 N. Y. S. 306; but when the defect is patent or discoverable the warranty does not survive acceptance of the goods after opportunity to ascertain the defect. *Carleton v. Jenks,* (1897) 80 Fed. 937; *Dounce v. Dow,* (1876) 64 N. Y. 411; *Maggiores v. Edson Bros.,* (1917) 164 N. Y. S. 377.

The doctrine of implied warranty of fitness for use intended was first recognized in Minnesota by *Cosgrove v. Bennett,* (1884) 32 Minn. 371, 20 N. W. 359. It is embodied in the English Sales of Goods Act, Sec. 14, and in the Minnesota Uniform Sales Act, Session Laws 1917, Chap. 465, Sec. 15. The instant case seems to meet the requirements of the Uniform Sales Act as well as the requirements of the common law doctrine and illustrates a clear cut exception to the broad rule of caveat emptor.

TRADE UNIONS—LABOR LITIGATION—BOYCOTTING AND PICKETING.—Defendants, The Amalgamated Meat Cutters and Butchers Workmen of North America, in an effort to unionize the meat shop of plaintiff Vanstrum, presented for his signature a contract giving defendant union control over wages, hours, conditions of work, including the exclusion from employment of non-union men. Plaintiff declined to sign the contract. Provisions of the constitution and by-laws of the defendant union provide that if a grievance cannot be settled amicably by a council through its committee, the employer shall be placed on the unfair list, "After which it shall be a violation of these by-laws for the members of any affiliated organization to work in, deliver to, or handle goods of such place or firm unless by permission of the council." Another by-law provides for "bannering" the employer's place of business. No trade dispute existed between defendants and plaintiff other than plaintiff's refusal to unionize his market. Following plaintiff's refusal to sign the agreement, in pursuance of the provisions of the by-laws his place of business was "bannered" for months, first as "unfair" by the Meat Cutters Union, and afterwards as "unfair" to the Provision Trades Council. Seven other affiliated labor unions named as defendants united in the picket and instituted a general boycott on plaintiff's business. The boycott consisted not only in withdrawing the custom and trade of the affiliated unions from plaintiff, but attempted to interfere with his business by diverting and frightening away his custom and trade from other sources by every "available means short of physical violence." Plaintiff's business associates withdrew their business connection through fear that their business would suffer as plaintiff's had. Thus plaintiff's patronage, custom and trade fell away to his serious financial damage.

The district court of Hennepin County, Minnesota, by Judge Fish, issued a temporary injunction in substance as follows: (1) from the forming of a conspiracy to annoy, harrass, obstruct or interfere with or destroy the good will, trade and patronage of plaintiff's business, or to interfere with plaintiff's employees, or to do acts in furtherance of such combination or conspiracy; (2) from interfering with plaintiff's free flow of custom, trade or patronage; (3) from "bannering" plaintiff's place of business with signs to the effect that plaintiff is unfair to defendants or to organized labor, or picketing with signs likely to induce people not to trade with plaintiff or his place of business; (4) from threatening, intimidating, or interfering by means of pickets, banners, signs or otherwise, with persons desiring to transact business with or patronize plaintiff's market. The temporary injunction is directed

first, at the malicious conspiracy to injure and destroy the good will, trade and patronage of plaintiff's business; second, at the secondary boycott; third, at bannering or picketing plaintiff's business in a manner such as to be a menace to the free flow of custom, trade and patronage. Minneapolis Journal, June 2, 1920; Minneapolis Tribune, June 3, 1920.

