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MATTERS TO BE CONSIDERED BY THE MINNESOTA CRIME COMMISSION

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HOWEVER earnestly and faithfully we may proceed in the matters to come before us, and in furtherance of the objects sought to be accomplished by the governor in the appointment of the Minnesota Crime Commission, we neither hope nor expect to stem the tidal wave of crime now sweeping over the state,—over the United States,—and the world over. Our presence here, engaged in the work of devising ways and means to bring the outlaw to speedy trial and conviction, followed by prompt sentence to prison, will not be felt by that element, and none thereof will run to cover because we are thus engaged. The lawlessness of the present day is unprecedented and with a boldness never before experienced in the state. The old professional robber and bandit has been joined by the younger element, mere boys, who in boldness have outdistanced the old offender in recklessly, if not wantonly, shooting and killing their victims even though unnecessary to effect they own safety and escape. Many of these have been apprehended, convicted and sent to prison, while perhaps the greater number have succeeded in escaping detection, and go about the streets with heads erect, on the lookout for some new venture. We do not expect to check this, and it must go on until the wave runs its course.

[1]Remarks by Chief Justice Brown, Chairman, at the opening session of the Minnesota Crime Commission, named by Governor J. A. O. Preus, June 3, 1922, at Saint Paul, Minnesota.

[2]Chief Justice, Minnesota Supreme Court.

But it is believed that the commission may do much in suggesting improvements in our present criminal procedure, by eliminating requirements of no material value either to the state or to accused; many of which substantially handicap the state in the prosecution and enable the accused person to prolong the proceedings through the courts upon technical grounds and thus delay the day of final judgment, in the meantime being permitted to go at large on bail. Many technical requirements of the law of procedure are available for this purpose which lawfully may be dispensed with by proper legislation; the courts cannot ignore them, except to a certain extent after trial and a verdict of guilty returned; in that situation the courts in this state as well as many other states, look to the evidence to test the verity of the verdict, and if it be found clearly supported by the proof, errors and omissions during the trial which do not deny or essentially impair a constitutional or substantial right of the accused are brushed aside as without prejudice to him. Of course no right given by the constitution can be taken from a defendant, or materially impaired by statute; but ordinary methods of procedure are within legislative control, and may be changed from time to time as that body may deem expedient and proper.

We have at present an abundance of statutory law on the subject, and there is no occasion to do more than to remove by amendment some of the worn out requirements,—those not suited to present conditions, and tend only to prolong unnecessarily the due administration of the criminal laws. And in suggesting changes and modifications we should move cautiously and with due deliberation.

Some matters of substantive law, in respect to the suppression of crime and the punishment of offenders have been brought to your attention by Governor Preus;—a brief reference to which may be made. They are as follows:

1. The delay in bringing criminals to justice.

2. More effective methods in the apprehension of criminals should be provided.

3. The establishment of a state constabulary as a counter move to repel lawlessness upon the public highways, and to facilitate the capture of that class of criminals who can afford an automobile in furtherance of their ends.

4. The propriety of increasing the penalty for a crime where an automobile is used in its commission.

5. Restricting the right of bail after conviction, and
6. Whether carrying of firearms should not be prohibited.

These points suggest important matters, and should receive due and proper attention. The first relates to the delay in bringing criminals to justice. That there is a delay, in many instances an unusual delay, must be and is admitted; it exists and is not disputed. One factor causing the delay is the necessary compliance with the forms of procedure required by the constitution and the laws of the state, and observance of which in all criminal prosecutions cannot be dispensed with. But forms of procedure and their observance, not technically but substantially, are just as important in the administration of criminal law as the law itself. If not followed and applied chaos would follow and mob violence result, as often occurs in some parts of the country, even in Minnesota.

State Constabulary

The proposed state constabulary is an important subject and has been well explained by Governor Preus. There may be some difficulties in the way of this proposal which unless carefully guarded against, may result disastrously to that as a plan in aiding in the capture of outlaws in the outlying districts of the state. There can be no friction, or feeling antagonistic to the plan from within, or between the officers of the counties outside the large cities and the state forces; any plan which will create possible conflict as to superior authority between the state constabulary and the local officers will work a serious obstacle to favorable results. A conflict of authority between officers of the law is a far greater menace to contemplate than the occasional escape of a thief.

Record of Criminals

The matter of a bureau for the record of known criminals no doubt has its value in the detection and apprehension of criminals. It will receive proper attention.

Increase of Penalties

The matter of increasing the penalty of all crime where an automobile is made an agency in the commission thereof is worthy of special thought. But it may be remarked that it is not so much the penalty or the term thereof which deters the criminal. That does not disturb him. What will throw terror into him and his

kind is the fear of an unrelenting pursuit by the officers of the law, his capture and speedy trial and conviction; the question uppermost with him is, to use a street expression, "Can I get away with it?"

Bail After Conviction

The matter of bail after arrest and pending the trial is fixed by the constitution and cannot be denied. Whether it shall be allowed after trial and conviction rests with the legislature. It has been provided for in this state, and an application has generally been granted in bailable cases. Under our present statutes either the trial judge or justice of the supreme court may admit to bail pending an appeal. Whether the right to so grant bail after conviction should be taken away must rest with the legislature. But there is one thing that can with propriety be done, and that is to limit the authority to grant bail on appeal to the trial judge; the matter should not be vested in a member of the supreme court at all. They know nothing of the case when the appeal is taken, and are in no position to judge of the propriety or impropriety of granting an appeal for bail. The record in the case does not reach the supreme court until about the time the appeal is called for argument, and the act of a member of that court in granting bail is perfunctory and an arbitrary exercise of statutory authority, without knowledge of the facts which should be known to enable intelligent action in the matter. So that the right to grant bail pending an appeal should be left exclusively, in my judgment, with the trial judge, who is familiar with the facts of the case and in better position to act.

This in a general way covers the matters suggested by the governor. But closely related thereto are some other subjects to which I beg the privilege of making brief mention. The first has reference to our criminal procedure, and the delay in prosecution.

Criticism of Courts

The courts of the state are not open to criticism for this delay, whatever it may be. The trial judges of the state are entitled to credit for the part taken by them in the administration of the criminal laws. Their work as a rule is promptly and expeditiously dispatched and the criminal calendars in all save the more populous counties are cleared from term to term.

The crime centers are found in the large cities of the state, where opportunities for lawlessness and facilities for escape are

plentiful. There congregate that element in large numbers, forming bands of three or four who work in conjunction, one serving as a lookout to warn of approaching danger. I believe the great majority of those committing crimes in those centers are apprehended and made to suffer the penalty prescribed for the offense committed. But there is delay in securing convictions, not owing to any dereliction on the part of the courts or public officials, but because of the large volume of crime and the consequent congested condition of the criminal calendars; facilities for the speedy and prompt trial of indictments are at times inadequate; the courts are in session all the time, save during the summer vacation, busily engaged in the work presented to them, while the criminals are also constantly at work, furnishing additional material which accumulates faster than the courts can put it through the hopper in the due course of procedure.

There are at this time over three hundred criminal cases awaiting trial in Hennepin County; the number is much smaller in Ramsey as well as in St. Louis County. In most of the cases the defendants are out on bail and, of course, in no hurry for trial. And it is very probable that before many of them are reached in their order on the calendar the witnesses will have scattered and gone beyond the reach of a subpoena, resulting no doubt in the failure of the prosecution, a result attributable to the lack of court facilities and not to any failure of duty on the part of the prosecuting officers. In the situation thus presented, and there will be no substantial change in the near future, it is likely that the legislature will soon be called upon to create an additional court for the large centers with jurisdiction co-extensive with that of the district courts, but limited to criminal matters only.

The Rule oe Reasonable Doubt

In a recent public address at St. Paul the president of the American Bar Association, Hon. C. A. Severance, discussed to some extent the matter of reforms in criminal procedure, in the course of which he suggested certain specific changes which he thought might well be brought about.

1. That the rule requiring the state to establish the guilt of the accused by evidence beyond a reasonable doubt be abolished, and the preponderance of the evidence, the rule applicable to civil actions, adopted in its place; 2, that the state be given the closing address to the jury; and 3, that the law be so amended as to per-

mit the state to call the accused for cross-examination, as in civil actions. Coming from such high authority the matters suggested are worthy of special attention by the commission.

The rule of reasonable doubt is created by statute, G. S. 1913, Section 8508. It is applied in all criminal prosecutions in this and other states. It requires a greater weight of evidence than in civil actions, where the preponderance rule prevails. The rule may be changed by an amendment of the statute if deemed expedient and advisable.

Arguments to Jury

The right to the closing argument in a criminal prosecution is given the defendant by the statute. In most of the states it is given to the prosecution. Repeated efforts have been made to bring about a change in this state, but without success; the legislature has declined to make it. Whether another effort will meet the same fate as others cannot be foretold.

Cross-Examination of Defendant

The state can be given the right to call defendant on the trial for cross-examination only by an amendment to the constitution, wherein by section 6 of article 1, it is declared that no person accused of crime shall be compelled to be a witness against himself. The protection thus given an accused person is fundamental and was intended to guard against a return of abuses practiced in olden times under former standards of criminal procedure. It is doubtful whether a change could be brought about. There was a time in this state when the accused was not permitted to be a witness at all, in his own behalf or otherwise. Such was the old rule in other states. The theory of it was that a person accused of crime could not be expected to tell the truth, and rather than permit him to go on the witness stand and perjure himself to effect his acquittal, thus to heap sin upon sin, he was by law commanded and compelled to remain silent. That was a rather harsh rule. It was changed in this state by statute in 1868, and since then an accused person may become a witness in his own behalf, or remain silent, as he shall elect. He cannot be compelled to take the stand and if he elects not to do so, no comment on his failure to testify by court or opposing counsel is permitted. That restriction might well be removed, provided, that when defendant takes the stand his cross-examination be by statute limited to the subject matter of the particular case, and not extended over his life history.

Impaneling Juries

It is just as important that we have men and women of character and fitness serve upon the trial jury, as that we have men of character and fitness on the bench. The general policy of the officers charged with the duty of selecting the list of available persons for jury service has been to name those thus qualified. But when it comes to impaneling a jury for the trial of a particular action, the tendency has been to select those thought by the attorneys to be favorable to their sides of the case. Jurors called are subjected to the most searching inquiry by the attorneys, particularly in criminal causes, and often offended by the class of questions put to them. It has frequently taken days and weeks to select a jury in a criminal case, much to the annoyance and great inconvenience of the jurors selected to serve; for those chosen early in the proceedings are required to remain in the jury box for days listening to the humdrum questioning of those subsequently called. This situation has driven many men of character and active business life to shun jury service, and whenever possible to secure a release from the trial judge. The same situation will soon be presented when women become more frequently called for that service; they too will seek to avoid it and in the main for the same reasons. The right to interrogate the jurors as to their qualifications, has always been extended to the attorneys in this state; this by a practice grown up in the trial courts and not by statute. It has been claimed by those who have given the matter serious attention, that the practice has outgrown itself, and become the cause of long delay in the trial of criminal cases, as well as to have driven high class citizens from jury service. The criticism has merit, and a departure from the practice in this respect may well be made. A change has been advocated by a committee of the American Bar Association lately at work on the subject of law reform at Chicago. But no concrete remedy has been offered.

The Remedy

I believe there is a remedy, and will ask the privilege of the commission to present it for consideration in the form of a proposed amendment to our statute on the subject of challenging jurors. In a word the change to be proposed will be to take from the attorneys altogether the right to interrogate jurors as to their bias, prejudice, or fitness for service, and impose the duty ex-

clusively upon the trial judge, under such statutory directions as will insure a full and complete examination of each juror called and challenged. Such is the practice in Massachusetts, New Hampshire and other eastern states, and my information is that it works well in practice. It can be established in this state by an appropriate amendment to our statute. With the examination in the hands of the court the selection of a jury will proceed without the long delay now often experienced and with the sole object of getting a fair minded set of men and women in every case; rather than one believed to be partial to one side or the other.

The Writ of Habeas Corpus

The writ of habeas corpus is one of the most ancient of our common law prerogative writs, available to the citizen in defense of his personal liberty. It comes to us from centuries of use in England and is protected by the constitution of the several states, including Minnesota, wherein it is declared that the privilege of the writ shall never be suspended save in the time of rebellion or insurrection.

It is curious to note that originally and for two hundred years or more prior to the sixteenth century, the writ was employed exclusively as a judicial method of getting people into jail or prison; the function now served by the commitment issued by the courts of today for that purpose. But in the evolution of judicial procedure during the later centuries the writ became firmly established as one of liberty, and to get people out of prison when unlawfully detained therein. The change is said to have had its origin during the reign of King Charles II, and to release from prison some members of the English parliament who were confined therein on the order of the king.

In this country the writ with that limited scope has frequently been misused and the privilege abused. It is often applied by those convicted or accused of crime with the sole view and purpose of postponing the day of trial and punishment and circumventing the authorities in their efforts to secure a speedy and expeditious hearing. Men ordered by the governor of the state in extradition proceedings to be returned to a state demanding them on a charge of crime committed therein, have been able by the use of the writ to hold the matter in abeyance and frustrate a return of the accused to his home state for trial for months at a time. About two years ago a man was indicted in Minneapolis

on the charge of conspiracy to violate the prohibition law. When arrested and taken into court he pleaded guilty and was sentenced to a term of two years in the federal prison at Leavenworth, Kansas. He did not take the sentence kindly, and by means of the writ of habeas corpus and dilatory appeals succeeded in keeping the officers at bay for over two years. He was finally taken to Kansas and placed in prison and at last accounts was working the writ in that state in further and final efforts to circumvent the law.

It seems hardly necessary to say that a judicial process that can be so employed to escape jail for two years by a convicted person, after having pleaded guilty to the charge against him, contains some defect which ought to be removed.

Treatment and Punishment of Juvenile Offenders Between the Ages of Sixteen and Twenty Years

For ages prior to recent times the policy of the law-making authority in all countries, in respect to the criminal law, has been studied effort to make the punishment fit the crime; and the efforts have been quite generally successful. Murder is divided into three degrees and a punishment imposed commensurate with the enormity of the act causing death. Manslaughter, a crime of the same class, is also divided into degrees and the punishment graduated to meet the character of the act or acts constituting the offence. Robbery has three degrees, and the punishment fixed to correspond to the element of wickedness ascribed to each degree. Larceny is likewise graded. A theft of twenty-five dollars under certain circumstances constitutes petit larceny, punishable by a jail sentence. The theft of over twenty-five dollars under the same circumstances constitutes larceny in the second degree, and is punishable by a term in prison. Many other crimes are also graded with punishment to fit the circumstances of each grade. Further reference to them is not necessary. That has been the policy of the law for centuries, and has perhaps for its support the predominant element of vengeance. But there has come in recent years a change; there has arisen a tendency, in many states, which has found expression in statutory enactments, to change the law and to make the punishment fit the individual, rather than to fit the crime of which he was convicted. This change is found in our indeterminate sentence law, the probation, the suspended

sentence and the parole system for dealing with and treating the young offender.

The probation and suspended sentence laws, as well as the parole system have been challenged in some quarters, and a demand made that we return to the system which took no special account of the mentality of the offender when not reaching the point of insanity. The commission may well speak upon this subject, and express itself in the final report to be made. The great merit in the suspended sentence law, and the parole system, is found in the effort thus put forth to save the young man or young woman from a life of crime, and by considerate and helpful treatment place them in a condition mentally to lead a proper life in the future. The propriety of abandoning those efforts may be seriously doubted. The vengeance of the law may well be tempered with the humane efforts connected with and the basis of the parole system.

THE FEDERAL TRADE COMMISSION

ITS PRESENT SCOPE AND INCREASING IMPORTANCE

By Tracy J. Peycke*

A variety of things have coincided in the time since the close of the war to make the Federal Trade Commission and its functions and possibilities matters of increasing interest to lawyers and laymen alike. The volume of business coming before that body has been and still is being rapidly multiplied; the hearings on the so-called "Pittsburgh Plus" controversy have brought the commission into the northwest in a very definite way; and finally recent decisions of the courts[1] have served to give the commission a standing which had theretofore been challenged, and in large measure to allay the apprehensions of its friends and advocates as to its ultimate usefulness.

It is believed that these considerations furnish sufficient reason and timeliness for a discussion of a governmental agency which seems to bid fair to become in future increasingly powerful and ubiquitous. The subject matter with which the Federal Trade Commission deals is as varied and intricate as the economics of modern business. No more can be done here than to suggest its outlines. The strictly legal considerations which are necessarily involved in its operation are many and difficult, and it is not here the purpose to discuss them all exhaustively. However, there have been only few decisions by the courts construing the act creating the Federal Trade Commission and some of these may fairly be examined.

In a word it is purposed to outline, for the information and from the standpoint of those who do not in the course of a day's business have generally to do with administrative commissions, the scope of the Federal Trade Commission, its practice and procedure, the field of substantive law with which it deals, together with a possible basis for a prediction as to its future development and usefulness.

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[1]See particularly Federal Trade Commission v. Beech-Nut Packing Co., (1922) 42 S.C.R. 150.

The Federal Trade Commission was created by act of Congress of Sept. 26, 1914.[2] The Clayton Act[3] was passed a few days later, and the two acts must be construed together. Both acts were manifestly intended to be supplementary to previous legislation directed against trusts and monopolies restraining interstate trade.[4] The Bureau of Corporations had been created by act Feb. 14, 1903,[5] the act creating the Department of Commerce and Labor. This body had carried on extensive investigation. The Supreme Court of United States had but a short time before decided the Standard Oil and Tobacco Cases.[6] The feeling had gained strength that further legislation was necessary in this field. The legislation of 1914 was passed upon a definite theory and for the purpose of making effective the purpose underlying the earlier legislation. The theory adopted was that competition is an essential to be preserved.[7] The function of the Federal Trade Commission, stated in broad terms, was to be to preserve it.

Divisions of Activity

The Federal Trade Commission has organized its forces and functions into three main divisions, one of which is entirely administrative. A second is known as the legal division, and it is with work of that division that we are here mainly concerned. The other is the economic division. The main concern of the legal division of the Federal Trade Commission is the enforcement of section five of the Federal Trade Commission Act, an act frequently referred to as the Trade Law, and of sections two, three, seven and eight of the Clayton Law. The economic division carries on the investigative work of the commission,[8] which though vast in scope is not properly of primary concern in this article.

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[2]38 Stat. L. 717, U. S. Comp. Stat. (1918) Secs. 8836ff., 4 Fed. Stat. Ann. 575.

[3]Act. Oct. 15, 1914, ch. 323, 38 Stat. L. 730, 9 Fed. Stat. Ann. 730, U. S. Comp. Stat. (1918) Secs. 8835 aff.

[4]Federal Trade Commission v. Gratz, (1920) 253 U. S. 421, 40 S.C.R. 572, 64 L. Ed. 993, (dissenting opinion of Mr. Justice Brandeis).

[5]32 Stat. L. 825, 2 Fed. Stat. Ann. 475.

[6]Standard Oil Co. v. United States, (1911) 221 U. S. 1, 31 S.C.R. 502, 55 L. Ed. 619, 34 L.R.A. (N.S.) 834, Ann. Cas. 1912D 734; American Tobacco Co. v. United States, (1911) 221 U. S. 106, 31 S.C.R. 632, 55 L. Ed. 663.

[7]See report of Senate Committee on Interstate Commerce, June 13, 1914, 63rd Congress, Second Session, No. 597, p. 10.

[8]Secs. 6, 7 and 8.

The functions of these divisions properly overlap, and it is obvious that the activities of the commission occupy a field where legal and economic principles meet and must be fused. The Federal Trade Commission inherited the property and functions of the Bureau of Corporations.[9] By section six of the Trade Law the commission is given power to conduct investigations into the affairs of corporations engaged in interstate and foreign commerce except banks and interstate carriers, both of which are subject to investigation and control by other boards. Under this section the commission has carried on numerous investigations, the result of many of which have from time to time been published in special reports. It is given express authority to make public information so obtained "except trade secrets and names of customers, as it shall deem expedient in the public interest."[10]

It may also require reports as to the affairs of corporations of the class just referred to.[11] It may on its own initiative, and must when so required by the attorney general, investigate the manner of carrying out a decree against a defendant corporation under the antitrust acts.[12] Other duties in connection with these acts may be required of the commission by other departments of the government,[13] and other investigations of a more special character are authorized.

When a decree is to be made against a defendant in an equity suit under the antitrust acts, the court may refer the suit to the commission, as a master in chancery, to report an appropriate form of decree.[14]

Substantial penalties are provided for failing to make reports required by the commission, for falsifying such reports, or for refusing to testify or produce evidence when subpoenaed to do so.[15]

All these investigative and advisory functions are of the same type as those required of many administrative boards and warrant little comment here. The act creating the commission, together

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[9] 32 Stat. L. 825, 2 Fed. Stat. Ann. 475.
[10] Sec. 6 (f). [11] Sec. 6 (b). [12] Sec. 6 (c). [13] Sec. 6.
[14] Sec. 7. District courts declined the assistance of the commission in this capacity in United States v. Reading Company, (1915) 226 Fed. 229, 285, and in United States v. Eastman Kodak Company, (1915) 226 Fed. 62, 80-81.
[15] Sec. 10. It is provided by section 9 that a person is not to be excused from testifying or producing records for the reason that this might tend to incriminate him, but he may not be prosecuted for anything concerning which he may testify, except for perjury in so testifying. It will be interesting to notice whether this section is given full effect.

with the Clayton Act did, however, impose upon it duties of a highly distinctive character. These duties are in the enforcement of the sections of the Clayton Act heretofore referred to,[16] and of section five of the Trade Law. The only rule of conduct contained in the Trade Law is in the initial words of section five, which provide "that unfair methods of competition in commerce are hereby declared unlawful." The commission is then empowered and directed to prevent persons, partnerships, or corporations, subject to the act, from using unfair methods of competition in commerce. The remainder of section five provides the manner in which and the machinery by which this mandate is to be carried into effect.

Section eleven of the Clayton Act substantially re-enacts the procedural portion of section five of the Trade Act insofar as it is related to the duty imposed on the commission to enforce compliance with sections two, three, seven and eight of the Clayton Act. This is true with one important reservation. Whenever the commission shall have reason to believe that a violation of section two, three, seven or eight of the Clayton Act is involved, section eleven of that act provides that the commission shall issue its complaint and proceed. Whenever the commission shall have reason to believe that a violation of the prohibition of employing unfair methods of competition under the Trade Law is involved, section five of that statute provides that it shall issue its complaint and proceed, only "if it shall appear to the comission that a proceeding by it in respect thereof *would be to the interest of the public.*"

The Federal Trade Commission Act was obviously designed in the public interest. It lays down, as we have seen, but one rule of conduct, namely the prohibition of *"unfair methods of competion in commerce."* But this rule would seem to be intended in protection of broad public interests, and not as a basis for the redress of private grievances. Only the commission may institute proceedings. Private parties may be allowed to intervene, but it was plainly not the intention of Congress that such parties should become the prosecutors. And it is unfair *methods* that are inhibited, and not unfair *acts*.[17] These considerations tend to stamp this statute as one for the protection of the public, and

[16]Secs. 2, 3, 7, and 8.

[17]See dissenting opinion of Justice Brandeis in Federal Trade Commission v. Gratz, (1920) 253 U.S. 421, 40 S.C.R. 572, at p. 576, 64 L. Ed. 993.

only in an incidental way as furnishing a remedy for private wrongs. Accordingly, there is incorporated the requirement that a proceeding should be to the interest of the public.

We are not to understand that the commission may proceed under the Clayton Act in cases where no public interest is involved. In none of its activities is the commission to be regarded as a free legal aid bureau for corporations nursing competitive grievances. But the practices denounced by the Clayton Act fall under its prohibition only if they tend to substantially lessen competition or create a monopoly. Such a tendency, of course, stamps them with a public interest.[18]

Procedure and Practice

The procedure and practice of the Federal Trade Commission is regulated by the provisions of the act[19] and by the rules of practice adopted by the commission.[20] As has been seen, all proceedings are instituted by the commission. No private individual or corporation can institute a proceeding before that body. Here is to be found a radical departure from the practice of the Interstate Commerce Commission, after which the Federal Trade Commission is largely modeled. The commission has provided by rule, however, for filing by private parties with the commission of what is known as an application for complaint. This is required to contain "a short and simple statement of facts," constituting the alleged unfair method of competition. No docket of applications is kept or information given of the source of the application. The commission thus took cognizance at an early stage of the fact that its information as to possible violations would almost necessarily come from competitors conceiving themselves to be injured. Such in practice has been the case.[21]

The act provides that proceedings shall be initiated by the complaint of the commission. The complaint must state the

[18]The requirement of public interest is not included in the Clayton Act "presumably because such violations would per se be of interest to the public, as distinguished from an unfair method of competition, which might only involve a private injury." Annual report of the Federal Trade Commission for the year ending June 30, 1916, p. 5.

[19]Secs. 5 and 9.

[20]118 C.C.A. XV, 202 Fed. XIII.

[21]See rule II of the rules of practice of the Federal Trade Commission. Up to June 30, 1921, 2416 applications for complaints had been filed. Of these 1349 were dismissed without publicity. On that date 788 formal complaints had been served by the commission; 379 orders to cease and desist had been entered, and 101 complaints had been disposed of by orders of discontinuance or dismissal. Annual report for 1921.

charges of the commission,[22] and contain notice of hearing. In practice the formal complaint is preceded by a notice to the prospective defendant and an opportunity to cease the practice complained of. Very many cases are disposed of in this way: the method of unfair competition being abandoned, it is no longer in the interest of the public to issue a complaint. In disposing of these and similar matters, the commission has followed the practice of the Interstate Commerce Commission of issuing "conference rulings," which are published. This is also done to some extent upon requests for advice relating to the laws the commission is empowered to enforce.

The act makes no provision for an answer by the defendant, but the rules of practice[23] of the commission have supplied such a provision. There is no such thing as a default or an order entered upon default. The orders of the commission to cease and desist from a particular practice are enforceable only by an independent proceedings in the circuit court of appeals, and there a decree will be entered in favor of the commission only insofar as the order of the commission being reviewed is supported by testimony. However, a respondent would undoubtedly be seriously prejudiced in later proceedings by failure to answer. Three copies of the answer are required to be filed,[24] and the specifications as to paper, type, margins, etc., are full and minute. Neither the law nor the rules of practice appear to contemplate any pleading serving the office of a demurrer, although a motion to dismiss may be entertained.[25]

The complaint cites the defendant to appear and show cause why an order should not be entered directing it to cease and desist from the violation complained of. This, of course, has never been construed as placing an affirmative burden on the defendant, the commission assuming the burden of proof throughout.[26] The act provides for intervention by any person, partnership, or corporation upon good cause shown, by order of the commission.[27] The act appears to suggest no particular standard for determining what

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[22]See Federal Trade Commission v. Gratz, (1920) 253 U. S. 421, 40 S. C. R. 572, 64 L. Ed. 993, infra.

[23]Rule III.

[24]Rule III.

[25]Fruit Growers Express Inc. v. Federal Trade Commission, (C.C.A., 7th Circuit, 1921) 274 Fed. 205.

[26]Annual report, June 30, 1916, p. 11.

[27]Rule V. This rule sets out in detail the specifications to be observed in preparing this application.

constitutes "good cause," and the rules of practice adopted by the commission have not sought to clarify the phrase. Apparently the matter of intervention is in the discretion of the commission, presumably divorced from the technical requirements ordinarily associated with intervention.

The matter comes on for hearing, normally before an examiner of the commission. These hearings may be held at any convenient place, and evidence is frequently taken in many different cities in the same proceeding. The commission thus takes on a more ambulatory character than is commonly the case in similar proceedings. Depositions may be taken on order. The testimony upon a proceeding is reduced to writing and filed. Objections to testimony are required to be in short form, and the transcript contains no debate.[28]

The attitude of the commission toward the usual rules of evidence seems not to be radically unlike that of an ordinary judicial tribunal, with perhaps some relaxation, and upon hearings one hears objections to testimony with about the accustomed frequency and upon the usual grounds. In a proceeding the findings of the commission are conclusive only if supported by "testimony." Presumably this means competent testimony, and while we may assume that evidence is to be rather freely admitted,[29] yet the importance to a respondent of reserving his objections on the record is apparent.[30]

When the evidence has been taken the examiner makes proposed findings and a proposed order, which is served on the parties or their attorneys. The latter then have ten days in which to file exceptions.[31] At the close of the hearing briefs may be filed with the commission, twenty copies together with the proof of service being required to be filed in such case. Oral argument is had only as ordered by the commission.

When the matter has been fully considered the commission may make its order requiring the respondent to cease and desist from the practice complained of, or dismissing the complaint. Until the record is filed with the circuit court of appeals, in the event that there is to be a review, an order of the commission may be modified or set aside by it at its will. Instead of a hearing, it

[28] Rule IX.
[29] Annual Report, June 30, 1916, p. 11.
[30] See Harlan & McCandless, (1916) The Federal Trade Commission, Sec. 33 (4), and cases there cited.
[31] Rule XII.

is a common practice in simple cases to make the facts upon which any order is to be based appear by stipulation.

Like many other administrative boards the Federal Trade Commission presents what will probably always seem an anomaly to many lawyers in that it sits in judgment in proceedings in which it is the complainant. In practice this possible incongruity is mitigated by the conscious effort made by the commission to keep the department which is actively engaged in prosecuting complaints separated from the examiners who preside at the hearings. It is easy to see that actual partizanship under these circumstances might largely be dissipated.

Review

It is noteworthy that the commission has no power of its own for enforcing its orders. Neither the Clayton Act nor the Trade Commission Act provides any penalty for a failure to obey any order of the commission, or for a violation of a section of which the commission has jurisdiction. There are certain drastic penalties imposed in aid of the commission's investigative powers, but no such penalties are provided in aid of the enforcement of section five of the Trade Law or of sections of the Clayton Act above referred to.[32]

The commission can enforce its orders only by a proceeding in the circuit court of appeals. While with respect to the enforcement of its orders the commission does not appear on paper to be formidable, in practice its orders are obeyed with the necessity for but very infrequent resort to this judicial proceeding.[33] Where the aid of the court is invoked, its jurisdiction is original, not appellate. Where its order is not obeyed the commission may apply to the circuit court of appeals for its enforcement, filing at the same time the entire record of the proceeding before the commission;[34] or the party against whom an order has been made may petition the court to set aside the order. In the latter case also the commission is required forthwith upon being served with a copy of such petition to file in the court a transcript of the record. In practice either method is used. In either event the proceedings are not de novo. Additional evidence may be ordered

[32]Compare the provisions of the Interstate Commerce Act.

[33]See note 47, infra.

[34]In a proper case the record may be condensed and the testimony put in narrative form, in analogy with the practice under general equity rule 75, 115 C.C.A XL, 198 Fed. XL. National Harness Mfrs. Asso. v. Federal Trade Commission, (1919) 261 Fed. 170.

taken, but it is taken before the *commission* and not before the court, and the commission may thereupon modify its findings of fact.

It has previously been pointed out that the findings of fact of the commission, if supported by testimony, are conclusive. This is, of course, a familiar provision with respect to administrative boards of this kind. The court is not concluded as to the legal effect of such findings,[35] nor is the court concluded where matter which is properly a conclusion of law is denominated a finding of fact.[36] The rule here, like that applied to the Interstate Commerce Commission, will probably be that a mere scintilla of evidence will not suffice; it will be enough, however, if there is *substantial* testimony.[37]

The jurisdiction of the circuit court of appeals "to enforce, set aside, or modify orders of the commission" is exclusive.[38] Interesting attempts have been made to enjoin in district court the prosecution of complaints by the commission. In *T. C. Hurst & Son v. Federal Trade Commission,*[39] such an effort was made, the basis of the objection being the alleged unconstitutionality of the statute creating the commission. The court held the act valid and denied the injunction.

The possibility of resisting the commission by injunction in a court of equity was a question more sharply raised in suits for injunctions begun in the supreme court of the District of Columbia by Butterick Co., and affiliated companies to enjoin the commission from prosecuting a complaint, which it was claimed failed to state facts sufficient to constitute a violation of the Trade Law or the Clayton Act. The commission resisted on the ground that the proceeding in the circuit court of appeals prescribed in the statute was an exclusive remedy, and that the court was without jurisdiction to enjoin the commission. The bills were dismissed and the injunction denied.[40] An appeal has been noticed by Butterick Company.

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[35]Great Northern Ry. Co. v. Minnesota, (1915) 238 U. S. 340, 345, 35 S.C.R. 753, 59 L. Ed. 337.

[36]Standard Oil Company v. Federal Trade Commission, (1921) 273 Fed 478.

[37]Interstate Commerce Commission v. Union Pacific R. Co. et al., (1912) 222 U. S. 541, 547-8, 32 S.C.R. 108, 56 L. Ed. 308.

[38]Sec. 5.

[39](1920) 268 Fed. 874.

[40]See annual report of Federal Trade Commission, June 30, 1921, p. 26.

PRESENT STANDING OF THE COMMISSION

The Federal Trade Commission was largely modeled after the Interstate Commerce Commission, and it may be fair to assume that the framers creating the former intended the Trade Commission to assume a degree of power and importance commensurate with that of the Interstate Commerce Commission. The Trade Act and Clayton Act provide machinery which in its larger outlines has been tested and found effective. A system of procedure is afforded which has developed no considerable weaknesses in practice. In a word, we may look for the Federal Trade Commission to become one of the major agencies of the federal government, subject to one condition. That is that the commission should have been afforded a sufficiently ample field of substantive matter in which to function.

Sections two, three, seven and eight of the Clayton Act cover fairly well defined practices—price discrimination, "tying" contracts, intercorporate shareholding, and interlocking directorates, under certain conditions. At this point of time it seems safe to say that Congress in enacting the Clayton Law added somewhat to the substantive law relating to the above mentioned practices as contained in the antitrust acts.[41] Nevertheless Congress purported to deal only with a very small group of cases, and the activities of the commission in enforcing the Clayton Act have not been particularly marked.[42]

If that body is to be rounded into a powerful regulative agency it will be because it has been given to it to deal with the initial paragraph of section five of the act creating it, declaring "that unfair methods of competition in commerce are hereby declared unlawful." The accurate appraisal of the scope of the commission depends upon the meaning to be attached to the words "unfair methods of competition." The term "commerce" is defined in the act, and means substantially interstate and foreign commerce. But the term *unfair methods of competition* is nowhere defined. Its definition was debated by the legislators and deliberately avoided.[43] The validity of this section

[41]See 4 MINNESOTA LAW REVIEW 287.

[42]Of about 700 complaints served up to the early part of 1921, 572 charged violation of section 5 of Trade Law, and 135 charged violation of various sections of the Clayton Act. Annual report of Federal Trade Commission, June 30, 1921.

[43]Report of Senate Committee on Interstate Commerce, June 13, 1914, 63rd Congress, Second Session, No. 597, p. 13.

was challenged, on the score of the indefiniteness of this term, in *Sears, Roebuck & Company v. Federal Trade Commission,*[44] but the court was not impressed with the objection. No doubt the term is as definite as "unjust discrimination," "unreasonable restraint," and many other concepts perfectly familiar to all lawyers. It is worth noting in this connection that the section does not establish a rule of criminal liability.[45]

The meaning of the term is a question for ultimate determination by the courts and not by the commission.[46] The number of cases construing the phrase in the courts is limited, and those decided by the Supreme Court is very small. The normal activities of the commission were interrupted by the war, at which time it devoted itself largely to assisting the government's war-making branches. For that reason the act has been slow to receive judicial construction. It is also remarkable that the orders of the commission have been very largely complied with without review by the court.[47] It must be assumed that business interests generally regard the commission as a helpful agency, and are in the main willing to cooperate with it. So long as this is true the commission may well accomplish things not possible strictly as a matter of powers conferred by the act.

As a result of the matters just referred to it is difficult to predict the scope which will be assigned by the courts to section five of the Trade Law. It is quite probable that its limitations will be marked out by a process of slow development and definition. In the interests of a sound jurisprudence this may be most desirable.

The term "unfair methods of competition" is one to which the courts had up to the passage of the Trade Law never had occasion to give a settled construction. The term "unfair competition" did have a meaning in the language of the law. It consisted shortly of representing one's products, etc., as those of an-

[44](1919, C.C.A. 7th Circuit) 258 Fed. 307, 169 C.C.A. 323, 6 A.L.R. 366. The constitutionality of the law was also unsuccessfully attacked in the following cases: Hurst & Son v. Federal Trade Commission, (1920) 268 Fed. 874; National Harness Mfrs. Asso. v. Federal Trade Commission, (1920 C.C.A. 6th Court) 268 Fed. 705.

[45]See 5 MINNESOTA LAW REVIEW 298.

[46]Federal Trade Commission v. Gratz, (1920) 253 U. S. 421, 40 S.C.R. 572, 64 L. Ed. 992; Wholesale Grocers Ass'n v. Federal Trade Commission, (C.C.A. 5th Circuit 1922) 277 Fed. 657.

[47]On June 30, 1921, the commission had made a total of 379 orders to cease and desist. In respect to only 32 of these had there been a resort to the court for review, and 12 of these 32 cases involved the same question and may here be regarded as one. Annual report, June 30, 1921, p. 8.

other of established reputation.[48] This came to be an actionable wrong and was termed unfair competition. That it would be within the condemnation of section five of the Trade Law if it rose to the dignity of a "method" can hardly be doubted. It will be seen, however, that common law definitions have not proved of very material assistance.

Since the enactment of the Federal Antitrust Acts the courts have fallen into the habit of speaking of numerous other practices as "unfair competition."[49] Economic writers had previous to the creation of the Federal Trade Commission taken an interest in the subject and had cataloged numerous business practices as "unfair competition."[50] As has been pointed out the scope of this term is for the courts, and they have as yet hardly begun its consideration. The commission considers it the first instance, however, and there the term has been many times construed. In determining whether a method of competition is unfair the commission has recourse to all the available sources of information,—legal, economic, or of whatever character.[51] In the annual report of the commission for 1920[52] three classes of cases are recognized. The first includes those practices which involve an element of moral turpitude. The second embraces practices which were condemned at common law. The third class represents a rather miscellaneous group which had at that time been developed by the experience of the commission. In the same report[53] are listed numerous specific methods of competition which had been condemned by orders of the commission in particular cases.

The question must ultimately be settled by the courts, and it is to their decisions that we must finally look. One of the earliest cases to construe the Federal Trade Law was *Federal Trade Commission v. Gratz.*[54] The commission had there entered a cease and desist order directed against the practice of respondents of refusing to sell cotton bagging to customers unless the latter would take a corresponding quantity of ties. This order was re-

[48]Rathbone, Sard & Co. v. Champion Steel Range Co., (1911) 189 Fed. 26, 110 C.C.A. 596.

[49]Standard Oil Co. v. United States, (1911) 221 U. S. 1, 31 S.C.R. 502. 509, 55 L. Ed. 619, 34 L.R.A. (N.S.) 834, Ann. Cas. 1912D 734.

[50]See W. S. Stevens, Unfair Competition, 29 Pol. Sc. Q. 284-306 and 463-485.

[51]Annual report, June 30, 1916, p. 6.

[52]P. 48.

[53]P. 56 ff.

[54](1919 C.C.A. 2nd Circuit) 258 Fed. 314, 169 C.C.A. 330, 11 A.L.R. 793.

versed. The court found that there was no evidence of a general practice to refuse to sell bagging without ties, and held the commission had no jurisdiction of individual grievances. The court declared:

"It seems to us that unfair methods of competition between individuals are not contemplated by the act."[55] "We think the unfair methods. though not restricted to such as violate the anti-trust act, must be at least such as are unfair to the public generally."[56]

The case went to the Supreme Court of the United States, and was there disposed of on the narrow ground that the complaint of the commission failed to state facts sufficient to constitute a violation of section five of the Trade Law.[57] The court pointed out that the complaint failed to allege that either the public or any competitor suffered from the practice complained of. The court said:

"If, when liberally construed, the complaint is plainly insufficient to show unfair competition within the proper meaning of these words there is no foundation for an order to desist—the thing which may be prohibited is the method of competition specified in the complaint. Such an order should follow the complaint; otherwise it is improvident and, when challenged, will be annulled by the court."[58]

The objection to the complaint was raised for the first time in the Supreme Court and was not taken by counsel at all. Justice Brandeis, Justice Clarke concurring, dissented upon the ground among others that it was contrary to ordinary practice to dispose of the case under these circumstances upon a question of pleading.

Sears, Roebuck & Company v. Federal Trade Commission[59] appeared at about the same time. The complaint there charged that respondent falsely advertised that it had sources for securing certain of its goods not enjoyed by competitors; that it purchased teas, etc., only after inspection had been made on the ground by its own expert. The complaint further charged that respondent sold sugar at a loss. An order was entered to cease

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[55](1919) 258 Fed. 314, 316.

[56](1919) 258 Fed. 314, 317. See also as supporting this view New Jersey Asbestos Company v. Federal Trade Commission, (1920 C.C.A. 2nd Circuit) 264 Fed. 509; Kinney Rome Co. v. Federal Trade Commission, (C.C.A. 7th circuit 1921), 275 Fed. 665.

[57](1920) 253 U. S. 421, 40 S.C.R. 572, 64 L. Ed. 993.

[58](1920) 40 S.C.R. 572, 574-575, 64 L. Ed. 993.

[59](C.C.A. 7th Circuit 1919), 258 Fed. 307, 169 C.C.A. 323, 6 A.L.R. 366 and note.

and desist from these practices. The court affirmed the order with the exception of the item of selling at less than cost, a practice which standing alone the court declined to condemn. The court took occasion to say, "The commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived."[60]

The case of *Winsted Hosiery Company v. Federal Trade Commission,*[61] as decided by the circuit court of appeals, furnished an interesting contrast to the view taken in the *Sears, Roebuck & Company Case.* In the *Winsted Hosiery Company Case* the order was to cease and desist from a practice of marking and branding shirts as "wool," "natural wool," etc., when in fact but a small amount of wool was present. It was in evidence that this system had been a trade practice for the past twenty years, and that the trade was familiar with it and was not misled by it. The order of the commission was reversed. The court remarked, "the commission is not made a censor of commercial morals generally." As against any other manufacturer or any competitor of respondent, no unfair method was employed. If a consumer was misled, the court was of opinion that this had nothing to do with "unfair competition."[62]

The doctrine of this case apparently was that a business method will not be interfered with unless it is unfair to a competitor. Standing alone the term "unfair methods of competition" might easily bear this construction.[63] As we have seen, however, Congress was grappling with the large problem of business regulation, and opinion was divided between those who favored regulated monopoly and those who advocated competition as a sufficient remedy but who conceded that its regulation was necessary. That such regulation was deemed necessary primarily in the *public* interest can hardly be doubted. If any doubt should exist, it ought largely to be dispelled by the requirement, as a condition precedent to any action by the commission to prevent

[60]258 Fed. 307, 311. See unfavorable comment on this case in 88 Cent. Law J. 425, where it is pointed out that false advertising is not unlawful at common law unless someone is deceived. And compare Winsted Hosiery Co. v. Federal Trade Commission, (1921 C.C.A. 2nd Circuit) 272 Fed. 957, infra.

[61](1921 C.C.A. 2nd Circuit) 272 Fed. 957.

[62]See adverse comment on this case in 20 Mich. Law Review 122-123. Certiorari in this case was granted by the Supreme Court. 255 U. S.——, 41 S.C.R. 625, 65 L. Ed. 735.

[63]Dissenting opinion of Mr. Justice Brandeis in Federal Trade Commission v. Gratz, (1920) 253 U. S. 421, 40 S.C.R. 572, 577, 64 L. Ed. 993.

"unfair methods of competition," that such action be "to the interest of the public."

The *Winsted Case* was brought to the Supreme Court on writ of certiorari, and an opinion was there handed down on Apr. 24, 1922, reversing the decree of the circuit court of appeals.[64] Mr. Justice Brandeis wrote the unanimous decision of the court. The court held that the findings of the commission were supported by the evidence. The commission found that the labels employed deceived a large part of the buying public; and that the method was unfair to competitors in that the Winsted Co. was enabled thereby to get orders which would otherwise have gone to manufacturers of similarly branded articles which were genuine. An element of wrongdoing was found by the court in the fact that unscrupulous retailers were by this method supplied with a means of fraud.

The decision of the Supreme Court clearly proceeds upon the finding that honest competitors of the Winsted Co. were adversely affected by the practice. The circuit court of appeals had declared: "In this case there was obviously no unfair method of competition as against other manufacturers of underwear."[65] The Supreme Court regarding the contrary finding of the commission, insofar as it represented a finding of fact, as supported by the evidence. Competitors were in fact no doubt damaged by the practice of the Winsted Co.

Royal Baking Powder Co. v. Federal Trade Commission[66] was a case in which the commission had issued an order against a certain plan of advertising by the Royal Baking Powder Co. the petitioner. This corporation, with its constituent companies, had according to the findings of the commission, been engaged for many years in making and selling a high grade cream of tartar baking powder. It ceased to manufacture this and in place thereof put out a phosphate powder, which was much less expensive. The containers remained very similar to those formerly used. Both powders were sold under the brand "Dr. Price's Baking Powder." It was advertised that the price of this brand had been reduced. The order of the commission in a general way prohibited these practices and required that the new powder be plainly designated as a phosphate powder.

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[64] Federal Trade Commission v. Winsted Hosiery Co., (1922) 42 S.C.R. 384.

[65] (1921) 272 Fed. 957, 960.

[66] (1922 C.C.A. 2nd Circuit) 281 Fed. 744.

The Supreme Court decision in the *Winsted Hosiery Co. Case* was strongly relied on by the court in affirming the order of the commission, and is cited as supporting the proposition that the commission has power to prevent the misrepresentation of the quality of the goods of a manufacturer in his advertising. It is interesting to notice that the practice condemned in the *Royal Baking Powder Co. Case* is that of representing one product of a manufacturer as being another and in fact different product *of the same manufacturer.*

The two cases last cited clearly go far to support the exercise of power by the Federal Trade Commission to prevent misbranding of goods and misleading advertising.

The case which is perhaps most important in defining the powers of the commission is that of *Federal Trade Commission v. Beech-Nut Packing Company,*[67] recently decided by the Supreme Court. The order of the commission in that case was directed against the so called Beech-Nut system of merchandising. It was found as facts by the commission or appeared by stipulation that this system was employed by respondent and consisted briefly in refusing to sell to jobbers and wholesalers who in turn sold to retailers not observing the "suggested" prices. Such jobbers and wholesalers were subject to be reported to respondent by its agents or other dealers, and distributors not maintaining the indicated resale prices were listed and remained in disfavor until they could give satisfactory assurances of future compliance with the company's schedule of prices. This system was not maintained by contract, but by the practice and the tacit understandings indicated above.

The circuit court of appeals reversed the order of the commission.[68] This was done upon the authority of *United States v. Colgate & Company,*[69] which the court considered as controlling and as establishing the proposition that a manufacturer might refuse to sell at his choice so long as there was no contract, express or implied, effecting a combination.

The decision of the circuit court of appeals was reversed by the Supreme Court. It was pointed out that the *Colgate Case* arose under the Sherman Act while the proceeding in the instant case

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[67](1922) 42 S.C.R. 150, 19 A.L.R. 882.

[68]Beech-Nut Packing Company v. Federal Trade Commission, (1920) 264 Fed. 885.

[69](1919) 250 U. S. 300, 39 S.C.R. 465, 63 L. Ed. 992, 7 A.L.R. 443.

was under section five of the Trade Law. It was not regarded by the court as essential that a contract be established. The court remarked:

"The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose."[70]

Competition among retailers was substantially restricted by the Beech-Nut system. As bearing upon the scope to be given the term "unfair methods of competition" the court said:

"If the 'Beech-Nut system of merchandising' is against public policy, because of its dangerous tendency unduly to hinder competition or to create a monopoly, it is within the power of the Commission to make an order forbidding its continuation."[71]

Justice Holmes, McKenna, Brandeis, and McReynolds dissented. Mr. Justice Holmes wrote a dissenting opinion the purport of which may fairly be summed up in his remark: "to whom respondent's conduct is unfair I do not see."[72] The respondent already had a monopoly of its own goods. It was argued that the competition referred to is competition among the doers of the condemned act. In rejecting this view the Supreme Court has substantially broadened the meaning and force of section five of the Trade Law. In rejecting the view that the method of competition complained of must be one unfair to a competitor of respondent the court has likewise materially added to the power and effectiveness of the Federal Trade Commission. If the principle involved in the *Beech-Nut Case* is to be followed to its logical conclusion it means that a method of competition falls within the ban of the act if it is unfair to the public, regardless of whether it is or is not unfair to a competitor of respondent and regardless of whether it is unfair to any individual in the trade. This decision strengthens the hand of the Federal Trade Commission, and may result in making that body the medium through which we may expect to be made whatever substantial progress is possible for a considerable time to come in the regulation of interstate business.

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[70](1922) 42 S.C.R. 150, 155.
[71](1922) 42 S.C.R. 150,154.
[72](1922) 42 S.C.R. 150, 156.
See Standard Oil v. Federal Trade Com. (1922), 282 Fed. 81.

THE PROHIBITION AMENDMENT AND INTERNATIONAL LAW

QUINCY WRIGHT*

THE eighteenth amendment," said Justice Holmes of the Supreme Court, in the *Grogan* and *Anchor Line Cases,* "meant a great revolution in the policy of this country, and presumably and obviously meant to upset a good many things on as well as off the statute books."[1] It is not surprising that the reconciliation of the amendment with time honored principles of public law has proved a difficult process. With the claim that the amendment overthrew individual and states rights more fundamental than the constitution, and with the efforts of the bootleggers to shelter themselves under the unreasonable search and seizure clause the international lawyer is not concerned.[2] When, however, the Supreme Court follows the statement just quoted, with the announcement that the amendment "did not confine itself in any meticulous way to the use of intoxicants in this country," he may well prick up his ears or even raise his voice as did three justices of the court, who, though almost ashamed to criticize "the attractive spectacle of a people too animated for reform to hesitate to make it as broad as the universe of humanity," nevertheless did so with an admonition to their brethern of the majority.

"I put my dissent," writes Justice McKenna, speaking also for Justices Day and Clarke, "upon the inherent improbability of such intention—not because it takes a facility from intoxicating liquor, but because of its evil and invidious precedent, and this at a time when the nations of the earth are assembling in leagues and conferences to assure one another that diplomacy is not deceit and that there is a security in the declaration of treaties, not only against material aggression but against infidelity to engagements when interest tempts or some purpose antagonizes. Indeed I may say there is a growing aspiration that the time will come when nations will not do as they please and bid their wills avouch it."

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[1]Grogan v. Walker, Anchor Line v. Aldrich, (1922) 42 S.C.R. 423.

[2]See Abbott, Inalienable Rights and the Eighteenth Amendment, 20 Col. L. Rev. 183.

The admonition, however, has proved of no avail. The majority opinion in this case, delivered by Justice Holmes on May 15, 1922, held that liquor could not be transferred from one British vessel to another in an American port for shipment to a foreign country and that Great Britain could not ship liquor under bond from Canada via Detroit though transit of bonded goods without customs seemed to be guaranteed by article 29 of the Treaty of Washington of 1871. On October 6th, Attorney General Daugherty[3] deduced from this opinion a prohibition upon the "possession and transportation of beverage liquor on board foreign vessels while in American territorial waters, whether such liquors are sealed or open," and on October 23rd, Justice Learned Hand of the federal court of the southern district of New York[4] refused to enjoin the secretary of the treasury from putting this interpretation into effect except with reference to ship's stores for the use of the crew. Pending final review of this decision by the Supreme Court, and in consideration of the informal complaints of foreign governments as well as the difficulty of perfecting enforcement regulations, the executive officials have temporarily withheld enforcement.[5]

Aside from the questions of the (1) sanctity of treaties and (2) the immunities of foreign merchant vessels in port here involved, the zeal of officers enforcing the eighteenth amendment and the Volstead Act has raised the question of (3) the right to seize suspicious vessels beyond the three mile limit.

1. Impairment of Treaties.

On the question of treaty violation, international law has but one answer. Treaties are made to be kept.

"It is an essential principle of the law of nations," asserted the London Protocol of 1871, "that no power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting powers by means of an amicable arrangement."[6]

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[3]Daugherty, Att. Gen., Opinion Oct. 6, 1922. Text printed in New York Times, Oct. 7, 1922. In an opinion of July 7, 1921, Attorney General Daugherty had denied the right of transit to intoxicating beverages, thereby agreeing with Acting Attorney General Nebeker's opinion of Feb. 4, 1921. 32 op. 419.

[4]Cunard Line v. Mellon, Oct. 23, 1922. Text printed in New York Times, Oct. 24, 1922, p. 2.

[5]Press Reports, Oct. 25, 1922.

[6]2 Satow, Diplomatic Practice 131; Hall, International Law, 7th ed., 365.

The only international defense is that the treaty was not binding and in this case something can be said on that score. Article 29 of the treaty of Washington which provided for reciprocal transit of goods through the United States and Canada without customs duties, was to continue only for the term of years mentioned in article 33. This in turn provided that articles 18 to 25 inclusive and article 30 would continue for ten years and further until the expiration of two years after notice of termination by either party. Under this article the United States denounced articles 18 to 25 and article 30 in 1883 and though the act of denunciation failed to mention article 29, Presidents Cleveland and Harrision subsequently expressed the opinion that it had been terminated.[7] Though referring to these opinions the Supreme Court proceeded on the assumption that the treaty was binding.[8]

So far as American law is concerned, there is no doubt but that a constitutional amendment or a later act of Congress will prevail over a treaty[9] though such provisions are interpreted to save the treaty if possible.[10]

"Zeal," said the dissenting justices, "takes care to be explicit in purpose and it cannot be supposed that sec. 3005 and the treaty were unknown and their relation—harmony or conflict—with the new policy, and it must have been concluded that there was harmony, not conflict."

"We appreciate all this," said the majority, "but are of opinion that the letter is too strong in this case."

2. Foreign Private Vessels in Port.

The same rule of interpretation applies to customary international law.[11] The courts apply it as part of the law of the

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[7]8 Richardson, Messages and Papers of the President 623-625; vol. 9, p. 340.

[8]The dissenting justices give the existence of the treaty as the leading reason for their opinion, yet the precedents would seem to require the Supreme Court to follow the president's decision in such a political question as treaty termination. Doe v. Braden, (1853) 16 How. (U.S.) 635, 14 L. Ed. 1090; Terlinden v. Ames, (1902) 184 U.S. 270, 46 L. Ed. 534, 22 S. C.R. 484; Wright, Control of American Foreign Relations 172.

[9]The Chinese Exclusion Case, (1888) 130 U.S. 581, 32 L. Ed. 1068, 9 S.C.R. 623; The Cherokee Tobacco Case,(1870) 11 Wall (U.S.) 616, 20 L. Ed. 227; The Head Money Cases, (1884) 112 U.S. 580, 28 L. Ed. 798, 5 S.C.R. 247; 5 Moore, Digest of Int. Law, 167, 356-370.

[10]Whitney v. Robertson, (1887) 124 U.S. 190, 31 L. Ed. 306, 8 S.C.R. 456; In re Dillon, (1874) 7 Sawy. (C.C.) 561, Fed. Cas. 3,914.

[11]The Paquette Habana, (1900) 175 U.S. 677, 44 L. Ed. 320, 20 S.C.R. 290.

land unless a constitutional provision, statute or treaty conflicts.[12] But since foreign nations are not barred from presenting claims by such provisions of domestic law[13] the courts and executive officials have always endeavored to interpret them in accord with international law if possible.[14] Especially is this true with reference to constitutional provisions. Thus the compulsory process for obtaining witnesses guaranteed to accused persons by the sixth amendment has always been construed in accord with the usual exemption from such process enjoyed by resident diplomatic officers.[15] The eighteenth amendment itself has not been allowed to impair the immunity of diplomatic baggage. Under date of April 29, 1922, the department of state informed the writer:

"No change has been made with respect to the privilege of entry free of duty without examination of the baggage and other effects of diplomatic officers accredited to this government, which privilege is accorded to them under articles 376 and 377 of the Customs Regulations of 1915."

There seems to have been no question of the immunity from search for liquor of foreign public vessels in port. Foreign private vessels in port, however, have been held within the prohibition by appeal to the words of the statute, to the requirements of administrative efficiency and to the duty of protecting American vessels from unfair competition.

The Supreme Court based the decision already cited on the prohibition by the eighteenth amendment of "transportation of intoxicating liquors . . . within the United States and all territory subject to the jurisdiction thereof for beverage purposes." It is to be noticed that the other prohibitions, "manufacture and sale within," "importation into" and "exportation from" the United States, are not involved and that "transportation within" is given a somewhat broad interpretation. The attorney general, however, was influenced by the Volstead Act which also prohibits "possession," though that term is not found in the amendment. He also fortified himself by Justice Holmes' argument that the makers of the amendment "reasonably may have thought that if they let it (liquor) in, some of it was likely to stay," in spite of

[12]Wright, 11 Am. Jnl. Int. Law 5, 8, 575.

[13]Borchard, Diplomatic Protection of Citizens Abroad 181; Wright, Control of American Foreign Relations 17-18.

[14]Murray v. The Charming Betsey, (1804) 2 Cranch (U.S.) 64, 118, 2 L. Ed. 208; Wright, 11 Am. Jnl. Int. Law 10, 575.

[15]4 Moore's Digest, 643-645; vol. 5 pp. 167-168.

Justice McKenna's insistence that this "presented the United States in an invidious light," and his doubt whether even if the "watchfulness of the government may be evaded . . . such petty pilferings can so determine the policy of the country as to justify the repeal of an act of Congress, and violation or abrogation of its treaty obligation by implication." An additional arrow in the attorney general's quiver was supplied by his own opinion barring carriage of liquor by American ships on the high seas. With that opinion "the results of granting the privilege to foreign ships would be to produce manifestly unfair conditions of competition for our own citizens and shipping interests."

The Supreme Court based its decision on a literal reading of the amendment with but scant attention to the rule of international law on which the foreign ships claimed immunity, yet with Chief Justice Marshall's rule that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,"[16] such consideration would seem appropriate in determining the true meaning of the amendment and the Volstead Act. For determining the international responsibilities of the United States, it is of course fundamental.[17] In appreciation of these facts Attorney General Daugherty cited several authorities on the completeness of territorial jurisdiction,[18] to indicate conformity of his opinion to international law, but refrained from an exhaustive examination of the question.

Does international law permit the United States to make and enforce laws prohibiting intoxicating beverages from foreign private vessels in port?

Several theories have been advanced with reference to the exemption of private vessels in port, the British view in general holding against such exemption, and the French holding for it,

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[16]Murray v. The Charming Betsey, (1804) 2 Cranch (U.S.) 64, 118, 2 L. Ed. 208; Wright, 11 Am. Jnl. Int. Law 10, 575.

[17]Supra note 13. France has informally suggested submission of the question to the permanent court of international justice, which would be bound only by treaty and international law. (Statute of the court, art. 38, 22 Col. L. Rev. June No.). Judging from the nationality of a majority of its judges the continental European view of international law would be likely to prevail in this court.

[18]United States v. Diekelman, (1875) 92 U.S. 520, 525, 23 L. Ed. 712; 2 Moore's Digest 275 et seq.; Bayard, Secretary of State, 2 Moore's Digest 308; Wildenhus Case, (1887) 120 U.S. 1, 11, 12, 30 L. Ed. 565, 7 S.C.R. 385; The Exchange, (1912) 7 Cranch (U.S.) 116, 135, 143; 3 L. Ed. 287; The Eagle, (1868) 8 Wall. (U.S.) 15, 22, 19 L. Ed. 365.

as to certain matters.[19] In practice, however, all states refrain from exercising jurisdiction in certain matters pertaining to foreign ships,[20] so the question is really whether such practice is a concession from courtesy and convenience or an obligation of international law. The majority of text writers,[21] including many of British[22] and American[23] nationality and the Institute of International Law,[24] hold the latter view, they, however, disagree as to the extent of the exemption. This can only be ascertained by appeal to reason and practice.[25] Hall, though asserting the British view, recognizes the reasonableness of the exemption in certain cases: "To attempt to exercise jurisdiction in respect of acts producing no effect beyond the vessel, and not tending to do so is of advantage to no one."[26] This logic seems to have been recognized by municipal courts of the port state in practice.[27] They have generally refrained from exercising jurisdiction in civil disputes involving merely the ship's personnel,

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[19]Charteris, The Legal Position of Merchant Men in Foreign Parts, 1 British Year Book of Int. Law, 1920-21, 45; Wilson International Law, 8th ed., 129.

[20]Charteris, loc. cit., particularly exemptions given in British practice, p. 66, and in German port regulations, p. 80, though according to the writer, p. 56, both of these countries deny any obligation to accord exemptions.

[21]See authorities cited by 1 Halleck, Int. Law, 4th ed., 246, and Hall, op. cit., pp. 212-214. The latter, though recognizing that the rule of exemption "is in course of imposing itself upon the conduct of states" thinks "it can not as yet claim to be of compulsory international authority." In his Foreign Jurisdiction of the British Crown, however, Hall says, "the usage is sufficiently established in its broad lines to render it a fair subject for international complaint if local authorities interfere in questions of discipline which involve offenses criminal by British law; and generally abstention from interference goes considerably further." p. 81.

[22]See 1 Westlake, Int. Law, 2nd ed., 272.

[23]Wheaton adheres to the British view in his International Law but in a review of Ortolan, Diplomatie de la Mer, 2 Revue de Droit Francaise et Etrangère, 206-207 he accepts the French. See Dana ed., of Wheaton, p. 153, note 58, and Charteris, op. cit., p. 59. See also, 1 Halleck, Int. Law, 4th ed., p. 245; Davis, Int. Law, 3rd ed., p. 71; Wilson, Int. Law, 8th ed., p. 129.

[24]Resolution of Aug. 23, 1898, arts. 29-32, 17 Annuaire, 231, Scott, Resolutions of the Institute of Int. Law 151-152.

[25]See 1 Westlake, op. cit., p. 216.

[26]Hall, op. cit., p. 216.

[27]This has often been provided by treaty. See The Ester, (1911) 190 Fed. 216; The Bound Brook, (1906) 146 Fed. 160; Tellefsen v. Fee, (1848) 168 Mass. 188; The Koenigin Luise, (1910) 184 Fed. 170. See also The Reliance, 1 Abbott (D.C.) 317, Fed. Cas. 10,521; Willendson v. The Forsoket, (1801) 1 Pet. Adm. 197, and complaint by Secretary of State Fish on British exercise of jurisdiction in the case of the Anna Camp, Nov. 8, 1873, 2 Moore's Digest, 293; Scott, Cases on International Law, 1st ed., p. 233.

though under the LaFollette Seamen's Act of 1915 American courts are obliged to take cognizance of cases of seamen's wages.[28] Patent laws have generally been held inapplicable to ships in port[29] and in exercising criminal jurisdiction the peace of the port rule, first laid down by the French Conseil d'État in 1806[30] has been followed in most countries.[31]

"The principle which governs the whole matter is this:" said Chief Justice Waite; "disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed and, if need be, the offenders punished, by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case."[31a]

Administrative officials have likewise generally refrained from interference in the ship's discipline and when they have made arrests on board it has usually been in pursuance of the port's legitimate jurisdiction.[32] Liberation of prisoners held on board for offenses committed at sea, or for breach of ship's discipline,

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[28]The courts have construed the act so far as possible as not applying to contracts made abroad. See The Rindjani, (1919) 254 Fed. 913; Sandberg v. McDonald, (1918) 248 U.S. 185, 63 L. Ed. 200, 39 S.C.R. 84; Neilson v. Rhine Shipping Co. (1918) 248 U.S. 205, 63 L. Ed. 208, 39 S.C.R. 89. This was not possible however, of the contract involved in Strathearn S. S. Co. v. Dillon, (1920) 252 U.S. 348, 64 L. Ed. 607, 401 S.C.R. 350. See also F. K. Neilsen, 13 Am. Journ. Int. Law, 12, Stowell, Intervention in International Law, pp. 261-268.

[29]Brown v. Duchesne, (1857) 19 How. (U.S.) 183, 15 L.Ed. 595. A British court held the reverse in Caldwell v. VanVlissingen, (1851) 9 Hare 415, 21 L. J. Ch. 97, but Parliament promptly passed a statute recognizing the exemption, 46-47 Vict. c. 57 sec., 43, now in 7 Ed. VII c. 29, sec. 48. The British Plimpsoll act of 1876, which regulated with criminal penalties the loading of foreign vessels in British ports, caused some discussion (2 Moore's Digest 282-283) but was incorporated in the consolidated shipping act of 1894 and in 1906 amendments further regulated foreign ships in British ports in respect to loading and life saving appliances. (1 Stowell and Munro, International cases 434-445). The LaFollette seaman's act, passed by the United States in 1915 goes even farther, in regulating the composition and care of the crew and the life saving appliances on foreign vessels clearing from American ports.

[30]Text printed in 1 British Year Book of Int. Law 1920-21, 50 and Perels, Das Int. Offent. Seerecht der Gegenwart, 2nd ed., p. 62.

[31]See Charteris, loc. cit.

[31a]Wildenhus Case, (1886) 120 U.S. 1, 30 L. Ed. 565, 7 S.C.R. 385, which thoroughly reviews American and Foreign Precedents. See also Legare, Att. Gen., 4 Op. 98, 102, Cushing, Att. Gen., 8 Op. 73 and Secretary of State, Webster in Creole Case, Aug. 1, 1842, 2 Moore's Digest 353-354.

[32]See case of L'Ocean, 2 Moore's Digest 856. Incarceration of free negroes on foreign vessels in ports of South Carolina before the civil war

has been successfully protested by the flag state;[33] and in the *Creole case* Great Britain was held liable in an arbitration for liberating slaves on board an American ship in one of her West Indian ports.[34] Here, however, the forced entrance of the Creole was a primary basis of the decision. In the similar case of the Maria Luz, a later arbitration held otherwise.[35] A moral disturbance of the peace may be caused by the presence of slavery in the port of a state. Consequently this also accords with the principle suggested by other cases, that foreign private vessels in port are exempt from port jurisdiction except insofar as the local authorities are obliged to act in defense of the safety and peace of their territory and the civil rights of their own citizens and foreigners not of the ship's company.[36]

Thus it would seem in accord with international law to hold foreign merchant vessels exempt from the operation of American prohibition laws in respect to liquor which cannot reach shore or intoxicate any one who will reach shore. This would obviously permit the United States to prohibit service to passengers on board. With respect to liquor carried as cargo in transit to foreign ports, the danger of leakage into a market offering top prices is so great that prohibition would seem justifiable. With respect to liquor in the ship's stores the question would seem to depend on the adequacy of the assurances given that it will remain there during the ship's stay in port. As for that part of the ship's stores intended for the crew it would seem that the law and customs of the ship's flag with respect to service in seamen's rations may be observed, provided adequate precau-

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under authority of the port act, may be justified as a measure of necessary security in a state with a large slave population. Attorney General Berrien was of this opinion in 1831, 1 Op. 762, thereby reversing the opinion of his predecessor, Wm. Wirt, in 1824 1 Op. 430. The act is also sustained by 1 Twiss, Law of Nations, 230. Merchant vessels can not give asylum to refugees from local justice as the United States contented in the Barrundia case, 1890. 2 Moore's Digest, 855, 871 et seq; Scott, Cases in Int. Law, 1st ed., p. 275.

[33]See cases of John Anderson, (1879) The Venus, (1830), The Reindeer, (1856) The Atalanta, (1856) 1 Moore's Digest 932; vol. 2 p. 286 et seq. and the Admiral Hamelin, (1911), Charteris, op. cit. 82.

[34]The Creole, (1853) 2 Moore's Digest 358.

[35]This case (1873) involved the release of slaves by Japan from a Peruvian vessel at Kanagawa, Charteris, op. cit. 85; 5 Moore, Int. Arbit. 5034; Darby, Int. Tribunals, 4th ed., p. 798.

[36]Compare this with resolution by Institute of International Law, 1898, arts. 29-32, 17 Annuaire 231, and statement by Bonfils, De la Competence des Tribunaux Francais, sec. 326 endorsed by Wilson, Int. Law, 8th ed., p. 129.

tions are taken by the ship against sale on shore or disorder by drunken seamen.[37]

If, in fact, international law accords these exemptions to foreign private vessels in port, the term "transportation within the United States" of the eighteenth amendment, might, under recognized rules of construction, be held inapplicable to such liquor, since in law it would not be "within the United States."[38]

3. Seizure of Foreign Vessels Beyond the Three-Mile Limit.

A number of vessels suspected of rum smuggling have been seized by officers enforcing the eighteenth amendment beyond the three-mile limit, apparently under authority of an act of 1799 which authorizes revenue officers to visit vessels bound for the United States within four leagues (twelve miles) of the coast and penalize the masters thereof for failure to produce cargo manifests or for unloading without proper authority.[39]

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[37]The law of France and other countries requires the service of wine in seamen's rations on their ships. In Cunard Line v. Mellon, Oct. 23, 1922. Text printed in New York Times, Oct. 24, 1922, p. 2. Judge Hand said: "If the ration is cut off some, in any case, the plaintiffs will be in a serious dilemma between two conflicting laws. The others will probably have a good deal of trouble and expense in securing seamen who will sign on a "dry" ship. On the other hand, foreign crews are scarcely within the dominant purpose of the eighteenth amendment. It appears to me just on a fair balance of the relative advantage to stay the enforcement of the law against stocks of wine and liquor necessary for crew's rations if honestly kept and dispensed for that purpose alone."

[38]Judge Hand said on this question in Cunard Line v. Mellon: "Cases like Brown v. Duchesne, (1857) 19 How. (U.S.) 183, Taylor v. United States, (1907) 207 U.S. 120, 52 L. Ed. 130, 28 S.C.R. 53, Scharrenberg v. Dollar Steamship Co., (1917) 245 U.S. 122, 62 L. Ed. 189, 38 S.C.R. 28 are all indeed in point. They illustrate the extent to which seamen and ships are regarded as enclaves from the municipal law. But they were all judicial exceptions by implication out of the words of a statute, and they therefore depended upon how far in the circumstances of each case it was improbable that "the natural meaning of the words expressed an altogether probable intent." Were it not for the declaration of the Supreme Court in what I regard as far weaker circumstances, that the literal meaning accords with the probable intent, they might embarrass my conclusion. As it is, they do not, for in such matters each case is sui generis, and I have only to follow any decision which is apt to the statute under consideration." Attorney General Daugherty expressed similar doubt of the Supreme Court's decision on principle: "Prior to the sweeping and comprehensive construction placed upon the prohibition law in those cases, it might possibly have been arguable whether liquors forming a part of the ship stores on vessels within territorial waters might be regarded as an implied exception to the national Prohibition Act. Whatever doubts there may have previously existed have been swept away by the language of the majority opinion in those cases."

[39]U.S. Rev. Stat. 2760, 2813, 2814, 3067, 5770, Comp. Stat. 8459 ½ b (52), 5510, 5511, 5555, 5770; 1 Moore's Digest 725; 1 Hyde, Int. Law 418,

Seizure in such cases was sustained by Judge Morton in the United States district court at Boston in the case of the Schooner Grace and Ruby,[40] only in case actual communication of the vessel with the shore were established and on September 26, 1922, President Harding ordered confinement of search and seizure to these limits. Subsequent seizure of the Canadian schooner Emerald[41] twelve miles from the coast of New Jersey, presumably under these circumstances, was protested by Great Britain.

International law is as uncertain on this question as on that just discussed, and on this question also the British view which inclines to a rigid maintenance of the three-mile limit, differs from that of continental European countries which generally admit extensions for certain purposes to four leagues or more.[42]

The great majority of text writers and the law of most states recognize three miles as the normal limit of jurisdictional waters,[43] but text writers generally support,[44] and legislation generally provides, for a wider jurisdiction for certain purposes, and in certain circumstances.[45] Even Great Britain has such legislation. It is true that her hovering act of 1736, which suggested the American act of 1799, was repealed in 1876 because of doubt as to its international validity, but acts are still in force for quarantine and fishery protection beyond the three-mile limit.[46] Most other states authorize customs inspection of incoming vessels within the four league limit.[47]

Hershey, Int. Law, 1912, p. 198; Naval War College, Int. Law Topics, 1913, p. 18-19.

[40]The Grace and Ruby, Press notices, Sept. 26, 1922.

[41]The Emeral, Press notices, Oct. 18, 1922. The British Schooner, Henry L. Marshall was seized Aug. 1, 1921, (Stowell, 275.)

[42]Compare Hall, op. cit., p. 266 with Russian Memorandum to Japan, 1912, U.S. For. Rel. 1912, p. 1308.

[43]The Scandinavian countries recognize four miles, France, Spain and Portugal six, and the Institute of International Law recomended six in 1894. See N.W.C. Int. Law Topics, 1913, p. 24, 27. It may be doubted, however, whether a claim of general jurisdiction beyond the three mile limit would be sustained in an international controversy. See Hall, op. cit. 157, 1 Westlake op cit. 189, and exchange of notes in British hovering near American coasts while the latter was neutral, March 20, April 26, 1916, U. S. Dept. of State, White Books, Eur. War. No. 3, 1916, pp. 135, 139.

[44]1 Westlake, Int. Law, 176; 1 Hyde, Int. Law 420.

[45]See N.W.C., Int. Law Topics, 1913, p. 24, 34, and U.S. For. Rel. 1912, p. 1308.

[46]Holland, Studies in Int. Law, 1898, p. 182; N. W. C. Int. Law Topics, 1913, pp. 15-16. Hall, Foreign Jurisdiction of the Crown, 1894, p. 243 considers some of the British Hovering Acts as still in effect.

[47]See N.W.C., Int. Law Topics, 1913, p. 24 et seq, and U. S. For. Rel. 1912, p. 1308.

Decisions of municipal courts have generally sustained such assumptions of jurisdiction but these precedents are of little value for international law, because where they involved seizures beyond the three-mile limit by the court's own state, the courts have felt bound by municipal legislation.[48] On the other hand, where the seizure has been by a foreign state, the court has usually felt obliged to recognize a title created by a decree of condemnation by an established court of a recognized government without considering whether the original seizure was illegal or not.[49] The strongest municipal cases denying such jurisdiction are Le Louis,[50] a British case, which, however related to a seizure of a foreign vessel for slave trading and not for defense of the state's territorial jurisdiction and *Rose v. Himely*,[51] an American Supreme Court case, which was by a divided court and overruled two years later.[51a] *Church v. Hubbart*[52] is the case most frequently cited in support of a right to seize beyond the three-mile limit but this in fact turned on the illegality of the vessel's conduct in attempting to smuggle goods, thus the insurers were exempted by the exception in the policy, irrespective of the legitimacy of the seizure by Brazil (then under Portuguese sovereignty) beyond the three mile limit. It cannot be denied, however, that in this case Chief Justice Marshall in dicta supported the right under the circumstances:

"A nation's power to secure itself from injury may certainly be exercised beyond the limits of its territory . . . Any attempt to violate the laws made to protect this right, is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same, at all times and in all situations. If they are such as unnecessarily to vex and harass

[48]In re Cooper, (1892) 143 U.S. 472, 36 L. Ed. 232, 12 S.C.R. 453; The Sylvia Handy, (1892) 143 U. S. 513, 36 L. Ed. 246; Mortensen v. Peters, (1906) 14 Scot. L.T.R., 227 (Moray Firth Case); Direct U.S. Cable Co. v. Anglo-Am. Telegraph Co., (1877) L.R. 2 App. Cas. 394, (Conception Bay Case.)

[49]Hudson v. Guestier, (1810) 6 Cranch (U.S.) 281; Williams v. Armroyd, (1813) 7 Cranch (U.S.) 423.

[50]Le Louis, (1817) 2 Dods. 210.

[51]Rose v. Himely, (1808) 4 Cranch (U.S.) 241, 2 L. Ed. 608.

[51a]Marshall, C. J. in Hudson v. Guestier, (1810), 6 Cranch (U.S.) 281, 285, 3 L.Ed. 224.

[52]Church v. Hubbart, (1804) 2 Cranch (U.S.) 187, 2 L. Ed. 249. Most of the above cases are discussed by L. L. Woolsey, Municipal Seizures beyond the Three Mile Limit, U. S. For. Rel., 1912, p. 1289 and by 1 Hyde, Int. Law, 418-419.

foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to."

In international controversies, however, seizures beyond the three-mile limit have generally been condemned either by diplomacy or arbitration,[53] but seldom has the question of a seizure within reasonable limits off the coast necessary for enforcement of local laws been squarely presented. The British protest at the Russian hovering law of 1909 seems most nearly in point, though here Great Britain seemed to be more directly concerned with the Russian laws creating fishery monopoly beyond the three-mile limit.[54] It should be noticed that the United States, although not protesting against this law, felt "constrained to reserve all rights of whatever nature" in a note of January 21, 1911.[55] It is not believed, however, that either of these governments intended a position contrary to that asserted by Sir Charles Russell, later Lord Chief Justice of England, in the *Bering Sea Arbitration case*:[56]

"No civilized state will encourage offences against the laws of another state, the justice of which laws it recognizes. It willingly allows a foreign state to take reasonable measures of prevention within a moderate distance even outside the territorial waters."

This seems to support the right to seize beyond the three-mile limit and within the twelve-mile limit where necessary for the enforcement of revenue and other laws of local application not violently offensive in themselves to other nations. Unless, however, there is clear evidence that the vessel intends immediately or proximately to violate the state's laws within its territory, the seizure is illegal. When pursuit of a guilty or suspected vessel has been begun within the three mile limit, it is generally admitted under the principle of "hot pursuit" that seizure may be made anywhere on the high seas provided the pursuit has been continuous until the seizure.[57]

Thus Judge Morton's opinion would seem in accord with international law.

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[53]Bering Sea Arbitration, 1 Moore's Digest 921; The Virginius, (1872), 2 Moore's Digest 895, 980; La Jeune Eugenie, (1821), 2 Moore's Digest 920; The Deerhound, (1873) 2 Moore's Digest 979.

[54]U. S. For. Rel. 1912, pp. 1287, 1304.

[55]Ibid. 1299.

[56]1 Hyde, op. cit. 419-420. This statement closely resembles that by Hall, Foreign Jurisdiction of the Crown, p. 244.

[57]1 Hyde. Int. Law, 420; Hall, Int. Law, 7th ed., p. 266; 1 Westlake, Int. Law, 177.

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THE LAW REVIEW. The Minnesota State Bar Association at its last meeting unanimously voted to adopt the LAW REVIEW as the journal of the Association. The REVIEW will print a supplement containing the annual proceedings of the Association. The regular numbers of the REVIEW will contain a section devoted to reports of committees, notices of meetings and such other matters as the Association desires to bring to the attention of its members. The supplement and the regular numbers of the REVIEW will be supplied to all members of the Association in good standing at the expense of the Association. Hereafter a paid up membership in the State Bar Association will carry with it a paid up subscription to the MINNESOTA LAW REVIEW.

THE LAW SCHOOL. The requirement for entrance to the Law School has been two years of college work. It was raised this year by admitting only students who attain in their pre-legal work a rank one grade above the passing grade in the college of Science, Literature and Arts. Students of lower scholarship have not been successful in the law school. In the entering class of 1921-22 there were 47 students of merely passing grade in their pre-legal work and only 10 of them passed in the first year work of the law school.

The registration for the year 1922-23 is first year 131, second year 87, third year 54, total 272. The enrollment is 22 less than the corresponding time last year. The decrease is in the first year class and is more than accounted for by the higher entrance requirement.

A course in legal bibliography, brief making and preparation of legal documents is added to the second year of the curriculum. Private Corporations is made a second year subject. Evidence, hitherto a second year course, is now in the third year where it will be taught concurrently with the work in Practice.

The faculty is increased by the appointment of Rex H. Kitts. Mr. Kitts received the degree of B. A. from Carleton College in 1917 and LL. B. from the University of Minnesota in 1922. He was Note Editor of the MINNESOTA LAW REVIEW 1921-22 and was elected to the Order of the Coif.

Professor Noel T. Dowling resigned to accept an appointment to the faculty of the Columbia University Law School. To fill the vacancy Henry Rottschaefer was appointed Professor of Law. Professor Rottschaefer is a graduate of Hope College in 1909, of the University of Michigan Law School in 1915, and of the Graduate course of Harvard Law School in 1916. He was an editor of the Michigan Law Review and is a member of the Order of the Coif. He has been engaged in practice in New York since 1916. His work is Constitutional Law, Taxation and Public Utilities.

Professor A. A. Bruce resigned in September to accept an appointment to the faculty of the Northwestern University Law School. The course of Equity formerly taught by Professor Bruce is being taught by Sigurd Ueland, B. A. University of Minnesota 1916, LL. B. cum laude, Harvard University 1920. Mr. Ueland is engaged in the practice of law in Minneapolis.

PRIVATE CORPORATIONS—CORPORATIONS BY ESTOPPEL—LIABILITY OF ASSOCIATES.—There may be for some purposes an estoppel to deny the corporate existence of a pretended corporation although it is not a corporation de facto. It is necessary, however, to classify the different cases in which the doctrine of corporations by estoppel is invoked. These are: First, cases in which the alleged corporation or one of its members is seeking to escape liability by setting up a defect in the organization. Secondly, cases in which a defendant is seeking to escape liability to a corporation plaintiff by setting up irregularities in its organization. Thirdly, cases in which the question is whether irregularities in the organization will subject the associates to individual liability.[1]

It is only in the first class of cases that the elements of a true estoppel appear to be present. If A contracts with an association as a corporation, he may sue the association as a corporation, and the principle of estoppel will prevent them from setting up the invalidity of their incorporation as a defense.[2]

As to cases arising under the second class, it is frequently said that the obligor in a contract with a pretended corporation is estopped to deny the corporate existence in a suit to enforce the obligation. This cannot be a case of true estoppel. It hardly can be said that a person who deals with a company which claims to be a corporation impliedly represents to it that it is incorporated, or that the supposed company or its members are misled by any such representation.[3] It is sometimes said that the party who enters into a contract with an assumed corporation in its corporate name thereby *admits* it to be a corporation, and many cases hold that there is a binding recognition of its corporate existence for purposes of suit by the corporation on the contract.[4] This rule then is not founded upon any prinicple of

[1]See article by G. W. Pepper, Incidents of Irregular Incorporation, 36 Am. L. Reg. (N.S) 161, 162.

[2]Gardner v. Minneapolis & St. L. Ry. Co., (1898) 73 Minn. 517, 527, 75 N.W. 710; Perine v. Grand Lodge A.O.U.W., (1892) 48 Minn. 82, 88, 50 N.W. 1022; Scheufler v. Grand Lodge A.O.U.W., (1891) 45 Minn. 256, 47 N.W. 799; Jewell v. Grand Lodge A.O.U.W., (1889) 41 Minn. 405, 43 N.W. 88; 1 Fletcher, Corporations, sec. 343.

[3]1 Machen, Modern Law of Corp., sec. 282; 20 Harv. L. Rev. 456, 475.