The Minnesota supreme court has held that a complaint alleging a malicious conspiracy to injure a man's business whereby his business was injured was not demurrable. *Ertz v. Produce Exchange,* (1900) 79 Minn. 140, 81 N. W. 737, 79 A. S. R. 433, 48 L. R. A. 90. The withdrawing on the part of the affiliated unions of their own patronage or trade is not enjoined. Clearly this would be a legal act on their part. *Bohn Mfg. Co. v. Hollis,* (1893) 54 Minn. 223, 55 N. W. 1119. It is the "secondary" boycott which the injunction aims at. This form of boycott brings into a labor dispute between A and B, C who has no difference with either. It contemplates that C upon the demand of B and under the moral intimidation created by the fear that B will boycott him, may be constrained to withdraw his patronage from A with whom he has no controversy. The bringing by labor unions of economic pressure to bear on neutrals to compel them to fight the unions' battle for them—this is the "secondary" boycott. It is rigorously opposed by the English courts, the federal courts, and the weight of American authority is against it. See authorities cited 1 MINNESOTA LAW REVIEW 439. Until the decision of *Grant Construction Co. v. St. Paul Bldg. Trades Council,* (1917) 136 Minn. 167, 161 N. W. 520, 1055, it was accepted that a "secondary" boycott was illegal in this state *Gray v. Bldg. Trades Council,* (1903) 91 Minn. 171, 97 N. W. 663, 1118 certainly if made effective by means stronger than persuasion. The decision in the *Grant case* apparently legalized the secondary boycott. Plaintiff, a contractor, ran an open shop and the defendants agreed not to work for him until the dispute was settled, and further refused to work for any subcontractor working for plaintiff as long as plaintiff employed non-union men. The trial court refused a temporary injunction and this order was affirmed. One distinguishes with difficulty between prospective customers and prospective subcontractors. The instant case will present the question squarely to the supreme court: Is a "secondary" boycott legal in Minnesota? The final provision of the injunction is against bannering or picketing of such a nature as to be a menace to the free flow of custom or patronage. On the theory that there can be a peaceful picket amounting only to notification and in effect only persuasion it has been held legal in Minnesota. *Steffes v. Motion Picture Machine Operators Union,* (1917) 136 Minn. 200, 161 N. W. 524. The court said, however, in this case, that the picket and banner might portend a threat or be in effect intimidating. Some courts enjoin all picketing on the ground that it necessarily leads to violence and threats. *Vegelahn v. Guntner,* (1896) 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 A. S. R. 443, and other cases, on the ground that in actual practice a place of business is never picketed or bannered solely for the purpose of notification and that the term peaceful picket is a misnomer. *Atchison, Topeka & Santa Fe Ry. Co. v. Gee,* (1905) 139 Fed. 582. The instant case will present the question afresh to the

supreme court. If they follow former holdings they must at least define more clearly a peaceful picket fixing its limitations and boundaries.

WILLS—ABSOLUTE POWER OF DISPOSITION IN FIRST TAKER—LIMITATION OVER TO THIRD PARTY OF PROPERTY NOT DISPOSED OF.—Will contained this bequest: "I give, devise and bequeath all the rest, residue and remainder of my estate, both real and personal, to my beloved wife, Elizabeth Prieve, and after death, all the real estate and personal property to A. Prieve, his heirs and assigns forever. *Held,* will gave widow life estate with power to dispose of the property absolutely, with limitation over in fee of residue remaining after her death to her son. *Prieve v. Prieve,* (N.D. 1919) 175 N. W. 732.

At common law when the testator conveyed an estate in realty with absolute power of disposing of it, the first taker was deemed to take an estate in fee, and the limitation over was void on the ground of repugnancy. *Jackson v. Bull,* (1813) 10 Johns, (N.Y.) 19; *Van Horne v. Campbell,* (1885) 100 N. Y. 287, 3 N. E. 316; *Wilson v. Turner,* (1897) 164 Ill. 398, 45 N. E. 820. Some courts refused to adopt this ruling and hold that the limitation over is valid. *Grace v. Perry,* (1906) 197 Mo. 550, 95 S. W. 875; *In Re Polley's Estate,* (1905) 70 N. J. Eq. 659, 62 Atl. 553. See 24 Am. & Eng. Ency. 449. On principle there is nothing inherently objectionable in permitting the limitation over to take effect on the ground that the event upon which the property was to go over has happened. Dying without disposing of property is as much an event as dying without issue. It would seem that a gift to A and if he dies without disposing of the property then to B indicates an intention on the part of the testator that A should have only a life estate in the property of which he did not dispose, and that B should then take. To give effect to this intention and to counteract the common law result several states, including North Dakota, New York, and Minnesota, have adopted statutes to the effect that the limitation over should not be adjudged void in its creation because it is liable to be defeated. Thus in New York, which has the same statute as Minnesota, the limitation over has been held valid. *Leggett v. Firth,* (1892) 132 N. Y. 7, 29 N. E. 950. The true test of the validity of the limitation over, it is submitted, is not the improbability of the happening of the event, but rather whether it is too remote. For elaborate annotation, Rights and Duties of Life Tenant with Power to Anticipate and Enjoy Principal, see 2 A. L. R. 1243, annotating *Presbyterian Church v. Mize,* (1918) 181 Ky. 567, 205 S. W. 674.

WILLS—FULL FAITH AND CREDIT CLAUSE—FOREIGN PROBATE OF A DOMESTIC WILL.—Testator domiciled in Iowa, executed a will and died while visiting in Nebraska. He left real property in both states. The will was admitted to probate in Nebraska. The proponents of the will claimed that it was entitled to probate in Iowa upon the authenticated record of the foreign probate, without further proof or notice. The lower court so held. *Held,* a will probated in an a state other than that of the testator's domicile affects only the real property in such state, and has

no extra-territorial effect, either under the Iowa statute admitting foreign wills to probate upon certificate of foreign probate or under the full faith and credit clause of the constitution. Judgment reversed. *In re Longshore's Will,* (Iowa 1920) 176 N. W. 902.

Most states have statutes providing for the admission of foreign wills to probate upon production of an authenticated certificate of foreign probate without further proceeding. But even under these statutes and under the full faith and credit clause of the constitution, it is generally, if not universally, held that these provisions apply only where the foreign will was probated at the domicile of the testator, and not where the domicile of the testator is in the state where the foreign certificate is sought to be probated. *Bate v. Incissa,* (1882) 59 Miss. 513; *Stark v. Parker,* (1876) 56 N. H. 481, *Scripps v. Wayne Probate Judge,* (1902) 131 Mich. 265, 90 N. W. 1061, 100 A. S. R. 614; *Succ. of Drysdale,* (1908) 121 La. 816, 46 So. 873.

Where a certificate of probate of a foreign will is offered, two questions must be considered by the court: the sufficiency of the proof of foreign probate and the question of the testator's domicile, whether it was in the state where the probate was originally granted. *In re Clark,* (1905) 148 Cal. 108, 82 Pac. 760, 1 L. R. A. (N.S.) 996, 113 A. S. R. 197, 7 Ann. Cas. 306. As the jurisdiction of the state in probate proceedings is dependent on the fact of the testator's domicile, it has been held that the full faith and credit clause does not bind the courts of one state on the adjudication on the question of domicile by another state though the first state court decides the testator's domicile was in that state. *Tilt v. Kelsey,* (1907) 207 U. S. 43, 28 S. C. R. 1, 52 L. Ed. 95; *Burbank v. Ernst,* (1914) 232 U. S. 162, 34 S. C. R. 299, 58 L. Ed. 551. But it has been held where the foreign court at the time of probate also decides the question of the testator's domicile, that question can not be raised elsewhere when the foreign certificate is offered for probate by a collateral attack by the same persons who were parties to the foreign probate and raised the same issue in former proceeding. *Torrey v. Bruner,* (1910) 60 Fla. 365, 53 So. 337. Again, in a collateral attack, though nothing appears on the record, it will be presumed that the testator's domicile was at the place of original probate. *Stull v. Veatch,* (1908) 236 Ill. 207, 86 N. E. 227.

WILLS—GIFT OF RESIDUE TO NAMED INDIVIDUAL AND A CLASS—REVOCATION OF BEQUEST AND DEVISE TO ONE.—Testatrix gave the residue of her estate in equal parts to her grandson and to the children of a friend. By codicil she revoked the gift to the grandson and died leaving next of kin. The friend left three children as legatees under the will. *Held,* the one-fourth share which would have gone to the grandson did not fall into the residue to augment the shares of the children, but went to the next of kin. *Garnier v. Garnier,* (Pa. 1919) 108 Atl. 595.

In England the rule is established that where there is a residuary gift of personalty to named individuals, as to A, B, and C, equally, if the share to C. fails by reason of lapse or revocation, that share goes not to augment the shares of A and B, but goes to the next of kin. *Bagwell*