[4]Ingle System Co. v. Norris, (1915) 132 Tenn. 472, 178 S.W. 1113, 5 A.L.R. 1578; Johnston Harv. Co. v. Clark, (1883) 30 Minn. 308, 15 N.W. 252; Continental Ins. Co. v. Richardson, (1897) 69 Minn. 433, 72 N.W. 458; Minnesota Gas L. Co. v. Denslow, (1891) 46 Minn. 171, 48 N.W. 771; Columbia Elec. Co. v. Dixon, (1891) 46 Minn. 463, 49 N.W. 244; Richards

estoppel but upon the broader principles of contracts and business convenience. In *Continental Ins. Co. v. Richardson*,[5] it is said:

"The defendant by contracting with the Continental Insurance Company recognized the existence of some legal entity known by that name, and having capacity to contract; and the contract was itself prima facie proof against the defendant, in the nature of an admission of the right of the person or being represented by that name to enforce the contract by action."

To come now to the third class of cases, suppose that A sells goods to the B Company and later sues the associates C and D, who compose the company, as partners or principals on the ground that the B Company was never in fact incorporated and is merely a trade name under which the individuals C and D are doing business. It is, of course, the settled law of this state that a creditor who deals with a corporation de facto and gives credit to it and not to its members or stockholders cannot charge them as partners for the debts of the corporation.[6] But are persons dealing with a defectively incorporated association on a corporate basis estopped to deny the corporate character of the association and to hold the associates individually liable on contracts made in the corporate name even where the de facto doctrine does not apply? Some writers have argued that the shareholders of the pretended corporation should not be held individually liable, because they have not agreed to be so liable and that to hold them to such liability would be the creation of a different contract from what either of the parties intended to make.[7]

Mr. G. W. Pepper, now United States Senator from Pennsylvania, has suggested the theory that where associates have held themselves out as a corporation and engaged in business as such, they should be treated as a corporation in all private litigation between themselves and those who make contracts with them on a corporate basis. If associates sue as a corporation upon such a

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v. Minnesota Sav. Bank, (1899) 75 Minn. 196, 77 N.W. 822; French v. Donohue, (1882) 29 Minn. 111, 12 N.W. 354; see also 1 Fletcher, Corporations, sec. 334.

[5](1897) 69 Minn. 433, 435, 72 N.W. 458.

[6]Richards v. Minnesota Sav. Bank, (1899) 75 Minn. 196, 206, 77 N.W. 822; Finnegan v. Noerenberg, (1893) 52 Minn. 239, 53 N.W. 1150, 18 L.R.A. 778, 38 A.S.R. 552; Johnson v. Okerstrom, (1897) 70 Minn. 303, 73 N.W. 147.

[7]2 Morawetz, Private Corporations, 2nd ed., sec. 748; Clark on Corporations, 3rd ed., 113, 122; J. L. Lewinson, Liability to Third Persons, of Associates in Defectively Incorporated Associations, 13 Mich. L. Rev. 271; G. W. Pepper, 36 Am. L. Reg. (N.S.) 161.

contract, the defendant cannot set up the irregularity of the plaintiff corporation as a defense. If they are sued as partners, they may defend on the ground that an implied exemption from individual liability was a term of the contract. The plaintiff would accordingly be confined to remedies such as he would have against a corporation. A further argument in support of this contention is that the defendants did not give their officers or agents, through whom they contracted, authority to subject them to anything more than a limited liability.[8]

By the great weight of authority, however, where the attempt to comply with the incorporation law does not go far enough to create a corporation de facto, the associates are held to full liability on contracts authorized or ratified by them, either as partners or as principals.[9] The statement in Fletcher on Corporations, sec. 340, to the contrary is erroneous, and the cases cited by him do not support the text.[10]

Perhaps the strongest case on this point is *Harrill v. Davis*,[11] in which it was held that the associates cannot escape individual liability because strangers are misled to contract with the pretended entity as a corporation. There is no estoppel of one who deals with parties who masquerade under a name which represents no corporation de facto, because the elements of estoppel, viz., action induced by misrepresentation of the party against whom the estoppel is asserted, do not exist. The benefit of an estoppel cannot be claimed by one who is not misled. Though the elements necessary to raise an estoppel strictly so-called are not present, yet there are some cases which hold, in view of the fact that the plaintiff consented to contract with the association on a corporate basis, that there is an implied contractual limitation of liability to such remedies as could be used if the associates possessed corporate character or capacity.[12]

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[8]Fay v. Noble, (1851) 7 Cush. (Mass.) 188, 192; G. W. Pepper, 43 Am. L. Reg. (N.S.) 409, 413, 423, 426.

[9]Johnson v. Corser, (1885) 34 Minn. 355, 25 N.W. 799 (see explanation of this case in Finnegan v. Noerenberg, (1893) 52 Minn. 239, 244, 53 N.W. 1150, 18 L.R.A. 778, 38 A.S.R. 552); Roberts Mfg. Co. v. Schlick, (1895) 62 Minn. 332, 64 N.W. 826; In re Ballard, (1922) 279 Fed. 574, 596; Harrill v. Davis, (1909) 168 Fed. 187, 94 C.C.A. 47, 22 L.R.A. (N.S.) 1153; Cottentin v. Meyer, (1910) 80 N.J.L. 52, 76 Atl. 341; Burdick, 6 Col. L. Rev. 1; E. H. Warren, Collateral Attack on Incorporation, 21 Harv. L. Rev. 305, 311, 321.

[10]See 14 C. J. 986, 987.

[11](1909) 168 Fed. 187, 94 C.C.A. 47, 22 L.R.A. (N.S.) 1153.

[12]Sniders' Sons' Co. v. Troy, (1890) 91 Ala. 224, 8 So. 658, 11 L.R.A. 515; Blanchard v. Kaull, (1872) 44 Cal. 440; Planters' & Min. Bank v.

INSURANCE—EFFECT OF INSURED'S SUICIDE, EXECUTION, OR DEATH WHILE VIOLATING THE LAW UPON RIGHT OF RECOVERY ON POLICY IN ABSENCE OF STIPULATION.—If a person commits suicide, is executed pursuant to sentence of death imposed by law, or is killed while violating the law, may there be a recovery on his life insurance policy, there being no stipulation in it excepting these risks? The question is involved in no little difficulty and confusion.[1] This discussion will exclude situations where the insured intended to commit the wrongful act when he took out the policy and also those where he was insane at the time of its commission. In the former case the insurer is never liable because of the fraud of the insured;[2] in the latter it is always liable, because the act is not chargeable to the insured.[3]

As respects the question of suicide, the federal courts and some of the state courts hold that there can be no recovery on the policy, because the risk of suicide is impliedly excepted, and because it is contrary to public policy to allow a recovery.[4] The majority of the state courts, however, reach a contrary result.[5] Some of the state courts, apparently to avoid opposing the federal supreme court's decision, have limited its application to the exact situation on which it was rendered, viz., where the policy is payable to the insured's estate. Consequently these courts permit a recovery where the policy runs to a designated third person as

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Padgett, (1882) 69 Ga. 159; Canfield v. Gregory, (1895) 66 Conn. 9, 17, 33, Atl. 536 (semble); Wesco Supply Co. v. Smith, (1918) 134 Ark. 23, 203 S.W. 6; Miller v. Coal Co., (1888) 31 W. Va. 836, 840, 8 S.E. 600, 13 A.S.R. 903 (semble); Bond & Graswell v. Scott Lbr. Co., (1911) 128 La. 818, 55 So. 468; Tulane Improv. Co. v. S. A. Chapman & Co., (1911) 129 La. 562, 56 So. 509; 14 C. J. 987; C. E. Carpenter, De Facto Corporations, 25 Harv. L. Rev. 623, 634.

[1]See 22 Yale L. J. 292; 21 Harv. L. Rev. 530; 1 Cal. L. Rev. 513; 7 Ky. L. J. 1.

[2]Grand Lodge I.O.M.A. v. Wieting, (1897) 168 Ill. 408, 48 N.E. 59, 61 A.S.R. 123.

[3]See Parker v. Des Moines L. Ass'n, (1899) 108 Ia. 117, 78 N.W. 826.

[4]Ritter v. Mutual L. Ins. Co., (1898) 169 U.S. 139, 18 S.C.R. 300, 42 L. Ed. 693; Davis v. Supreme Council of R. A., (1907) 195 Mass. 402, 81 N.E. 294, 10 L.R.A. (N.S.) 722, 11 Ann. Cas. 777, and note; Supreme Commandery K.G.R. v. Ainsworth, (1882) 71 Ala. 436, 46 Am. Rep. 332; Vance, Insurance, 516.

[5]Campbell v. Supreme Conclave I.O.H. (1901) 66 N.J.L. 274, 49 Atl. 550, 54 L.R.A. 576; Supreme Conclave I.O.H. v. Miles, (1901) 92 Md. 613, 48 Atl. 845, 84 A.S.R. 528, and note; Grand Legion of Ill., S.K.A. v. Beaty, (1906) 224 Ill. 346, 79 N.E. 565, 8 L.R.A. (N.S.) 1124, and note, 8 Ann. Cas. 160, and note; Lange v. Royal Highlanders, (1905) 75 Neb. 188, 106 N.W. 224, 10 L.R.A. (N.S.) 666, 121 A.S.R. 786; 4 Joyce, Insurance, 4444.

beneficiary,[6] the theory being that he has a vested interest in the policy which cannot be divested by any act of the insured.[7] It is submitted that this distinction is untenable. If it be true, as the federal supreme court seems to think, that it is contrary to public policy to allow a recovery in this instance, why does not public policy override the claims of everybody? Can it truly be said that a person has vested rights to that which public policy prohibits? And if, as the court says, the insurance is subject to an implied exception, is not that exception, being a part of the contract, operative against anyone and everyone? It is indeed a curious provision which slumbers when A's rights are involved but which is active if it be a question of B's rights.

The question as to whether recovery may be had where the insured has been executed at the hands of the law has apparently arisen in only a few cases. When the point came before the federal Supreme Court, it held, approving the famous *Fauntleroy's case*,[8] decided by the English House of Lords, that the execution of the insured, even though he were innocent, is a valid defense to an action brought on the policy.[9] The holding has been followed by three state courts,[10] and rejected by one.[11]

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[6]Fitch v. The American P.L.Ins. Co. (1875) 59 N.Y. 557, 17 Am. Rep. 372; Seiler v. The Economic L. Ass'n, (1898) 105 Ia. 87, 74 N.W. 941, 43 L.R.A. 537; Patterson v. Natural Prem. M. L. Ins. Co., (1898) 100 Wis. 118, 75 N.W. 980, 42 L.R.A. 253, 69 A.SR. 899; Mills v. Rebstock, (1882) 29 Minn. 380, 13 N.W. 162. But New York has held that the beneficiary of a mutual benefit certificate has not such a vested interest as will bring him within this rule. Shipman v. The Protected H. Circle, (1903) 174 N.Y. 398, 67 N.E. 83, 63 L.R.A. 347; contra, Kerr v. Minnesota Mut. B. Ass'n, (1888) 39 Minn. 174, 39 N.W. 312, 12 A.S.R. 631

[7]Some cases that follow the federal rule refuse to make this distinction, and accordingly deny recovery even to a beneficiary with the so-called vested interest. Hopkins v. Northwestern L. Ins. Co., (1899) 94 Fed. 729, aff'd on other grounds in 99 Fed. 199, 40 C.C.A. 1; Security L. Ins. Co. of Am. v. Dillard, (1915) 117 Va. 401, 84 S.E. 656, Ann. Cas. 1917D 1187; see also Mutual L. Ins. Co. v. Kelly, (1902) 114 Fed. 268, 274, 52 C.C.A. 154.

[8]Amicable Soc. v. Bolland, (1830) 4 Bligh (N.S.) 194, 2 Dow & Cl. 1, reversing Bolland v. Disney, (1827) 3 Russ. 351.

[9]Burt v. Union Cent. P. R. L. Ins. Co., (1902) 187 U.S. 362, 23 S.C.R. 139, 47 L.Ed. 216 later followed in Northwestern Mut. L. Ins. Co. v. McCue, (1912) 223 U.S. 234, 32 S.C.R. 220, 56 L.Ed. 419, 38 L.R.A. (N.S.) 57.

[10]Scarborough v. American Nat. Ins. Co., (1916) 171 N.C. 353, 88 S.E. 482, L.R.A. 1918A 896, Ann. Cas. 1917D 1181; American Nat. Ins. Co. v. Munson, (Tex. Civ. App. 1918) 202 S.W. 987; Collins v. Metropolitan L. Ins. Co., (1905) 27 Pa. Super. Ct. 353; Vance, Insurance, 524.

[11]Collins v. Metropolitan L. Ins. Co., (1907) 232 Ill. 37, 83 N.E. 542, 14 L.R.A. (N.S.) 356, and note, 13 Ann. Cas. 129, 122 A.S.R. 54. It is to be noted that the court, instead of following the line of reasoning used in the Beaty case on suicide, cited in note 5, said that the rule established in Fauntleroy's case was based on the fact that when a man committed a

As to the effect of the insured's death while violating the law,[12] there is an equal dearth of authority. Two jurisdictions have committed themselves to the rule that it is not a defense to the insurer when sued on the policy.[13] Alabama, however, repudiates this doctrine.[14] Massachusetts has held that death while engaged in the illegal act of slave trading is not an excepted risk.[15] Later, however, it was held that the insured's submission to a criminal operation which resulted in death bars recovery on the policy.[16] But the Indiana court of appeals reached a contrary result on similar facts.[17]

With the authorities thus aligned, it is interesting to note the reasons for the various holdings. The resumé to be given will show, it is submitted, that the three situations should be governed, as they generally are,[18] by the same considerations, and that any court holding one way on one of the questions and another way on the others lays itself open to the charge of inconsistency.[19]

A general survey of the cases shows that the federal rule is based on the following arguments: First, the policy does not in the contemplation of the parties cover these risks, because there is an implied condition, similar to that in fire insurance policies, not wrongfully to accelerate the maturity of the policy, and because the life tables on which the premiums are based exclude as

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felony, his property was forfeited, and that since forfeiture is now prohibited, the common law rule should no longer prevail. The fallacy of the court's reasoning would seem to be that it treated the right of recovery on an insurance policy as a species of property.

[12]Where this risk is expressly excepted, "law" means "criminal law," not "civil law," 4 Joyce, Ins., 4324; but see Bloom v. Franklin L. Ins. Co., (1884) 97 Ind. 478, 482, 49 Am. Rep. 469; and although it has not been decided, the same interpretation should be made where the policy is silent on the point.

[13]McDonald v. Order of Triple Alliance, (1894) 57 Mo. App. 87; Jordan v. Logia, (Ariz. 1922) 206 Pac. 162.

[14]United Order of G. C. v. Overton, (1919) 203 Ala. 335, 83 So. 59, 13 A.L.R. 672.

[15]Lord v. Dall, (1815) 12 Mass. 115. The case might have been decided on the ground that there was no causal connection between the illegal act and the death of the insured.

[16]Hatch v. Mutual L. Ins. Co., (1876) 120 Mass. 550, 21 Am. Rep. 541. The court did not consider the fact that a clause in the policy excepted death in violation of law.

[17]Mutual L. Ins. Co. v. Guller, (1918) 68 Ind. App. 544, 119 N.E. 173. The court expressly limited its holding to the case where the policy is payable to a third party, as distinguished from the insured's estate.

[18]The federal Supreme Court expressly followed in the Burt case on legal execution the reasons it set forth in the Ritter case on suicide.

[19]For an example of this inconsistency compare Collins v. Metropolitan L. Ins. Co., (1905) 27 Pa. Super. Ct. 353 and Morris v. State Mut. L. A. Co., (1898) 183 Pa. 563, 39 Atl. 52.

causes of mortality suicide, execution, and death due to the commission of crime. Secondly, to permit recovery would be contrary to public policy, because no one should be allowed to profit by his own wrong, and since an express contract to insure against the commission of crime or suicide would tend to encourage their commission and therefore would be void, the same is true in the case of an implied contract to that effect in the form of an insurance policy not expressly excepting those risks.

In opposition to these arguments the following contentions are made: First, death from all risks not expressly excepted is intended by the parties to be covered, and since no true analogy exists between life and fire insurance,[20] there is no implied condition that the insured do nothing wrongfully to accelerate the maturity of the policy. Furthermore, the life tables used to determine the premiums are in fact based upon groups of persons over a period of years, regardless of the manner of their death. Then again, clauses excepting these risks are so common in policies that their omission shows an intention that the risks be covered. Secondly, to allow recovery is not against public policy, because it is obvious that the insured cannot be benefited by his own wrong, and because the possibilty that it might encourage crime is too remote, for the instinct of self preservation and the love of life are a guarantee against increasing the risk. Thirdly, there is on the contrary a superior public policy which requires that the insurer expressly provide against the wrongful act if he wishes to use it as a defense. Since he prepares the contract with particularity and knows that the wrong *might* be done, he could easily make provision against it. Moreover, it is the policy of the law to construe policies strictly against the insurer.

A comparison of these two lines of argument would seem to establish the superiority of the latter over the former. It is to be noted in this connection that where a policy contains a so-called incontestable clause, which deprives the insurer of the right to set up defenses after the lapse of a specified time, the federal Supreme Court and some of the state courts following the federal rule have held that after the clause has become operative, the insurer cannot defend on the ground that the insured was executed[21] or

[20]Life insurance is a contract to pay a certain sum of money upon death regardless of value, whereas fire insurance is a contract of indemnity. Life insurance is based upon a contingency that is bound to happen; fire insurance is not.

[21]Weil v. Traveler's Ins. Co., (1918) 16 Ala. App. 641, 80 So. 348, 352, reversed on rehearing pursuant to ex parte Weil, (1918) 201 Ala. 409.

committed suicide.[22] But if the right of recovery in these cases really involves, as these courts have held, a grave question of public policy, then incontestable clauses are void as being contrary to that public policy. The net result of the recognition of their validity would seem to indicate a desire of these courts to recede from their earlier holdings, and further substantiates the correctness of the rule which permits recovery on a policy regardless of the manner of the death of the insured.

ADMIRALTY—APPLICATION OF STATE WORKMEN'S COMPENSATION ACTS TO MARITIME TORTS.—If a person with a maritime claim proceeds in rem, he must prosecute his action in admiralty in the United States courts; but if he proceeds in personam, he may sue in admiralty, or on the law side of the federal courts, or in a state court if the latter has an appropriate common-law remedy.[1] This right of election was originally conferred on a claimant by the Judiciary Act of 1789,[2] which gave to the federal courts exclusive original cognizance of all civil causes of admiralty jurisdiction, "saving to suitors the right to a common-law remedy where the common-law is competent to give it."[3] Upon the advent of the various state workmen's compensation acts the question soon arose as to whether this saving clause entitled a person having a claim in admiralty to recover in a state court under the compensation act of that state on the theory that the act was a common-law remedy. When the point reached the United States Supreme Court, it was held that the rights conferred by the compensation acts could not be extended to cover cases of maritime tort[4] for two reasons: first, the remedy they attempt to give is wholly unknown to the common law, and therefore is not within the saving clause, and secondly, the paramount power of Congress to fix and determine maritime law cannot be

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[22]Northwestern L. Ins. Co. v. Johnson, (1920) 254 U.S. 96, 41 S.C.R. 47, 65 L.Ed. 58; Mutual L. Ins. Co. of N.Y. v. Lovejoy, (1918) 201 Ala. 337, 78 So. 299. England has reached a somewhat similar result. See Moore v. Woolsey, (1854) 4 El. & Bl. 243, 24 L.J.Q.B.N.S. 40, 1 Jur. (N.S.) 468.

[1]See Lindstrom v. Mutual Steamship Co., (1916) 132 Minn. 328, 332, 156 N.W. 669.

[2]Chap. 20, sec. 9, 1 U.S. Stat. 73, 77; carried into the Judicial Code, cl. 3 of secs. 24 and 256.

[3]For a discussion of this clause, see 2 MINNESOTA LAW REVIEW 145, 147.

[4]As to the nature of a maritime tort, see 6 MINNESOTA LAW REVIEW 230.

interfered with by state legislation.[5] Congress, in order to overcome these objections, enacted in 1917 an additional saving clause, which said: "and [saving] to claimants the rights and remedies of the workmen's compensation act of any state."[6] This clause received various and diametrically opposed interpretations in the lower courts,[7] and was finally held unconstitutional by the Supreme Court of the United States in *Knickerbocker Ice Co. v. Stewart,*[8] for the reasons that Congress could not transfer its legislative power to the states, and that it had the effect of making operative different rules in each state, thus destroying the harmony and uniformity of maritime law which was contemplated by the federal constitution.

A recent case in Maine,[9] presenting an apparent attempt to avoid the effect of this holding, rather ingeniously argued that even though a contract of employment be maritime, the contract imposed upon the employer and the employee by the state compensation act is non-maritime, over which admiralty has no jurisdiction. Accordingly it was held that a person injured on land while performing a maritime contract may nevertheless recover under the state compensation act. The court distinguished this case from the *Knickerbocker Ice Co. case,* which refused to apply the New York act, in that the New York act is compulsory in nature, and forces the employer and employee to be subject to its terms. Thus the state law *itself* ousted admiralty of its jurisdiction contrary to the established federal law. On the other hand, due to the elective nature of the Maine act, the parties may or may not agree to be subject to its terms. If they do, then *their* act, and not the force of the statute, ousts admiralty.[10]

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[5]Southern Pac. Co. v. Jensen, (1917) 244 U.S. 205, 37 S.C.R. 524, 61 L.Ed. 1086, L.R.A. 1918C 451, Ann. Cas. 1917E 900, reversing 215 N.Y. 514, 109 N.E. 600, L.R.A. 1916A 403, Ann. Cas. 1916B 276, (JJ. Holmes, Brandeis, Pitney, and Clarke dissenting).

[6]Chap. 97, 40 Stat. at L. 395 (Comp. Stat. 1918, Comp. State. Ann. Supp. 1919, sec. 991 (3) 1233). For discussion of this clause, see 4 MINNESOTA LAW REVIEW 444.

[7]Rohde v. Grant Smith Porter Co., (1919) 259 Fed. 304, held that the clause gave concurrent jurisdiction to the state and the admiralty courts. The Howell, (1919) 257 Fed. 578, held that it made the remedy in the state courts under the compensation acts exclusive. Sudden & Christenson Industrial Accid. Comm., (1920) 182 Cal. 437, 188 Pac. 803, held the clause unconstitutional.

[8](1920) 253 U.S. 149, 40 S.C.R. 438, 64 L.Ed. 834, 11 A.L.R. 1145, and note, (JJ. Holmes, Brandeis, Pitney, and Clarke dissenting).

[9]Berry v. W. F. Donovan & Sons, (1921) 115 Atl. 250.

[10]See Duart v. Simmons, (1918) 231 Mass. 313, 121 N.E. 10, where the court says, p. 319, "The reasoning [of the Supreme Court of the

It hardly can be denied that an employer and employee may enter into a binding agreement providing for compensation of personal injuries incurred by the employee in the course of his employment, and this would seem true regardless of the nature of the contract of employment, regardless, in this particular connection, of whether it is maritime or non-maritime. They could arbitrate the matter after the injury; they can with equal right make anticipatory provision for it. But is such a contract similar to the one imposed on employer and employee by the compensation acts? It is submitted that it is not, clearly so as to the compulsory acts, since under them the rights and liabilities of the parties arbitrarily arise, and not much less so under the so-called elective acts. An examination of the latter shows that under most of them the parties are subject to their terms unless they affirmatively reject them, and further, that, as an alternative to acceptance, the employer is threatened with a deprivation of his common-law defences of negligence of a fellow-servant, contributory negligence, and assumption of risk. In view of this, it hardly would seem proper to say that the compensation provisions read into a contract of employment by the "elective" acts constitute a contract between the parties, for a contract presupposes the right to exercise a free will. It would rather seem that what does happen is the creation of a legal obligation under certain circumstances,[11] at most, a contract implied by law. If this be granted, then it follows irresistibly that the act can never be applied to vary the rights and liabilities that are definitely fixed by maritime law, whose uniformity is essential, because state law can never contravene any superior maritime law. In short, the provisions of a compensation act, be it elective or compulsory, can never be read into a maritime contract.[12] This latter rule should not, however, be so construed as to bar any and all persons from relief under a compensation act just because they are employed under maritime contracts,[13] because the nature of the

United States on this question] seems to us to apply equally to an elective as to a compulsory workmen's compensation act." See also Los Angeles S. & D. Co. v. Industrial Accid. Comm. (Cal. 1922) 207 Pac. 416, 418.

[11]"The liability of the employer under the act being statutory, the act enters into and becomes a part of every contract, not as a covenant thereof, but to the extent that the law of the land is part of every contract." Anderson v. Miller Scrap Iron Co., (1919) 169 Wis. 106, 115, 170 N.W. 275, 171 N.W. 935. The Wisconsin act is elective in nature.

[12]Kennedy v. Cunard S.S. Co., (1921) 189 N.Y.S. 402, 408.

[13]Apparently this was the mistaken view of the Maine court in the case discussed in the text, and of the New York court in a series of cases.

contract of employment does not alter the jurisdictional nature of the injury.[14] Thus the Supreme Court of the United States in the recent case of *State Industrial Commission v. Nordenholt Corporation,*[15] held that an employee working under a maritime contract, but injured on shore, is entitled to an award under the compensation act, because admiralty was without jurisdiction since locality is the exclusive test of admiralty jurisdiction in matters of tort. Thus this holding by itself would stand for the clear and simple though arbitrary rule that the compensation acts are applicable to non-maritime torts, and not applicable to those of a maritime nature.[16] But the court cited with approval two of its immediately preceding decisions, which apparently mark notable limitations to the strict rule formerly laid down. Thus in *Grant Smith-Porter Ship Co. v. Rhode,*[17] a person employed under a non-maritime contract but sustaining a maritime tort-injury was denied the right to sue for damages in admiralty. And in *Western Fuel Co. v. Garcia,*[18] it was held that where a person employed under a maritime contract died as a result of a maritime injury, an admiralty court, in the absence of federal statute or positive maritime law, would apply the state statute.[19] In both of these cases the court said that the state law is applicable where the question involved is entirely local in character, and where its application "will not work material prejudice to the characteristic features of general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations." These two decisions apparently plunge the whole situation into a new confusion, for the test of when the application of the state law will work "material

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Matter of Keator v. Rock Plaster Mfg. Co., (1918) 224 N.Y. 540, 120 N.E. 56; Matter of Anderson v. Johnson Lighterage Co., (1918) 224 N.Y. 539, 120 N.E. 55; Matter of Newham v. Chile Explor. Co., (1921) 232 N.Y. 37, 133 N.E. 120.

[14]A non-maritime tort is not brought within admiralty jurisdiction by the fact that the person suffering the wrong was employed under a maritime contract. Netherlands Am. S.N. Co. v. Gallagher, (1922) 282 Fed. 171, 183.

[15](1922) 42 S.C.R. 473.

[16]On this basis the actual decision of the Maine court in the Berry case is clearly correct.

[17](1922) 42 S.C.R. 157. In Los Angeles S. & D. Co. v. Industrial Accid. Comm., (Cal. 1922) 207 Pac. 415, it was held, following the Grant Smith-Porter case, that a person who suffered a maritime tort-injury while employed under a non-maritime contract was entitled to an award under the state compensation act.

[18](1922) 42 S.C.R. 89.

[19]Accord, West v. Kozer, (Ore. 1922) 206 Pac. 542.

prejudice to the characteristic features of general maritime law," would seem indefinite at its best. That it is unsatisfactory is perhaps shown by the fact that Congress by Act of June 10, 1922, has added a new saving clause to the Judicial Code, the amendment to cl. 3 of sec. 256, reading: "and [saving] to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel, their rights and remedies under the workmen's compensation act of any state, district, territory, or possession of the United States;" and the amendment to cl. 3 of sec. 24 reading the same as the one just stated with the additional provisions, "which rights and remedies when conferred by such law shall be exclusive . . . Provided that the jurisdiction of the district courts shall not extend to causes arising out of injuries to or death of persons other than the master or members of the crew, for which compensation is provided by the workmen's compensation law of any state . . ." The reason for the difference between the two amendments is not apparent. In the debate in the House of Representatives over the passage of the bill making these changes, it was said: " . . . [these amendments differ] from the legislation that was held unconstitutional in this: That it does not include seamen, the men engaged in board vessels.[20] The object of this bill is to give to the longshoremen the [benefit of the state compensation acts]. It is believed that with this modification there should be no real objection to the bill."[21] The *Knickerbocker case,* which held the prior legislation unconstitutional, however, did not involve the rights of seamen. Thus the same objections there made to that legislation are in point here. There is still an attempted transfer by Congress of its legislative power to the states. There is still the possibility that it will make operative different rules in each state. Thus the commendable attempt of Congress to simplify the admittedly confusing state of affairs on this question would again seem unavailing, unless it be said that in view of the most recent decisions of the Supreme Court its ideas on the subject have undergone so radical a change that the decision of the *Knickerbocker case* is not now entirely correct. In view of this possibility, and it is indeed a possibility, the judicial construction of these new amendments will be awaited with much interest.

[20]It is to be noted that the federal employers' liability act has been extended by 41 Stat. at L. 1007, to seamen; so their exclusion from the operation of this legislation is mere surplusage, for in no event could the state compensation acts apply to them.

[21]62 Cong. Rec. 8411-2.

RECENT CASES

ADMIRALTY—EXCLUSIVENESS OF FEDERAL JURISDICTION OVER MARITIME MATTERS—APPLICATION OF STATE WORKMEN'S COMPENSATION ACTS TO MARITIME TORT—INJURIES.—The plaintiff, employed under a maritime contract, suffered a non-maritime tort-injury, and sought an award under the state compensation act. *Held,* that he is so entitled, because the contract which the compensation act reads into the contract of employment is non-maritime, over which admiralty has no jurisdiction. *Berry v. W. F. Donovan & Sons,* (Me. 1921) 115 Atl. 250.

On facts similar to the above it was *held* that the compensation act was applicable, because, since the injury was non-maritime in character, admiralty had no jurisdiction. *State Industrial Comm. v. Nordenholt Corp.,* (1922) 42 S.C.R. 473.

Where the plaintiff was employed under a non-maritime contract and suffered a maritime tort-injury, it was *held* that he cannot recover damages in admiralty, because the application of the state compensation act will not destroy the harmony of maritime law in its international and interstate relations. *Grant Smith-Porter Ship Co. v. Rhode,* (1922) 42 S.C.R. 157.

On much the same reasoning of the case last above stated it was *held* that where a person employed under a maritime contract died as a result of a maritime injury, an admiralty court, in the absence of federal statute or positive maritime law, would apply the state statute. *Western Fuel Co. v. Garcia,* (1922) 42 S.C.R. 89.

For a discussion of these cases, see Notes, p. 49.

BAIL—FORFEITURE—REMISSION OF BAIL—LIFE IMPRISONMENT OF DEFENDANT IN A FOREIGN STATE AS AN EXCUSE.—The defendant was accused of having committed a felony in North Dakota and was bound over to the district court. His wife deposited $1400 as bail for his appearance. When the defendant's case was called he was serving a life sentence in the Minnesota state prison, having been convicted of charges which were pending when he voluntarily entered the state. His bail was forfeited. By North Dakota C.L. 1913, sec. 11125 it is provided that a forfeiture may be discharged at any time before final adjournment when the accused or his bail appears and satisfactorily excuses the failure to appear. On motion to vacate the forfeiture it is *held,* (two justices dissenting) that "the record discloses a satisfactory excuse for the neglect or failure of the defendant to appear," and the cash deposit be remitted, less costs to the state, to the wife. *State v. Williams,* (N.D. 1922) 189 N.W. 625.

Incarceration in a foreign jurisdiction for a second and different offence is generally held not to operate as a discharge of the sureties on a bail bond; 3 R.C.L. 53; *State v. Horn,* (1879) 70 Mo. 466, 35 Am. Rep. 437; for the reason (1) that performance in such case has not been prevented by an act of the state in reference to whose laws the contract of bail was made, 6 C.J. 1026; *Taintor v. Taylor,* (1869) 36 Conn. 242, 4 Am. Rep. 58, aff'd (1872) 16 Wall. (U.S.) 366, 21 L.Ed. 287; notes in Ann.

Cas. 1912C 746, 748; 99 Am. Dec. 217;—(2) that the failure to appear was a result of the accused's own voluntary act, *United States v. Marrin*, (1909) 170 Fed. 476; *King v. State*, (1885) 18 Neb. 375, 25 N.W. 519;—or (3) that the sureties, having friendly custody of the accused, are at fault in permitting him to go into another jurisdiction, *Withrow v. Commonwealth*, (1866) 1 Bush (Ky.) 17. Construed strictly as a statute in derogation of a common law rule, it would seem that the statute merely extended the *power to remit* after forfeiture and did not enlarge or extend greater discretion in determining what should excuse. The court finds an excuse for the failure of the defendant to appear but it is apparent that the court, in considering the stringent circumstances of the wife, actually is excusing the wife's failure to produce the defendant. Even under statutes, such as G. S. Minn. 1913, sec. 9090, allowing the courts considerable discretion in remitting forfeited recogizances, the power of remission should be exercised only in extreme cases, as a necessary precaution in insuring the enforcement of criminal laws. *State v. Frankgos*, (1904) 114 Tenn. 76, 85 S.W. 79; but see *Cain v. State*, (1876) 55 Ala. 170. Even though a necessary precaution the result seems unduly harsh unless the correlative rights of the bail are kept in mind. Sureties have almost unlimited power over a prisoner. "Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the re-arrest by the sheriff of an escaping prisoner." *Taylor v. Taintor*, (1872) 16 Wall. (U.S.) 366, 21 L.Ed. 287.

BANKS AND BANKING—AGENCY—NEGLIGENCE—COLLECTING BANK HAS NO AUTHORITY TO ACCEPT IN PAYMENT ANYTHING OTHER THAN MONEY —WHAT IS MONEY.—The plaintiff, payee of a check drawn on an out-of-town bank, deposited it with his local bank for collection and credit. Through the usual channel of exchange, the check was presented to the drawee bank which remitted by draft on its correspondent. The draft having been dishonored because of the insolvency of the drawee bank, the item was charged back successively through the several banks and eventually debited against the plaintiff's account by the local bank. The evidence showed that the drawee bank could have paid actual money at the time of presentation. *Held*, that the bank to which a check is sent for collection has no authority to accept in payment thereof anything other than money. *Malloy v. Federal Reserve Bank*, (Dist. Ct. N. C. 1922) 281 Fed. 997.

It is a well recognized rule of agency that where a collecting agent, in the absence of express or implied in fact authority, accepts in payment anything other than money he will be answerable to his principal for any loss occasioned thereby. 1 Mechem, Agency, 2nd ed., sec. 1302. By a long line of decisions this rule has been recognized as applying to banks

which receive commercial paper for collection, and, as in the instant case, the rule is applied strictly. *Bank of Antigo v. Union Trust Co.*, (1894) 149 Ill. 343, 36 N.E. 1029, 23 L.R.A. 611; *Fifth N. Bank v. Ashworth*, (1889) 123 Pa. St. 212, 16 Atl. 596, 2 L.R.A. 491; *Bradley Lumber Co. v. Bradley County Bank*, (1913) 206 Fed. 41, 124 C. C. A. 175; 1 Daniels, Neg. Inst., 6th ed., sec. 335; 2 Bolles, Modern Law of Banking, 553, sec. 9 (a); note 18 A.L.R. 537. A minority view contends that our well established system of commercial exchange and credit demands that banks be taken out of the rule applicable to ordinary agents. 2 Daniels, Neg. Inst., 6th ed., sec. 1625; see *Farmers Bank and Trust Co. of Stanford v. Newland*, (1895) 97 Ky. 464, 31 S.W. 38; *Hilsinger v. Trickett*, (1912) 86 Ohio St. 286; see *Shafer v. Olson*, (1913) 24 N. D. 542, 139 N. W. 983, 43 L.R.A. (N.S.) 762, Ann. Cas. 1915C 653 and note. Though the case of *Whitney v. Esson*, (1868) 99 Mass. 308, 96 Am. Dec. 762 frequently is cited as being contra to this minority view, the facts show that the parties to the action agreed that there was no general custom whereby banks accepted commercial paper in lieu of money. It would seem that the reason why the minority rule has not been generally adopted is because the bank stands in a better situation to ascertain the worth of banking paper than does the customer.

By the term "money" is meant "legal currency of the country or bills which pass as money at their par value by the common consent of the community." 1 Daniels, Neg. Inst., 6th ed., sec. 335. But this does not authorize collecting agents to receive depreciated bills issued as a circulating medium, *Ward v. Smith*, (1868) 7 Wall. (U.S.) 447; note 19 A.L.R. 587; nor even certified checks which are commonly regarded as the equivalent of money. 2 Bolles, Modern Law of Banking, 553, sec. 9 (a).

CANCELLATION OF INSTRUMENTS—DURESS—AGREEMENTS TO STIFLE PROSECUTION—PARTIES IN PARI DELICTO.—The defendant gave a mortgage on being threatened that her daughter would be prosecuted for obtaining money under false pretenses. In an action to foreclose the mortgage the defendant sought to avoid it on the ground of duress, and asked its cancellation as a cloud on her title. *Held*, that the mortgage is rendered unenforceable by duress, but because of the defendant's guilt in attempting to stifle prosecution, the court will not cancel the mortgage, but will leave both parties where it finds them. *Cushing v. Hughes*, (N.Y. 1922) 195 N.Y.S. 200.

It is a general rule that where parties are in pari delicto neither will be granted relief from, nor enforcement of, the illegal contract. 2 Story, Equity Jur., 14th ed., sec. 941. The great weight of authority recognizes that one acting under a threat of prosecution of a near relative cannot deal on an equal footing with the one exerting the pressure. Thus, not being in pari delicto, the rule barring relief does not apply, and relief is granted. 2 Pomeroy, Equity Jur., 4th ed., sec. 942; *Gorringe v. Reed*, (1901) 23 Utah 120, 63 Pac. 902, 90 A.S.R. 692; *Bryant v. Peck & Whipple Co.*, (1891) 154 Mass. 460, 28 N.E. 678; *Bell v. Campbell*, (1894) 123 Mo. 1, 25 S.W. 359, 45 A.S.R. 505. And it is immaterial whether or not the threat of prosecution is based on an actual crime. *Koons v. Vaucon-*

sant, (1902) 129 Mich. 260, 88 N.W. 630, 95 A.S.R. 438; but see *Eddy v. Herrin,* (1840) 17 Me. 338, 35 Am. Dec. 261, and *Treadwell v. Torbert,* (1898) 122 Ala. 297, 25 So. 216, granting equitable relief but on the theory that a felony that has not been committed cannot be compounded, misconceiving the primary objection to relief, which is not that a felony has been compounded but that prosecution, investigation of an *alleged* crime, has been stifled. A minority view contends that the parties are in pari delicto and considers only the danger involved in an agreement to stifle prosecution. *Allison v. Hess,* (1870) 28 Iowa 388; *Shattuck v. Watson,* (1890) 53 Ark. 147, 13 S.W. 516, 7 L.R.A. 551; *Haynes v. Rudd,* (1886) 102 N.Y. 372, 7 N.E. 287, 55 Am. Rep. 815. See however *Schoener v. Lessauer,* (1887) 107 N.Y. 111, 13 N.E. 741, where relief was granted to the heirs of one in the position of the defendant here. See also *Jaeger v. Koenig,* (1900) 30 Miscl. Rep. 580, 62 N.Y.S. 803, and in *Union etc., Bank of New York v. Joseph,* (1921) 231 N.Y. 250, 254, 131 N.E. 905, 17 A.L.R. 323, the court suggests a further possible exception of those cases where the charge of crime is made in bad faith without reasonable foundation or genuine belief, and also states that upon facts substantially identical to those in *Haynes v. Rudd,* "we do not exclude the possibilty that variant degrees of mitigation may permit variant conclusions."

CHARITABLE CORPORATIONS—NUISANCE—INJUNCTION—DAMAGES.—The plaintiff, owner of a spring possessing medicinal qualities, sues to enjoin the defendant, a charitable corporation, from maintaining a nuisance which contaminated the plaintiff's spring through seepage from the defendant's defective sewage drain, and to recover damages for the injury to the commercial value of the spring. *Held,* that the plaintiff may have the nuisance permanently enjoined, and also recover damages. *Love v. Nashville Agricultural and Normal Institute,* (Tenn. 1922) 243 S.W. 304.

Even an arm of the government in the exercise of a governmental function may be enjoined from maintaining a nuisance. *Atlanta v. Warnock,* (1892) 91 Ga. 210, 18 S.E. 135, 23 L.R.A. 301, 44 A.S.R. 17; *Pierce v. Gibson County,* (1901) 107 Tenn. 224, 233, 64 S.W. 33, 55 L.R.A. 477, 89 A.S.R. 946. It would seem clear, therefore, that there is no public policy extending immunity to a charitable corporation for its torts which is paramount to the public policy demanding the abatement of a nuisance and there is authority for an injunction in such a case. *Deaconess Home and Hospital v. Bontjes,* (1902) 104 Ill. App. 484, affirmed without reference to this point in 207 Ill. 553, 69 N.E. 748, 64 L.R.A. 215. This form of remedy is not open to the objection that funds are directly diverted from the charitable purpose to the payment of damages to third persons though indirectly it may result in expenditures on the undertaking itself.

The objection that trust funds shall not be diverted from the charitable purpose designated by the doner is said to rest on the fact that the donor contemplated no such diversion and excluded power to make a diversion in creating the trust, and on the more fundamental ground that there is a public policy encouraging such donations that is promoted by granting this immunity. Tennessee sustained this objection in a case where servants injured a patient, *Abston v. Waldon Academy,* (1906) 118

Tenn. 24, 102 S.W. 351, 11 L.R.A. (N.S.) 1179. Here the court admits that that fictitious reason is founded on a questionable premise, i. e., that the donor does not contemplate mismanagement, and also that the objection to the premise is of equal force whether the act is by a servant or the corporation or whether the injury is to a patient, servant or third party. The rule or objection to diversion is however sustained as sound on the latter ground, public policy, and this case is distinguished in that the act here is not the act of a servant but is one so directly attributable to the management of the charity that to permit irresponsibility for such acts would endanger the charity by encouraging mismanagement and the charity would "go to pieces on the rock of its immunity" and hence would discourage rather than encourage donations. But will not immunity from liability for the conduct of servants result in the same inefficient and lax management? And further, assuming that this public policy will be subserved by granting immunity, is this public policy paramount to the public policy which demands an adequate remedy for one wrongfully injured? See 31 Harv. Law Rev. 481.