v. Dry, (1721) 1 P. W. 700, 24 Eng. Rep. 577; *Page v. Page*, (1728) 2 P. W. 489, 24 Eng. Rep. 828; *Skrymsher v. Northcote*, (1818) 1 Swans. 566, 36 Eng Rep. 507. This rule has been followed with hesitancy and after a great deal of criticism in Pennsyvania. *Gray's Estate*, (1892) 147 Pa. 67, 23 Atl. 205; *Wahn's Estate*, (1893) 156 Pa. 194, 27 Atl. 59. New York refuses to follow the rule. *Heartt v. Livingston*, (1878) 14 Hun 285. This form of gift is distinguishable in form at least from gift of one-half of residue to A and the other half to B, where it is clear that a lapse or revocation as to one share does not augment the other share. 2 Jarman, Wills 1056. According to the view of the English courts the gifts are the same in effect. The question is one of intention, whether after the lapse or revocation the testator intended that there should be a partial intestacy, or whether he intended the remaining legatees to take all of the residue. It is submitted that the latter construction is preferable on these grounds: First, the testator's gift of all his property in the "residue" precludes any presumption of a partial intestacy; Second, a gift to A, B, and C equally is not properly a gift of one-third to each, but rather a bequest of the whole to be effective as to all three provided they all outlive the testator, and provided there be no revocation; Third, the revocation of the putative share to C is not conclusive of an intention that there shall be a partial intestacy, but is only conclusive of an intention that C shall not take. There is authority holding that the gift as in the instant case to A and the children of B is a class gift. *Asphinall v. Duckworth*, (1866) 35 Beav. 307, 55 Eng. Rep. 914. On the basis of this authority also, the instant case is wrongly decided, for where there is a gift to a class followed by a revocation as to one member of the class, the other members of the class take the increase. 2 Jarman, Wills 1059.

WILLS—REVOCATION IMPLIED BY LAW.—The testator willed all of his property to a trust company, with directions to pay his wife $200 per month for life, and at her death to sell it, and distribute the proceeds among the collateral blood relatives. The principal portion of the testator's property was an apartment house. After making the will he leased this building for one hundred years, with an option to the lessee to buy within ten years at a specified price. *Held*, the making of this contract did not impliedly revoke the will. *In re Evans' Estate*, (Minn. 1920) 177 N. W. 126.

The result which the court reaches in this case is directly in line with the weight of authority on the question of implied revocation in this country. "As a general rule, no mere change in the testator's circumstances, not involving a change in his family, will operate as a revocation of his will, unless such a change is one which makes impossible the carrying out of his intentions as manifested in the will." Note to *Graham v. Burch*, (1891) 47 Minn. 171, 49 N. W. 697, in 28 Am. St. Rep. 339. There was no such impossibility here. The court, however, does get away from the liberal view which it seemed to take in the earlier case of *Donaldson v. Hall*, (1909) 106 Minn. 502, 119 N. W. 219, 20 L. R. A. (N.S.) 1073. The instant case quotes from that case as

follows: "The tendency of the reported cases has been to restrict, rather than to enlarge, its scope." In the *Donaldson Case* this statement was part of a paragraph which pointed to the adoption of a very liberal rule by the Minnesota court. The court there said, "The rule, if accorded substance and merit, must serve the purpose of doing by implication what the testator should, in justice to those entitled to his bounty, have done, had his attention been directly called to the matter, after the change in circumstances, and before his death. The rule it is true has not been generally extended that far. At least the tendency of the reported cases has been to restrict, rather than to enlarge, its scope." The fact that the court in the instant case refers only to this last sentence of the paragraph would seem to show that the majority, and not the minority, holding is to be followed in Minnesota, in spite of the attitude the other way indicated in the earlier case.

WITNESS—COMPETENCY OF INFANT.—Plaintiff when a child five years of age was bitten by defendant's dog. Three years later, when the plaintiff was eight years old, she was allowed to testify in court as to the injury. *Held,* the happening of the incident when the witness was probably too young to testify would not bar the admission of the evidence. *Maynard v. Keough,* (Minn. 1920) 175 N. W. 891.

Similar cases have arisen in other jurisdictions with like decisions. *Kelly v. State,* (1883) 75 Ala. 21, 51 Am. Rep. 422; *Miller v. State,* (1899) 109 Ga. 512, 35 S. E. 152. The courts have always drawn a distinction between evidence of children and that of adults concerning matters which occurred in their childhood. In the former the competency of the witness is the chief issue, while in the latter the lapse of time and the age of witness at time of accident only goes to the weight of the evidence. *Parker v. Chambers,* (1858) 24 Ga. 518; *Moffett v. South Park Comrs.,* (1891) 138 Ill. 620, 28 N. E. 975. The same distinction should apply, it seems, to a case like the instant one assuming the child was competent at the time of testimony. There seems to have been little doubt as to the competency of the witness, though only eight years old.

Statutes in many states provide, as the Minnesota statute does, that "children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly, are not competent witnesses." General Stat. Minn. 1913, sec. 8375, subd. 6. The competency of such witness is a matter lying largely within the discretion of the trial court. *People v. Wilmot,* (1903) 139 Cal. 103, 72 Pac. 838; *State v. Levy,* (1876) 23 Minn. 104, 23 Am. Rep. 678. The incompetency of infants results chiefly either from (1) lack of understanding as to the obligation of an oath or (2) lack of intelligence or capacity of observation or (3) insufficient capacity of recollection. 1 Wigmore, sec. 506. It is to be noticed that our statute only mentions the second and third. There is little trouble encountered in applying those two, but it is as to the first that the courts are at great variance.