CONTRACTS—DAMAGES—RATE OF EXCHANGE.—The defendants, citizens of Maryland, without good cause declined to accept delivery of goods ordered from the plaintiff, a French manufacturer. The contract called for delivery of the goods in France at an agreed price in francs. *Held,* that damages must be assessed on the basis of the rate of exchange at the time of the breach. *Page v. Levenson,* (Dist. Ct. D. Md., 1922) 281 Fed. 555.

The question here presented is of peculiar importance at this time because of the extremely abnormal fluctuation in foreign exchange rates. Shall damages be assessed as of the time of (1) the making of the contract, (2) the commencement of the action, (3) the time of judgment, or (4) the time of breach? It is obvious that none of these rules can be applied with entire satisfaction. The first and second seem seldom, if ever, to have been seriously considered. After a period of hesitancy the English decisions have definitely crystallized in favor of assessing damages as of the time of the breach, which is conceded to be the soundest view. The decision in the instant case is particularly noteworthy in that it adopts the English view in direct repudiation of the rule allowing the rate of exchange current at the time of judgment which had been adopted by the American courts in the few instances where the question has arisen. See 5 MINNESOTA LAW REVIEW 146; 31 Yale L.J. 198; 34 Harv. Law Rev. 422 and 435. For an extensive discussion, see 22 Col. Law Rev. 217; note 11 A.L.R. 363.

A fifth rule has been suggested based on the analogy of foreign money to stocks and bonds which are subject to a constant and high degree of fluctuation in value, damages in such a case being measured by the highest rate of exchange which obtained within a reasonable time after the breach. See *Butler v. Merchant,* (Tex. Civ. App. 1894) 27 S.W. 193; 22 Col. Law Rev. 217, 246. Such a rule is open to the objection that it presents for determination the vexatious question as to what constitutes a reasonable time.

GRAND JURY—CONTRACTS—EMPLOYMENT OF DETECTIVES BY GRAND JURORS TO INVESTIGATE A PARTICULAR CRIME AS CONTRARY TO PUBLIC POLICY—DUTIES OF A GRAND JUROR.—Members of the grand jury employed the plaintiff detective agency to aid them in securing evidence regarding particular crimes which were to be investigated. This action is against certain members of the grand jury for services rendered in securing evidence under the contract. *Held,* that the plaintiff could not recover, the contract being void as against public policy. *Wm. J. Burns International Detective Agency v. Doyle,* (Nev. 1922) 208 Pac. 427.

Contracts are generally held void if their tendency is contrary to public policy, even where in the given case no injury to the public interest has resulted; 13 C.J. 424; 3 Williston, Contracts, sec. 1628. In the instant case the court holds that the grand jury would incline to be prejudiced in favor of the testimony of its own employees, and that the employment of detectives would thus tend to create a bias in the minds of the jury contrary to the fairminded attitude required of grand jurors by public policy; See *Wm. J. Burns International Detective Agency v. Holt,* (1917) 138 Minn. 165, 167, 164 N.W. 590. A consideration of the essential functions of a grand jury shows ample basis for the court's decision. A grand jury is primarily a judicial body which should act as an umpire between the accuser and the accused, rather than as an accuser, if it would preserve the dignity and veneration in which it is held, see 5 Pa. Law J. 63, 64, and the employment of detectives to investigate crimes is more properly a matter for the administrative department of the government.

Its purpose is not only to bring to justice persons accused of public offences, but also to protect citizens from unfounded accusations; *Charge to Grand Jury,* (1872), 2 Sawy. (C.C.) 667, Fed. Cas. no. 18,255. Investigations of federal grand juries are limited to such matters as (1) may be submitted by the district attorney, or (2) may be called to its attention by the court, or (3) may come to the knowledge of jurors from their own observation or personal investigation, or (4) may come to their knowledge from disclosures of their own associates in the grand jury. *Charge to Grand Jury,* (1872) 2 Sawy. (C.C.) 667, Fed. Cas. no. 18,255. See also *Wm. J. Burns International Detective Agency v. Holt,* (1917) 138 Minn. 165, 164 N.W. 590.

HOMICIDE—DUTY TO RETREAT—CLUB ROOMS AS ONE'S CASTLE.—The appellant, a member of the Elk's Club, and deceased, a non-member, were playing cards in a room at the club. They became involved in a personal difficulty. The deceased struck the appellant with a chair, seriously injuring him, and was about to strike another blow when the appellant fired the fatal shot. *Held,* that one is not bound to retreat when attacked in the rooms of a club of which he is a member. *State v. Marlowe,* (S.C. 1922) 112 S.E. 921.

The application of the "retreat to the wall" doctrine of early common law, Wharton, Homicide, 3rd ed., 467, to American homicide cases arising under different conditions has resulted in confusion as to what really is the duty to retreat. See note 18 A.L.R. 1279; 16 Harv. Law Rev. 567. There is also a divergence of opinion as to whether the defendant's failure

to retreat, where the duty to retreat is recognized, shall be considered a categorical proof of guilt, or whether that fact is merely one of the circumstances to be considered together with the other evidence. *Brown v. United States,* (1921) 256 U.S. 335, 65 L.Ed. 961, 41 S.C.R. 501, 18 A.L.R. 1276 and note. The universally recognized exception to this rule imposing no duty to retreat on one assailed in his own home, has been adhered to in all jurisdictions. Wharton, Homicide, 3rd ed., 490; *Brinkley v. State,* (1889) 89 Ala. 34, 8 So. 22, 18 A.S.R. 87; *People v. Tomlins,* (1914) 213 N.Y. 240, 107 N.E. 496, Ann. Cas. 1916C 916. The term "castle" has been construed as not limited to the dwelling alone but to embrace also the curtilage, *Pond v. People,* (1860) 8 Mich. 150; *Madry v. State,* (1918) 201 Ala. 512, 78 So. 866; and one's office or place of business, *Askew v. State,* (1891) 94 Ala. 4, 10 So. 657, 33 A.S.R. 83; *Morgan v. Durfee,* (1879) 69 Mo. 469, 33 Am. Rep. 508; provided such place of business is not of an illicit nature, *Hill v. State,* (1915) 194 Ala. 11, 69 So. 941. In *Beard v. United States,* (1895) 158 U.S. 550, 39 L. Ed. 1086, 15 S.C.R. 962, one attacked on his own land fifty or sixty yards away from his dwelling house was held under no obligation to retreat, but this has been criticised as extending the "castle" doctrine too far. See 16 Harv. Law Rev. 580. If, in the instant case, the club was actually the defendant's domicile the analogy to the "castle" would seem logical. However, the statement of the court that, "A man is no more bound to run out of his rest room than his workshop," seems questionable. The extension of the "castle" idea to places not strictly within the original conception of that word seems to indicate a tendency to break down the "retreat to the wall" doctrine as an absolute rule of law by widening the scope of the recognized exceptions to it. See note 18 A.L.R. 1276.

INFANTS—PRINCIPAL AND AGENT—APPOINTMENT OF AGENT BY AN INFANT VOID.—The plaintiff, who was a married woman twenty years old, owned one hundred shares of stock in defendant corporation, and entrusted them to one Kastel, who sold them through a firm of brokers. This stock was taken up by the defendant corporation, and a new certificate issued to the ultimate purchaser. Kastel was unable to pay the full value of the stock, and this action was instituted to recover the balance due. The defendants maintain that they took the stock under authority of Kastel and are not liable as converters. *Held,* that the plaintiff was unable to appoint an agent, and that the acts of Kastel were void so that all who took under him were converters. *Casey v. Kastel et al.,* (N.Y. 1922) 195 N.Y.S. 848.

In regard to articles not necessaries, the modern rule is that the contracts of infants are not void but merely voidable, *Cogley v. Cushman,* (1871) 16 Minn. 397 (Gilf 354), in that the object of the law is not to bar the infant from contracting but merely to afford him protection. *Johnson v. Northwestern Mutual Life Ins. Co.,* (1894) 56 Minn. 365, 373, 57 N.W. 934, 59 N.W. 992. To this general rule, there is the positive exception that a formal power of attorney given by an infant is void, and not voidable. See *Gillespie v. Bailey,* (1877) 12 W. Va. 80, 89, 29 Am. Rep. 445 and *Dexter v. Hall,* (1872) 15 Wall. (U.S.) 9, 26, 21 L.Ed. 73. But in *Zouch v.*

Parsons, (1765) 3 Burr, 1974, 1804, 1808 a power to accept seisin, executed by an infant, was held valid. A numerical weight of authority would extend this exception to the appointment of agents generally. *Doe d. of Thomas v. Roberts,* (1847) 16 Mees. & W. 778, declares that there is "no rule clearer than that which says an infant cannot appoint an agent." See *Armitage v. Widoe,* (1877) 36 Mich. 124; *Fonda v. Van Horne,* (1836) 15 Wend. (N.Y.) 631, 30 Am. Dec. 77; *McDonald v. City of Spring Valley,* (1918) 285 Ill. 52, 120 N.E. 476, 2 A.L.R. 1359. The reason supporting this rule, i.e., that it is repugnant to allow a principal to do by an agent that which he cannot do himself—make valid contracts, 1 Am. Lead. Cas. 247, 5th ed., 305, has been admitted to be doubtful. *Trueblood v. Trueblood,* (1856) 8 Ind. 195, 196, 65 Am. Dec. 756. The decided tendency of the later decisions is to hold that the appointment of an agent by an infant is voidable and not void. *Benson v. Tucker,* (1912) 212 Mass. 60, 98 N.E. 589, 41 L.R.A. (N.S.) 1219; *Towle v. Dresser,* (1882) 73 Me. 252; *Coursolle v. Weyerhauser,* (1897) 69 Minn. 328, 333, 72 N.W. 697; 3 Page on Contracts, 2nd ed., 2725; see note 18 A.S.R. 629. The reason for the rule is self evident, for an infant should not be deprived of the benefits of a contract executed by an agent when he is amply protected by being able to disaffirm any detrimental agreement. Mechem on Agency, 2nd ed., 104; 23 Harv. Law Rev. 145. Nor is it essential to create an exception to the rule to protect the infant from liability for the torts of his servant, *Covault v. Nevitt,* (1914) 157 Wis. 113, 146 N.W. 1115, 51 L.R.A. (N.S.) 1092 and note, for under the general rule the infant would have the power to disaffirm the detrimental contract of employment.

INSURANCE—INSURED'S DEATH WHILE VIOLATING LAW—EFFECT ON RIGHT OF RECOVERY ON POLICY IN ABSENCE OF STIPULATION.—The insured committed the crime of burglary and was killed by the accidental discharge of his gun while attempting to escape from the householder who had seized him. His beneficiary sued on the policy. *Held,* that in the absence of provision in the policy the death of the insured while violating the law is no defense to the insurer, unless the policy was obtained in contemplation of the commission of crime. *Jordon v. Logia Suprema, etc.,* (Ariz. 1922) 206 Pac. 162.

For a discussion of the principles involved, see Notes, p 45.

LICENSES—STATE SECURITIES COMMISSION—BLUE SKY LAW NOT APPLICABLE TO A SALE BY OWNER OF STOCK OF COMPANY THAT HAD NEVER SOLD ITS STOCK WITHIN THE STATE.—The plaintiff, a stock broker, who admittedly was the absolute owner of certain stock in X company, was about to sell it in the usual course of his brokerage business when the state securities commission took steps to prevent his doing so on the ground that he had not received the commission's approval as to such sale, as required by the so-called Blue Sky Law. X company had never either itself or through others sold its stock or offered it for sale within the state. The plaintiff now seeks to enjoin members of the commission from interfering with him. *Held,* reversing the trial court's action in sustain-

ing the defendant's demurrer, that the intended sale by the plaintiff does not bring him within the purview of the Blue Sky Law. *Gutterson v. Pearson,* (Minn. 1922) 189 N.W. 458.

The holding of the instant case marks a notable limitation on the application of the Minnesota Blue Sky Law. The statute in question, which is Laws of 1917, chap. 429 as amended by Laws of 1919, chaps. 105 and 227 and Laws of 1921, chap. 372, prohibits "investment companies" and "dealers" from selling a particular security without first receiving sanction from the state securities commission. For the purposes of the act an "investment company" is defined as one which either itself or through others sells or offers for sale within the state securities issued by itself. A "dealer" is next defined as one, not an issuer, who sells or offers for sale securities issued by an "investment company." As held in the instant case, the statute is highly penal and must therefore be strictly construed even though the result is regrettable and the legislative purpose defeated. It follows from the definitions, the company never having solicited the sale of its stock within the state, that the broker is not a "dealer" as the stock in question is not the stock of an "investment company." By striking the words "within the state" from the definition of an "investment company" the legislature can remedy this serious defect in the act.

Under Chap. 257, Laws of 1919, it is a misdemeanor to circulate written matter offering for sale securities that have not been approved by the commission. This provision not being limited in its application to "investment companies" and "dealers" an anomalous situation arises in which an *attempt* is punishable but not the consummated act.

For a discussion of this subject, see Montreville J. Brown, The Minnesota "Blue Sky Law." 3 MINNESOTA LAW REVIEW 129.

LIMITATION OF ACTIONS—ACCELERATION CLAUSE—TIME OF BREACH.—The plaintiff sues on a promissory note made by the defendant containing an acceleration clause to the effect that if any installment of interest shall not be paid as provided, the "whole sum of the principal and interest" shall become "immediately due and collectible." This action was commenced before the statutory period of five years had run from the due date on the note but more than five years from the default in payment of interest. *Held,* that this action is barred because the statute had run from the date of default. *Perkins v. Swain,* (Idaho 1922) 207 Pac. 585.

The conclusion in the principal case is said to be but the result of an application of the ordinary rules of contract construction. The words are *imperative* and cannot be construed as but an optional remedy for the holder of the note, which if intended could easily have been expressed. *Green v. Frick,* (1910) 25 S.D. 342, 126 N.W. 579; *Buss v. Kemp Lumber Co.,* (1918) 23 N.M. 567, 170 Pac. 54, L.R.A. 1918C 1015; see *Douthitt v. Farrell,* (1899) 60 Kan. 195, 56 Pac. 9. The statute of limitations will run from the date of default even though the clause is optional or permissive where the statute of limitations is held to run from the time the creditor has power to bring suit, *Hemp v. Garland,* (1843) 4 Q.B. 519, even though by express provision the creditor must demand payment after default, *Boyd v. Buchanan,* (1913) 176 Mo. App. 56, 162 S.W. 1075. See also

Harrison Machine Works v. Reigor, (1885) 64 Tex. 89. Professor Williston suggests that the better rule is that the statute of limitations runs from the due date of the note. 3 Williston, Contracts, 3428; *First National Bank v. Parker,* (1902) 28 Wash. 234; *Richardson v. Warner,* (1886) 28 Fed. 343. The reason sustaining this position is that regardless of the precise language used the clause is inherently permissive for it should not be mandatory that a forfeiture be enforced. In a great majority of the cases cited by courts and text writers as opposed to the rule of the principal case the notes have been issued in connection with trust deeds and mortgages and the acceleration clause in the note has been in imperative form but expressly optional in the collateral instrument. The courts have in many cases expressly construed the two instruments together but in some the point is not mentioned. While the latter cases might be taken as supporting the rule that even though the clause is imperative the statute runs from the due date of the note, the former cases, expressly relying on the optional words in the collateral instruments, impliedly admit that where the only terms under consideration are absolute and imperative the rule of the principal case would be applied. *Moline Plow Co. v. Webb,* (1891) 141 U.S. 616, 12 S.C.R. 100, 35 L.Ed. 879.

MUNICIPAL CORPORATIONS—CONSTITUTIONAL LAW—TAXATION—POWER OF MUNICIPALITY TO ENGAGE IN RETAIL FUEL BUSINESS.—The city of Waseca, acting under the express authority of its home rule charter, established a municipal retail coal and wood yard. In an action to enjoin the city from engaging in this enterprise, it was *held,* that the establishment and operation of a municipal coal and wood yard is a public purpose for which taxes may be levied and collected within the meaning of the Minnesota constitution, article 9, sec. 1. *Central Lumber Co. v. City of Waseca,* (Minn. 1922) 188 N.W. 275.

The earlier authority is clear that it is beyond the power of a municipal corporation to engage in the sale of commodities which are and can be easily furnished by private, competitive business, and the sale of fuel has been held to fall expressly within that class. *Opinion of Justices,* (1892) 155 Mass. 598, 30 N.E. 1142, 15 L.R.A. 809; *Opinion of Justices,* (1903) 182 Mass. 605, 610, 66 N.E. 25; I Wyman, Public Service Corp., sec. 64; Freund, Police Powers, sec. 23; See Abbott, Public Corp., sec. 187 and 472. The Massachusetts Justices agreed that a city might have authority to buy and sell coal to its citizens in time of fuel famine, but even this modification was specifically rejected in *Baker v. Grand Rapids,* (1906) 142 Mich. 687, 106 N.W. 208, where a combination among the coal dealers aggravated the situation. See also the dissenting opinion in *Opinion of Justices,* (1903) 182 Mass. 605, 611, 66 N.E. 25.

The principal case follows the celebrated Maine decisions which hold that a municipality may establish and maintain a permanent fuel yard. *Laughlin v. City of Portland,* (1914) 111 Me. 486, 90 Atl. 318, 51 L.R.A. (N.S.) 1143, Ann. Cas. 1916C 734. The court there argued that the furnishing of water, light, and heat were proper public functions. Why, it said, if a city can send heat by pipes and wires, can it not do so by team

and wagon? The court admits, however, that it was influenced in its decision by the fact that coal combines were regulating prices to the detriment of the public. The question again arose in Maine and, on appeal to the Supreme Court of the United States was affirmed. *Jones v. City of Portland,* (1917) 245 U.S. 217, 38 S.C.R. 112, 62 L. Ed. 252, Ann Cas. 1918E 660; see also *Consumer's Coal Co. v. City of Lincoln,* (Neb. 1922) 189 N.W. 643. By analogy, we find that furnishing of natural gas is a public purpose, *State v. Toledo,* (1891) 48 Ohio St. 112, 26 N.E. 1061, 11 L.R.A. 729; as is also the establishment of a municipal ice plant. *Holten v. City of Camilla,* (1910) 134 Ga. 560, 68 S.E. 472, 31 L.R.A. (N.S.) 116; contra, *Union Ice & Coal Co. v. Town of Ruston,* (1914) 135 La. 898, 66 So. 262, L.R.A. 1915B 859, Ann. Cas. 1916C 1274. For full discussion of the subject, see 27 Yale L. J. 824. It has been said to be largely a question of economics when an enterprise becomes a public purpose; neither the legislatures nor the courts can declare a thing a public purpose unless the actual facts constitute it such. *Munn v. Illinois,* (1876) 94 U.S. 113, 132, 24 L. Ed. 27. The instant case, like the Maine case, justifies its decision with the terse sentence, "Times change." This would seem to indicate that these courts regard the question as something more than one of economics alone.

REAL PROPERTY—ADJOINING LAND OWNERS—LATERAL SUPPORT—MEANING OF "PROPERTY" IN CONSTITUTION.—The plaintiff and defendant are adjoining land owners. The defendant, without notice to the plaintiff, excavated on his lot and the act resulted in damage to the plaintiff's house and trees. *Held,* that an instruction that the defendant must use reasonable means to protect the adjoining land and house is just and proper in that the constitution of Washington, article 1, sec. 16, providing that no private property shall be taken or damaged for public or private use without just compensation, limits the common law principle that one land owner cannot by building a house near the margin of his land prevent a neighbor from excavating his soil, although excavating may endanger the house. *Knapp v. Siegley,* (Wash. 1922) 208 Pac. 13.

It is universally held that there is an absolute right of support for land in its natural condition by adjoining land, and there follows absolute liability for damage caused by removal of such support irrespective of negligence, as the right is a property right. *Schultz v. Bower,* (1894) 57 Minn. 493, 59 N.W. 631, 47 A.S.R. 630; *Gildersleeve v. Hammond,* (1896) 109 Mich. 431, 67 N.W. 519, 33 L.R.A. 46. This absolute property interest extends only to the land in its natural state, and not to improvements thereon, if the improvements add material pressure to the weight of the soil. *Transportation Co. v. Chicago,* (1878) 99 U.S. 635, 644, 25 L. Ed. 336; *Lasala v. Holbrook,* (1833) 4 Paige (N.Y.) 169. Aside from liability for negligence there will be no recovery even for the injury to the soil, if it would not have caved in but for the weight of the improvements. *Gildersleeve v. Hammond,* (1896) 109 Mich. 431, 67 N.W. 519, 33 L.R.A. 46. The constitutional provision is construed to extend plaintiff's absolute right of support for his land in its natural state to include a right of support for

the building; and defendant's correlative absolute duty to furnish support for the land to include a duty to furnish support for the building. The constitutional provision should be construed only to protect plaintiff's legal rights in his property, not to enlarge them. The error lies in taking the word "property" to mean the tangible thing itself instead of the legal rights in the tangible thing. The effect is to destroy legal rights of the defendant.

REAL PROPERTY—EASEMENTS—RAILROAD RIGHT OF WAY—ADVERSE POSSESSION.—The defendant railroad had acquired by condemnation proceedings a right of way through land now held by the plaintiff. All of the right of way so acquired except the actual roadbed of the railway and fifty feet on each side had, however, for forty years been used by the plaintiff and his predecessors in title for a fairgrounds, buildings, and stockyards. The plaintiff sues to quiet his title, claiming by adverse possession. *Held,* that the grant to the railroad was of an easement only, the right to use the land for a railway; that consequently the plaintiff, servient owner, had the right to use any part of the land not needed for railway purposes; that his possession is, therefore, not hostile and adverse, and the railroad's title is still good. *Harvey v. Missouri Pac. R. Co.,* (Kan. 1922) 207 Pac. 761.

The instant case is supported by substantial authority in holding that a railroad's easement is but a right for railway purposes only, and that the use of the servient owner of the fee cannot be hostile, so long as he does not interfere with use by the railroad, that the use is of right and not adverse, or as some courts say, presumptively permissive. *Dulin v. Ohio River R. Co.,* (1913) 73 W. Va. 166, 80 S.E. 145, L.R.A. 1916B 653, Ann. Cas. 1916D 1183 and notes; *Roberts v. Sioux, etc., R. Co.,* (1905) 73 Neb. 8, 102 N.W. 60, 2 L.R.A. (N.S.) 272, 10 Ann. Cas. 992 and notes; *Beyer v. Chicago, etc., R. Co.,* (1919) 186 Ia. 1133, 169 N.W. 651; *Southern, etc., R. Co. v. Vann,* (1919) 142 Tenn. 76, 83, 216 S.W. 727. Authorities of equal weight hold that a railway's easement in its right of way is necessarily, by its nature, continuous and exclusive, by contrast probably with such a right of way as often affords means of communication between an enclosed lot and the highway; and since the easement is exclusive, occupation by the fee owner may be hostile and a basis for title by adverse possession. *Illinois, etc., R. Co. v. Houghton,* (1888) 126 Ill. 233, 18 N.E. 301, 1 L.R.A. 213, 9 A.S.R. 581; *St. Louis, etc., R. Co. v. Ruttan,* (1909) 90 Ark. 178, 118 S.W. 705; *Texas, etc., R. Co. v. Belcher,* (Tex. Civ. App. 1920) 226 S.W. 471. While the precise point has not been passed on in Minnesota, it has been held that a railroad right of way is an exclusive easement. *Chicago, etc., R. v. Zahner,* (1920) 145 Minn. 312, 177 N.W. 350. In a recent Alabama decision it is held that the servient owner's possession cannot be adverse and also that the railroad's easement was exclusive, giving the railroad the right to possession even though they have shown no necessity for the use of the land for railroad purposes. In support of the first conclusion, the court, without argument, cites *Alabama, etc., R. v. McWhorter,* (1919) 202 Ala. 455, 80 So.

839, in which case the only reason given supporting the rule was that the easement was not exclusive. The later case thus adopts, without argument, the rule of the *McWhorter case,* but overrules that case by specific reference, as to the only argument advanced therein for the rule. *Seaboard Airline R. v. Banks,* (Ala. 1921) 92 So. 117. A few jurisdictions hold that railroad land is held for a public use, and hence not subject to adverse possession. *Western, etc., R. Co. v. Vulcan,* (1916) 251 Pa. 383, 96 Atl. 830.

REAL PROPERTY—WILLS—EXECUTION OF POWERS—LIFE ESTATE WITH A POWER TO DISPOSE OF THE FEE AND TO USE THE PRINCIPAL IS NOT A FEE SIMPLE ESTATE.—The decedent devised land to his wife for life with full power to sell and convey "as she may see fit and use the proceeds thereof as she may see fit," and with a devise over of "whatever remains undisposed of." The property was sold by the wife and other property purchased with the proceeds which property was again exchanged for land, the subject of this action. The remainderman contests the right of the wife's heir to this land. *Held,* that the devise created but a life estate with power in the life tenant to convey a fee and dispose of the proceeds but that the property here in question was held by the life tenant under the same title as the original property and therefore goes to the remainderman. *Olson v. Weber,* (Iowa 1922) 187 N.W. 465.

The extent of the estate subject to sale and use under a power is generally held, in the absence of express restrictions, to be a fee though there is authority to the effect that only the life estate may be sold. See 5 MINNESOTA LAW REVIEW 320. See G.S. Minn. 1913, sec. 6735. It is generally held, in accord with the instant case, that a devise for life with a power of disposition of the fee followed by a limitation over, creates a life estate only, and is not enlarged into a fee by the annexation of the power. *Peckham v. Lego,* (1889) 57 Conn. 553, 19 Atl. 392, 14 A.S.R. 130, 7 L.R.A. 419; *McCullough's Adm'n v. Anderson,* (1890) 11 Ky. Law Rep. 939, 13 S.W. 353, 7 L.R.A. 836; *Warren v. Ingram,* (1910) 96 Miss. 438, 51 So. 888, Ann. Cas. 1912B 422 and note; Kales, Executory Future Interests, 2nd ed., 563; 62 Cent. L.J. 25.

Powers can only be executed on the happening of the contingency stipulated by the testator, *Stevens v. Winship,* (1823) 1 Pick. (Mass.) 318, 11 Am. Dec. 178, and where the power can only be exercised for "maintenance and support" a purchaser must prove the existence of the emergency to protect his title, *Larsen v. Johnson,* (1890) 78 Wis. 300, 47 N.W. 615, 23 A.S.R. 404, though as a practical limitation it is generally held that the purchaser need not establish that fact where it is indefinite, as in the *Larsen case,* but only in cases where the contingency is such that a purchaser might readily ascertain the fulfillment of the stipulated condition. *Matthews v. Capshaw,* (1902) 109 Tenn. 480, 72 S.W. 964, 97 A.S.R. 854. But where, as in the instant case, the court cannot limit the power of sale to certain contingencies, without doing violence to the donor's express words, the power is in effect limited by holding that the power to use requires more than a sale, a change in the form of the res, that it requires also consumption of the proceeds to take them out of the estate limited

over. And even though the power is such that a gift might have been made of the principal by the life tenant, a liquidation of the estate and a testamentary disposition of the proceeds will not be effective as the power is to consume during life. *Keniston v. Mayhew,* (1897) 169 Mass. 166, 47 N.E. 612; *Shapleigh v. Shapleigh,* (1899) 69 N.H. 577, 44 Atl. 107.

SALES—AFTER ACQUIRED PROPERTY—ACT OF APPROPRIATION—TAKING TITLE "PIECE-MEAL".—On December ninth, the plaintiff contracted with a firm of stock brokers for the purchase of sixty thousand dollars worth of municipal bonds. The firm at the time had only nineteen thousand dollars worth of bonds in their possession. On the twenty-fourth of December, the plaintiff gave the firm his check for sixty-one thousand dollars, and they agreed to forward the bonds to him by mail when a sufficient quantity had been acquired. A few days later the firm became bankrupt, having collected and filed in an envelope bearing the plaintiff's name, fifty-thousand dollars worth of bonds. In an action against the receiver to recover the bonds it is, *held,* that title had passed to the plaintiff, and that he could recover. *Hopkins v. Bronaugh,* (C.C.A. 9th Cir. 1922) 281 Fed. 799.

As a general rule in contracts of sale, title passes when the parties intend. *Day v. Gravel,* (1898) 72 Minn. 159, 162, 75 N.W. 1. Where the intent is not expressed, presumptions arise as to the passing of title. *The Elgee Cotton Cases,* (1874) 22 Wall. (U.S.) 180, 187, 22 L.Ed. 863. The instant case seems to have relied on the presumption of *Rugg v. Minett,* (1809) 11 East 210, that where something remains to be done to the goods by the vendor, the doing of that act will pass title. This rule is applied only where the goods are ascertained. Where, as here, the goods are not ascertained when contracted for, there must be some act of appropriation, after the goods are specified, assented to by the other party, to pass title. *Churchill, etc., Co. v. Newton,* (1914) 88 Conn. 130, 89 Atl. 1121; *Lieb Packing Co. v. Trocke,* (1917) 136 Minn. 345, 346, 162 N.W. 449; *Minnick v. Dreyer Motor Co.,* (Tex. Civ. App. 1921) 227 S.W. 365; Williston, Sales, 379, 381. Some cases require delivery to pass title, *Crown, etc., Co. v. Chiariello,* (1919) 106 Misc. Rep. 511, 175 N.Y.S. 167, but the better rule is that an irrevocable appropriation of the goods to the contract, with the buyer's consent, either express or implied, is sufficient. *Bundy v. Meyer,* (1921) 148 Minn. 252, 181 N.W. 345. But see 35 Harv. Law Rev. 797, 811, asserting the possibility that the idea of constructive delivery is at the bottom of the theory of appropriation. The act of appropriation must be an act distinctly showing an intent to pass title, and acts customarily used in the manufacture and handling of the goods will not be so regarded. *Procter & Gamble Co. v. Peters, White & Co.,* (1922) 233 N.Y. 97, 134 N.E. 849. Though on principle there is no objection, it is doubtful whether the law will permit the designation of the act by which goods are to be acquired as the act of appropriation. *Low v. Pew,* (1871) 108 Mass. 347, 11 Am. Rep. 357. See also *Lunn v. Thornton,* (1845) 1 C.B. 379; Williston, Sales, 380; and on this point the Sales Act is of little assistance as it is but a codification of the common law. 35 Harv. Law Rev. 797, 812.

The decision in the present case also may be challenged on the ground that where the contract is for goods to be ascertained, the mere appropriation of a part does not warrant the inference that title to that part was intended to pass. *Anderson v. Morice,* (1876) L.R. 1 App. Cas. 713, but see *Aldridge v. Johnson,* (1857) 7 E. & B. 885, and *Langton v. Higgins,* (1859) 4 H. & N. 402, where title was held to have passed when goods were placed in receptacles furnished by the buyer. These cases are open to criticism, Williston, Sales, 390, and the authorities in this country sustain the rule first stated. *Hays v. Pittsburg, etc., Co.,* (1888) 33 Fed. 552; *Rochester Oil Co. v. Hughey,* (1867) 56 Pa. St. 322, 325. In the instant case, however, the container was not furnished by the buyer, and there is no evidence that he had knowledge of it, so there would be obvious difficulty in supporting the decision on even the doubtful authority of the English decision above referred to. For a discussion of this class of cases see Samuel Williston, Delivery as a Requisite in the Sale of Chattel Property, 35 Harv. Law Rev. 797, 807 et seq.

TORTS—HIGHWAYS—UNLICENSED AUTOMOBILE—UNLICENSED DRIVER—LIABILITY OF DRIVER OR OWNER FOR INJURIES.—The defendant owned an unlicensed automobile which, while being driven by a hirer, struck and injured the plaintiff. *Held,* that the automobile was a nuisance, the driver a trespasser, and the owner liable for the injury regardless of negligence. *Pierce v. Hutchinson,* (Mass. 1922) 136 N.E. 261. See also *McDonald v. Dundon,* (Mass. 1922) 136 N.E. 264.

As a general rule statutes prohibiting the operation of unregistered vehicles on public highways are not construed as barring a recovery for damages sustained by an unregistered car through the negligence of a third party, *Shimoda v. Bundy,* (1914) 24 Cal. App. 675, 142 Pac. 109; *Derr v. Chicago etc., R. Co.,* (1916) 163 Wis. 234, 157 N.W. 753; *Gilman v. Central Vt. R. Co.,* (1919) 93 Vt. 340, 107 Atl. 122, 16 A.L.R. 1102 and note; nor are they construed as creating liability per se for negligence, *Armstrong v. Sellers,* (1913) 182 Ala. 582, 62 So. 28. As to the test of whether a breach of statutory duty is negligence per se, see 1 MINNESOTA LAW REVIEW 76. And for the same reason, i.e., that there is no causal connection between such failure and the injury, it is held that an unlicensed driver may recover for injuries received, *Moyer v. Walden W. Shaw Livery Co.,* (1917) 205 Ill. App. 273; and is not liable per se, *Dervin v. Frenier,* (1917) 91 Vt. 398, 100 Atl. 760, where a statute provides for the mandatory licensing of drivers. As in the principal case, Massachusetts has long maintained that the owner of an unregistered vehicle must be barred of recovery, *Dudley v. Northampton St., R. Co.,* (1909) 202 Mass. 443, 89 N.E. 25, 23 L.R.A. (N.S.) 561; *Chase v. New York Central R. Co.,* (1911) 208 Mass. 137, 94 N.E. 377; and liable per se for negligince, *Fairbanks v. Kemp,* (1917 226 Mass. 75, 115 N.E. 240, in order to insure to an injured party a means of identifying the car that injures him. The unlicensed driver is not barred of recovery, *Conroy v. Mather,* (1914) 217 Mass. 91, 104 N.E. 487, nor is he liable per se for negligence, *Bourne v. Whitman,* (1911) 209 Mass. 155, 95 N.E. 404,

35 L.R.A. (N.S.) 701, 2 N.C.C.A. 318. As to the Canadian law, see 10 B.R.C. 134. Chap. 365, sec. 24, Laws of Minn., 1911 (superseding Chap. 259, Laws of 1909); G.S. Minn. 1913, sec. 2643 specifically provides that "Nothing in this act shall be construed to curtail or abridge the right of any person to prosecute a civil suit for damages by reason of injuries to persons or property resulting from negligent use of the highways by a motor vehicle . . ." In *Armstead v. Lounsberry*, (1915) 129 Minn. 34, 151 N.W. 542, L.R.A. 1915D 628, 9 N.C.C.A. 828, (the collision took place in 1910), it is held that the plaintiff is not barred of recovery because of the fact that his car was not registered, on reasons underlying the weight of authority and without mentioning the section referred to which seems to require the same result. See *Stroud v. Water Commissioners*, (1916) 90 Conn. 412, 97 Atl. 336, under a statute expressly denying a right of recovery to the owner of an unlicensed automobile.

TORTS—LABOR UNIONS—INDUCING BREACH OF CONTRACT—MALICE.—The plaintiff, a "finisher" operating a non-union shop, had a contract for unfinished hats. The defendants were the local officers of the United Hatters' Union of North America, and, following national orders, advised their employers, who were hat "makers," that they would work only on hats to be "finished" in union shops, to insure steady employment for members of the union in "finishing" shops. The "maker" informed the defendants that he had certain contracts with the plaintiff, but they told him that they could not work on hats to be "finished" by the plaintiff. The "maker" thereupon breached his contract with the plaintiff, who instituted this action to recover the damage resulting from the breach thus procured. *Held*, one justice dissenting, that the defendants were liable for willfully and knowingly procuring a breach of contract. *R & W Hat Shop v. Sculley*, (Conn. 1922) 118 Atl. 55.

The instant case is in accord with the weight of authority in holding that a willful interference with the contractual relations of third parties, without just cause or excuse, is tortious. *Hitchman Coal & Coke Co. v. Mitchell*, (1917) 245 U.S. 229, 38 S.C.R. 65, 62, L.Ed. 260, L.R.A. 1918C 497, Ann. Cas. 1918B 461; *Twitchell v. Nelson*, (1914) 126 Minn. 423, 148 N.W. 451, 148 N.W. 601. For a discussion and further authority see 2 MINNESOTA LAW REVIEW 71. Knowledge of the contract is necessary in order that the interference be willful, *McGurk v. Cronenwett*, (1908) 199 Mass. 457, 85 N. E. 576, and the question of justification, (i.e., superior legal right, competition, freedom of market, etc.,) is for the jury in each case, *Berry v. Donovan*, (1905) 188 Mass. 353, 74 N. E. 603, 5 L.R.A. (N.S.) 899, 3 Ann. Cas. 738, 108 A.S.R. 499.

The leading case of *Lumley v. Gye*, (1853) 2 El. & B. 216, created a great deal of confusion, when, in introducing this doctrine, it employed the term "malicious." The word according to the later decisions merely signifies that the interference is intentional, with no just cause or excuse being shown. *Brennan v. United Hatters*, (1906) 73 N.J.L. 729, 744, 65 Atl. 165, 9 L.R.A. (N.S.) 254, 9 Ann. Cas. 698; see also dicta and cases cited in *Roraback v. Motion Picture Machine Operators Union*, (1918) 140

Minn. 481, 486, 168 N.W. 766, 169 N.W. 529, 3 A.L.R. 1290. In *Berry v. Donovan,* (1905) 188 Mass. 353, 356, 74 N.E. 603, 5 L.R.A. (N.S.) 899, 3 Ann. Cas. 738, 108 A.S.R. 499, the court declared that an intentional interference was unlawful even if actuated by good motives and without malice, and in the case of *Jackson v. Morgan,* (1911) 49 Ind. App. 376, 94 N.E. 1021, it was held that where an act is inherently lawful the mere existence of spite or ill will does not give rise to cause of action. But see *Tuttle v. Buck,* (1909) 107 Minn. 145, 119 N.W. 946. This willful interference has been called malice in law, *Bitterman v. Louisville, etc., R. R. Co.,* (1907) 207 U.S. 205, 223, 28 S.C.R. 91, 52 L. Ed. 171, 12 Ann. Cas. 693, 118 A.S.R. 727, but the modern tendency, observed in the instant case, is to follow the suggestion of Lord Lindley in *South Wales, etc., v. Glamorgan,* L. R. [1905] App. Cas. 239, 255, to the effect that it is better to drop the world "malice" altogether in considering cases of this sort, and to substitute for it the meaning intended to be conveyed. This suggestion is important in view of *McGurk v. Cronenwett,* (1908) 199 Mass. 457, 462, 85 N.E. 576, which holds that the allegation "malicious" does not constitute an allegation that the act was committed with knowledge of an existing contract.

VENDOR AND PURCHASER—MORTGAGE TAX—EFFECT OF FAILURE TO PAY TAX ON VALIDITY OF STATUTORY NOTICE TO TERMINATE INTERESTS OF VENDEE.—The plaintiff, a vendee in possession under an executory contract for the sale of land, defaulted in making his second payment. The defendant, the vendor, gave notice to the plaintiff of cancellation and termination of the contract and after a lapse of several months sold the property to a third party. The mortgage tax required by G. S. Minn. 1913, sec. 2301 to be paid on the unpaid balance of an executory land contract had not been paid. The vendee now sues to recover purchase money paid down. *Held,* that the vendor could not divest the vendee of his equitable interest in the land by giving the statutory notice of cancellation as required by G. S. Minn. 1913, sec. 8081, without first paying the mortgage tax upon the unpaid balance of the purchase price, and that notice being ineffectual the vendor's conveyance to a third party was a repudiation of the contract by the vendor giving the vendee the right to treat the contract as rescinded and recover purchase money paid. *Engel v. Mahlen et al.,* (Minn. 1922) 189 N. W. 422.

This case is in accord with other Minnesota decisions in holding that notice of cancellation of an executory contract for the sale of land for default in payment by the vendee is rendered ineffectual by failure to pay the statutory mortgage tax. *Greenfield v. Taylor,* (1919) 141 Minn. 399, 170 N.W. 345; *First State Bank of Boyd v. Hayden,* (1913) 121 Minn. 45, 140 N. W. 132. Such notice of cancellation has been interpreted to be clearly a document relating to foreclosure, *International Realty & S. Corp. v. Vanderpoel,* (1914) 127 Minn. 89, 92, 148 N.W. 895, and as such is inadmissible in evidence under G. S. Minn. 1913, sec. 2307 unless the mortgage tax is paid. The general rule in Minnesota seems to be that the only mode by which the vendor can extinguish the vendee's rights under such a contract is by compliance with G. S. Minn. 1913, sec. 8081 requiring the

vendor to give vendee thirty days' notice of his intention to cancel contract for default. *Finnes v. Selover, Bates & Company,* (1902) 102 Minn. 334, 113 N. W. 883; *Chapman v. Propp,* (1914) 125 Minn. 447, 147 N. W. 442; *Needles v. Keys,* (1921) 149 Minn. 447, 184 N.W. 33. Conceding that the vendor must give the vendee the statutory notice in order to terminate the vendee's rights under the contract, it has nevertheless been maintained that the vendee may lose his rights thereunder by abandonment, *Mathwig v. Ostrand,* (1916) 132 Minn. 346, 157 N. W. 589; and see *Enkema v. McIntyre,* (1917) 136 Minn. 293, 161 N. W. 587, 2 A.L.R. 411, wherein the court states that the statute does not stand in the way of the vendee's abandoning his rights under the contract. However, mere failure of the vendee to make one payment when due, as in the present case, has not been construed as an abandonment justifying the vendor in treating the rights of the vendee as forfeited without giving the statutory notice. *Hage v. Benner,* (1910) 111 Minn. 365, 127 N.W. 3; *Needles v. Keys,* (1921) 149 Minn. 477, 184 N.W. 33. Hence, in the instant case, by giving the vendor's notice no effect, the court is able to avoid a forfeiture by shifting the default from its vendee to the vendor, his sale to a third party coupled with an attempt to declare a forfeiture being a repudiation, *Western Land & Securities Co. v. Daniels-Jones Co.,* (1911) 113 Minn. 317, 129 N.W. 587, entitling the vendee to rescind and recover the purchase price paid. The case is illustrative of the growing tendency to avoid forfeitures whereever possible. *Ballard v. Friedman,* (Minn. 1922) 187 N.W. 518, 520, citing 5 MINNESOTA LAW REVIEW 329.