The courts are practically unanimous in requiring the witness, whether infant or adult, to take an oath or affirmation and to be capable

of understanding its obligation. But the courts are in conflict as to the nature of such understanding. Some courts still look to the religious education or belief of the child, usually because of constitutional provisions. *White v. State,* (1902) 136 Ala. 58, 34 So. 177; *State v. Belton,* (1885) 24 S. C. 185, 58 Am. Rep. 245; *State v. Washington,* (1897) 49 La. Ann. 1602, 22 So. 841, 42 L. R. A. 553. But the majority of the states allow the testimony of an infant if he has an adequate sense of the impropriety of falsehood, *State v. Levy,* (1876) supra; *White v. Commonwealth,* (1894) 96 Ky. 180, 28 S. W. 340; *State v. Meyer,* (1907) 135 Ia. 507, 14 Ann. Cas. 1, and note p. 3. For excellent note see 42 L. R. A. 553 where the states are classified as to their holdings.

An examination of the cases shows a uniformity in the rules regarding the testimony of infants but a decided confusion in their application, with an inclination to disregard rather than observe their strict construction. The criticism of Wigmore, Sec. 507, that it would be logical to abolish the rules disqualifying infants seems timely. *Hughes v. Detroit, etc., Ry. Co.,* (1887) 65 Mich. 10, 31 N. W. 603.

BOOK REVIEWS

FEDERAL INCOME TAX, WAR PROFITS AND EXCESS PROFITS TAXES including Stamp Taxes, Capital Stock Tax, Tax on Employment of Child labor. 1920 Edition. By George E. Holmes. Indianapolis: The Bobbs-Merrill Company. 1920. Pp. xv, 1151. Price $10.00.

The lawyer in general practice is called upon, more and more, for advice upon the income tax problems of his clients. The Income Tax Law now embodies such a large aggregate of legislation, regulations and decisions that the lawyer in general practice cannot possibly hope to acquaint himself in advance with all of the principles presented. Attorneys, less frequently, are called upon for advice on the more serious problems presented by the law involving possible litigation. Holmes' "Federal Taxes" is a work of great value for both these classes of work. It is a book remarkable primarily for its completeness, the text comprising about 850, pages, the appendix with text of Revenue Act of 1918, various regulations and table of cases some 200 pages more, and the index an additional 100 pages.

The complexities of the present income tax situation arise from the involved revenue acts themselves upon which are superimposed the numerous Treasury Decisions largely summarized in "Regulations 45," having the force of, and in practice frequently constituting additional legislation. This combination makes difficult the task of determining the state of administrative interpretation at any given moment.

Mr. Holmes has been most industrious in the compilation of all existing regulations and decisions bearing upon the administration of the law. The practice in the text of quoting so liberally from "Regulations 45" without quotation marks, (but properly credited in the footnote references) is disconcerting. It is true the Treasury Regulations constitute the latest word, for the time being, on the administrative interpre-

tation by the government but Mr. Holmes' habit above mentioned has the effect of giving editorial support to many Treasury regulations which are, we feel, still in a state of flux.

Any attorney attempting to deal with income tax matters must first have mastered the general principles of the Revenue Laws. After this, however, there remains a multiplicity of details both in statutes, regulations and decisions which no one can hope to keep, properly cross-referenced, in mind. In this respect, Mr. Holmes' very complete index will be found of great assistance.

Income tax practice is different from most branches of law in that the points of contact most frequently have to do with details of definitions and accounting rather than with the larger basic principles of the subject. Mr. Holmes' text takes up the discussion of these details in forty-seven chapters each treating the details of some particular phase, such as tax rates, fiduciaries, personal service corporations, corporations, income in general, income from sales, deduction of business expenses, deduction for depreciation, depletion of mines, oil and gas wells, and timber, constitutionality of the law war profits and excess profits tax and capital stock tax to mention by name only a few of the different chapters.

The frequent quotations from the Treasury Regulations give the text a dry impersonal style, rather lacking in "human interest" and too suggestive of the arbitrariness of the average Treasury Department communications. This is well enough for the attorney who wishes to follow the established order and answer propositions flatly based upon the rulings of the Treasury Department. It is not so conducive, however, to the kind of independent thinking which is needed in presenting problems to the Treasury Department from new viewpoints for the purpose of securing modification of regulations which are apparently not in accord with an enlightened interpretation of the law. Put in another way, this appears to be a book better adapted to the analysis of past acts than to the giving of advice as to contemplated actions which is an important part of the work of a tax consultant.

The leading cases which have been decided by the Supreme Court thus far have served to establish firmly the general principles of the Income Tax such as its constitutionality, classification and graduated taxation thereunder, retroactive features and the taxability of stock dividends, all of which are discussed by Mr. Holmes with complete reference to decisions. The question of taxation of so-called "gains from the sale of capital assets" and taxation of the gradual increase in the value of property over a series of years, in the light of the *Gray v. Darlington* decision, is one of the important unsettled questions discussed at length. Some of the other open questions such as the right of Congress to tax incomes from interest on obligation of states and political subdivisions, as was proposed by Congress in the preliminary stages of both the 1917 and 1918 Acts, are less satisfactorily handled.

While mention of other current works is generally avoided in reviews, a fair judgment of the worth of this work may perhaps best be arrived at by a frank comparison with another leading work, Montgomery's "Income Tax Procedure" written by an authority who is both an attorney

and an accountant. Montgomery's work has a distinctive place because of its discussion of so many practical problems from the combined viewpoint of the accountant and the attorney. This is a note that the reviewer misses in Mr. Holmes' work. On the other hand we find in Mr. Holmes' book a far more complete presentation of the Treasury Department's rulings on the multitude of details of the law and far more complete citations and discussion of the various court decisions. The attorney who desires the complete law on the subject will find Holmes' "Federal Taxes" a very valuable work, bearing in mind, however, the additional necessity for keeping in touch with the new interpretations of the Treasury Department since the first of the year when this book was published.

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THE IMMUNITY OF PRIVATE PROPERTY FROM CAPTURE AT SEA. By Harold Scott Quigley. Madison: Bulletin of the University of Wisconsin No. 918. 1918. Pp. 200.

Although discussion of the second of President Wilson's fourteen points was withdrawn from the Peace Conference by the reservation upon it, entered by the allied powers and accepted by the United States and Germany in the preliminary agreement of November 5, 1918, which lead up to the armistice of six days later, yet the problem of freedom of the seas remained. Since the appearance of Admiral Mahan's great work, over three decades ago, the dominating importance of sea power in the rise and fall of nations has been admitted and consequently the effect of rules and principles of international law, governing the use of the sea, especially in time of war, upon the maintenance of that power by particular nations, has assumed increased importance. Dr. Quigley's thesis is particularly interesting as showing how national interests have partly unconsciously shaped the views of theoretical writers upon the legal principles governing capture at sea. His examination of the views of text writers, (Chap. IV) covers the period since Grotius (1625). As for the official attitude of states, students will be disposed to agree with Dr. Quigley that the controlling factor (at least until a League of Nations becomes influential) "Will continue to be the effectiveness of capture, as a military method supplementing other means of naval warfare." (p. 182.)

Dr. Quigley realizes that capture of enemy property can not be separated from other factors involved in "a system for the control of enemy trade" (p. 191) hence does not hesitate to give attention to contraband, continuous voyage, visit and search, destruction, war zones and to a less degree, blockade.

The synthesis of relevant treaty provisions since the 15th century, frequently quoted at length, is among the most valuable features of the book. The evidence shown of steady progress toward acceptance first of the Dutch rule, and then the rule of the Declaration of Paris, as opposed to the original rule of the Consolato del Mare, well illustrates the value of treaties as sources of international law, as does the query "whether the Declaration of Paris did not grant a degree of immunity greater

than the spirit and conditions of the period justified" (p. 191) their limitations.

The discussion of practice is carried through the first year of the recent war, by which time the issues as between belligerents and neutrals were clearly drawn. This discussion seems to bear out the author's conclusion that "the movement for the immunity of all private property from capture at sea can not be expected to raise the superstructure of legal limitation until the foundations shall have been strengthened" (p. 178).

A few minor criticisms may be made. L. A. A. Jones would be more recognizable as L. A. Atherley-Jones, the Swiss-British publicist, Oppenheim, should not be classed as a German, (pp. 85, 91) and the omission of the Naval War College, International Law Situations, from the bibliography is surprising.

Students of international law and of world politics will find themselves repaid by a careful examination of this book. The treatment is scholarly and comprehensive, and the author duly emphasizes various practical factors, (too often neglected by technical writers) which underly the development and assure the validity of principles of international law.