WILLS—PROBATE—RIGHT OF AN EXECUTOR TO CONTEST THE PROBATE OF AN ALLEGED SUBSEQUENT WILL.—The defendants are executors under a will made prior to the alleged will which the proponent seeks to establish. The proponent contends that the executors under a prior will are not proper contestants of the will. *Held,* that the executors have such an interest as entitles them to contest the admission to probate of an alleged subsequent will. *In re Murphy's Estate,* (Minn. 1922) 189 N.W. 413.

The decision in the instant case follows the weight of authority. Various courts assign various reasons for the rule. The Minnesota court bases its conclusion on the theory that the executor is the "proper party to champion in the courts" the will which names him; California says, "It was the right and duty of the executor named in the prior will to defend it," *In re Langley,* (1903) 140 Cal. 126, 131, 73 Pac. 824; New York assigns as a reason the fact that the establishment of a subsequent will would divest the executor of title and possession of the personal property to which he would be entitled under the will appointing him, *Matter of Greeley's Will,* (1873) 15 Abb. Pr. (N.S.) 393, but later in *In re Davis,* (1905) 182 N.Y. 468, 75 N.E. 530, recognizes that the executor's interest is only in the fees; while Illinois in *Connelly v. Sullivan,* (1893) 50 Ill. App. 627, holds that an executor who has only "a naked power without an interest" because he had only to sell the estate and distribute the proceeds, may contest an alleged subsequent will. See note L.R.A. 1918A 467. Had the majority rule been applied in *In re Estate of Stewart,* (1898) 107 Iowa, 117, 77 N.W. 574, an obvious injustice would have been worked, as the

effect of the second disposition in that case was merely to change the executor, and the effect of a suit to contest the will would be only to diminish the interest of the beneficiaries by taxing the cost of such a suit on the estate. The court laid down the minority rule, refusing to allow the executor to contest because the executor had no interest in the estate, as all he would get under the will was his fees, and for those he renders full value in services.

The "duty" to contest referred to in some cases is clearly a moral duty, and not a legal one, *Kelly v. Kennedy,* (1916) 133 Minn. 278, 158 N.W. 395, L.R.A. 1917A 448, Ann. Cas. 1918D 164, unless as some courts hold, the will under which the executor acts has been held valid and letters testementary have been issued by the court. *Dodd v. Anderson,* (1910) 197 N.Y. 466, 90 N.E. 825, 27 L.R.A. (N.S.) 336, 18 Ann. Cas. 738. But even in this latter situation the Minnesota court would probably refuse to recognize such a duty as it would give rise to a correlative right of compensation for costs where the executor defends a single invalid devise in an otherwise valid will. *Minnesota Loan & Trust Co. v. Pettit,* (1919) 144 Minn. 244, 175 N.W. 540; 4 MINNESOTA LAW REVIEW 282. At common law the whole personal estate of the testator vested in the executor, and if there should be any surplus after the payment of the debts, funeral expenses, and legacies, it would vest in him beneficially rather than in the next of kin. *Attorney-General v. Hooker,* (1725) 2 P. Wms. 338. Under such conditions the interest of the executor is apparent. But this was changed in England in 1830 by the Act of 1 Wm. IV, c.40, providing that the executor should hold any residue as trustee for persons entitled thereto under the Statute of Distributions, unless it was otherwise provided in the will. 2 Williams on Executors, 1343. And the weight of American authority is to the same effect. See 2 MINNESOTA LAW REVIEW 544. It would seem that the best interests of the testator and the interest of the public in the efficient operation of its probate courts would be subserved by a limitation of the rule adopted in the principal case. Is it not feasible to require a showing on the part of the executor that he has a beneficial interest, other than that for fees, in the estate; or that he *in fact* represents one having a beneficial interest who desires to contest the will; or that he appears in the interest of a person not in being, named in the will; or that he is under a legal duty to appear by reason of letters testementary duly issued, before permitting him to contest the probate of a will?

BOOK REVIEWS

THE PROBLEM OF PROOF. By Albert S. Osborn. Matthew Bender & Company, New York and Albany, 1922. Pp. XXII, 526.

Here is a book which neither the lawyer nor the law student should miss. Every member of every class in trial practice should be required to read it. No lawyer having a case involving a questioned document can afford to disregard it, and even the veteran practitioner in other lines will find profit in it. Not that it is a perfect piece of book-making; it is not, for it has faults in arrangements, it contains many repetitions, and its discussion of the history and development of the law concerning disputed handwriting does not equal that of Dean Wigmore. But its faults are few and trifling, its merits many and weighty.

Designed primarily to help in the solution of the problem of proof of disputed documents, it serves that purpose admirably. Even the inexperienced trial lawyer might with its aid properly prepare and adequately try such a case, with a real appreciation of the difficulties involved and the most feasible method of attacking them. Speaking from an experience of more than thirty years as witness and adviser in these technical cases, the author shows the lawyer how to obtain his facts, how to choose and cooperate with his expert, how to bring out and use most effectively the expert's testimony, how to expose the weaknesses of mistaken or false testimony both lay and expert, and what methods to use in attempting to persuade the court or jury in proper cases that his technical evidence really amounts to a demonstration of fact instead of being mere matter of opinion. In so doing, he gives valuable advice to the general practitoner as well, for most of the questions in disputed document cases are merely special manifestations of the fundamental problems of all trial practice.

The average trial of the average lawsuit, viewed as a proceeding for the ascertainment of truth, is a distressing spectacle. The obstacles which our procedure opposes to the discovery of facts seem to be legion. Mr. Osborn is not the first layman upon whom this has been profoundly impressed. But he has not been content merely to complain; he has tried to ascertain the causes and to offer some helpful suggestions for eliminating them.

First the attitude of many a lawyer toward a proffered case is wrong. Either through unjustifiable motives or an unconscious will to believe, he is prone to accept at face value many a story that will not bear unprejudiced investigation. And having accepted a case, he is likely to cling tenaciously to it, under a mistaken idea of duty, forgetting that no client has the right to expect an attorney to attempt to win against the facts. His duty is to promote justice, not to defeat it. The chapter on advocacy is a lay sermon for the young lawyer which his more experienced brother at the bar may read with profit. Notwithstanding his zeal to win, the lawyer frequently goes into court poorly prepared. Proper preparation necessitates not only a thorough understanding of the principles of law

involved but also an absolutely exhaustive investigation of the facts and an appreciation of their significance in the case. Without this as a basis even the most brilliant counsel cannot hope to perform his obligations to his client, for how can he expect to make manifest to court or jury that which he does not himself clearly apprehend? And even with the most painstaking preparation, his task is difficult enough, for the handicaps under which he must necessarily labor are very heavy. To bring out effectively the story of a witness by questions framed to fit our procedural rules requires skill enough at best; but when that story must be made real and convincing to our usual triers of fact, the jury, in a court room badly ventilated, inadequately lighted and with poor acoustic properties, the task is well nigh insuperable. The lawyer who does not realize the existence of these handicaps, who does not appreciate the weaknesses of human nature reacting to such a situation as the jurors occupy, can succeed only because his opponent is in as bad a predicament as himself. Other writers have called attention to some of these truths, but few, if any, so effectively as Mr. Osborn. He has made them stand out concretely; and he has offered sound specific advice for reducing the handicaps to a minimum. If the trial lawyer will attack these handicaps instead of ignoring them, and follow the author's suggestions for putting on a well prepared case, he will in the vast majority of cases, win where he deserves to win. Many of the faults of the much-abused jury system are due not to the jurors but to the lawyers.

The outstanding virtue of the book is that it does not deal in vague generalities or consist of a relation of anecdotes wherein adept trial practitioners have made the worse appear the better cause, but it states concrete problems and offers definite concrete methods of meeting them.

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UNIFORM LAWS, ANNOTATED. Vol. I, SALES ACT. Edward Thompson Company, Northport, New York, 1922. Pp. VIII, 376.

This volume is the first of a series annotating the various uniform laws. The annotations consist of commissioner's notes, statutory notes and case notes. As a rule, the first are merely brief statements comparing the American act with its English model. Where the former differs from its prototype there is a short discussion of the reason for the change. The statutory notes give various changes in the uniform act made by the different states adopting it. The case notes summarize decisions on the problems covered by the section. These cases include not only those which cite the act but also those which contain no reference to it although its provisions are applicable. In addition there is an appendix setting out the English Sale of Goods Act. Also, in the front of the book there is a table of states wherein the act has been adopted. It gives the date of taking effect, the adopting act and its present form. The publishers have a patented device for a Cumulative Supplement by which all decisions and statutory changes will be kept up to date.

Since both the number of uniform laws and the number of states

enacting them are rapidly increasing there is an obvious need for a good annotation of them. The main attempt of the publishers to fill this need has been by a thorough search for cases which, on the whole, have been stated clearly and concisely. That is a time saving improvement over Terry's bare citations. Perhaps one should not expect to find in such a work any critical examination of the decisions. In lieu thereof, however, it seems inexcusable not to cite the discussions of the act and of current cases by law periodicals where such a treatment can be found. Moreover, the usefulness of the only comment and explanation undertaken, i.e., the commissioner's notes, is lessened by not annotating corresponding sections of the English act to which reference is constantly made.

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CANADIAN CONSTITUTIONAL STUDIES. By The Right Hon. Sir Robert Borden, University of Toronto Press, 1922. 163 pages.

This little volume consists of a short series of lectures delivered at the University of Toronto under the Marfleet Foundation. The distinguished lecturer has always taken a keen interest in constitutional questions and is eminently qualified to speak on this subject by virtue of his legal attainments and his exceptional political and diplomatic experiences as a former prime minister of Canada, and as the representative of that country at the Paris Conference. The lectures in question are unpretentious in character and profess only to serve as an introduction to the study of the constitutional history of Canada, but in truth, they serve a much broader purpose.

In his constitutional outlook, Sir Robert is a modern conservative imperialist. He combines in his political creed the principles of imperial unity and of national autonomy.

"I have never wavered in the firm and constant belief that in the British commonwealth of nations, Canada will find her most commanding influence, her widest usefulness, and her highest destiny. With that opinion, is coupled the fixed and absolute conviction that the unity of the Empire can alone find its expression in complete autonomy and in equality of nationhood. A strong, Canadian national spirit is entirely consistent with the firm purpose to maintain our country in a high place within the British Commonwealth."

But notwithstanding his strong political convictions and his deep personal interest in much of the history in question, he never allows partisan considerations to creep into his narrative or discussion. The treatment throughout is marked by a natural reserve and self effacement, and by a striking breadth and liberality of outlook on constitutional and international questions.

The three lectures are of unequal merit. The first, which deals with the early constitutional history of the country, contains nothing new or distinctive, either in material or in point of view, and suffers, moreover, from several minor historical slips as well as from a general lack of unity of treatment.

The second address is distinctly better in quality. The lecturer is now upon more certain ground, as he has entered upon the period of his own

political knowledge and experience. His distinct political principles now come into view. Although a staunch imperialist, he does not hesitate to criticise the standpat policy of the English government from 1889 to 1894 and the reactionary attitude of Mr. Asquith at the 1911 Conference. But some features of the discussion, unfortunately, are rather unsatisfactory; for example, the treatment of the question of merchant shipping is fragmentary and inconclusive. The lecturer entirely fails to consider the important influence of party politics upon the course of constitutional development and likewise the marked influence which American politics have exerted upon the life and institutions of Canada. This omission may be due, however, to the speaker's desire to avoid controversial topics, particularly in view of the fact that his own political party has generally been suspicious of the alleged dangerous nationalist and American tendencies of many of its political opponents.

In the last lecture, dealing with the constitutional and international developments during the World War and afterwards, the lecturer makes an important contribution to our knowledge of the period. He here speaks as one having authority, with the fullness and certainty of one who played no mean part in securing international recognition of the new world status of his native country. There is, indeed, a subdued note of satisfaction in his brief survey of the conclusion of the struggle for the recognition of colonial nationalism.

"On the battlefields of Europe and at the council table of the nations, the British Commonwealth entered upon a new stage of its existence and development. The principle established by the constitutional resolution of 1917 was carried to a logical conclusion at the Peace Conference. There were anomalies at Paris; but the Britannic system of government, and for that matter international law itself, are full of anomalies. The important consideration is the outstanding fact that the Dominions secured a recognized status in the family of nations. It was not without strong insistence that the principle affirmed in the Imperial War Conference of 1917, and acted upon by the Imperial War Cabinet of 1918, was accepted by the Peace Conference. Other nations had learned during the war to realize the strength of the ties that unite the British Dominions, but they could not be expected quickly to comprehend their nature. The principle of equal nationhood and complete autonomy has been established. It remains to determine the system and method by which that principle shall receive vitality and force in the practical administration of the Empire's affairs."

Sir Robert Borden is not content, however, with the existing constitutional organization of the Empire, particularly in the conduct of foreign affairs. He is greatly disappointed that the recent Imperial conference did not take positive measures to assure to the Dominions a permanent place in the counsels of the Empire on matters of war and international relations. He had hoped to see the imperial war cabinet develop into an effective peace organ for the discussion and direction of the common imperial and international affairs of the Empire.

It is upon this issue that some of the chief political controversies of the future are almost sure to arise. The non-committal attitude of some of the nationalist leaders, especially Jan Smuts, at the recent imperial conference was not due to any sympathy with the old Tory doctrine of colonial dependence or to any opposition to the conception of national equality within the Empire, but rather to the fear that the imperial war

cabinet might develop into an imperial executive and that participation in the discussion and determination of questions of foreign policy might involve responsibility for the execution of that policy, even though it should lead to war. In short, Sir Robert Borden and Jan Smuts belong to two antagonistic schools of political thought,—the former as a conservative imperialist, believes in colonial participation in, and imperial control of, foreign affairs, whereas, the latter is essentially a liberal nationalist, who demands for the Dominions, the same measure of independence and freedom of action in international affairs that they already possess on domestic matters. The question at issue resolves itself into this: Shall the future organization of the Empire be based upon the principle of a federation of equal states or upon that of a League of nations, and the crux of the whole issue, as Sir Robert Borden clearly sees, is control of foreign policy —shall it be determined around the imperial council table at Westminster or at the respective capitals of the self-governing states of the Empire? It is little wonder, therefore, that Sir Robert is critical of the decision of the London conference not to proceed for the present at least with the proposal for an imperial reorganization of the Foreign Office.

Sir Robert concludes his valuable study with some interesting comments upon certain manifestations of modern democracy, such as the labor agitation for direct action or the general strike, and the tendency towards the group system of parties. He makes a strong defense of the League of Nations and an equally eloquent plea for the future cooperation of the English and American people for the preservation of world peace.

"Never did there rest upon any people a more vital responsibility than that which the present conditions of the world impose upon the British and American Commonwealths. In their united hands, rests world peace; above their disunion hovers the shadow of world destruction. By their sense and acceptance of that responsibility these democracies will be sternly and perhaps finally tested. As they meet the test, so shall their worth be measured in the ultimate judgment of history."

This little volume, we may then conclude, is a most timely and suggestive contribution to the constitutional history and international relations of the Canadian Dominion.

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Cases on the Law of Contracts. By Arthur L. Corbin, West Publishing Company, St. Paul, 1921, pp. 1514.

Professor Corbin selects as his aim in his new casebook on contracts to afford introductory material for answering the question "What are our American courts going to decide tomorrow?" As pointed out in the preface, he gives preference to recent American cases. At least one-fourth of the cases, however, will be found in earlier casebooks on the subject.

"The order of arrangement has been chosen with the purpose of making the topics and the individual cases most readily understood by the beginning student." The different topics are clearly indicated by section headings.

After offer and acceptance, consideration and sealed contracts, it seems very wise to present the fundamental subject of the duties of performance under contract as affected by express and implied conditions, repudiation, prevention and impossibility; then the discharge of contractual duties by release, novation, accord and satisfaction, etc., before the special topics of third party beneficiaries, assignment and joint contracts are taken up. In this way one considers first, the making of contracts, the source of obligation; second, the duties under contract and when they become operative; third, the discharge of contractual duties; fourth, different parties affected by contracts; and fifth, invalid contracts including illegality and statute of frauds.

The careful analysis and subdivision of topics should prove especially helpful in the study of conditions which are presented by Professor Corbin in a way that should illuminate this most intricate and confusing branch of the subject, in which the courts themselves are still groping their way somewhat blindly.

The selection of cases is, in general, interesting and satisfactory, although occasionally one wonders at the inclusion of a particular case which seems weak or irrelevant (See cases pp. 58, 130, 134.) In connection with chapter I on mutual assent and chapter II, section 6, on past consideration, there is some impression of redundancy and repetition and some cases on these topics might well be omitted by the teacher to save time for other topics.

The notes are in general very full and helpful, but one might hope for more on certain points, such as the interesting one of an obligation arising from a voluntary undertaking, (pp. 228, 231.) It would also be helpful if more complete references were given to leading legal articles in the various law reviews in connection with the different topics.

It may be suggested that more problem material should be included in our casebooks and more cases without opinions submitted to the students, to stimulate their individual and creative thought and give them drill in the application of legal principles.

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STOCKHOLDERS' LIABILITY IN MINNESOTA

BY HENRY W. BALLANTINE*

JUSTICE Canty, in a case involving a construction of the Minnesota statutes as to the liability of officers and members for corporate debts, significantly said:[1]

"Each case adds new proof to what has been so often remarked,—that the statutes of this state regulating corporations are crude, unsatisfactory and in conflict with each other, and it is often difficult to spell out the real intent of the legislature."

Since some thorough-going revision of our corporation laws, similar to that of Illinois in 1919, ought to be undertaken at an early date, it may be of interest to attempt a survey of the important and complex topic of stockholders' liability. It will be convenient to take up *first,* the peculiar situation presented by the absence of any requirement of subscription to capital stock as a condition to the transaction of business, *second,* the rights of creditors against shareholders with respect to bonus and watered stock, which will involve a discussion of the so-called "trust fund doctrine;" *third,* the rights of creditors against shareholders by reason of the constitutional or double liability; and *fourth,* the remedies and methods of enforcement of the two principal kinds of stockholders' liability.

I. ANOMALY OF CORPORATIONS WITHOUT STOCKHOLDERS.

The exemption of the stockholders from unlimited liability is "the corporation's most precious characteristic," which makes

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[1]National New Haven Bank v. Northwestern Guaranty Loan Company, (1895) 61 Minn. 375, 386, 63 N.W. 1079.

the corporation the greatest factor in modern business. What is the security which the law exacts as the condition upon which it grants this special corporate privilege, viz: the right to incur liabilities for the discharge of which the persons owning the business are not liable as partners? A startling gap in this respect is revealed in the recent decision of *Moe v. Harris.*[2] The plaintiffs having recovered judgment against the Yale Mining Company for services rendered, sued the three individuals who had attempted to organize the corporation. The defendants were named in the articles as directors and officers of the corporation to serve until their successors were elected. The theory of the action was that the pretended corporation was a hollow mockery in view of the fact that no stock had ever been subscribed or paid for, and it was urged that the defendants were simply co-partners doing business under the guise of a corporation.

The decision was in favor of the defendants on the ground that when the organization of the corporation has been completed, as required by statute, a corporation de jure is brought into existence notwithstanding the fact that no capital stock has been subscribed or paid for, no books kept, no by-laws adopted, no meetings held or officers elected.

"The statute does not make it a condition precedent to the right of the corporation to transact business, that all or any of its authorized capital stock shall be subscribed or paid in."

How can there be a corporation without capital stock or stockholders? The statute does not require that the corporators should be subscribers to stock. They have no interest whatever in the company to be formed. As the Pennsylvania Court says:[3]

"They are mere instruments of the law for purposes of preliminary organization. The moment that is accomplished . . . the necessary certificates signed and the charter granted they are functi officio. The corporation is thenceforth composed of stockholders."

But if there are no subscribers or stockholders of what is the corporation composed? It is indeed an imaginary and fictitious entity without body or soul or pocket book, existing only in contemplation of the law, "a speculative bubble, ready to explode into thin air at the first touch of adversity." Those designated as directors and officers are not members unless they are stockholders but are merely agents.

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[2](1919) 142 Minn. 442, 172 N. W. 494.
[3]Densmore Oil Co. v. Densmore, (1870) 64 Pa. 43.

The statement in the articles or certificate of incorporation that the capital stock is a designated amount divided into a certain number of shares, each of a named par value, creates neither shares nor capital stock. It expresses the power of the corporation to acquire a capital stock; it creates potential shares; it fixes the amount of the contribution required from the holder of a share.[4]

Corporations for profit organized under the present laws of Minnesota must have at least $10,000 authorized capital stock, divided into shares having a nominal or par value of not less than $1.00.[5] But apparently by oversight, there is no requirement that any minimum amount of stock be subscribed or paid in as a condition of doing business. The statutes permit a corporation to incur debts without any capital or corporate fund or resources of any sort answerable for their payment.

By the corporation laws of many states the subscription and payment of a minimum capital stock is required before the transaction of business, and persons who organize corporations and transact business as corporations without this are made liable to creditors.[6] Statutory regulations as to banks and financial corporations invariably require that actual capital to a certain amount be subscribed and paid in before business is begun or indebtedness created.[7] In addition to this, in national banks and most state banks there is a superadded liability equal to the face value of the stock. Thus two hundred dollars is placed behind every one hundred dollars of issued stock as security for deposits and other debts of the corporation.

Stockholders take the profits and hence should take some of the risks of the business. They are exempted from personal liability upon the supposition that they will make some contribution to the capital of the corporation. A corporation without any subscribed or paid in stock is "a ghost, a fraud per se, a

[4]U.S. Radiator Co. v. New York, (1913) 208 N.Y. 144, 152, 101 N.E. 783, 46 L.R.A. (N.S.) 585.

[5]Minn. G.S. 1913, sec. 6181.

[6]14 C.J. 980, 982; Walton v. Oliver, (1892) 49 Kan. 107, 30 Pac. 172, 33 A.S.R. 355; Heinze v. South Green Bay L. Co., (1901) 109 Wis. 99, 85 N.W. 145; Badger Paper Co. v. Rose, (1897) 95 Wis. 145, 70 N. W. 302; John V. Farwell Co. v. Jackson Stores, (1911) 137 Ga. 174, 73 S.E. 13; Wells v. Ivey, (1916) 144 Ga. 548, 87 S. E. 661; Ames v. McCaughey, (1913) 88 Ohio 297, 102 N.E. 989; Thompson, Corps. sec. 4732.

[7]Minn. G.S. 1913, Sec. 6142, 6348, 6365, 6372, 6405. See also Minn. Laws 1921, ch. 23, sec. 3.

licensed pirate without fear of capture and execution."[8] The legislative grant of limited liability is made very freely in this country, but as is well said in the New Jersey case of *See v. Heppenheimer*:[9]

"Men of business, who transact their business under the shield of a corporate existence, have the great and peculiar advantage over those trading as individuals of avoiding personal pecuniary liability. If the enterprise is prosperous, they make and enjoy its gain. If, on the other hand, it is not prosperous, they lose only their original investment, which may be a part only of their individual fortunes, and any loss beyond that investment falls on the unfortunate creditors. This involves apparent, if not real, unfairness in trade. Be that is it may, under these conditions, surely the investors in the stock of trading corporations ought not to complain or ask any sympathy if the courts of the country hold them to a strict compliance with the terms of the law under which they claim immunity from pecuniary responsibility."

II. Rights of Creditors Against Stockholders With Respect to Watered and Bonus Stock.

A creditor may seek to collect his debt on the basis of the liability of the stockholder to pay the par value of his stock under various circumstances: (1) Where an unpaid balance is due the corporation upon his subscription contract; (2) where he has received dividends out of capital assets; (3) where the shares were issued as a bonus or at a discount with no contract to pay more; (4) where the shares were issued as full paid in exchange for property or services fictitiously valued, in other words for a consideration diluted with water or blue sky.

It is important to observe that there are two sorts of obligation to pay up on stock not paid for dollar for dollar at the time of issue. The first is a contractual obligation of the stockholder to the corporation to pay the subscription price or any unpaid installment thereof. It is clear that the "indebtedness of stockholders upon subscriptions to stock held by them is an indebtedness, not to the creditors of the corporation, but to the corporation itself. Such indebtedness is an asset of the corporation."[10] The second kind of obligation has a different basis. It is not usually regarded as a contractual obligation or as an asset of the corporation. It is an equitable obligation enforced by the courts

[8]Cook, 7 Am. Bar Ass'n Jnl. 534.
[9](1905) 69 N.J. Eq. 36, 49, 61 Atl. 843.
[10]In re Peoples Livestock Insurance Co., (1893) 56 Minn. 180, 185, 57 N.W. 468; 5 Fletcher Corps. 3455.

in favor of creditors where the corporation itself would have no right, and contrary to the actual agreement of the stockholder. It is the source or basis of this obligation to creditors to pay up the par value of bonus or watered stock which it is difficult to explain.

In *First National Bank of Deadwood v. Gustin Minerva Mining Co.*,[11] Justice Mitchell clearly points out the above distinction. If stockholders are indebted to the corporation for unpaid installments on stock, this debt is an asset of the corporation which, in case it becomes insolvent, any creditor may enforce for the purpose of satisfying his claim. This might be by a creditor's bill in the nature of an equitable execution. But where stock is sold at a discount or is given away as full-paid, it is very clear that the stockholder owes the corporation nothing. As between the corporation and the stockholder the arrangement by which the stock is issued as full-paid stock is entirely valid. Upon what ground is it then held that the arrangement, although valid against the company, will be ineffectual against the creditor? Upon what ground will equity hold the shareholder liable to pay up the full par value, if necessary to satisfy the debts of the corporation? What is the source of the equitable right of the creditor to insist on a contribution of a greater amount of capital by the shareholder than he has agreed to contribute?

The New York courts deny that there is any such liability. As is said in the case of *Christianson v. Eno*:[12]

"But the liability of a shareholder to pay for stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute. . . We do not perceive how a person to whom shares have been issued as a gratuity has, by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract."

It seems then that by the law of New York (although recognizing the trust fund doctrine) the subscription agreements are the source and measure of the duty of the subscribers.[13]

In an article entitled, The Trust Fund Theory and some Substitutes for It,[14] Mr. Edwin S. Hunt comes to the conclusion

[11](1890) 42 Minn. 327, 6 L.R.A. 676, 44 N.W. 198, 18 A.S.R. 510.
[12](1887) 106 N.Y. 97, 60 Am. Rep. 429.
[13]Southworth v. Morgan, (1912) 205 N.Y. 293, 98 N.E. 490.
[14]12 Yale L. J. 63, 81. See also Wickersham, The Capiltol of a Corporation, 22 Harv. L. Rev. 319, 322.

that there is no principle of law or of equity upon which a creditor can compel a stockholder to pay more for his stock than he has agreed to pay. He believes that the liability of stockholders beyond their agreements is a matter for statutory regulation, in accordance with the New York view; that unissued stock is not assets and that a person accepting shares as a gratuity or at a discount has not injured the creditors, prior or subsequent.

Most courts recognize that there is such a liability upon the original holders of bonus or watered stock or their transferees with notice.[15] There is much difference of opinion, however, as to the principle upon which this liability to creditors rests and whether it should be limited to subsequent creditors without notice. This liability has been accounted for on various theories; first upon the trust fund theory originated by Judge Story in 1824 in the case of *Wood v. Dummer*;[16] second, the fraud theory, the presumed reliance of the creditor upon the issued capital stock of the corporation;[17] third, the co-debtor theory, to the effect that the stockholders are in reality co-debtors up to the limit set by the par value;[18] and fourth, the prescribed obligation theory, that an obligation to contribute an amount equal to the par value is imposed by operation of law as an incident of acquiring membership in a corporation.[19]

The trust fund theory is the one most commonly advanced. As stated in *Farnsworth v. Robbins*,[20] a case involving the release of a subscriber and a discharge of his obligation to pay upon surrender of his stock, "the capital stock of a corporation contributed or agreed to be contributed by its stockholders, is in equity and as to creditors, deemed a trust fund charged with the payment of the debts of the corporation, and must be treated as such by the corporation.[21]

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[15]Wallace v. Carpenter, etc. Co., (1897) 70 Minn. 321, 73 N.W. 189, 65 A.S.R. 530.

[16](1824) 3 Mason (C.C.) 308, Fed. Cas. No. 17, 944.

[17]Hospes v. Northwestern Trust Co., (1892) 48 Minn. 174, 50 N.W. 1117, 31 A.S.R. 637, 51 L.R.A. 470.

[18]56 Univ. Penn. L.Rev. 57.

[19]Pepper, 34 Am. L. Reg. (N.S.) 448, 457; 29 Harv. Law Rev. 857; Warren, 34 Harv. Law Rev. 287.

[20](1887) 36 Minn. 369, 371, 31 N.W. 349. See also Ross v. Kelly, (1886) 36 Minn. 38.

[21]Citing Upton v. Tribilcock, (1875) 91 U.S. 45, 23 L. Ed. 203; Sanger v. Upton, (1875) 91 U.S. 56, 23 L.Ed. 220; Sawyer v. Hoag, (1873) 17 Wall. (U.S.) 610, 21 L.Ed. 731; Clapp v. Peterson, (1882) 104 Ill. 26; Crandall v. Lincoln, (1884) 52 Conn. 73; Adler v. Milwaukee, etc., Mfg.

In the case of *Wood v. Dummer,*[22] in which a bank had divided up two-thirds of its capital stock among its stockholders without providing funds sufficient to pay its debts, Mr. Justice Story pointed out that the charter of a corporation relieves the stockholders from personal responsibility and substitutes the capital stock in its stead. Credit is universally given to this fund by the public as the only means of repayment. Accordingly contributions cannot be withdrawn without payment of the debts.

The reason for the trust fund theory is well stated in *Sanger v. Upton.*[23]

"The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships . . . The creditors have a lien upon it in equity. If diverted they may follow it as far as it can be traced."

Mr. Justice Miller said in *Sawyer v. Hoag*:[24]

"We think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation."

The capital of a corporation may perhaps be regarded as a trust fund in the sense that it cannot be diverted or distributed among the stockholders without provision being first made for full payment of corporate debts.[25] As said by Mr. Pomeroy:[26]

"These statements may be sufficiently accurate as strong modes of expressing the doctrine that such property is a fund sacredly set apart for the payment of partnership and corporation creditors, before it can be appropriated to the use of individual partners or corporators."

The principal office of the trust fund doctrine is to preserve the capital of a corporation as a fund for the payment of its debts against withdrawal by stockholders.[27] It fails to explain the right of creditors where the corporation has no res to hold in trust, no asset or right against the stockholder such as a contract to pay the par value. A trust may be impressed upon un-

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Co., (1860) 13 Wis. 57; 2 Morawetz. Corps. 780, 781, 790, 820. See also Hatch v. Dana, (1879) 101 U.S. 205, 210, 25 L.Ed. 885; Scoville v. Thayer, (1881) 105 U.S. 143, 26 L.Ed. 968; Camden v. Stuart, (1892) 144 U.S. 104, 36 L.Ed. 363, 12 S.C.R. 585.

[22](1824) 3 Mason (C.C.) 308, 30 Fed. Cas. No. 17, 944.

[23](1875) 91 U.S. 56, 23 L.Ed. 220.

[24](1873) 17 Wall. 610, 21 L.Ed. 731.

[25]Lebens v. Nelson, (1921) 148 Minn. 240, 245, 181 N.W. 350; Mackall v. Pocock, (1917) 136 Minn. 8, L.R.A. 1917C 397, 161 N.W. 228.

[26]3 Pomeroy, Eq. Jur. 4th. Ed. Sec. 1046.

[27]Upham v Bramwell, (Or. 1922) 209 Pac. 100, 121; Mackall v. Pocock, (1917) 136 Minn. 8, 12, 161 N.W. 228, L.R.A. 1917C 390, 397, 399.

paid subscriptions to stock, but where the stockholder is under no subscription obligation to the corporation itself what is there for the corporation to hold in trust?[28] Issuing shares wholly or partly as a bonus is not a disposition of corporate assets like paying dividends out of capital, because unissued stock is no asset. The statement of authorized capital stock in the certificate creates merely authority to raise capital.

In the leading case of *Hospes v. Northwestern Mfg. & Car Co.*,[29] Judge Mitchell in one of his most celebrated opinions, criticized and in effect repudiated the trust fund theory at least as the foundation of the stockholders' liability on watered or bonus stock. He placed this liability on the basis of fraud, actual or constructive. Prior to the *Hospes case,* as we have seen, the Minnesota court had recognized the trust fund doctrine, and for certain purposes, at least, particularly to prevent withdrawal of capital, it is no doubt still operative in this state.[30] Both the trust fund and the fraud doctrines are recognized in Illinois and enforced where applicable.

In the *Hospes case* the Minnesota Thresher Mfg. Co., filed a complaint in the insolvency proceedings pending against the Northwestern Mfg. and Car Co., against one hundred or more stockholders of the insolvent corporation to compel them to pay to the receiver the face value of the common stock issued to them as a bonus. In passing upon the nature and basis of the liability of the holders of watered stock, Judge Mitchell denied the necessity or expediency of inventing any such theory as the trust fund doctrine.

According to Judge Mitchell the right of creditors to compel holders of bonus stock to pay for it, contrary to their actual agreement with the corporation, rests neither upon implied contract nor upon any trust fund doctrine, but upon the ground of fraud. The fraud consists in the misrepresentation as to the actual amount of capital, upon the faith of which persons have dealt with a corporation and given it credit. Since it is only those creditors who have relied on, or who can fairly be pre-

[28]O'Bear Jewelry Co. v. Volfer & Co., (1894) 106 Ala. 205, 17 So. 528, 28 L.R.A. 707; 20 Harv. L. Rev. 401; 6 Fletcher, Corp. sec. 4095.

[29](1892) 48 Minn. 174, 50 N.W. 1117. 31 A.S.R. 637, 51 L.R.A. 470.

[30]Farnsworth v. Robins, (1887) 36 Minn. 369, 371, 31 N.W. 350; Mackall v. Pocock, (1917) 136 Minn. 8, 161 N.W. 228. In L.R.A. 1917C 397 the annotator speaks of this case as a virtual abandonment of the attitude of Justice Mitchell in the Hospes case, in other words a recognition of the trust fund theory. Johnson v. Canfield-Swigart Co., (1920) 292 Ill. 101, 126 N.E. 608; 15 Ill. L. Rev. 217.

sumed to have relied on, the stock representing actual capital, who can claim an equity to enforce payment of such stock, payment can never be enforced in favor of one who became a creditor before the bonus stock was issued. As to subsequent creditors, it is also a matter of defense to show that the creditor had knowledge of the arrangement by which the bonus stock was issued, which negatives the presumption that he gave credit on the faith of it.

In *First National Bank of Deadwood v. Gustin Minerva Mining Co.*,[31] it was laid down by Judge Mitchell that:

"It is only those creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, who have a right to make such inquiry, or in whose favor equity will impress a trust upon the subscription to the stock, and set aside a fictitious arrangement for its payment. . . Where corporations have organized and engaged in business with a certain amount of ostensible and professed paidup capital, but which was not in fact paid in, there are numerous cases in which the courts have set aside the arrangement by which the stock was called 'paid-up,' and impressed a trust upon the subscription of the shareholder in favor of subsequent creditors who relied upon, or whom the law would presume to have relied upon, the apparent and professed amount of capital.[32]

"If a corporation issue new shares after the claim of the creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them. Whatever was contributed as capital in respect of the new shares was a clear gain to the creditor's security."

"So, too, if a party deals with a corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in and has no equitable right to insist on the contribution of a greater amount of capital by the shareholder than the corporation itself could claim as part of its assets."[33]

This idea of fraud is again emphasized by Chief Justice Start in *Wallace v. Carpenter Electric Heating Mfg Co.*,[34] which was an equitable action by judgment creditor to enforce payment of

[31](1890) 42 Minn. 327, 333, 44 N.W. 198, 18 A.S.R. 510, 6 L.R.A. 676.

[32]Citing Sawyer v. Hoag, (1873) 17 Wall. 610, 21 L.Ed. 731; Wetherbee v. Baker, (1882) 35 N.J.Eq. 501.

[33]Citing Coit v. Gold Amal. Coal Co., (1882) 14 Fed. 12; affirmed 119 U.S. 343, 30 L.Ed. 420, 7 S.C.R. 231.

[34](1897) 70 Minn. 321, 73 N.W. 189, 68 A.S.R. 530. See, also, Randall Pr. Co. v. Sanitas Water Co., (1913) 120 Minn. 268, 139 N.W. 606; Downer v. Union L. Co., (1911) 113 Minn. 410, 416, 129 N.W. 777; State Bank v. Kenny, etc., Co., (1919) 143 Minn. 236, 173 N.W. 560.

his judgment by a stockholder of the debtor corporation on the ground that its stock was fraudulently issued as fully paid up when in fact it was not. Start C. J. declares that the issuing of stock as fully paid up when in fact it is not, is a cheat and a fraud which enables a corporation to obtain credit and property by false pretenses and misrepresentation of its assets.

Probably the most important consequence of the fraud or holding out theory is the limitation of the stockholders' liability on watered or bonus stock to subsequent creditors without notice. This limitation is observed in a majority of jurisdictions.[35] But in some states the creditor may recover from the stockholder even though he extended credit prior to the issue of the stock or with full knowledge that the subscription was not paid in full.[36] This result is usually based in part at least on statutory construction. But it could also be reached as a matter of common law if the right of the creditor is really derived through an obligation owed to the corporation, and does not accrue to the creditor directly upon a kind of tort liability in the nature of deceit. It should be noted that the statutory double liability is imposed both in favor of prior and subsequent creditors.

In *Easton National Bank v. American Brick & Tile Co.*,[37] it is held that under the New Jersey General Corporation Act of 1875, a creditor's knowledge that stock was improperly issued as "full paid" and as "issued for property purchased," when the fact was otherwise, is not sufficient to debar him from relief against recipients of the stock. As Pitney, J. says, if the only foundation of the stockholders' liability to creditors is that of

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[35]See Minn. cases cited above; also Sherman v. Harley, (1918) 178 Cal. 584, 174 Pac. 901, 7 A.L.R 950; Hill v. Silvey, (1888) 81 Ga. 500, 8 S.E. 808, 3 L.R.A. 151; First National Bank of Chanute v. Northrup, (1910) 82 Kan. 638. 109 Pac. 672, 136 A.S.R. 119; Scott v. Luehrman, (1919) 278 Mo. 638, 213 S.W. 855; Shields v. Clifton Hill Land Co., (1894) 94 Tenn. 123, 154, 28 S.W. 668 but see Jones v. Whitworth, (1895) 94 Tenn. 602, 30 S.W. 736; Gogebic Inv. Co. v. Iron Chief Co., (1891) 78 Wis. 427, 47 N.W. 726, 23 A.S.R. 417; Thompson, Corps, sec. 3945, 3983; 2 Morawetz, Corporations sec. 829.

[36]Easton National Bank v. American B. & T. Co., (1906) 70 N. J. Eq. 732, 64 Atl. 917, 8 L.R.A. (N.S.) 271; J. W. Cooney Co. v. Arlington Hotel Co., (1917) 11 Del. Ch. 286, 101 At. 879, 890; Dupont v. Ball, (1918) 11 Del. Ch. 430, 106 At. 39, 7 A.L.R. 955; Sprague v. National Bank, (1898) 172 Ill. 149, 50 N.E. 19, 42 L.R.A. 606, 64 A.S.R. 17; Gillett v. Chicago, etc., Co., (1907) 230 Ill. 373, 82 N.E. 891; Rosoff v. Gilbert Transportation Co., (1915) 221 Fed. 972, (Under Conn. Statute).

[37](1906) 70 N.J.Eq. 743, 64 Atl. 921, 10 Ann. Cas. 84, 8 L.R.A. (N.S.) 271. See Volney v. Nixon, (1905) 68 N.J.Eq. 605, 60 Atl. 189.

having held out the issued stock as a source from which payment might be expected, then it would not be irrational to debar from any claim creditors whose claims accrued prior to the stock issue in question, and subsequent creditors who had notice. But in New Jersey, stockholders' liability upon watered stock does not depend on the theory of fraud or "holding out." It depends upon the stockholders' statutory obligation that the stock subscription be made good for the benefit of creditors of insolvent companies. The obligation is owed by the holders of watered stock without distinction between prior and subsequent creditors, or between creditors who have had notice and those who had none. Watered stock, under whatever device, is absolutely alien to the statutory policy of the state, which prohibits that stock be issued without the receipt of an equivalent in value.

It is submitted that the constructive fraud doctrine, as laid down in the *Hospes case* and the subsequent Minnesota cases, is no more sound or satisfactory as a basis for the stockholders' liability than the trust fund doctrine. In the first place the stockholder, by accepting a certificate of watered stock doesn't make any actual representation to the creditor that he has paid for the stock in full and it seems difficult to convict him of having participated in any.[38] As a general thing the creditor doesn't know how much of the authorized capital stock has been actually issued.