QUINCY WRIGHT.

University of Minnesota.

MINNESOTA STATE BAR ASSOCIATION

Notice of Annual Meeting

The annual meeting of the Minnesota State Bar Association will be held at Saint Paul on Tuesday, Wednesday and Thursday, July 27, 28, 29, 1920. The Headquarters will be at the St. Paul Hotel.

REPORT OF THE COMMITTEE OF LEGAL EDUCATION

TO THE BOARD OF GOVERNORS,
MINNESOTA STATE BAR ASSOCIATION,
ST. PAUL, MINNESOTA.

Your Committee on Legal Education has the honor to report as follows:

The work of this Committee has related almost entirely to the standards for admission to the Bar and the statutes and rules governing the Bar examinations, particularly as they were affected by the repeal of the "admission on diploma" privilege.

Under the statutes the year 1920 will be the last in which large numbers of law school students will be admitted to practice upon diploma. There are a few students still in school who matriculated prior to the enactment of Ch. 282, Laws Minn. 1917, whose courses of study have been interrupted, and who will be entitled to admission upon diplomas when they graduate in 1921 or 1922, but the number admitted on diploma after this year will be negligible.

In this situation we thought it best to confer with the representatives of all the law schools in the state and of the Board of Law Examiners to

the end that those necessary changes in the statutes and rules of court which have been talked about for several years might be presented to the Association for definite action. Accordingly the Committee sent invitations for such a meeting to be held in Minneapolis on April 10th. This conference was attended by representatives of each of the law schools, and after discussion of many subjects, adjourned to meet again on April 24, at which time it finished its work. We are attaching to this report, copies of the minutes of those two meeting.

With the exceptions hereinafter noted, the following recommendations were unanimously agreed upon, and your Committee respectfully submits them to the Association, with recommendation and request that the Association itself take action urging that the rules of the supreme court, and, so far as may be necessary, the statutes applicable thereto be changed so that these recommendations may be given effect. Most of the recommendations are self explanatory. Where they are not, we have added the necessary explanation.

1. That a diploma from a high school giving a four year's course, or the equivalent of a four years high school education, be required from all applicants for admission to the Bar.

The statutes now applicable are Sections 4945 and 4946, General Statutes 1913, the latter as amended by Chapter 282, Laws of Minnesota 1917. These statutes make no reference to the preliminary education required from applicants for admission. The superseded portion of Section 4946, however, did provide for the admission on diploma of graduates of approved law colleges, "provided such college receives as students only those having the equivalent of a high school education . . ."

Rule 7 of the Supreme Court provides:

"Upon such (law) examination, such Board shall examine applicants in such branches of general education as it may deem expedient, etc."

The rules of the Board of Law Examiners contain the following:

"Applicants, other than attorneys of five years standing in other states or foreign countries, who cannot produce evidence of having successfully passed examinations in the following studies, will be examined therein before being admitted to the Bar examination: One year's Latin, English History, American History, English Composition and Rhetoric, Common School Branches."

2. That only graduates of approved law schools be admissible to examination for the Bar.

The statute authorizes the Supreme Court to fix the rules under which persons shall be admitted to practice. The present rule of the Supreme Court reads as follows:

"Any person not an attorney who shall have studied law for a period of not less than three years within the five years preceding his application for examination, either in an accredited law school of this state, or in the office of a resident practicing attorney, or both, may be examined by said Board as hereinafter prescribed."

Rule 6 provides that the applicant shall present with his application, "The certificate of an attorney in whose office he studied, stating how long he so studied and the result of his work in such office." The purpose of the recommendation is to do away with study in a law office as adequate preparation for admission to the Bar. It is generally conceded that such study is a farce, and that under the present system the lawyer exercises no supervision over the work of his clerk.

3. That during the continuance of the system permitting men to study in the offices of practicing attorneys for three years to take the Bar examinations, each lawyer who takes a student into his office be required

to register that fact at the time with the Secretary of the State Board of Law Examiners, and that the applicant's period of study date from such registration.

Your Committee further recommends that the lawyer in whose office an applicant is studying, should also be required to make affidavit at the end of each year of such study covering the subjects studied by the applicant, the character of that study, and the degree of supervision over the same exercised by the lawyer.

4. That during the continuance of the present rule whereby students from law offices are permitted to take the examination, no such student be examined who has not had at least four years of such study in a law office, rather than the three years now treated as sufficient.