In the second place it seems a pure fiction to say, as Morawetz and many courts have said, that the amount of capital stock is fixed for the purpose of obtaining commercial credit by indicating to the community what security has been provided for those who deal with the corporation.[39] The amount of authorized capital stock of a corporation is usually fixed partly with a view to the maximum amount of capital to be raised by an issue of stock, and partly in view of the organization and annual franchise taxes which are levied on the basis of the amount of authorized capital. According to the fraud theory each stockholder represents to every creditor that for each share of stock issued to him 100% par value has actually been paid into the treasury of the company.

Various writers on non-par stock have clearly pointed out that as a business reality the amount of outstanding stock pur-

[38]See Hunt, Trust Fund Theory, 12 Yale L. J. 63.
[39]See 2 Morawetz, Corp. Sec. 781.

porting to be fully paid up affects the question of corporate credit very little, if at all. The time has gone by, if it ever existed, when creditors rely on the professed capitalization rather than upon the real financial condition in extending credit.[40]

The fictitious basis of this fraud doctrine clearly appears when we find that the supposed reliance of the creditor is *presumed* and that public policy requires that the fact whether a particular creditor did or did not trust the corporation on that basis should not be inquired into.[41] It is apparent from this that the rule is really based upon reasons of convenience, public policy, and practical justice and that the supposed fraud is fraud in law or imaginary fraud rather than actual fraud. In other words it is merely a name for something else.

The capital stock of a corporation is the basis of its credit, not because of actual reliance by creditors on the precise amount of stock issued, but because the contributions of the stockholders are the substitute for their personal liability. It is not any misrepresentation of fact as to the amount of paid-in capital which is the basis of liability, but the obligation imposed by law on the stockholder to contribute capital as an incident of membership in a limited liability corporation. This obligation is in the nature of an asset of the corporation and should be available to prior creditors and to subsequent creditors with notice as well as to those whose debts were contracted after the subscription without notice. The law assures to those dealing with the company, where the liability is limited, that the whole of the subscribed capital shall remain available for the discharge of its liabilities, except as diminished by losses and expenditures in the course of business. Capital may be lost in carrying on the business and the stockholder is not bound to replace it or keep it unimpaired except in banks and financial corporations; but he cannot escape his obligation to contribute by any fictitious arrangement with the corporation or by withdrawing his contribution to the prejudice of creditors.[42]

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[40]Bank v. Belington Co., (1902) 51 W. Va. 60, 41 S.E. 390; State v. Sullivan, (1920) 282 Mo. 261, 221 S.W. 728; 1 Machen, Corp. sec. 786; Rice & Harno, Shares With No Par Value, 5 MINNESOTA LAW REVIEW, 494.

[41]Dwinnell v. Minn. F. & M. Ins Co., (1906) 97 Minn. 340, 347, 106 N.W. 312; Randall Printing Co. v. Sanitas Water Co., (1913) 120 Minn. 268, 139 N.W. 606, 43 L.R.A. (N.S.) 706; R. H. Herron Co. v. Shaw, (1913) 165 Cal. 668, 133 Pac. 488, Ann. Cas. 1915A 1265.

[42]See Buck v. Ross, (1896) 68 Conn. 29, 31, 35 Atl. 763, 57 A.S.R. 60; Handley v. Stutz, (1891) 139 U.S. 417, 35 L. Ed. 227, 11 S.C.R. 530; Minn. G.S. 1913, sec. 6193.

The true theory of stockholders' liability upon watered and bonus stock thus appears to be that of an obligation imposed by law on original subscribers and purchasers with notice to make a contribution to capital for the benefit of creditors as an incident of membership in the corporation.[43] On this theory the stockholder becomes liable without the aid of any fiction of reliance by the creditor on the professed capital. It may be that in imposing such an obligation the courts have been doing legislative work but it is in line with the general policy of the law as to corporations. No one can justly expect to become a member of a corporation and share in the profits of the enterprise without taking some financial responsibility and contributing his share of the capital.[44]

As Judge Mitchel says in *Hospes v. Northwestern Mfg. & Car Co.*:[45]

"The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with and give their credit on the faith of it. They have a right to assume that it has paid in capital to the amount it represents itself as having."

The law accordingly says to the would be stockholder:

"You are not entirely without responsibility for the debts of this enterprise. You must make a contribution of capital to the business to the par value of the stock issued to you as a burden incident to holding such stock, at least where needed to meet the claims of creditors."

No better criterion or standard of limited liability is to be found ready-made than the par value of the stock, as it represents the proportionate interest in the business and the proportion in which the owner should contribute to pay the debts.

An issue of watered stock should be looked at as a double-barrelled transaction: (1) A subscription to the stock, which imposes an obligation to pay the par value; (2) a separate agreement between the subscriber and the corporation that the shares shall be deemed fully paid for an inadequate equivalent, which is to be regarded as a release or conveyance of the claim of the corporation fraudulent as to creditors.

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[43]See Pepper, 34 Am. L. Reg. (N.S.) 448, 457, 459.

[44]Gordon v. Cummings, (1914) 78 Wash. 515, 139 Pac. 489; Holcombe v. Trenton White City Co., (1912) 80 N.J.Eq. 122, 82 Atl. 698.

[45](1892) 48 Minn. 174, 197, 50 N.W. 1117. 31 A.S.R. 637, 15 L.R.A. 470; Wetherbee v. Baker, (1882) 35 N.J.Eq., 501, 511.

While it is very true that the stockholder who takes stock at fifty cents on the dollar does not defraud or do wrong to prior creditors, but whatever he contributes is a clear gain to them, still there is as much reason or justification for holding him upon the obligation to pay up the balance of the par value for the protection of prior as for the protection of subsequent creditors. In reality he does no fraud or wrong to subsequent creditors either. The obligation is a positive one imposed by law; it is an asset of the corporation, in its true nature; and the release of this obligation without fair equivalent, while valid against the corporation, is in effect a fraudulent conveyance as against all creditors in event of subsequent insolvency, because it deprives the corporation of the prescribed basis of financial responsibility, which is demanded by the policy of the law as the price of limited liability. The duty to contribute is an asset of a corporation which may be called a trust fund in the sense that the corporation cannot dispense with or release it as against creditors.

The obligation to contribute capital is theoretically not discharged by fictitious payment. Very often, however, in order to wash out of the watered or bonus stock the danger of liability to pay up its par value to creditors in event of insolvency, the organizers go through a solemn ceremony of legal hocus pocus which is supposedly sufficient to deceive the fiction-loving eye of the law, and which has become a part of the customary rigamarole of corporate organization and stock issues.

The entire authorized capital stock is commonly issued to the promoters by the dummy directors in payment for a mine, a lease, an oil well, a patent, an option, or some other consideration of uncertain value. The fiction consists in the determination by the directors that the value of the property thus acquired is the same as the par value of the stock issued in exchange for it. But the fact that the promoter, as part of the transaction, graciously donates back to the corporation as "treasury stock" a large portion of the stock for which he has just paid in full, shows that the valuation of the property is excessive. It is supposed that the stock can now be sold to the public for less than par as fully paid up and non-assessable, although upon an original issue a liability would attach for the unpaid balance.

The question then arises, what showing will the courts require to set aside the arrangement as a fraud upon creditors? In some jurisdiction the so called *"true value rule"* has been adopted

by the courts. According to this rule, payment for capital stock with property is no payment except to the extent of the true value of the property. If property is taken at an overvaluation the stockholder is liable to make up the deficiency and perform his obligation to give money or money's worth to the full amount of the par value of the stock taken.[46] In other jurisdictions a more lenient standard called the *"good faith rule,"* has been adopted. By this rule the determination by the directors is conclusive unless fraud or intentional or reckless overvaluation can be shown.[47]

This rule seems to be the one adopted in Minnesota. In *Hastings Malting Co. v. Iron Range Brewing Co.,*[48] it is said:

"The value of the property is to be determined, not from subsequent events, but as of the time of the transaction, and from the situation, nature, and condition of the property as they honestly appeared to the parties at the time. Although there was in fact an over valuation, it will not render the stockholders liable for the deficiency if it was the result of an honest mistake or error of judgment."

The test is whether the stockholder was justified in believing, in the exercise of ordinary business sense, that the property was being turned in at fair valuation. This will often turn on whether the value of the property is capable of being readily estimated or ascertained. In *Randall Printing Co. v. Sanitas Mineral Water Co.,*[49] it is said, "a corporation may in good faith issue paid up shares for the purchase of property or for services actually rendered." But equity will inquire into any fictitious arrangement by which stock is issued as fully paid up as a fraud on subsequent creditors without notice. In *State Bank v. Kenny etc. Co.,* it is said that:[50]

"When stock is issued as fully paid upon a grossly inadequate consideration in property transferred, stockholders receiving it will be required to pay the difference between what they paid and par if subsequent creditors who have actually or presumably relied upon the stock as fully paid, require it for the satisfaction of their debts."

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[46]Wm. E. Dee Co. v. Proviso Coal Co., (1919) 290 Ill. 252, 125 N.E. 24, 26; Lanz v. Moeller, (1913) 76 Wash. 429, 136 Pac. 687, 50 L.R.A. (N.S.) 68; 14 C.J. 961.

[47]Coit v. Gold Amalgamating Co., (1886) 119 U.S. 343, 30 L. Ed. 420, 7 S.C.R. 231; 5 Fletcher, Corp. sec. 3576. Clinton Mining & Mineral Co. v. Jamison, (1919) 256 Fed. 597, 167 C.C.A. 607; 14 C.J. 962.

[48](1896) 65 Minn. 28, 34, 67 N.W. 652.

[49](1913) 120 Minn. 268, 274, 139 N.W. 606, 43 L.R.A. (N.S.) 706.

[50](1919) 143 Minn. 236, 173 N.W. 560.

In some jurisdictions additional stock may be issued by a going concern at its market value irrespective of its par value, or the corporation may issue bonus stock in aid of the sale of bonds.[51] Where money is contributed for stock to keep an embarrassed corporation going in the hope of paying its debts, it would be clearly unjust to hold that creditors are entitled to recover more than the amount agreed to be paid.[52] So it has been held that stock may be issued at its full market value to pay corporate debts without obligation to pay up the par value.[53] As Mr. Wickersham points out, if the creditors have the right to rely upon the par value of issued stock, there would seem to be no basis for a distinction between the original issue and any subsequent issue. It is otherwise if it is an obligation to contribute imposed by law, according to circumstances.[54]

By the Minnesota General Statutes, 1913, sec. 6193, it is provided "that no corporation shall issue any shares of stock for a less amount to be actually paid in than the par value of those first issued." This statutory provision, enacted in 1866, leaves little room for doubt that this market price exception to the obligation of paying the par value could not be followed in Minnesota.

Bonds on the other hand, apart from usury laws, may be sold for less than face value.[55] Bondholders are not owners but creditors of the enterprise. They do not enjoy the privilege of sharing the profits with limited liability and so do not come under an obligation to contribute a specified amount to the capital. Under

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[51]Handley v. Stutz, (1891) 139 U.S. 447, 35 L. Ed. 227, 11 S.C.R. 530; Thomas & Brenneman v. Goodman, (1918) 254 Fed. 39, 165 C.C.A. 391; Courtney v. Georger, (1916) 228 Fed. 859, 143 C.C.A. 257; 3 MINNESOTA LAW REVIEW 281; Wickersham, 22 Harv. Law Rev. 319, 331, Trust Fund Theory, Pepper. 32 Am. Law Reg. (N.S.) 175; McMurtrie, 25 Am. L. Rev. 749, Thatcher, 25 Am. Law Review, 940.

[52]Weed etc., R. Co. v. Gainsville, (1904) 119 Ga. 596, 46 S.E. 895; Iowa Drug Co. v. Souers, (1908), 139 Ia. 72, 117 N.W. 300, 19 L.R.A. (N.S.) 115, See Ann. Cas. 1915A 1271.

[53]Clark v. Bever, (1891) 139 U.S. 96, 110, 35 L. Ed. 88, 11 S.C.R. 468; Fogg v. Blair, (1891) 139 U.S. 118, 35 L. Ed. 104, 11 S.C.R. 476. See Hospes v. Northwestern Mfg. & Car Co., (1892) 48 Minn. 174, 197, 50 N.W. 1117, 31 A.S.R. 637, 15 L.R.A. 476.

[54]Wallace v. Carpenter Electric Heating Mfg. Co., (1897) 70 Minn. 321, 73 N.W. 189, 68 A.S.R. 530. See 3 MINNESOTA LAW REVIEW 281, Hospes v. Northwestern Mfg. & Car Co., (1892) 48 Minn. 174, 197, 50 N.W. 1117, 31 A.S.R. 637, 51 L.R.A 470. See also 1 Machen, Corp. 631; 14 C. J. 959. Enright v. Heckscher, (1917) 240 Fed. 863, 153 C.C.A. 549; Donald v. Am. Smelting & Refining Co., (1901) 62 N. J. Eq. 729, 48 Atl. 771, 1116.

[55]Clearwater County State Bank v. Bagley-Ogema Telephone Co., (1911) 116 Minn. 4, 133 N.W. 91, Ann. Cas. 1913A 622; Pueblo Foundry & Machine Co. v. Lannon, (1920) 68 Colo. 131, 187 Pac. 1031.

some statutes, however, bonds are declared void if issued at less than a certain per cent of their face value.[56]

In the last few years twenty-three or more states and the Dominion of Canada have adopted laws authorizing corporations to be formed with stock having no stated par value.[57] The great popularity of this idea of non-par stock arouses a question whether it possesses more than legitimate attractiveness to those interested in the promotion and organization of corporations. It seems to be provided in all the statutes as to non-par stock that it shall be deemed fully paid and non-assessable. The holder of the shares is not liable to the corporation nor to the creditors on the stock, no matter how little has been paid. This provision renders inapplicable the great mass of law on stockholders' liability on bonus and watered stock. Stock without par value can be issued as fully paid for contracts, patents, mines, or promotion services. This insures promoters and organizers against liability to creditors based on over-valuation of assets. It furnishes a very convenient means of providing liberally for those who have promoted or brought about the organization of the corporation.

Some possible objections to no-par stock which need more careful attention than the present laws give, are: First, the ease of inflation and the danger of manipulation by issuing large amounts of stock for property of little value;[58] Second, the possibility of frauds on investors by diluting the stock already issued by subsequent issues at lower prices; theoretically the subscription price of the stock should be uniform and equal; at least in the beginning the subscriber should have some assurance that others will not pay less than he is required to pay; Third, the absence of any convenient basis of taxation for organization and franchise taxes;[59] Fourth, the lack of sufficient protection to creditors, only

[56]In re Valecia Condensed Milk Co., (1916) 233 Fed. 173, 147 C.C.A. 183; Thompson, Corp. sec. 2241, 2246.

[57]Ala. (1919); Cal. (1917); Colo. (1921); Del. (1917); Idaho (1921); Ill. (1919); Kan. (1921); Me. (1917); Md. (1916); Mass. (1921); Mich. (1921); Mo. (1921); N.H. (1919); N.J. (1920); N.Y. (1912); N.C. (1921); Okla. (1919); Pa. (1919); R.I. (1919); Utah (1921); Va. (1918); W. Va. (1920); Wis. (1919); Canada, (1917).

The following states have issued licenses to admit foreign corporations having shares without par value to do business in the state. Ark., Colo., Fla., Md., Iowa., Ky., Minn., Mont., Nev., N. Dak., Ore., S. Dak., Tex., Vt.

The right to do business as a foreign corporation has been refused in six states: Ga., Neb., N. Mex., S. Car., Tenn., and Washington. See Rice & Harno, Non-Par Value Stock, 56 Am. L. Rev. 329.

[58]Cook, 19 Mich. L. Rev. 583, 592; 7 Am. Bar Assn. 534.

[59]Pierson, Stock Having No Par Value, 17 Ill. L. Rev. 173, 184.

a small amount of capital usually being required to be paid in as a basis of financial responsibility at the start, with no provision for increase later.

The principal arguments advanced in favor of no-par stock are:

1. That the par value is misleading to investors. It is supposed that misrepresentation or misunderstanding arises through the difference between the actual value and the par value. Some writers seem to labor under the misapprehension that it is the doctrine of the law that the assets or capital of the corporation shall at all times equal the face value of the stock, and that the par value of the stock is an index to the assets of the corporation.[60] That, however, is only the case with banks and financial corporations. Shares are supposed to represent membership based on specified sums of money contributed to capital. The par value of issued stock is not supposed to be the index of the financial condition for the information of investors and creditors and is probably not relied upon as such. No doubt inexperienced persons are sometimes misled into subscribing for stock at a discount or taking it as a bonus with no idea of the liabilities thereby incurred.

2. A more substantial argument is that some method should be provided to give an interest in the profits to persons concerned as founders and organizers, regardless of the actual contribution in money or property which they make to the corporation's capital. Capital isn't everything in a corporation any more than in a partnership. At present this can be accomplished only by subterfuge and indirection.

3. It is desirable that a going concern should be able to increase its capital by a new issue of stock, to be sold at the market price, rather than to be compelled to increase its fixed charges by an issue of bonds if the stock has fallen below par. It ought to be possible also to give a bonus of common stock with bonds or preferred stock to add a speculative attraction to the investment.

4. A strong argument in favor of the no-par stock would seem to be that the performance of the obligation to pay the par value of stock is usually fictitious. The courts apply more or less uncertain tests to determine the liability of the stockholder

[60]Rice & Harno, Shares With No Par Value, 5 MINNESOTA LAW REVIEW 493, 497; 56 Am. L. Rev. 321, Thompson, Corporations, 1922 Supplement, Sec. 3447; Morawetz, 26 Harv. L. Rev. 729.

when the creditors call upon him to pay the difference between the face value of the stock and the value of property transferred. The liability of the stockholder is thus left in doubt and uncertainty. The attempt to enforce proper contributions of capital and to safeguard creditors in this manner is largely a failure and should perhaps be abandoned in favor of something else. The amount of capital which a corporation must have as a basis of financial responsibility may be fixed without reference to the number of shares issued, by an amount to be stated in the charter or articles of incorporation. The present non-par laws, however, seem very inadequate in this regard.

There may be some doubt, in view of the Minnesota constitutional double liability provision that "stockholders in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the *amount of stock* held or owned by them," whether it is possible for the legislature of this state to provide for no-par stock. The difficulty might perhaps be met if the statute should provide that "the amount of the stock" for purposes of stockholder's liability, but for no other purpose, should be taken to be of the par value of $100 per share." It has recently been held, however, that a statute which places a value of $100 per share on stock of no par value, for purposes of taxation, is unconstitutional, as arbitrary, discriminatory, and unequal.[60a]

III. Rights of Creditors Against Stockholders by Reason of Constitutional or Double Liability

Statutes and constitutional provisions have been adopted in some states for the purpose of providing a security for creditors in addition to the security furnished by the company's capital. Statutes providing that stockholders shall be liable to the par value of their stock impose little more liabiity than would exist in equity. Statutes imposing an additional liability to an amount equal to the par value of the stock, that is a double liability, are now rare except in the case of banks. In California a peculiar statutory liability is imposed for each debt in proportion to the amount or value of the stock held.[61] In some states individual

[60a] People ex rel. Walsh v. Tax Commissioners, (App. Div. N. Y. 1922) 195 N.Y.S. 184; See also People ex rel. v. Mensching, (1907) 187 N.Y. 8., 79 N.E. 884, 10 L.R.A. (N.S.) 625, 10 Ann. Cas. 101.

[61] Sacramento Bank v. Pacific Bank, (1889) 124 Cal. 147, 56 Pac. 787, 71 A.S.R. 36.

liability is imposed upon stockholders until the entire or a specified amount of the capital stock has been paid in; in others there is a liability for particular debts such as those due laborers; by some statutes penal liabilities are imposed for failure to file reports or otherwise comply with the requirements of the corporation laws.[62]

It is the policy of Minnesota as expressed in our present constitution, that stockholders of corporations should be individually liable to a limited amount and that the measure of such liability should be a sum equal to the par value of the stock owned or held by them. Mr. Justice Miller, of the United States Supreme Court, speaking of the distinction between joint stock companies and corporations, said in 1870:[64]

"The principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and is a principle which has warm advocates for its universal application when the organization is for pecuniary gain."

This is certainly no longer the attitude of those who make the corporation laws of this country. The great advantage of incorporation is the exemption of the stockholder from individual liability, except for the par value of the stock held. When this is once paid there is at common law no further liability. Double or superadded liability by statute is common in case of banks, but as to other classes of corporations it has become exceptional. The policy of American corporation law at the present day is to encourage enterprise, and to favor the interests of the investor as against the creditor.

As Cook says:[65]

"This class of statutes, except in the case of banks, have proved signal failures. They drive corporations from the state, are rarely relied upon by creditors, and are productive of interminable litigation."

Business men may well hesitate to incorporate large or speculative enterprises in Minnesota and incur the risk that the stockholders will be held as guarantors to creditors in case of failure. When the incorporation is applied for in another state no such liability will be incurred. Stockholders of a foreign corporation

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[62]3 Clark & Marshall, Corps. sec. 806; Minn. G.S. 1913. 6178-2; 4 C. J. Corp. p. 980. Natl. New Haven Bank v. Northwestern Guaranty Loan Co., (1895) 61 Minn. 375, 63 N.W. 1079.

[63]Willis v. Mabon, (1892) 48 Minn. 140, 149, 50 N.W. 1110.

[64]Liverpool Ins. Co. v. Mass., (1870) 10 Wall. (U.S.) 566, 9 L. Ed. 1029; quoted by Lurton J. in Andrews Bros. Co. v. Youngstown Coke Co., (1898) 86 Fed. 585.

[65]Stock and Stockholders, sec. 215.

doing business here escape this double liability altogether, being subject only to such liability as is imposed by the state of incorporation. We thus favor the stranger within our gates and lose the benefit of large incorporation fees, regulatory power and the convenience of domestic incorporation owing to dangerous and unusual liabilities not imposed on stockholders of foreign corporations.

Section 3, article 10 of the Minnesota constitution provides:

"Each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him."

The effect of this provision is stated as follows by the United States Supreme Court:[66]

"The provision is self-executing, and under it each stockholder becomes liable for the debts of the corporation in an amount measured by the par value of his stock. This liability is not to the corporation but to the creditors collectively, is not penal but contractual, is not joint but several, and the mode and means of its enforcement are subject to legislative regulation."[67]

The constitutional amendment of 1872 excepted the stockholders of manufacturing and mechanical corporations from the personal liability imposed by article 10, section 3, of the constitution upon stockholders of all corporations. The purpose of this amendment, as stated by Justice Mitchell, was to encourage manufacturing enterprises by exempting those investing their capital in that business from personal liability.[68] It was held that to extend this exemption to corporations combining manufacturing with some other distinct and independent business would defeat the object of the amendment of 1872 and also nullify the constitutional provision imposing liability on the stockholders of all but manufacturing and mechanical corporations.

As is said by Brown, C. J.:[69]

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[66]Converse v. Hamilton, (1912) 224 U. S. 243, 253, 255, 56 L. Ed. 749, 32 S.C.R. 415.

[67]Citing: Willis v. Mabon, (1892) 48 Minn. 140, 50 N.W. 1110, 31 A.S.R. 626, 16 L.R.A. 281; Minneapolis Baseball Co. v. City Bank, (1896) 66 Minn. 441, 446, 69 N.W. 331; Hanson v. Davison, (1898) 73 Minn. 454, 76 N.W. 254; Straw & Ellsworth Mfg. Co. v. Kilbourne Boot & Shoe Co., (1900), 80 Minn. 125, 83 N.W. 36; London & North West American Mortgage Co. v. St. Paul Park Improvement Co., (1901) 84 Minn. 144, 86 N.W. 872; Bernheimer v. Converse, (1907) 206 U.S. 516, 51 L. Ed. 1163, 27 S.C.R. 755.

[68]State ex rel. Clapp v. Minnesota Thresher Mfg. Co., (1889) 40 Minn. 213, 222, 41 N.W. 1020, 3 L.R.A. 510.

[69]Graff v. Minnesota Flint Rock Co., (1920) 147 Minn. 58, 179 N.W. 562.

"If the corporation under the authority reserved to it by its articles of incorporation, lawfully may engage in any business or occupation other than manufacturing, not incidental to nor allied therewith, the constitutional exemption from liability does not apply. . . A manufacturer is one who by labor, art, or skill transforms raw material into some kind of a finished product or article of trade."

As stated by Judge Mitchell in another case:[70]

"If the corporation is organized for the purpose, as declared in the articles of association, of carrying on both a manufacturing business and also some other kind of business not properly incidental to or necessarily connected with a manufacturing business, the mere fact that the corporation never exercised all its corporate powers, and never in fact engaged in or carried on anything but a manufacturing business, will not bring the case within the constitutional exception."

A "mechanical business," within the meaning of the constitutional exception, is one incidental to or closely allied with some kind of manufacturing business. It is held that the mining of iron ore is such a mechanical business and the stockholder of a corporation organized for that purpose is exempt from the stockholder's double liability.[71] But a corporation authorized by its articles to speculate in mineral lands, in addition to the power to mine and work ores, is not organized for the purpose of an exclusively mechanical business.[72]

The fact that a manufacturing corporation engages in a line of business not authorized by the articles of incorporation, does not subject the stockholders to double liability.[73] What the situation would be, however, if a corporation were organized for the very purpose of evasion of the law as a manufacturing company, if only a trifling part of the business actually transacted were manufacturing, and the real object of the organization was the carrying on of some other kind of business such as buying and selling, has not been settled as yet by the decisions of this state.[74]

Corporations which "embrace banking privileges" are excepted from the operation of article 10, section 3 of the constitution by article 10, section 1. But it is held that stockholders of a banking

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[70]Arthur v. Willius, (1890) 44 Minn. 409, 415, 46 N.W. 851.

[71]Cowling v. Zenith Iron Co., (1896) 65 Minn. 263, 68 N.W. 48, 60 A.S.R. 471, 33 L.R.A. 508.

[72]Anderson v. Anderson, (1896) 65 Minn. 281, 68 N.W. 49, 33 L.R.A. 510.

[73]Nicollet Nat. Bank v. Frisk Turner Co., (1898) 71 Minn. 413, 74 N.W. 160, 70 A.S.R. 334.

[74]See Mohr v. Minnesota Elevator Co., (1889) 40 Minn. 343, 346, 41 N.W. 1074; Arthur v. Willius, (1890) 44 Minn. 409, 416, 46 N.W. 851.

corporation organized under the laws of this state, which is not a bank of issue or circulation, are liable under article 10, section 3, for the debts of the corporation. The clause, "except such as embrace banking privileges" refers only to banks of issue or circulation whose stockholders are made liable by article 9, section 13.[75] The constitutional liability, which constitutes a reserve or trust fund for the benefit of creditors, is not discharged by the payment of an assessment upon bank stock levied pursuant to orders given by the public examiner on account of an impairment of the bank's capital, and to enable it to re-open its doors and continue its banking business.[76]

The methods of avoiding stockholders' liability are: First, to organize as a manufacturing or mechanical corporation; Second, to issue only a few shares of low par value and to capitalize the corporation by an issue of bonds secured by mortgage. This will have the advantage of giving the owners priority over general creditors; also the bonds may be deducted from property in a statement of tangible property, or the interest from income, and thus bring about a reduction of taxes.[77] The third and usual method is to incorporate in another state such as South Dakota, where the taxes are low, and either do business in Minnesota as a foreign corporation or organize a small local operating company with a nominal capitalization as local agent.

The nature of the constitutional liability of stockholders is described in *Northwestern Trust Co. v. Bradbury*[78] as being "for all practical purposes a reserve or trust fund, to be resorted to only in proceedings for liquidation, when necessary to meet the obligations of the corporation. It is limited to an amount equal to the par value of the stock held and owned by each stockholder, and exists in favor of the creditors collectively, not severally, and in proportion to the amount of their respective claims against the corporation. No single creditor can enforce payment of his debt against any one or more of the stockholders, because he has no several or independent right to the fund."

It follows from this that:

"A stockholder cannot, by the voluntary payment of the full quota of his liability to a particular creditor or set of creditors,

[75]Northwestern Trust Company v. Bradbury, (1910) 112 Minn. 76, 127 N.W. 386; International Trust Company v. American Loan & Trust Company, (1895) 62 Minn. 501, 65 N.W. 78, 632; Allen v. Walsh, (1879) 25 Minn. 543, 541.

[76]Northwestern Trust Company v. Bradbury, (1912) 117 Minn. 83, 134 N.W. 513, Ann. Cas. 1913D 69.

[77]Conyngton, Corp. Procedure sec. 93.

[78](1912) 117 Minn. 183, 134 N.W. 513.

discharge his further responsibility. . . a trust fund designed for the benefit of all creditors would be thus unfairly distributed, and those most deserving, perhaps, deprived of the benefit the law intended to confer upon them."

The constitutional liability of stockholders does not depend upon presumed reliance or estoppel but extends to present as well as to future creditors, unlike liability upon watered or bonus stock.[79] The stockholder is liable as long as he holds his stock, although he may have a right of action to rescind his stock subscription if induced by fraud of the corporation.[80] It has been held that a renewal of a certificate of deposit by the issue of a new one in lieu thereof, after transfer of bank stock, creates a new debt and relieves the former stockholder from his liability.[81] When a corporation is declared insolvent and goes into the hands of a receiver all corporate debts mature. The stockholders' liability becomes fixed as of that date for whatever deficiencies then exist; the cause of action then accrues so as to set the statute of limitations running.[82]

Under the laws of California a stockholder of a domestic or foreign corporation is liable for his proportion of the debts of a corporation as a principal and not as a surety. The California constitutional provision makes the liability of the stockholder that proportion of the creditor's total claim which the amount of stock owned by the shareholder at the time the debt was contracted bears to the whole subscribed capital stock.[83] The California statute imposes a primary and direct liability to the creditor which can be enforced in an action against the stockholder independent of any judgment against the corporation. The stockholder is liable individually, as a principal debtor, not as a surety or guarantor.[84]

The Minnesota statute on the other hand imposes a secondary liability to contribute to a fund to be distributed by a court of equity among the creditors equally. The stockholders are in the position of sureties or guarantors for the debts of the corpora-

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[79]Olson v. Cook, (1894) 57 Minn. 552, 561, 59 N.W. 635; First National Bank v. Winona Plow Co., (1894) 58 Minn. 167, 59 N.W. 997.

[80]Bartlett v. Stephens, (1917) 137 Minn. 213, 163 N.W. 288.

[81]Seymour v. Bank of Minnesota, (1900), 79 Minn. 211, 81 N.W. 1059. Compare L.R.A. 1915B 168 n.

[82]Shearer v. Christy, (1917) 136 Minn. 111, 114, 161 N.W. 498.

[83]Gardner v. Bank of Napa, (1911) 160 Cal. 177, 117 Pac. 667.

[84]Ellsworth v. Bradford, (1921) 199 Pac. 335.

tion.[85] The discharge of the corporation in bankruptcy does not extinguish the debt or release the surety from liability.

It seems that the stockholder's constitutional liability is secondary to the liability upon watered or bonus stock. In *Hosford v. Cuyuna Minneapolis Iron Co.*[86] one contention was that the primary liability of stockholders who paid the corporation nothing or less than par for the stock they had obtained, had not been taken into consideration. It was also contended that all persons who obtained any of the stock without paying for it in full should be compelled to pay for it before the stockholders' liability was enforced. Lees, C., says "there seems to be substantial basis for this assertion," but it was held that the court was justified in assessing the stockholders unless the corporate assets available were clearly sufficient to pay the corporate debts in full and without delay and that the assessment should stand unless palpably beyond all reasonable necessity. It would seem that the statutory liability is the ultimate resource of the creditors, the last resort, and that the assets of the corporation, including the liability of the stockholder to pay for his shares in full, are primarily liable for the corporate debts.[87]

In general where a stockholder makes a complete sale and transfer of his stock, and the transfer is duly registered, a novation or substitution is produced and the transferee is the one liable for future calls for the unpaid balance due on the stock.[88] The stockholders' liability for unpaid subscriptions does not continue after he has transferred the stock, except when the transfer was made for the purpose of defrauding creditors.[89] But if the transfer is made without consideration after the company has become insolvent this makes out a prima facie case of fraud upon creditors.[90]

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[85]Way v. Barney, (1911) 116 Minn. 285, 133 N.W. 801, Ann. Cas. 1913A 719.

[86](Minn. 1922) 189 N.W. 1025.

[87]See also Dupont v. Ball, (1918) 11 Del. Ch. 430, 106 Atl. 39, 7 A.L.R. 955; Weil v. Defenback, (1918) 31 Idaho 258, 170 Pac. 103; Peter v. Union Mfg. Co., (1897) 56 Ohio St. 181, 202.

[88]Basting v. Northern Trust Co., (1895) 61 Minn. 307, 311, 63 N.W. 721; 14 C. J. 780, See Axford v. Western Inv. Co., (1918) 141 Minn. 412, 423, 168 N.W. 97, 170 N.W. 587.

[89]In re Peoples Livestock Insurance Co., (1894) 56 Minn. 180, 186, 57 N.W. 468.

[90]McConey v. Belton Oil Gas Co., (1906) 97 Minn. 190, 198, 106 N.W. 900.

A transferee of under-paid stock who doesn't participate in the transaction whereby the stock was issued and who purchases the stock on a representation by the corporation that the stock is fully paid cannot be held liable to creditors of the corporation for the difference between the price paid and the par value of the stock.[91] Whether on the fraud theory a transferee with notice can be held on bonus or underpaid stock to a creditor who became such after the issue of the stock, but prior to the transfer, query?

A shareholder in a corporation cannot escape his constitutional liability for the debts of the corporation even by a bona fide sale of the stock to a solvent party and a transfer on the books of the corporation.[92] Nor can he escape by selling or surrendering his stock to the corporation.[93] After transfer of the stock the liability rests primarily upon the transferee. While the transferor is not released from liability from the then existing debts of the corporation, his liability, thereafter, becomes secondary to that of the transferee, and the liability of both is secondary to that of the corporation. A valid extension of time for payment granted by a creditor to the corporation without the consent of the stockholder who has previously transferred his stock operates to release such stockholder from his liability as surety for the debt, but the burden is upon the stockholder to show that such extension was made without his consent.[94]

IV. Method of Enforcement.

1. *Statutory or Double Liability.* The statutes give the individual creditor no right of action against the individual stockholder. Since the decision in *Allen v. Walsh,* [95] the law applicable to the enforcement of the constitutional liability has been settled, that the only remedy is by proceedings brought in behalf of all the creditors and that this, being the remedy prescribed by statute, is exclusive.[96] The proper form of action in which to enforce the

[91]Rhode v. Dock Hop Co., (1920) 184 Cal. 367, 194 Pac. 11, 12 Am. L. R. 437, 449; Bowen v. Imperial Theaters Inc., (Del. Ch. 1922) 115 Atl. 918. See Warren, 34 Harv. L. Rev. 287; 9 Cal. L. Rev. 238.

[92]Minn. G.S. 1913, sec. 6177, Tiffany v. Gieson, (1905) 96 Minn. 448, 105 N.W. 901; Gunnison v. U.S. Investment Co., (1897) 70 Minn. 292, 73 N.W. 149; Selig v. Hamilton, (1914) 234 U.S. 652, 659, 58 L. Ed. 1518, 34 S.C.R. 926, Ann. Cas. 1917A 104.

[93]Lebens v. Nelson, (1921) 148 Minn. 240, 181 N.W. 350; 14A C. J. 280.

[94]Way v. Mooers, (1917) 135 Minn. 339, 160 N.W. 1014. See also Harper v. Carroll, (1896) 66 Minn. 487, 502, 503, 69 N.W. 610, 1069.

[95](1879) 25 Minn. 543, 553.

[96]Northwestern Trust Co. v. Bradbury, (1912) 117 Minn. 83, 89, 134 N.W. 513; McKusick v. Seymour, (1892) 48 Minn. 158, 170, 50 N.W 1114;

double liability of stockholders is sequestration proceedings under what was formerly chapter 76. Prior to the revision of 1905 the statutes relating to sequestration proceedings and the enforcement of stockholders' liability are found in chapter 76, of the various editions of the statutes.[97] The plaintiff must be a judgment creditor who has exhausted his legal remedies by having an execution against the corporation returned unsatisfied. The court may in this proceeding sequestrate the property of the corporation, appoint a receiver, and upon final judgment order the property or its proceeds to be distributed proportionately among the creditors. This is in its nature an equitable action in behalf of all the creditors against the corporation and its stockholders, wherein the debts of the corporation are determined and after exhausting the corporate assets, the liability of the stockholders for any deficiency may be adjudicated and enforced.[98] In *McKusick v. Seymour, Sabin & Co.*,[99] it was pointed out that the stockholders may only be compelled to contribute the deficiency, which can only be estimated after the corporate assets are all distributed among the creditors, which has to be done in the sequestration proceeding, if one is pending. Judge Mitchell says:

"It is entirely consistent with the established equity jurisdiction and in accordance with established equity practice, to forestall a multiplicity of actions by bringing all the litigation into its grasp in one suit for a general accounting and a complete adjustment of all rights.... In fact it is only by sequestrating the corporate assets and enforcing this liability of stockholders in the same proceeding that results equally just and equitable to all parties can be worked out."

Whatever is realized in such a proceeding belongs to all the creditors, or at least to all that class of creditors entitled to participate in the fund, and will be in the custody of the court and distributed by it, or by the receiver under its direction.

Hanson v. Davison, (1898) 73 Minn. 454, 76 N.W. 254; Harper v. Carroll, (1896) 66 Minn. 487. 69 N.W. 610, 1069; Johnson v. Fischer, (1883) 30 Minn. 173, 14 N.W. 799; Mpls. Baseball Co. v. City Bank, (1896) 66 Minn. 441, 69 N.W. 331.

[97]See Minn. R. L. 1905 secs. 3169, 3183, Minn. G.S. 1913 secs. 6634 ff; Dunnell's Digest sec. 2144.

[98]Hanson v. Davison, (1898) 73 Minn. 454, 76 N.W. 254; McKusick v. Seymour, Sabin & Co., (1892) 48 Minn. 158, 50 N.W. 1114; Winnebago Paper Mills Co. v. Northwestern Printing. etc., Co., (1895) 61 Minn. 373, 63 N.W. 1024; Parten v. Southern Col. Co., (1920) 146 Minn. 287, 178 N.W. 744.

[99](1892) 48 Minn. 158, 50 N.W. 1114.

The enforcement of stockholder's liability for corporate debts in sequestration proceedings is now regulated by a statute enacted in 1899.[100] This statute provides a method for the enforcement of any kind of liability, constitutional, statutory, or otherwise, upon a petition by a receiver or assignee of a corporation or of any creditor thereof whose claim has been filed. The statute provides for due notice by publication or otherwise, for a general inquiry into the question whether the available assets will be sufficient to pay the expenses of the proceedings and the indebtedness in full and without delay, and for a ratable assessment upon all parties liable as stockholders for such amount or percentage of such liability upon each share of stock as it shall deem proper. The order is to authorize and direct the assignee or receiver to collect the amount so assessed and upon failure of payment by any stockholders to prosecute an action against them whether resident or non-resident and wherever found.

Proceedings under sec. 6646, Minn. G. S. 1913 upon petition for an assessment against the stockholders of an insolvent corporation are summary and informal. The statute provides that the court shall consider evidence bearing upon the following points: (1) The nature and probable extent of the indebtedness of the corporation; (2) the probable expense of the receivership; (3) the probable amount of available assets; and (4) the persons liable as stockholders, the nature and extent of their liability, and their probable solvency or responsibility; and therefrom determine the propriety and necessity of the proposed assessment. The question is to be determined by the probability of the case.[101] The assessment is but the foundation for the proceedings subsequently to be brought for collection if voluntary payment be not made. If a surplus remains after payment of debts and expenses it is returned to the stockholders.[102]

The proceeding on the petition by the receiver or creditor for an assessment on the stockholders is not an independent suit but is simply a further step in the original sequestration proceedings.[103] The proceedings have two stages: (1) the taking of an account

[100]Laws 1899 C. 272, Minn. R. L. 1905 secs. 3184, 3190, Minn. G.S. 1913, sec. 6645 ff. Way v. Barney, (1911) 116 Minn. 285, 294, 133 N.W. 801.

[101]Hosford v. Cuyuna Mpls. Iron Co., (Minn. 1922) 189 N.W. 1025

[102]See generally Straw & Ellsworth Co., v. L. D. Kilbourne, etc., Co., (1900) 80 Minn. 125, 83 N.W. 36; Van Slyck v. Vanasek, (1916) 132 Minn. 9, 155 N.W. 754.

[103]Ueland v. Haugan, (1897) 70 Minn. 349, 73 N.W. 169.

and the levying of an assessment upon the stockholders; and (2) the collection of the assessment by individual suits by the receiver.

It is said that the proceeding is not materially different from that authorized by the National Banking Act, except that under the latter the assessment is made by the comptroller of the currency, while here the assessment is made by the court.[104]

The order of assessment is, under sec. 6647 G. S. 1913, conclusive upon all of the stockholders as to all matters relating to the amount, propriety, and necessity of the assessment. No person is deprived by the finding however, of opportunity of showing that he is not a stockholder, or that he holds less stock than found, or that he has a set-off available or has any other defence personal to himself.[105] The conclusive effect of the court's order is not dependent on the personal appearance or joinder of the stockholders because they are represented by the corporation.[106] There is no difference between a suit against a stockholder for an unpaid subscription and a claim against him on his superadded liability, so far as the conclusiveness of the assessment is concerned.[107]

An ancillary action may be prosecuted in another state, if necessary, by the receiver appointed to collect and distribute the fund arising from the stockholders' liability in the sequestration proceedings.[108] It is the duty of the courts of other states under the full faith and credit clause to give effect to the orders of the Minnesota courts in making assessments on stockholders, although the stockholders were not personally made parties to the suits in which the orders were made.[109]

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[104]Straw & Ellsworth Co. v. L. D. Kilbourne, etc., Co., (1900) 80 Minn. 125, 83 N.W. 36; Conflict of Laws and Statutory Liability, Abbot, 23 Harv. L. Rev. 37, 43.