5. That for the purposes of qualifying applicants for admission to the Bar, four years study in an approved night school be considered the equivalent of three years study in an approved day school. (Mr. Rue, the representative of the Minnesota College of Law, did not vote upon this point.)

At the present time, there are in this state the University Law School, giving a full time day course, and the St. Paul College of Law, the Minnesota College of Law, the Northwestern College of Law, and the Minneapolis Y. M. C. A. Law School, each of which is a night law school. The University of Minnesota has no night course at the present time. The Northwestern College of Law and the Minneapolis Y. M. C. A. Law School are now giving a four years course. The faculty of the St. Paul College of Law has voted to lengthen its course to four years, beginning with the class entering the school in September, 1920. The matter has not been acted upon by the Minnesota College of Law, but will be presented at its annual meeting in June of this year.

Some of the leading law schools are advocating a four years instead of a three years full time course, as necessary for adequate preparation in law under present conditions; and legislation and rules of court in several states now require four years of work in night schools as preparation for taking the Bar examination. In view of these conditions, and of the almost unanimous sentiment expressed at our meetings in favor of such a rule, we will not state here the obvious arguments in favor of the change

6. That the June examination be given the last week in June in each year.

This is in order that third year students might not have their class work or their examinations interfered with by the Bar examinations which the present rules provide shall be given at an earlier date.

7. That the Supreme Court be requested to modify the list of subjects in which examinations are to be given so as to embrace a list of required subjects (in which all applicants shall be required to pass) and a list of elective subjects, of which the applicant shall be required to pass six which may he may select. The following is the list of subjects recommended:

REQUIRED SUBJECTS

Property, Real and Personal, Contracts, Torts, Evidence, Criminal Law and Procedure, Private Corporations, Pleadings and Practice in Minnesota, Equity Jurisprudence, Constitutional Law, Sales, Negotiable Instruments, Wills and Administration, Legal Ethics.

ELECTIVE SUBJECTS

Agency, Domestic Relations, Partnership, Bailments and Carriers, Insurance, Suretyship, Trusts, Conflict of Laws, Damages, Taxation, Practice in the Federal Courts, Mortgages, Quasi Contracts, Bankruptcy.

The present rules of the Supreme Court require examinations to be given in the following subjects:

Real Property (including Mortgages and Landlord and Tenant), Personal Property (including liens and Chattel Mortgages), Criminal Law and Procedure, Contracts, Torts, Evidence, Corporations (Private and Public), Pleading and Practice in the State and Federal Courts, Wills and Administration of Estates, Equity Jurisprudence (including Trusts), Domestic Relations (Persons), Agency, Sales, Partnership, Negotiable Instruments, Bailments and Carriers, Insurance, Suretyship, Constitutional Law, Conflict of Laws, Damages, Taxation, Legal Ethics, the Constitution and Statutes of Minnesota in connection with each of the foregoing subjects.

Not only do examinations in all these subjects constitute a physical endurance test rather than a test of legal knowledge and ability, but the requirement of all these subjects is opposed to the approved principles of legal education and to the practice of the best law schools. At the present time the schools rightly regard some subjects as of more importance than others, and feel that thorough and intensive training in the major subjects, and in a limited number of elective subjects, is better preparation for the practice of law than smattering instruction in a larger number of subjects. It is in every way desirable to bring the requirements of the Bar examinations into harmony with the requirements of the best law schools and thereby to secure thorough work on the part of applicants in the more important subjects.

The selection of the required and elective subjects, and the number of elective subjects to be required from each applicant, were unanimously agreed to by those present at the meeting.

8. That the State Board of Bar Examiners consist of three members who shall receive adequate salaries payable from the State Treasury, and that the fees received from examinations shall be paid into the State Treasury.

This recommendation was unanimously adopted at the meeting on April 10th, but at the meeting on April 24th it was suggested that instead of having salaries paid by the State, it would be better to have the examination fee increased from $15 to $25, and to let the Supreme Court fix the compensation of the examiners.

Your Committee offers both suggestions. In our judgment the important matter is the small board of three members adequately compensated. Whether the compensation shall be paid by way of salary from the State, or by way of fees received under authority of the Supreme Court is of less importance.

The present statute on the subject is as follows:

[The report quotes Sec. 4945. Ed.]

Respectfully submitted,

FRANCIS B. TIFFANY
A. L. YOUNG
JOHN H. RAY, JR., Chairman.

SUBJECT INDEX