[105]Neff v. Lamm, (1906) 99 Minn. 115, 108 N.W. 849. Selig v. Hamilton, (1914) 234 U.S. 652, 659, 58 L. Ed. 1518, 34 S.C.R. 926; Hanson v. Davison, (1898) 73 Minn. 454, 76 N.W. 254; Harrison v. Carman, (1921) 149 Minn. 365, 183 N.W. 826; Abbot, 23 Harv. L. Rev. 37, 44.

[106]Marin v. Augedahl, (1918) 247 U.S. 142, 62 L. Ed. 1038, 38 S.C.R. 452.

[107]Hanson v. Davison, (1898) 73 Minn. 454, 462, 76 N.W. 254.

[108]Hale v. Hardon, (1899) 95 Fed. 747; Hanson v. Davison, (1898) 73 Minn. 454, 76 N.W. 254.

[109]Bernheimer v. Converse, (1907) 206 U.S. 516, 528, 51 L. Ed. 1163, 27 S.C.R. 755; Converse v. Hamilton, (1912) 224 U.S. 243, 56 L. Ed. 749, 32 S.C.R. 415; Selig v. Hamilton, (1914) 234 U.S. 652, 58 L. Ed. 1518, 34 S.C.R. 926, Ann. Cas. 1917A 104; Marin v. Augedahl, (1918) 247 U.S. 142, 62 L. Ed. 1038, 38 S.C.R. 452.

The receiver, as statutory representative of the creditors may sue in aid of the parent proceeding in another state. As is said in *Converse v. Hamilton.*[110]

"Under this statute, as interpreted by the supreme court of the state, as also by this court, the receiver is not an ordinary chancery receiver or arm of the court appointing him, but a quasi-assignee and representative of the creditors, and when the order levying the assessment is made he becomes invested with the creditors' rights of action against the stockholders and with full authority to enforce the same in any court of competent jurisdiction in the state or elsewhere."[111]

2. *Bonus and Underpaid Stock.* The stockholder's liability on bonus and underpaid stock, like the liability on unpaid subscriptions and like double liability, is in general regarded as a fund for the equal benefit of all the creditors entitled to enforce it. They are, as it were, tenants in common of the amount unpaid on the par value of the stock and the amount still due should be apportioned among them all like a trust fund. Accordingly, the proper remedy for its enforcement would seem to be an equitable proceeding in which all persons interested may be joined and their respective rights, equities, and liabilities adjusted and determined after a proper accounting.[112]

Where the liability of stockholders to corporate creditors involves a fund for the benefit of all creditors in proportionate shares, the remedy naturally belongs to a court of equity.[113]

It has been held that payment for bonus stock may be enforced in sequestration proceedings just as the constitutional liability is enforced.[114] An action to enforce payment for stock issued for an inadequate consideration may be joined with an application

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[110](1912) 224 U.S. 243, 56 L. Ed. 749, 32 S.C.R. 415.

[111]Straw & Ellsworth Co. v. L. D. Kilbourne, etc., Co., (1900) 80 Minn. 125, 83 N.W. 36; Bernheimer v. Converse, (1907) 206 U.S. 516, 51 L. Ed. 1163, 27 S.C.R. 755; Converse v. Hamilton, (1912) 224 U.S. 243, 255, 56 L. Ed. 749, 32 S.C.R. 415.

[112]Minnesota Thresher Mfg. Co. v. Langdon, (1890) 44 Minn. 37, 46 N.W. 310; Merchants Natl. Bank v. Northwestern Mfg. & Car Co., (1891) 48 Minn. 361, 51 N.W. 119; McKusick v. Seymour, Sabin & Co., (1892) 48 Minn. 158, 50 N.W. 1114. See Pittsburgh Steel Co. v. Baltimore Eq. Soc., (1913) 226 U.S. 455, 57 L. Ed. 297, 33 S.C.R. 167.

[113]Hornor v. Henning, (1876), 93 U.S. 228, 23 L. Ed. 879; Signor Tie Co. v. Monett, etc. Co., (1912) 198 Fed. 412.

[114]Hospes v. Northwestern Mfg. & Car Co., (1891) 48 Minn. 174, 50 N.W. 1117, Minn. G.S. 1913, sec. 6634. Hastings Malting Co. v. Iron Range Brewing Co., (1896) 65 Minn. 28, 67 N.W. 652; Merchants Nat. Bank v. Northwestern Mfg. & Car Co. (1891) 48 Minn. 361, 364, 51 N.W. 119.

for the enforcement of the constitutional liability.[115] The liability of the stockholders to pay the par value of the stock held by them may be enforced in the sequestration suit upon the petition or complaint of the receiver or of creditors who have become parties to it. The complaint is, as we have seen, not the commencement of an independent action by creditors in their own behalf, but is filed in the sequestration proceeding itself and in aid of it.

Under sec. 6645 Minn. G. S. 1913, the receiver or assignee of a corporation, as well as any creditor, may petition that the court order an assessment to enforce *any kind of liability* of stockholders to creditors. This provision for the enforcement of the liability of stockholders by a ratable assessment does not supersede the equitable remedy for the enforcement of the liability of holders of bonus or watered stock for the difference between its par value and the amount paid for it. Creditors may enforce such liability by a suit in equity in the federal courts.[116] A statutory remedy for the enforcement of liabilities not created by statute is not exclusive.

In the case of *Randall Printing Co. v. Sanitas Mineral Water Co.*, [117] it is said that an action in the nature of a *creditor's bill* to reach unpaid subscriptions for the benefit of all the creditors may be maintained under R. L. 1905 sec. 3173, Minn., G. S. 1913 sec. 6634 to enforce the liability of resident stockholders in a foreign corporation upon underpaid or bonus stock issued for services to be rendered as directors.[118] It is somewhat difficult to see how a "creditors' bill" strictly so called will lie to enforce the liability arising out of the legal fraud which results from the issue of bonus or watered stock. If the present theory is sound that such liability is not an asset of the corporation but is a direct tort liability to the creditor, it would seem rather to be in the nature of a tort action. A judgment creditor's bill is in its essence an equitable action comparable to proceedings supplementary to execution.[119] The stockholder's duty to pay par for his stock is indeed essentially capital of the corporation and that is why it is to be equitably enforced for the benefit of all creditors and not by a race of diligence between creditors.[120]

[115]Northwestern Railroader v. Prior, (1897) 68 Minn. 95, 70 N. W. 869, Fish v. Chase, (1911) 114 Minn. 460, 131 N.W. 631.

[116]Second National Bank of Erie v. Georger, (1916) 246 Fed. 517.

[117](1913) 120 Minn. 268, 139 N.W. 606.

[118]See also McConey v. Belton, (1906) 97 Minn. 190, 106 N.W. 900; assessment not proper as preliminary. Dispatch Printing Company v. Security Bond, etc., Co., (Minn. Jan. 12, 1923.)

[119]Pierce v. United States, (1921) 255 U.S. 398, 402, 65 L. Ed. 404.

Indebtedness of stockholders upon subscriptions to stock is a debt to the corporation itself, not to the creditors. Upon appointment of a receiver of an insolvent corporation, the right to recover unpaid subscriptions, or capital withdrawn and refunded to stockholders passes to the receiver as part of the assets of the corporation.[121] The liability upon bonus and underpaid stock, however, according to the fraud theory, is not and never was an asset of the corporation, for it is due directly to the creditors, and the receiver could not enforce it in the absence of statute.[122] Yet it is held that when a corporation is insolvent and in the hands of a receiver, the right to enforce liability for bonus stock, like the liability to return funds withdrawn from capital on subscriptions unpaid, cannot be asserted by an individual creditor in proceedings independent of the receivership. The duty to pay the par value is regarded as a potential part of the capital.[123] As in the case of double liability stockholders can only be compelled to contribute to the deficiency ascertained after the corporate assets are distributed among the creditors, which has to be done in the sequestration proceeding, if one is pending.[124]

Under the Minnesota doctrine that the stockholders liability for bonus stock is based upon fraudulent representations and that only subsequent creditors who rely upon the representation can recover, the trustee in bankruptcy of the corporation, as successor to the property of the bankrupt, is not the proper person to sue the stockholders. The liability is not an asset of the corporation and does not pass to the trustee, and the bankruptcy act does not give the trustee the right to sue as a representative of the creditors.[125]

As pointed out by Justice Dibell in the *Kenney Case*[126] the result is unfortunate as the bankruptcy court ought to be able to wind up the whole matter. As Justice Dibell says:

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[120]See Pittsburgh Steel Co. v. Baltimore Equitable Society, (1913) 226 U.S. 455, 57 L. Ed. 297, 33 S.C.R. 167.

[121]Minnesota Thresher Mfg. Co. v. Langdon, (1890) 44 Minn. 37, 46 N.W. 310.

[122]See Tardy's Smith on Receivers, 2nd. ed., sec. 357.

[123]Merchants Nat. Bank v. Northwestern Mfg. & Car. Co., (1891) 48 Minn. 361, 51 N.W. 119.

[124]McKusick v. Seymour & Co., (1891) 48 Minn. 158, 50 N.W. 1114.

[125]State Bank of Commerce v. Kenney Band Instrument Co., (1919) 143 Minn. 236, 173 N.W. 560; Selig v. Hamilton, (1914) 234 N.S. 652, 58 L. Ed. 1518, 34 S.C.R. 926, Ann. Cas. 1917A 104; Courtney v. Croxton, (1917) 152 C.C.A. 235, 239 Fed. 247; Courtney v. Georger, (1916) 143 C.C.A. 257, 228 Fed. 859.

[126](1919) 143 Minn. 236, 173 N.W. 560.

"A holding which would permit the bankruptcy court in its administration of the bankrupt estate to enforce through its trustee the liability of holders of bonus stock, or to decline to do so and leave it to the state courts, as the convenience of the particular estate suggests, or which would permit the state court to proceed upon the refusal or failure of the trustee or the bankruptcy court to take action, would be workable. This would leave the right of administration in the bankruptcy court with the right in the creditors to prosecute the stock liability if the trustee would not. It might be well if the trustee had the requisite authority and the question were made one of convenient practice."[127]

By Minn. G. S. 1913 sec. 6178 it is declared that each stockholder shall be personally liable for corporate debts in the following cases:

"1. For all unpaid installments on stock owned by him or transferred for the purpose of defrauding creditors." It is held in *Merchant's Nat. Bank v. Bailey Mfg. Co.*, [128] that an action may be maintained under this section by a single creditor against a solvent corporation and one or more of its stockholders, somewhat in the nature of a garnishment to enforce payment of unpaid installments due on stock for his own benefit. Probably an action would not lie under this section to enforce liability on watered or bonus stock. The double or constitutional liability of stockholders cannot be enforced under this statute.[129]

Conclusion

A study of our corporation laws simply with reference to stockholders' liability to creditors and the remedies for its enforcement is sufficient to show that these laws are in a condition calling for prompt and systematic revision. They neither afford adequate protection to creditors nor suitable facilities to capitalists and organizers wishing to promote business enterprises.

It is possible, under our present law, to have a corporation without stockholders or capital stock, which is a legal monstrosity. It is possible to have a corporation with only two or three shares issued, the capital of which is raised by bonds, so that the real

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[127] See Grand Rapids Trust Co. v. Nichols, (1917) 199 Mich. 126, 165 N.W. 667; Stacker v. Davidson, (1906) 74 Kan. 214, 86 Pac. 136; In re Crystal Springs Bottling Co., (1899) 96 Fed. 945; Bergin v. Blackwood, (1919) 141 Minn. 325, 170 N.W. 508.

[128] (1885) 34 Minn. 323.

[129] Winnebago Paper Mills v.' Northwestern Printing Co., (1895) 61 Minn. 543, 553, 63 N.W. 1024.

proprietors do business under the shield of a mortgage lien, with virtual immunity from the claims of creditors, a gross perversion of corporate mechanism.

The method adopted of enforcing contributions of capital to the corporate being which the law permits the incorporators to spawn upon the business world is ineffectual and leads to systematic evasion. Its enforcement is based upon an artificial theory of fictitious fraud, which operates in favor of one class of creditors who have no better claim to insist on these contributions to the enterprise than another class of creditors. This does not mean that we ought to give up all attempt to enforce proper contributions of capital or to regulate inflation of stock.

Our constitutional double liability is contrary to the public interest and out of date except as to banks and financial corporations. It results in substantial public inconvenience and loss; it is a sword hanging over the head of unsuspecting investors; it discriminates unfairly against Minnesota corporations in favor of foreign corporations, and deprives the state of a large and legitimate source of income from corporation fees and taxes because new enterprises are forced to seek incorporation in other states. Non-par stock laws, such as are being enacted in many other states cannot safely be enacted in Minnesota without a constitutional amendment.[130] In short it is evident that we have here a subject of great practical importance to the business and prosperity of the state, which demands comprehensive study by scientific legislative draftsmen. Acts should be devised promptly to require the subscription and payment of a minimum capital stock as a condition precedent to the right to begin business; and to limit the issue of mortgage bonds to some proportion of the amount of stock issued, so that incorporators may not be allowed to place the owners of the business in the position of preferred creditors for the capital contributed. Those who are given the hope of unlimited profits should surely take a reasonable degree of risk as the price of limited liability.

[130]Four amendments to article 10, sec. 3, have been submitted to the voters without success. Minn. Laws, 1870 ch. 21; Minn. Laws, 1875 ch. 4; Minn. Laws, 1876 ch. 2; Minn. Laws, 1877 ch. 4; Anderson, History of the constitution of Minnesota 196, 197, 249.

TREATIES MADE OR WHICH SHALL BE MADE UNDER THE AUTHORITY OF THE UNITED STATES

By Joseph Whitla Stinson[1]

In 1778, the confederation of the United States of America came into existence by compact of the thirteen original colonies. By the articles of confederation the states severally and mutually pledged their faith to abide by the determination of the United States in Congress assembled in all questions that were thereby made subject to their deliberation and control. The authority of Congress included especially the power of "entering upon treaties and alliances," with the proviso that no treaty of commerce should be made whereby the legislative power of the respective states would suffer restraint in respect to the imposition of such imposts and duties upon foreigners as their own people were subject to or from prohibiting the exportation or importation of any species of goods or commodities whatsoever. This limitation upon the power of Congress to make treaties of commerce is reflected in early American treaties beginning with the treaties of Amity and Commerce with France of 1778,[2] and extending somewhat beyond the formation of the federal government under the constitution. The preamble of the Treaty of Commerce with France of 1778, Adams writes, "laid the cornerstone to our subsequent intercourse with foreign nations and was to the rest of mankind what the declaration of independence was to our internal government."[3] There was no reciprocity of duties established by these treaties. Until 1815, we have in general but two classes of treaties made by the United States during this early period,—those with England in which none of the neutral rights are recognized; and those with the great powers of continental Europe, in which all the principal neutral doctrines are secured by specific stipulation.[4] Until 1815, treaty control

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[2]The treaty of alliance with France of 1778 was concluded before the articles of confederation came into effect.

[3]Moore, Prin. Am. Diplomacy 107, 108.

[4]Lyman, Diplomacy of the United States 146.

of commerce rested in the almost universal modern arrangement and in the old diplomatic phrase of gentis amicissimae. Thereafter reciprocity of duties and tonnage charges on imports becomes the basis of commercial treaties.

"The law of March 3, 1815, is the ancestor of numerous subsequent laws which proposed to foreign nations terms of equality and reciprocity on duties upon the tonnage of vessels and the goods they carried to become effective by executive proclamation whenever the discriminations of such foreign nations operating to the disadvantage of the United States should be abolished."[5]

Some of these general laws remain unrepealed as section 4228 of the Revised Statutes. This brief survey shows the treaty-power, as first exercised, to have been characterized by a limitation upon Congress, touching commerce and navigation, and at the same time the agency of the treaty-authority was exerted in the extension of an obligatory law of nations, particularly directed to the freedom of neutral commerce.

The method of negotiation had aspects of really great consequence. Draft-forms of the pre-constitution treaties were prepared with great care by the committee of foreign affairs of the Continental Congress, a committee first known as the committee of foreign correspondence and its instructions were followed by the American plenipotentiaries abroad, perhaps the only serious departure from this rule being the exercise of individual discretion by Jay, Adams and the reluctant acquiesence of Franklin in the secret negotiation of a separate peace with Great Britain, it being known to them that both France and Spain were seeking to advance their own interests, to the prejudice of the young American nation. Under this practice and that of Washington's administration, to negotiate treaties "by and with advice and consent of the Senate," the United States possessed no grounds in international law or faith to decline to ratify treaties negotiated by the executive department or for their conditional or partial acceptance. When it became the custom to seek sanction of the Senate subsequent to the negotiation of treaties by the chief executive, the right of the Senate to reject, amend or reserve treaties was vigorously defended to save the constitutional provision from becoming an empty form and has ever since been sustained.

The treaty authority as granted to the Continental Congress, it will be noted, extended to the making of treaties and alliances.[6]

[5]55 Am. L. Rev. 68, 72.

The distinction is not observed with any uniformity by writers and commentators upon the constitution of the United States. An alliance is a union of interests, offensive or defensive; a league, coalition or federation which may be effected by compact or treaty between sovereign states. The Pinckney plan outlined the federal government as:

"A confederation between the free and independent states of . . . solemnly made uniting them together under one general superintending government for their common benefit and for their defense and security against all the designs and leagues that may be injurious to their interests and against all forc[e] and attacks offered to or made upon them."[7]

The authority to make alliances is a federative power.[8] It is in that sense to be distinguished from a law-making power. Hamilton classified the treaty-power as an executive authority, "the force of law being annexed to the result," a power commensurate with all those objects to which the legislative power is extended which are the proper subjects of compact with foreign nations. But its application is wider: Mr. Justice Holmes declares:[9] "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with, but that a treaty followed by such an act could," as where a national interest can be protected in concert with another power. And it is to be observed that the chief executive shares here with the states, as equally represented in the Senate, something more than either a power to execute the laws or to make them: it is "a power which must belong to and somewhere reside in every civilized government,[10] a supreme attribute of sovereignty."[11]

The constitution declared that no state shall "enter into any treaty, alliance or confederation,"[12] and in a subsequent clause of the same section, that no state shall "without the consent of

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[6]The declaration of independence asserted the power of the free and independent states to "levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do."

[7]2 Farrand, Records of the Fed. Conv. 134.

[8]Locke, Two Treatises of Government, ch. xii, sec. 143, 144, 146.

[9]Missouri v. Holland, (1919) 252 U. S. 416, 433, 64 L. Ed. 641, 40 S. C. R. 382.

[10]Andrews v. Andrews, (1902) 188 U. S. 14, 33, 47 L. Ed. 366, 23 S. C. R. 237.

[11]De Lima v. Bidwell, (1900) 182 U. S. 218, 45 L. Ed. 1041, 21 S. C. R. 743.

[12]Art. 1, sec. 10.

Congress . . . enter into any agreement or compact with another state, or with a foreign power." Here the words "alliance or confederation" are not used, so that the prohibition is absolute except as to agreements or compacts which may be made with the consent of Congress. This distinction is further emphasized by the fact that on Sept. 14, 1787, in the federal convention, the first mentioned clause was altered to read—"no state shall enter any *treaty alliance* or confederation."[13] It is apparent that the prohibition upon states is absolute with respect to the entering upon a treaty alliance or confederation, but conditional with respect to agreements or compacts which are not treaties, alliances or confederations. With these limitations upon the power of the states in mind, it is important to consider how far the treaty-power as granted by the constitution is subject to necessary retraint.[14]

The constitution provides only that the president shall have power "by and with the advice and consent of the Senate to make treaties,[15] provided that two-thirds of the senators present concur."[16] Treaties of alliance were however within the contemplation of the convention. To the Senate was attributed in early drafts of the proposed constitution, the power to make treaties

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[13]2 Farrand, Records of the Fed. Conv. 619. "The first of these prohibitions, is absolute and unqualified, and completely excludes all power in the states to make treaties with foreign nations on any subject whatever." "The second prohibition forbids the states, without the consent of Congress, to enter into any agreement or compact 'with a foreign power.' The agreement or compact as here referred to, is not identical with a formal treaty, which is absolutely forbidden in the previous clause . . . The words mean any arrangement, negotiation, agreement, or compact with a foreign power, though it should not amount to a treaty in the strict sense. 1 Butler, Treaty-making Power of the U. S. 35 citing S. T. Spear. The author might have added "or which does not amount to an alliance or confederation."

[14]"It would not be pretended that under the confederation the powers of Congress to formulate 'treaties and alliances' were more extensive than those of the president and Senate under the constitution to form 'treaties,' " speech of Mr. Sedgwick, debate on Jay treaty, 4 Annals of Congress, col. 527.

[15]"In the constitution and laws of the United States, the word 'treaty' has no special meaning, different from the general definition." Hauenstein v. Lynham, (1879) 100 U. S. 483, 489, 25 L. Ed. 628. "The treaty is a contract of both parties," Marshall in Meigs v. McClung's Lessee, (1815) 9 Cranch (U. S.) 11, 3 L. Ed. 639, it "must contain the whole contract between the parties," New York Indians v. United States, (1898) 170 U. S. 1, 42 L. Ed. 927, 18 S. C. R. 531; Fourteen Diamond Rings v. United States, (1901) 183 U. S. 176, 46 L. Ed. 138, 22 S. C. R. 59. "Generally a treaty is defined to be a compact made between two or more independent nations with a view to public welfare." Altman & Co. v. United States, (1912) 224 U. S. 583, 600, 56 L. Ed. 894, 32 S. C. R. 593.

[16]Art. 2, sec. 2.

of commerce, of peace, and of alliance.[17] Madison sought to lessen the difficulties of making treaties of peace,[18] urged the inconvenience of requiring a legal ratification of treaties of alliance for the purposes of war[19] and suggests consideration of whether "a distinction might be made between different sorts of treaties allowing the president and the Senate to make treaties eventual [contingent] and of alliance for limited terms and requiring the concurrence of the whole legislature in other treaties." May a distinction be made here as to the *authority* of the federal government to make alliances and to conclude treaties of limited alliance? Blackstone so differentiated: "It is also the King's prerogative to make treaties, leagues and alliances."[20] If, as he says, a league to be binding on the whole community must be made by the sovereign power, the treaty power in this federative capacity implies more than an authority constrained to constitutional guaranties, and a "plentitude of authority" which must contemplate a conjunction of expressly and impliedly granted sovereign powers as well as those residuary in the people, and the states, something not apparent in the grant to the president and Senate to make treaties, as distinguished from alliances, which is essentially a derivative authority of the powers of war and peace. There is then at common law a distinction between an act of unlimited sovereign power and the authority of the United States to make treaties, and "the nature and extent of the authority granted by the constitution must in the absence of positive law be governed exclusively by the common law."[21]

Article 6 of the constitution[22] declares that "this constitution, and the laws made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land." Mr. Justice Holmes has recently raised the question[23] whether there is any other test under American law of the validity of a treaty than the formal requisities for concluding it, implying that significance might

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[17] 2 Farrand, Records of the Fed Conv. 144-5, 155.
[18] 2 Farrand, Records of the Fed. Conv. 540.
[19] 2 Farrand, Records of the Fed. Conv. 392.
[20] 1 Blackstone, Commentaries 257.
[21] United States v. Coolidge, (1813) 1 Gall. (C.C.) 488, Fed. Cas. No. 14,857; Blackstone, Commentaries par. 158, par. 798, par. 1645.
[22] Marshall, in Cohens v. Virginia, (1821) 6 Wheat. (U. S.) 264, 381, 5 L. Ed. 285, declares "this is the authoritative language of the American people, and if gentlemen please, of the American states."
[23] Missouri v. Holland, (1919) 252 U. S. 416, 64 L. Ed. 641, 40 S. C. R. 382.

attach to the declaration in the constitution that treaties are "the supreme law of the land" when made "under the authority of the United States,"[24] while acts of Congress are similarly honored only when made in pursuance of the constitution.[25] The vari-

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[24]Debate on Jay treaty, House of Representatives, March 1796, Annals of Congress, IV, 1st sess. Col. 450, 451, Mr. Heath: "Great stress is laid upon the constitution declaring treaties laws of the land. (. . . quot. art. 6, sec. 2.) Hence it is obvious that the supremacy of the law is over the constitution and laws of the separate states, which was necessary to prevent these interfering with those. But it does not affect the powers of this House, as a component part of the Gen. Legislature, *and the authority of the United States.* It is also worth while to notice the gradation in this article . . . How absurd the doctrine then, that these last (treaties), third in order, can repeal the second (laws). At that rate, all power whatever, would remain vested in two branches of the government; the third with all its powers of originating bills for raising revenues would be dwindled into a mere board of assessors. If neither of the powers ought to possess, directly or indirectly, an overruling influence over others, whence is the power to be deduced of the president and states by treaty, to make laws possessing this very overruling influence over this House? Gallatin urged: "The clause by no means expresses that treaties are equal or superior to laws of the Union, or that they shall be supreme law when clashing with any of them." (Col. 469). Madison (Col. 488.) observed: "On comparing the several passages in the constitution, which has been already cited to the committee, it appeared that if taken literally, and without limit, they must necessarily clash with each other. Certain powers to regulate commerce, to declare war, to raise armies, to borrow money, etc., are first especially vested in Congress. The power of making treaties which may relate to the same subjects, is afterwards vested in the president, and two thirds of the Senate; and it is declared, etc., (Art. 6). . . .The term *supreme* as applied to treaties, evidently meant a supremacy over the state constitutions and the laws, and not over the constitution and laws of the United States. And it was observable, that the judicial authority and the existing laws, alone of the states, fell within the supremacy expressly enjoined. The injunction was not extended to the legislative authority of the states or to laws requisite to be passed by the states for giving effect to treaties; . . . etc. Mr. Bourne observed: "Laws contrary to the constitution are nugatory, and treaties contrary to existing laws, the same; because when in that stage, they are not concluded under the authority of the United States, (and there is no longer any clashing) (Supra. Col. 578) . . . . . Mr. Hillhouse declared (Col. 669): "Great stress has been laid on the words, under the authority of the United States, and in the sixth article, which declares etc. . . . as importing something more than what could be done by the president and Senate, and as pointing to the legislative powers of Congress; a little attention to the subject will show that those words are not used in that place for the purpose of limitation, but as descriptive of the kind of treaties intended. Under the confederation, the states had reserved a right, with the consent of Congress, to make treaties; it would not have done, therefore, to have used the word "treaties" only, for that might have included other treaties than those made by the United States. The Continental Congress would not answer; for that would have excluded treaties made under this government; it would not have done to have used the words president and Senate; that would have excluded treaties made by the old Congress. The words "*under the authority of the United States,*" are the only words that could give a definite and concise description of the treaties intended. It will be well to inquire where is the authority in the United States. Not in Congress, but in the people."

ance in the words descriptive of laws and treaties is not entirely satisfactorily accounted for by Rawle[26] as designed to include within the sanction of the constitution at the time of its adoption those treaties already in existence which had been made by Congress under the confederation, the continuing obligation of which it was proper to declare:[27]

"The words 'under the authority of the United States' were considered as extending equally to [those] treaties previously made and to those which should subsequently be effected, but although the former could not be considered as pursuant to a constitution which was not then in existence, the latter would not be 'under the authority of the United States' unless they are conformable to its constitution."

The authority of the United States is thus seen to have been retroactive; it assimilated prior contracts or compacts of the United States to the supreme obligation of law under the newly framed constitution. The federal convention at one stage adopted the clause:

"This constitution and the laws of the United States made in pursuance thereof and all treaties *made* under the authority of the United States shall be the supreme law of the several states and of their citizens and inhabitants."[28]

As first considered this clause read:

"That the legislative acts of the United States made by virtue and in pursuance of the articles of union, and all treaties *made and ratified* under the authority of the United States shall be the

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[25]Iredell in Debates in North Carolina Convention: "When treaties are made they become as valid as legislative acts. I apprehend that every act of the government, legislative or executive is good if in pursuance of a Constitutional power and the law of the land;" see also 4 Annals of Congress, Debate on Jay Treaty. This appears to have been the opinion of Jay, as communicated by letter to the Congress of the confederation, 1788.

[26]Rawle, Constitution 66.

[27]The Supreme Court of the United States, Judge Chase speaking, declared in Ware v. Hylton, (1796) 3 Dall. (U. S.) 199, 1 L. Ed. 568; "Four things are apparent on a view of this sixth article of the national constitution. First: That it is retrospective, and is to be considered in the same light as if the constitution had been established before the making of the treaty of 1783. Second: That the constitution or laws of any of the states so far as either of them shall be found contrary to that treaty are prostrated before the treaty. Third: That consequently the treaty of 1783 has superior power to the legislature of any state, because no legislature of any state has any kind of power over the constitution which was its creator. Fourth: That it is the declared duty of the state judges to determine any constitution or laws of any state contrary to that treaty, or any other, made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct."

[28]2 Farrand, Records of the Fed. Conv. 417, 572.

supreme law of the respective states, so far as those acts or treaties shall relate to the said states or their citizens and inhabitants."

It has been held that there are inherent limitations upon the authority of the United States to make treaties;[29] that the treaty power, as a delegated authority "cannot alter the constituting power;" "on natural principles a treaty which would manifestly betray and sacrifice the private interest of the state would be null;[30] nothing can be done by the treaty-making power . . . which robs a department of the government, or of any of the states, of its constitutional authority;[31] it is limited by all the provisions of the constitution which inhibit certain acts from being done by the government or any of its departments of which description there are many;"[32] "though the power is general and restricted," says Story, "it is not to be so construed as to destroy the fundamental laws of the state."[33] As affirmatively expressed by the Supreme Court of the United States:[33a] "It is impossible to conceive that where conditions are brought about to which any particular provision of the constitution applies, its controlling influence may be frustrated by the action of any or all the departments of government;" even where there is no direct command of the constitution which applies, "there may nevertheless be restrictions of so fundamental a nature that cannot be transgressed although not expressed in so many words of the constitution . . . In the nature of things, limitations of this character cannot be transcended, because of the complete absence of

[29]Gallatin based the limitation upon the authority to make treaties in all limited governments upon the law of nations:

"The law of nations, the practice under the articles of confederation, the opinions of individuals, and of conventions, had been conjured up as uniting in ascribing to the powers of making treaties the most unlimited and unbounded effect. . . . in all limited governments, where the powers of making treaties and laws were lodged in different hands, the first never had, *by its nature*, swallowed up and absorbed the legislative; but it would be found universally that the manner in which that power was exercised in such governments, when the conditions of the compact with the foreign nation were of a legislative nature, was, not by superseding, but only by calling to its aid and assistance the legislature, without whose consent the executive was not enabled to fulfill the conditions of the compact, and secondly this doctrine was perfectly well understood, as he stated it, by all nations, and therefore constituted a part of the law of nations. Vattel, book I, Chap. 21, Book II, Chap. 14, Book IV; 2; Debate on Jay Treaty; 4 Annals of Congress, 1796, Col. 727.

[30]Hamilton, Camillus Papers no. 35, 5 Hamilton's Works, Lodge Ed. 301.

[31]Cooley, Constitutional Limitations 117.

[32]Calhoun, see Tucker, Limitations on Treaty-Making Power.

[33]Story, Commentaries art. 1508.

[33a]Downes v. Bidwell, (1900) 182 U. S. 244, 45 L. Ed. 1088, 21 S. C. R. 770.

power." "A treaty cannot change the constitution or be held valid if in violation of that instrument."[84]

A test then of the validity of a treaty is its conformity to expressed or implied constitutional limitations; but this is not the sole measure of the validity of treaties. Another, very material to their obligation as the supreme law of the land, as well as to that of their legislative abrogation, is their conformity to, or constructive operation as the law of nations. It was urged before the North Carolina Convention, July 28, 1778[85] and the view is consonant with authority that "although treaties are mere conventional acts between nations, yet by the law of nations, they are the supreme law of the land to their respective citizens or subjects." In a debate on the Jay treaty, March, 1796, House of Representatives, Mr. Harper declared:

"A distinction here ought to be observed between the law of nations and municipal law. The former is the province of treaties, the latter of the legislative power . . . In all subjects, then, relative to the law of nations, to matters external, to the conduct of nations towards each other, treaties are laws and produce immediately and indirectly the effect of laws."[86]

The distinction is material and emphasizes at this time the abandonment of "the higher ground that commercial treaties were not when ratified the supreme law of the land."[87] Marshall had urged in the debates in the Virginia Legislature that the Jay treaty in all its commercial parts was still under the power of the House of Representatives.

In the debate in 1796 on the Jay treaty, the eighteen articles, succeeding the first ten, having for their manifest object the regulation of "external commerce and navigation,"[88] the question was as to the power of the House of Representatives in respect to commercial treaties made by the president and Senate. It was admitted that the House had not right to make treaties, however debatable was the treaty power in reference to regulation of commerce; and it was questioned whether the discretion of the House to judge with respect to effecting such treaties did not in effect imply an instrumentality in the making of such compacts.[89]

[84]Downes v. Bidwell, (1900) 182 U. S. 244, 287, 45 L. Ed. 1088, 21 S. C. R. 770; see also Geofroy v. Riggs, (1889) 133 U. S. 258, 33 L. Ed. 642, 10 S. C. R. 295.

[85]4 Elliot's Debates 119-144.

[86]Annals of the Fourth Congress, 1st Sess., 1795-96.

[87]Story, Miscellaneous Writings 193.

[88]4 Hamilton's Works, Lodge Ed. 475.

[89]Annals of Congress, 4th Congress, 1st Sess., Col. 454.

Gallatin defined an unconstitutional treaty to be one providing for the doing of that, forbidden by the constitution, and urged that if a "treaty embraces objects within the sphere of the general powers delegated to the federal government, but which have been exclusively granted to a particular branch of government, say to the legislative department, though not unconstitutional, it does not become the law of the land until it has obtained the sanction of that branch."[40] On the other hand the contention was that the treaty-making power was an authority paramount to the legislative power, and that the positive institutions of the Legislature must give place to compact; that the very object of the treaty power was to remove by contract with foreign nations, those legislative impediments which embarrass that intercourse, the argument being that the people could repeal laws made by one agency quite properly by another. One member observed that there had been no explicit determination of the sense in which treaties ought to be considered the supreme law of the land. Madison admits it is uniformly agreed that sovereignty resides in the people and defines the question as referring to the manner in which the will of the people had divided the powers delegated, and the construction that would best reconcile the several parts of the constitution with each other, and be most consistent with its general spirit and object. He thought the treaty power too greatly narrowed if it be regarded as moving in a separate orbit from the legislative authority; that it was impracticable to regard the former as a concurrent power with the latter; since "a treaty of commerce would rarely be made that would not trench

[40]"The general power of making treaties, undefined as it is by the clause which grants it, may be either expressly *limited* by some other positive clauses of the constitution, or it may be *checked* by some powers vested in other branches of the government, which although not diminishing, may control the treaty-making power . . . . The treaty-making power is limited by the constitution when in the first section it is said that ALL legislative power is granted to Congress . . . Shall a treaty repeal a law or a law a treaty? Neither can a law repeal a treaty, because a treaty is made with the concurrence of another party—a foreign nation—that has no participation in framing the law; nor can a treaty made by the president and Senate repeal a law, for the same reason, because the House of Representatives have a participation in making the law. It is a sound maxim of government that it requires the same power to repeal a law that enacted it. If so, then it follows that laws and treaties are not of the same nature; that both operate as the law of the land, but under certain limitations; both are subject to the control of the constitution; they are made not only by different powers, but those powers are distributed, under different modifications, among the several branches of the government. Thus no law could be made by the legislature giving themselves power to execute it, and no treaty by the executive embracing objects specifically assigned to the legislature without their assent."

on existing legal regulations as well as be a bar to future ones;" that to regard each of them as supreme over the latter involved the "absurdity of an imperium in imperio," of two powers both supreme, yet each of them liable to be superseded by the other, likening the case to the conflict of laws between the comitia curiata and the comitia tributa of Roman days; he urges with great finality that to regard the treaty power as both unlimited in its objects and completely paramount in its authority would be to give it a latitude necessarily prohibited by regard to the general form and fundamental principles of the constitution. It may be observed that so far as the law of nations, the universal sanction and usage of civilized nations, consists with the constitution, treaties affirming the understandings thereof, would not, if admitted to be of paramount obligation, infringe the constitution or delegated authorities. Madison finally submits the power of Congress may be viewed as coöperative with the treaty power on the legislative subjects submitted to Congress by the constitution, favoring the view of Mr. Gallatin, a view not inconsistent with the principle that no statute of one or two nations can change the law of nations. That the treaty power embraced all subjects arising under the law of nations, and for the mutual protection of the citizens in their correspondence with each other was admitted, but it was pointed out that the law of nations admitted causes which would justify a nation in departing from, or refusing to execute treaties; and that Congress in their legislative capacity were judges of those causes.[41]

Marshall in *Foster v. Neilson*[42] held that "our constitution declares a treaty to be a law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of legislature, whenever it operates of itself, without the aid of any legislative provision." Mr. Justice Baldwin in *Pollard v. Kibbe*[43] comments upon Marshall's opinion and declares in a concurring opinion that it was silent on the law of nations as in former adjudications; yet it will not be pretended that it was meant to controvert or abrogate those principles which are consecrated by "the usage of the civilized world." The significance of this qualification is seen when the power of Congress to abridge the law of nations is considered, and the inference is unavoidable in Mar-

[41]Hillhouse, Annals of Congress, 4th Congress, 1st Sess. Col. 669.
[42](1829) 2 Pet. (U. S.) 253, 314, 7 L. Ed. 415.
[43](1840) 14 Pet. (U. S.) 353, 402, 10 L. Ed. 490.

shall's opinion in *United States v. Percheman*[44] that it was the rule of the "universally received doctrine of nations" entering into the Florida Cession treaty which gave it executed obligation. In *Taylor v. Morton* [45] the "necessary prerogative of a nation" to abrogate treaties constituting municipal law of the United States is asserted to remain in Congress *"whenever* they relate to subjects which the constitution has placed under the legislative power," of which the law of nations is not one. This opinion is reflected in that of the Supreme Court[46] wherein Mr. Justice Field holds:

"If a treaty operates by its own force and relates to a subject within the power of Congress it can be deemed *in that particular only* the equivalent of a legislative act to be repealed or modified at the pleasure of Congress."

The obligation of treaties as municipal law by the constitution must then be distinguished from their obligations under the general law of nations.

This distinction is not taken in the *Head Money Cases*[47] where it was held that:

"So far as a treaty made by the United States with any foreign nation can be the subject of cognizance in the courts of the United States, it will be subject to such acts as Congress may pass for its enforcement, modification, or repeal."

So reiterated the Supreme Court in *Whitney v. Robertson.*[48] Thus the doctrine has grown up without express qualification that: "A treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty."[49] But the Supreme Court has declared that acts of Congress are to be construed "in the light of the purpose of the government to act within the limitations of international law;[50] that "no statute of one or two nations can create obligations for the world;"[51] and as the principle is as controlling today as when the constitution

[44](1833) 7 Pet. (U. S.) 51, 88, 8 L. Ed. 604.
[45](1855) 2 Curtis (C. C.) 454, 459, Fed. Cas. No. 13, 799.
[46]Chae Chan Ping v. United States, (1888) 130 U. S. 581, 32 L. Ed. 1068, 9 S. C. R. 623.
[47](1884) 112 U. S. 580, 28 L. Ed. 798, 5 S. C. R. 247.
[48](1887) 124 U. S. 190, 31 L. Ed. 386, 8 S. C. R. 456.
[49]Shiras, 169, 271.
[50]MacLeod v. United States (1912) 229 U. S. 416, 57 L. Ed. 1260, 33 S. C. R. 955.
[51]The Scotia, (1871) 14 Wall. (U. S.) 170, 187, 20 L. Ed. 822; The Paquette Habana, (1900) 175 U. S. 677, 711, 44 L. Ed. 320, 20 S. C. R. 290; In re petition of the Long Island North Shore Passenger & Freight Transportation Co., (1881) 5 Fed. 599, 622.

was framed that: "The municipal laws of a country cannot change the law of nations so as to bind the subjects of another nation."[52]

A distinction is unavoidable between the mere authority to make and ratify treaties and the authority to give to treaties paramount legal obligation consistent alike with the constitution and with international law. It is not sufficient to rest this distinction on that between executory and executed treaties;[53] nor between contractual treaties and treaties forming an international legal order. As between executed and executory treaties, that the former may be repealed as other federal enactments[54] they must not only be effective without aid of Congress or the executive or judicial department, but must touch the subject matter of the legislative power of the United States; and it is apparent that though of executed obligation in the sense that they constitute enforceable municipal law, such treaties may nevertheless contribute to an international legal order and so become of paramount authority under the constitution and the American doctrine of international law. Marshall held:[55]

"An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral *rights,* or to affect neutral commerce further than is warranted by the law of nations *as understood in this country.*"

Insofar as the treaty power transcends the domestic purposes of ordinary legislation, its means are characterized by the contraction of permanent obligations of general effect.[56] Marshall has refused to admit a construction of the constitution, with relation to the binding force of the accepted usages of nations at the time the constitution was framed which would fetter the war time powers of Congress or its discretion as to the making of reprisals; but this view is subject to his opinion in *United States v. Percheman* if not reversed by this decision, according to Professor John Bassett Moore.[57] That a general right derived under the constitution "by the rigor of the law of nations and the common law,"[58] is restrained by the modern usage of

[52]Miller v. Ship Resolution, (1781) 2 Dall. 1, 4, 11 L. Ed. 263.
[53]10 Am. Jnl. of Int. Law 706, 717.
[54]Ware v. Hylton, (1796) 3 Lall. (U. S.) 199, 1 L. Ed. 568.
[55]The Charming Betsy, (1804) 2 Cranch (U. S.) 64, 118, 2 L. Ed. 208.
[56]Federalist No. 75; 13 Am. Jnl. of Int. Law 64.
[57]Brown v. United States, (1814) 8 Cranch (U. S.) 110, 125, 3 L. Ed. 504. See Dillon's Marshall Vol. I, p. 526.
[58]Brown v. United States, (1814) 8 Cranch (U. S.) 110, 143, 3 L. Ed. 504.

nations rests in proof, declared Story, anticipating Marshall's final opinion by twenty years, that, "by the general consent of nations" the usage asserted has become incorporated into the code of public law. Thus the modern usage or law of nations "is resorted to merely as a limitation upon this discretion, not as conferring the authority to exercise it."[60] It is a nice question how far the modern usage of nations, as recognized by the constitution[61] or established and made of binding force by treaties of the United States, constrains necessarily "independent substantive power" arsing from the nature of sovereignty and of the government of the United States. Marshall in *Gibbons v. Ogden*[62] holds the commerce power "like all others vested in Congress" to be complete in itself. "It may," he says, "be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the constitution." But Marshall, himself,[63] declares the law of nations to be part of the law of the land, and is the expositor of its restraining influence upon statutes of Congress. The wisdom and unfettered discretion of Congress are relied upon to secure the people from the abuse of power, only in matters upon which there is no such limitation in the constitution. Story urged that if the doctrines of the British navigation laws formed "a part of the law of nations, however mischievous," the United States must submit until they should be relaxed by "*particular* convention."[64] It is apparent then in the view of this great justice and commentator upon the constitution, that treaties modifying the rules or the usage or law of nations were paramount in authority to federal statutory enactment: "I hold, with Bynkershoek (Quaest. Pub. Jur. Ch. 7.) that where such treaties exist they must be observed."[65] Mr. Justice Field in *Chae Chan Ping v. United States*[66] asserts:

"By the constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other;" but he adds: "It will

[59]Brown v. United States, (1814) 8 Cranch (U. S.) 110, 139, 3 L. Ed. 504.

[60]Brown v. United States, (1814) 8 Cranch (U. S.) 110, 154, 3 L. Ed. 504.

[61]Murray v. Chicago, etc., Ry. Co., (1899) 92 Fed. 868.

[62](1824) 9 Wheat. (U. S.) 1, 6 L. Ed. 23. See limitation referred to in The Brigg Wilson, 1820. p. 428, 436, 438.

[63]The Nereide, (1815) 9 Cranch (U. S.) 388, 423, 3 L. Ed. 769.

[64]Story, Miscellaneous Writings, 485.

[65]Brown v. United States, (1814) 8 Cranch (U.S.) 110, 142.

[66](1888) 130 U. S. 581, 599, 32 L. Ed. 1068, 9 S. C. R. 623.

not be presumed that the legislative department of the government will likely pass laws which are in conflict with the treaties of the country."

His claim is that of rebus sic stantibus: changed circumstances justifying the disregard of treaty stipulations or unavoidable change in foreign policy.[67]

The early American treaties embraced with commercial objects, stipulations relative to offenses against the laws of nations,[68] agreements relative to cases during the war, free bottoms, contraband, rights of war, all of which appear to have been regarded as within the sphere of legislative power. It should also be considered that the treaty power was exercised in an entirety by Congress, during the confederation, and that the legislative will, in consenting, through treaties of the United States to international regulations of commerce and neutral right was in respect to many of these provisions submitting the future exercise of its discretion to a paramount law, which was plainly within the contemplation of the constitution. This is apparent from contemporaneous opinion. Hamilton writes:

"That treaty stipulations, which are designed to operate in case of war, preserve their force and obligation when war takes place;"[69] "our treaties and the law of nations form a part of the

[67]Moore comments on this decision: "It was admitted that the act was violative of treaties, but it was held that it was within the power of Congress to exclude aliens from the United States, even though a treaty had guaranteed them the right to come here and reside; and to this extent it was held that treaties were abrogated. It was not held, as many have seemed to suppose that a nation may at will rid itself of the obligation of treaties by abrogating them."

[68]"Offences against the law of nations . . . cannot with any accuracy be said to be completely ascertained and defined in any public code recognized by the *common consent of nations*" . . . It is obvious that this power has an intimate connection and relation with the power to regulate commerce and intercourse with foreign nations, and the rights and duties of the national government in peace and war, *arising out of the law of nations.* As the United States are responsible to foreign nations for all violations of the law of nations, etc. . . . Congress ought to possess the power . . . Story, Commentaries, par. 1163, 1165; 1. Tucker's Blackstone, Comm. App. 268, 9; Rawle, Const. ch. 9 p. 108. Iredell declared that offenses against the law of nations "must come within the sphere of Legislative authority which is intrusted with their protection." Ford, Pamphlets on the Const. 359.

[69]5 Hamilton's Works, Lodge Ed. 126. "We think . . . that treaties stipulating for permanent rights and general arrangements and professing to aim at perpetuity, and to deal with the case of war as of peace do not cease on the occurrence of war, but are at most, only suspended while it lasts; *and unless they are waived by the parties,* or new or repugnant stipulations are made, they revive in their operation at the return of peace." Society for the Propagation of the Gospel v. New Haven, (1823) 8 Wheat. (U. S.) 464, 494, 5 L. Ed. 622.

law of the land;"[70] "an established rule of the law of nations can only be altered by agreements between *all* the civilized powers or by a new usage generally adopted and sanctioned by time;"[71] "no one nation can make a law of nations."[72]

Again he argued that the treaty with Sweden of 1783 "abridged the exercise of the legislative power to regulate trade . . . restraining the legislative power from extending prohibitions to them, which shall not equally extend to other nations the most favored."[73] Jefferson urged that the treaty of 1807 tied the hands of the United States to retaliate by legislating non-importation or non-intercourse."[74] Washington queries: "What are the advantages of treaties if they are to be observed no longer than convenient?"[75] Jay urges that: "No nation can have authority to vacate or modify treaties at pleasure."[76] Jay distinguishes between treaty contracts and the legislative power which has no foreign extra-territorial obligation.

We have under the practice of the American government, not only the phenomena of statutes and treaties operative in the same field but that of legislative compacts with foreign nations, accomplishing that which the treaty power has failed to accomplish. A notable case is exemplified in the repeal of the non-intercourse law of 1809 in response to the promise of France to conclude *"every species of convention"* tending to renew the treaty of commerce with America, etc., if American vessels would not submit to the British orders in council of 1807; but providing for the revival of certain sections should England or France continue their depredations upon American commerce. There was in this and other instances, complete coöperation between the executive and the legislative branches. It is a significant fact that our commercial relations with foreign powers rest today in no small degree upon a legislative basis. Comparatively recent instances are to be found in the tariff acts of 1890 and 1897 authorizing

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[70]4 Hamilton's Works, Lodge Ed. 146, Pacificus.
[71]4 Hamilton's Works, Lodge Ed. 218.
[72]5 Hamilton's Works, Lodge Ed. 258.

[73]"The words: 'the most favored nation' used in all the treaties between the United States and foreign nations in amity with them, have never been interpreted to found a jurisdiction exclusive of or inconsistent with the laws of the United States in our own ports." The St. Olaf, 2 Pet. Adm. 428, Fed. Cas. No. 17,790.

[74]9 Jefferson's Works, Ford Ed. 36.

[75]Message to Senate, November 19, 1794. 12 Sparks 491.

[76]Charge to Grand Jury, (1793) Fed. Cas. No. 6,360.

[77]Washburn, 55 Am. L. Rev. 68.

the executive agreements with foreign nations in respect to reciprocity of duties. The competency of Congress to enact the terms of compacts in such cases with foreign nations is not denied. The legislation is contingent and the compact is obviously unilateral in character.

"The real trouble of the law-making branch of the government in dealing with foreign nations is not . . . a matter of constitutional incompetence . . . ; it grows rather out of certain limitations, which are as inherent as they are obvious."[78]

The difficulty, as to conflict between the treaty authority and the legislative power is more apparent in the case of a treaty of guaranty and arbitration, a form of treaty which is of instant interest, than in the case of treaties of commerce and navigation. Thus it has been held that the guaranties under the Panama treaty of 1903[79] virtually bind the United States to a declaration of war in certain contingencies.[80] The so-called Bryan peace treaties stipulate for a year of grace before commencing war.[81] Chief Justice Taft has distinguished[82] the treaty power:

"Creates the obligation to declare war, or to refrain from so doing in certain contingencies. That obligation is to be discharged by Congress under its constitutional power to declare war. If it fails to do so, and thus comply with the *binding obligation* created by the treaty-making power, then it merely breaks the contract of the government."

This is an admission that the authority of the United States to make treaties is inadequate to restrain the exercise of the inherent substantive power of Congress. Does it further infer that, within the sphere of Congressional authority, the treaty authority may not engraft upon the law of nations new and great principles of the law of nations having paramount obligation over statutes of the United States? Is it to be implied that there is a class of government contracts which Congress may invalidate under the constitution or that such treaties are only conditional agreements? The Hon. Charles E. Hughes takes a somewhat different view of this question:

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[78]Ibid.

[79]Art. 1.

[80]Madison objects to giving paramount legislative authority to treaties since the United States under such a doctrine might "by means of an alliance with a foreign power be driven into a state of war by the president and senate, contrary both to the sense of the legislature, and to the letter and the spirit of the constitution. Debate on Jay treaty, 1796. 4 Annals of Congress col 5 and 6.

[81]12 Am. Jnl. of Int. Law 75.

[82]May 26, 1916, before the League to Enforce Peace.

"Congress alone has the power to declare war and any agreement made by the United States to coöperate in coercive measures amounting to war would necessarily be subject to the exercise by Congress of its unquestioned authority. But this does not mean that the treaty-making power may not, if it is found to accord with national interests and policies, aid in forming an international organization believed to be necessary and practicable, although its offer of coöperation in any given contingency must be subject to the well known conditions which inhere in our constitutional form of government. Congress, indeed, will have all its powers, but its course of action will depend upon the world outlook of the nation. . ."

But the powers of Congress in war as in peace respond to the rules of the laws of nations. Treaties which commit the government of the United States to territorial guaranties or to arbitration with its necessary limitations upon the war powers of Congress, must refer themselves to the definite obligations of the government of the United States under international law, to which the war and peace authorities of the legislative branch of the government are necessarily constrained. In this light alone can it be admitted that a treaty agreement to coöperate in coercive measures amounting to war would as the supreme law of the land obligate the executive branch of the government until Congress had legislated either to fulfil the treaty or to repeal it. Then mere failure of Congress to act would not necessarily break such an agreement; on the other hand, if the treaty should not conform to the law of nations in respect to its commitments to make law, express or implied, or its guaranties to refrain therefrom, jointly or severally, the failure of Congress to act would in reality be its tacit recognition of the unconstitutionality of the treaty. It is obvious that there are powers of Congress, subject to the law of nations, quite distinct from its powers to deal with questions which under the constitution, or "in the light of international law" are purely of domestic jurisdiction; and further that not only is the war power, but the authority to regulate commerce and navigation as well, constrained to the observance of the law of nations.[83] These observations, however cursory, emphasize the principle that not only is the validity of a treaty made by authority of the United States to be determined

[83]"No single nation can change the law of the sea," The Scotia, (1871) 14 Wall. (U. S.) 170, 187, 20 L. Ed. 822. "The constitution itself adopted and established as part of the laws of the United States approved rules of the general maritime law." Knickerbocker Ice Co. v. Stewart, (1919) 253, U. S. 149, 64 L. Ed. 83, 40 S. C. R. 438.

by "evidence, internal and external, according to the rules and maxims of the laws of nations relative to such cases,"[84] but that the binding force of the treaty, as of an international contract, upon Congress, is to be determined by its conformity to those principles of international law which have achieved the high sanction of the universal consent of nations.[85] Gallatin declared:

"If the treaty-making power is not limited by existing laws, or if it repeals laws that clash with it, or if the legislature is obliged to repeal the laws so clashing, then, the legislative power in fact resides in the president and Senate and they can pass any law under color of treaty."

Mr. Adams writes:[87] "The argument is irresistible: it has never been answered." A century has elapsed; "Whatever may be the national effect of a treaty which conflicts with the provisions of the constitution, it is generally admitted that it will be disregarded by the courts;"[88] the same must be held of a treaty in derogation of the law of nations. "By the general law of nations we certainly are bound."[89]

The distinction between executive agreements of an international character and treaties is one of no inconsiderable importance. Neither has the constitutional power of the chief executive to conclude such conventions, been at all clearly delimited when one reviews subsisting authorities.

A notable precedent, interesting because of its bearing on the Disarmament Conference, is the agreement of 1817 for the limitation of naval forces on the Great Lakes, made and carried into effect by the executive, though afterward submitted to the

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[84]Correspondence and Public Papers of John Jay, April 14, 1806.

[85]In Davis v. Concordia, (1850) 9 How. U. S. 280, 294, 13 L. Ed. 138, it was held by the Supreme Court that "the law of nations does not recognize in a nation ceding territory the continuance of supreme power over it after the treaty has been signed or any other exercise or sovereignty than that which is necessary for social order and common purposes . . . that if such soverignty could be exercised after a treaty had been signed, it would be a power to change materially the relations which the people of a ceded territory had to each other; and to establish between them and a new sovereign a different condition than had been contemplated when they were transferred." The rule "accords with the received usages of nations in respect of rights acquired under treaties." This indicates that the obligation of a treaty of session is to be referred to the law of nations.

[86]March 10, 1796 in the House of Representatives, speech on Jay treaty.

[87]Life of Gallatin, 161.

[88]29 Harv. L. Rev. 219; Doe v. Braden, (1853) 16 How. (U. S.) 635, 657, 14 L. Ed. 1090.

[89]Peters in Thompson et al. v. Ship Catharina, (1795) 1 Pet. Adm. 104, Fed. Cas. No. 13,949.

senate.[90] Another case of more than immediate interest is to be found in the protocol concluded at Peking, Sept. 7, 1901, between China and the allied and associated powers, subsequent to the Boxer uprising. Temporary working arrangements in the matter of modus vivendi agreements are likewise regarded as within the powers of the president pending action by the treaty-making authority. Another distinct class of executive agreements is recognized where the authority is derived from Congressional enactment.

"It is a peculiarity of these agreements that so long as the statute under which they are concluded stands unrepealed, they have precisely the same force as treaties, being in effect laws of the land."[91]

It has been urged that the treaty-making power is not, however, delegated in this class of cases to the president but "that though every treaty is an agreement, every agreement is not a treaty."[92] When authorized by enactment of Congress, negotiated and proclaimed under the authority of the president, the Supreme Court holds "such a compact is a treaty."[93] Constitutional limitations upon the authority of Congress with reference to change in the accepted law of nations must extend to this class of joint legislative and executive agreements.

Admitting that "no person acquires a right to the continued operation of a treaty"[94] the fact remains that the security of public or private right under the constitution, laws and treaties of the United States and very especially under the law of nations is the implied condition in the legislative abrogation of the international contracts of this government. This is the basis upon which is founded all national or private reclamations under treaties, the principle of equitable indemnification for violation of treaty rights or those given by the law of nations, and consists with the American doctrine that the law of nations and not the purely municipal law of the country is the measure of its obligation to other nations.

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[90]Moore, Treaties and Executive Agreements, 20 Pol. Sci. Q. 390; see also 5 Moore, In. Dig. 169, Report of Mr. Foster, Secretary of State.

[91]Ibid.

[92]19 Harv. L. Rev. 69.

[93]B. Altman & Co. v. United States, (1911) 224 U. S. 583, 600, 56 L. Ed. 894, 32 S. C. R. 593.

[94]Rainey v. United States, (1913) 232 U. S. 310, 58 L. Ed. 617, 34 S. C. R. 429.

SPECIAL LEGISLATION IN MINNESOTA

By William Anderson*

I. The Constitutional Amendment

Special legislation was a well known evil in state legislative practice long before the Civil War. It was an abuse from which the people of Minnesota did not escape. Under the organic act of the territory there was, unfortunately, no restriction of any kind upon the passage of special acts by the legislative assembly. Mr. Sibley, who sat for one session in that body, later said that:

"In that session I saw enough to determine me that if ever I had anything to do with the formation of the constitution of a new state, I would place it beyond the power of the legislature to pave the whole country as ours has already done with charters conferring special privileges. . . . It is doubly our duty to tie up the legislature from the power of imposing upon the people of our future state, these charter privileges which have been the curse and bane of all the states."[1]

The question of what could be done to put an end to this abuse was fully debated in the Democratic wing of the Minnesota constitutional convention of 1857, and received some attention also in the Republican wing.[2] In both it was agreed that the special incorporation of private companies should be forbidden. The Democratic group went even farther. During the debate upon the proposal that "No corporations shall be formed under special acts except for municipal purposes," an amendment was carried to strike out the last four words. In the Republican wing a provision was adopted which retained the exception authorizing special acts for incorporating municipalities. The compromise committee which drew up the constitution upon which both conventions and the people finally agreed, accepted the Democratic provision but restored the words "except for municipal purposes." This was, in brief, the origin of section 2 of article 10 of the Minnesota constitution which, though superseded in fact, is still

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[1]Minn. Const'l Deb., (Democratic) 169-170. See also Roos v. State, (1861) 6 Minn. 428 (Gil. 290).

[2]Minn. Const'l Deb., (Democratic) 125-148, 156-177; Minn. Conven. Deb., (Republican) 325-333.

printed as part of the constitution and was for many years the only important prohibition against special legislation in this state.[3]

As a limitation upon the powers of the legislature, the provision mentioned above was strictly construed. It prohibited the special incorporation of non-municipal corporations and nothing more.[4] In fact, it was a prohibition which prohibited almost nothing. Special legislation increased with almost every session and became finally so great an inconvenience to all concerned that in 1881 Governor John S. Pillsbury strongly recommended to the legislature that it propose an amendment to the constitution to curb the evil if not to end it. The legislature acceded to his request, and at the election that year the voters adopted an amendment which added sections 33 and 34 to article 4 of the state constitution.[5] This amendment was far from being an all-inclusive prohibition. It simply forbade "special or private" laws upon eleven stated subjects, seven of which related to questions of local government and four of which concerned questions more strictly private. General laws upon these subjects were expressly sanctioned, but such general laws were to be "uniform in their operation throughout the state." In the entire amendment there was nothing to prevent special legislation for cities, nor to prevent the amendment of any previous special act whatever. For these and other reasons this prohibition proved entirely unsatisfactory.[6] Special legislation, while changing somewhat in character, actually increased in quantity.[7] Legislators apparently found themselves unable to resist the demands put upon them, and came to desire some more efficacious measure of relief. The result was the

[3]For less important restrictions, and for provisions requiring "general" laws, see Minn. const. art. 4, secs. 28, 31; art. 8, sec. 1; art. 9, secs. 1 (original), 3 (original), and 13. Art. 11, secs. 1, 2, and 3 seem to require special laws; but see State ex rel. Childs v. Board of County Commissioners of Crow Wing County, (1896) 66 Minn. 519, 68 N.W. 767, 69 N.W. 925; State ex. rel. Childs v. Pioneer Press Co., (1896) 66 Minn. 536, 68 N.W. 769.

[4]Tierney v. Dodge, (1864). 9 Minn. 166 (Gil. 153); McRoberts v. Washburne, (1865) 10 Minn. 23 (Gil. 8); city of St. Paul v. Colter, (1866) 12 Minn. 41 (Gil. 16); Green v. Knife Falls Boom Corp., (1886) 35 Minn. 155, 27 N.W. 924.

[5]Anderson and Lobb, A Hist. of Const. of Minn., 169-170, 219-220; Anderson, City Charter Making in Minn, 5-17.

[6]State ex rel. Kemerer v. Gurley, (1887) 37 Minn. 475, 35 N.W. 267; McCormick v. Village of West Duluth, (1891) 47 Minn. 272, 50 N.W. 128; State ex. rel. Webster v. Beck, (1892) 50 Minn. 47, 52 N.W. 380; State ex rel. Quinn v. Village Council of Cloquet, (1892) 52 Minn. 9, 53 N.W. 1016; Brady v. Moulton, (1895) 61 Minn. 185, 63 N.W. 489.

[7]In the five sessions from 1883 to 1891, inclusive, the legislature enacted 2,129 special laws covering 4,376 pages.

proposal by the legislature of 1891 and the adoption by the voters in 1892 of the present section 33 of article 4 of the constitution. It is one of the most sweeping prohibitions of its kind to be found among the constitutions of the forty-eight states. Section 34 was not changed in 1892. For convenience of reference, both sections are printed herewith.[8]

Practically all of the state constitutions now prohibit special legislation by one method or another, either entirely or as to certain specified matters. It is unfortunate, therefore, that there is no adequate up-to-date treatise on the subject.[9] A complete discussion of special legislation even for the state of Minnesota alone would require a considerable space. Such a comprehensive examination of the subject will not be attempted here. The aim

[8]"Sec. 33. In all cases when a general law can be made applicable, no special law shall be enacted; and whether a general law could have been applicable in any case, is hereby declared a judicial question, and as such shall be judicially determined without regard to any legislative assertion on that subject. The legislature shall pass no local or special law; regulating the affairs of, or incorporating, erecting or changing the lines of any county, city, village, township, ward or school district, or creating the offices, or prescribing the powers and duties of the officers of or fixing or relating to the compensation, salary or fees of the same or the mode of election or appointment thereto; authorizing the laying out, opening, altering, vacating or maintaining roads, highways, streets or alleys; remitting fines, penalties or forfeitures; regulating the powers, duties and practice of justices of the peace, magistrates and constables; changing the names of persons, places, lakes or rivers; for opening and conducting of elections, or fixing or changing the places of voting; authorizing the adoption or legitimation of children; changing the law of descent or succession; conferring rights upon miners (sic); declaring any named person of age; giving effect to informal or invalid wills or deeds, or affecting the estates of minors or persons under disability; locating or changing county seats; regulating the management of public schools, the building or repairing of school houses, and the raising of money for such purposes; exempting property from taxation, or regulating the rate of interest on money; creating corporations, or amending, renewing, extending or explaining the charters thereof; granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever, or authorizing public taxation for a private purpose. Provided, however, that the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated.

"The legislature may repeal any existing special or local law but shall not amend, extend or modify any of the same."

"Sec. 34. The legislature shall provide general laws for the transaction of any business that may be prohibited by section one (1) of this amendment, and all such laws shall be uniform in their operation throughout the state."

[9]Among the better discussions of the subject, none of which are complete, are: 1 Dillon, Mun. Corps., 5th ed., secs. 140-175; 6 R.C.L. 373-392, 417-420 (Const. Law, secs. 369-384, 413-415), 12 C.J. 1108-1141 (Const. Law, secs. 824-873, *passim.*) McQuillin's discussion, 1 Mun. Corps., secs. 185-218, and Supplement, vol. 7, same section numbers, is of little value in Minnesota since it ignores the decisions in this jurisdiction. See also Binney, Const. Restric. upon Loc. and Spec. Legis'n in St. Const.

will be to analyze the decisions upon a few important points, and to pay particular attention to any rules laid down in this jurisdiction which seem to be in any sense unique or novel.

II. Class Legislation and Special Legislation

"The conception of equality," says Bryce, "has been the prime factor in the creation of democratic theory, and from misunderstandings of it have sprung half the errors which democratic practice has committed."[10] Judges who have been called upon to interpret and apply a constitutional guarantee of equal protection of the laws know full well how many misunderstandings there can be. Equality is of many kinds, or at least it presents many facts, political, social, and economic, but the equality which is undoubtedly most stressed in American law is civil equality, or the equality of men before the law. In the statement of this desirable principle, eighteenth century speculators like Rousseau, Paine, and Jefferson are scarcely distinguishable from solid nineteenth century American jurists like Cooley.

"Equality of rights, privileges, and capacities," says Cooley, "unquestionably should be the aim of the law; . . . The state, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights. Special privileges are always obnoxious, and discriminations against persons or classes are still more so; and, as a rule of construction, it is to be presumed they were probably not contemplated or designed."[11]

Practically all the state constitutions contain specific language designed to bring about equality before the law as between man and man. Where such clauses use the term "person" instead of "man" or "citizen" their protective force has generally been extended also to private corporations. In the Minnesota constitution it has been provided from the beginning that "No member of this state shall be disfranchised, or deprived of any of the rights

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[10]1 Bryce, Modern Democracies, 60.

[11]Cooley Const. Lim., 7th ed., 562-563. Compare with this the following statement from Rousseau, Social Contract, Bk. II, chs. IV, VI. "From whatever side we approach our principle, we reach the same conclusion, that the social compact sets up among the citizens an equality of such a kind, that they all bind themselves to observe the same conditions and should therefore all enjoy the same rights. . . . When I say that the object of laws is always general, I mean that law considers subjects *en masse* and actions in the abstract, and never a particular person or action. Thus the law may indeed decree that there shall be privileges, but cannot confer them on anybody by name. It may set up several classes of citizens, and even lay down the qualifications for membership of these classes, but it cannot nominate such and such persons as belonging to them; . . . In a word, no function which has a particular object belongs to the legislative power."

or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers," and that "No person shall . . . be deprived of life, liberty or property without due process of law."[12] "Class legislation," so-called, has been held unconstitutional in this state under these provisions alone and even without reference to them.[13] The fourteenth amendment to the federal constitution, adopted in 1868, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." This provision, wrote Judge Mitchell in 1883, "does not surround the citizen with any protection additional to those before given under the constitutions of the states."[14] The fourteenth amendment did not change or appreciably add to the substance of the existing prohibition in Minnesota against unequal or arbitrary legislation. What it did was to introduce the possible sanction of the federal courts backed by the entire force of the federal government. Granting that these state and federal constitutional provisions were a sufficient prohibition of "class legislation," as they have been held to be, we can define more precisely the meaning and intent of the more recent prohibitions against local and special legislation. We must assume that the later amendments were not designed to prohibit what was already effectually forbidden. Local and special legislation must, therefore, be something different from class legislation.

It has been said that "the familiar rule as to the interpretation of changes in statutory law, that an inquiry should be directed to the old law, the mischief, and the remedy, has frequently been applied in the interpretation of constitutional provisions."[15] A better rule could hardly have been provided for the present case. The people had seen their legislators deluged at every session with a host of bills for the enactment of measures not of general public interest. They had seen their legislators, forced by political

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[12]Minn. const. art. 1, secs. 2, 7.

[13]McComb v. Bell, (1858) 2 Minn. 295 (Gil. 256); County Commissioners of Hennepin County v. Jones, (1871-2) 18 Minn. 199 (Gil. 182); Lavallee v. St. Paul, Minneapolis & Manitoba Ry. Co., (1889) 40 Minn. 249, 41 N.W. 794; State v. Sheriff of Ramsey Co., (1892) 48 Minn. 236, 51 N.W. 112, where the headnote of the case refers to art. 4, sec. 33, but where the text of the decision makes no reference to it and where the subject matter does not come within the prohibition of that section; Gifford v. Wiggins, (1892) 50 Minn. 401, 52 N.W. 904; State ex rel. Luria v. Wagener, (1897) 69 Minn. 206, 72 N.W. 67.

[14]Herrick v. Minneapolis & St. Louis Railway Co., (1883) 31 Minn. 11, 16 N.W. 413; evidently following the decision in the Slaughter-House Cases, (1873) 16 Wall. 36, 21 L. Ed. 394.

[15]6 R.C.L. 50 (Const. Law, sec. 45).

considerations, spending much of their time and energy upon such matters. Biennially there had come forth from the presses of the public printers two volumes of laws, one containing acts called "general," and the other and thicker volume a mass of enactments called "special laws." In the latter volume every act began by naming the individuals, associations, corporations, or places to which it was intended to apply. In the main these acts dealt with the thousand and one special needs of particular units of local government, counties, cities, villages, towns, and school districts. Others of these acts changed the names of persons or places, or declared named persons of age, or made special rules for the disposition of the estate of some minor, or enlarged the powers of some corporation, or extended its life, or conferred special privileges upon named persons or corporations. These laws were known as "special laws" or as "local laws." It was the enactment of these special and local statutes which the voters and their representatives in the legislature desired to prohibit. In the constitutional amendment which was drawn up, appropriate language was used to accomplish this purpose. "In all cases when a general law can be made applicable, no special law shall be enacted." In the following sentence it is provided that "The legislature shall pass no local or special law" upon a number of subjects which are adequately described. Applying the doctrine of ejusdem generis we must conclude that "special law" in the first sentence means any law of a type or subject matter similar to that described as a special law in the second sentence. The legislators who drew up the 1891 amendments were sufficiently cognizant of the meaning of the terms "equal protection of the laws" and "class legislation." Had they intended to redouble the prohibition already existing against class legislation, they had intelligence enough to use that term in the amendment which they proposed. It is not without significance that they did not use it.

The term "class legislation" is not used in either the federal constitution or the constitution of this state. It is distinctly a misnomer and has been the cause of much misunderstanding. It is not seriously doubted that legislatures may classify the subjects of legislation and apply different rules to the government of different classes. Laws may be applied to grocers alone, or to physicians, or to railroads or colleges or what not. The point simply is that the classification must be germane and adequate to the purpose of the law. As to the law itself, "not only must it

treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions."[16] There must be some reason for what is done, some difference in conditions between different groups calling for different treatment, and all who fall within any natural grouping must be treated alike under the law. "Equal protection of the laws" has been held to mean the "protection of equal laws."[17]

What has been said relates, however, rather to the nature of the protection afforded by the guarantee of "equal protection of the laws" than to its application in practice. The question arises as to what subjects of legislation actually come within the equal protection provisions of the federal and state constitutions, quoted above. A brief review will show that these subjects differ sharply from the subjects enumerated in the prohibition against special and local legislation in section 33 of article 4 of the Minnesota constitution. (1) In the first place, the fourteenth amendment was in no wise intended to limit the control of the different states over their municipal institutions. This control remains as complete as before. The amendment "contemplates persons and classes of persons. It has not respect to local and municipal regulations that do not injuriously affect or discriminate between persons or classes of persons within the places or municipalities for which such regulations are made."[18] To put it differently, municipal bodies, including municipal corporations, public quasi-corporations like counties, and other local units, are mere agencies of the state government, and are not persons within the equal protection clause of the fourteenth amendment.

"Laws public in their objects may, unless express constitutional provision forbids, be either general or local in their application. . . . These discriminations are made constantly; and the fact that the laws are of local or special operation only is not supposed to render them obnoxious in principle."[19]

Thus under the constitution of Minnesota, before special legislation was prohibited, different municipal regulations in different

[16]Johnson v. St. Paul & Duluth Railroad Co., (1890) 43 Minn. 222, 45 N.W. 156; 6 R.C.L. 375-378 (Const. Law, secs. 370, 371).

[17]6 R.C.L. 370 (Const. Law sec. 364).

[18]Missouri v. Lewis, (1880) 101 U.S. 22, 25 L. Ed. 989.

[19]Cooley, Const. Lim., 7th ed., 554, 555. See also County Commissioners of Hennepin County v. Jones, (1871) 18 Minn. 199 (Gil. 182); Bruce v. County Commissioners of Lodge County, (1873-74) 20 Minn. 388 (Gil. 339); Nichols v. City of Minneapolis, (1883) 30 Minn. 545, 16 N.W. 410. Merritt v. Knife Falls Boom Corporation, (1885) 34 Minn. 245, 25 N.W. 403.

communities, far from being unconstitutional, were considered actually desirable and beneficial.[20]

(2) In the second place, legislative grants of special privileges or franchises to corporations or individuals for more or less public purposes were not considered in Minnesota to be violations of either the federal or state constitutional provisions according the equal protection of the laws. They were not class legislation, or partial and unequal legislation.[21] Examples of ferry, plank road, and boom privileges, as well as privileges of many other kinds, are so numerous in the special laws passed before 1892 as to give ample evidence that they were considered entirely valid. No doubt the well known decision in the *Slaughter-House Cases* gave a considerable support to this view.[22]

(3) Curative laws of various kinds were frequently enacted among the many special laws in Minnesota. Where they related to procedural irregularities, and did not extend to matters of jurisdiction, they were generally considered to be valid upon general principles. There is no evidence that such laws were considered as violating the guarantee of equal protection or any other general constitutional safeguard.[23]

It is unnecessary to enumerate or to describe further the types of laws which were not forbidden by other constitutional inhibitions and which it was the purpose of the people to prevent when they adopted the prohibition against special legislation. The guarantee of equal protection and the prohibition against special and local legislation occupy separate but adjoining fields. The latter forbids measures not inhibited by the former. The latter is a prohibition essentially against a form of legislation in a definite, restricted field. The two categories of class legislation and special legislation are similar in only one important respect, namely in that they both involve problems of classification. Nevertheless the two objects have become so confused and entangled in the decisions of the highest court in this state as to be almost if not quite inextricable. Shrewd counsel, seeking every possible

[20]Daley v. City of St. Paul, (1862) 7 Minn. 390 (Gil. 311); Tierney v. Dodge, (1864) 9 Minn. 166 (Gil. 163, 158); City of St. Paul v. Colter, (1866) 12 Minn. 41 (Gil. 16).

[21]McRoberts v. Washburne, (1865) 10 Minn. 23 (Gil. 8); Merritt v. Knife Falls Boom Corp., (1885) 34 Minn. 245, 25 N.W. 403.

[22](1873) 16 Wall. 36, 21 L. Ed. 394. See also 12 C.J. 1113, 1115, (Const. Law, sec. 832); 6 R.C.L. 408 (Const. Law, sec. 404).

[23]Cooley, Const. Lim., 7th ed., 530 ff; 6 R.C.L. 320, 361 (Const. Law, secs. 309-311, 357); 12 C.J. 1091 (Const. Law, secs. 785-802).

ground for proving the invalidity of statutes, have frequently, without discrimination, attacked the same legislative act as being repugnant at one and the same time to both the fourteenth amendment and the second section of the Minnesota bill of rights on the one hand, and to the prohibition against special legislation on the other.[24] There have been a few border line cases where this double attack has been justifiable, but these are the exception. The court has on several occasions called attention to the distinction without explaining it.[25] Justice Mitchell, in a concurring opinion, also has emphasized the fact that a differentiation should be made, but even he on other occasions has used his terms very loosely.[26] The safest rule to follow is that special legislation and class legislation must be presumed to be separate and distinct categories, exclusive of each other, unless the contrary is proved.

III. The Sweeping Clause of the 1892 Amendment

The 1892 amendment prohibiting special legislation improves upon the 1881 amendment in three important respects. (1) In addition to the specific prohibition of special laws in certain stated cases, the later amendment forbids the enactment of special laws "in all cases when a general law can be made applicable," and declares it to be a judicial question as to whether a general law could have been applicable in any case. This provision is the first

[24]Some striking examples of the confusion between class and special legislation existing in the arguments of counsel, or the opinions of the judges, or both, will be found in the following cases: State v. Sheriff of Ramsey County, (1892) 48 Minn. 236, 51 N.W. 112, and headnote; State ex rel. Luria v. Wagener, (1897) 69 Minn. 206, 72 N.W. 67; Anderson v. Seymour, (1897) 70 Minn. 358, 73 N.W. 171; State v. Sherod, (1900) 80 Minn. 446, 83 N.W. 417; State ex rel. Clay County Abstract Co. v. McCubrey, (1901) 84 Minn. 439, 87 N.W. 1126; State ex rel. Scheffer v. Justus, (1902) 85 Minn. 279, 88 N.W. 759; State v. Stoffels, (1903) 89 Minn. 205, 94 N.W. 675; State ex rel. Chapel v. Justus, (1903) 90 Minn. 474, 97 N.W. 124; State ex rel. Hoffman v. Justus, (1904) 91 Minn. 447, 98 N.W. 325, and headnote; Stees v. Bergmeier, (1904) 91 Minn. 513, 98 N.W. 648; Webb v. Downes, (1904) 93 Minn. 457, 101 N.W. 966; State ex rel. Mudeking v. Parr, (1909) 109 Minn. 147, 123 N.W. 408, and headnote; State ex rel. Young v. Standard Oil Co., (1910) 111 Minn. 85, 126 N.W. 527; State v. Bridgeman & Russell Co., (1912) 117 Minn. 186, 134 N.W. 496; State v. Elliott, (1916) 135 Minn. 89, 160 N.W. 204. Headnotes in Minnesota reports are presumably written by the judges.

[25]State ex rel. Olson v. Erickson, (1914) 125 Minn. 238, 146 N.W. 364.

[26]Compare concurring opinion in State ex rel. Luria v. Wagener, (1897) 69 Minn. 206, 72 N.W. 67, with the following sentence: "It has been sometimes loosely stated that special legislation is not class, 'if all persons brought under its influence are treated alike under the same conditions.' " Judge Mitchell's own statement includes a very careless use of terms. Johnson v. St. Paul & Duluth Railroad Co., (1890) 43 Minn. 222, 45 N.W. 156.

sentence of the present section 33. It is herein called the "sweeping clause" and will be discussed in the following paragraphs. (2) It extends very materially the list of named subjects upon which the legislature "shall pass no local or special law." (3) It also adds the clause that "the legislature may repeal any existing special or local law but shall not amend, extend or modify any of the same." The intention very clearly was to close the door to all special legislation upon the subjects stated and upon all similar subjects. As has been said above, the doctrine of ejusdem generis would require the limitation of the scope of the term "special law" in the first sentence to laws upon subjects closely allied to those named in the second sentence as to which special laws are absolutely forbidden. So construed, the sweeping clause is a sort of dragnet, not designed to catch everything, but only things, similar to those named, which might have been omitted through oversight. For example, it is very clear that the provision against special legislation was not intended to prohibit what is called "class legislation."

It is reasonable to presume that the members of the supreme court at the time of the adoption of the 1892 amendment understood quite as fully as any of their successors the meaning of the amendment and the intentions of its framers. Upon the first argument of the well-known *Cooley case* in 1893 the court made an explanation of the prohibition which has not been improved upon.[27] The facts were that at an earlier date the legislature had created a board of court house and city hall commissioners in and for the county of Hennepin and the city of Minneapolis to construct a combined court house and city hall. Finding itself short of means needed to complete the work, this body procured the passage of an act of the legislature authorizing it by name to borrow additional funds. The county auditor refused to recognize the validity of this act, holding it to be contrary to the new prohibition against special legislation. Thus the litigation arose. Counsel for the commissioners admitted that the act was special, but made a strong point of the fact that the legislature had found it impossible to enact a general act applicable to the situation in Hennepin county. It was one of those cases where a general law could not be made applicable. This argument compelled the court to consider the sweeping clause of the amendment in its relation to other provisions of the section.

[27]State ex rel. Board of Court House and City Hall Commissioners v. Cooley, (1894) 56 Minn. 540, 58 N.W. 150.

Judge Collins wrote for the court that the sweeping clause:

"Is entirely unlike anything that has previously appeared in the fundamental law. . . . It is sufficient to say that we regard it as independent of the sentence which follows, and that the specified prohibitions enumerated in the second sentence or clause are not subject to or modified by the first, which forbids the enactment of special laws where general laws can be made applicable."[28]

The court recognized that the act in question covered a situation where a general law could not have been made applicable. "The situation was so peculiar that no law, it would seem, could have been framed which would have covered it, and still be a general law in any sense."[29] Hence, if the sweeping clause had been the whole of the prohibition, the law would have been held valid even though special. But the argument of counsel for Cooley had stressed the fact that the act in question came under the express prohibition in the second sentence, which says that the legislature "shall pass no local or special law; regulating the affairs of . . . any county, city," etc. It could not be denied, the court said, that this act did fall under this prohibition, which was unqualified, and was entirely independent of the sweeping clause. Upon the assumption that the act was special, it followed that it was unconstitutional. It is the conclusion of the writer that, as far as it went, this interpretation of the amendment by the court was entirely sound. Though the court came to a different decision in the case upon reargument, it did not retract or modify any portion of what has been here set down.

The framers of section 33 seem to have considered the sweeping clause very important. They put it first in the amendment, and undoubtedly expected important results from it. Upon the first test given it in the courts, this clause was correctly interpreted as a separate and independent part of the prohibition. One would expect, therefore, to find in the decisions during the succeeding thirty years that the clause has been frequently applied to prevent the enforcement of special laws. In the ninety volumes of Minnesota reports from 1893 to date, one should find at least an occasional case in which the court, having determined that a certain special act does not violate one of the express prohibitions against special laws, would turn to consider the validity of the act under the sweeping clause, to determine, in other words, whether the

[28]State ex rel. Board of Court House and City Hall Commissioners v. Cooley, (1894) 56 Minn. 540, 546, 58 N.W. 150.

[29]State ex rel. Board of Court House and City Hall Commissioners v. Cooley, (1894) 56 Minn. 540, 58 N.W. 150.

subject is one to which the prohibition of the sweeping clause would apply, and whether a general law could have been applicable in the particular case. What is the surprise of the student, therefore, to find not a single discussion of this clause in any judicial decision from that day to this. The clause appears to be as dead as Caesar.

It is difficult to assign reasons for this neglect of the provision under discussion. To some extent, no doubt, it is due to the fact that the express prohibitions cover so much ground that very few cases arise which are not covered by one or another of them. Perhaps, also, there is misunderstanding as to the nature and significance of the clause. It may be considered either too vague to be concretely useful, or so broadly inclusive as to be dangerous. There is one assertion in a later case which seems to convey the idea that the court itself considers the clause of no effect. The statement is made that the prohibitions of section 33 of article 4 "are specific, not general, and are limited by the courts to the subjects particularly enumerated."[30] The few authorities cited for this statement do not support it in any way, and since there was no argument of the point in the decision we are left without any reasonable explanation of what the court meant. It is impossible to harmonize the view expressed with the many cases in which examples of "class legislation" upon subjects in no wise mentioned in section 33 have been held to be violative of its provisions.[31] If the court really intended to say that the sweeping clause adds nothing to the more specific prohibitions of section 33, it in effect declared that one portion of the constitution is mere waste of words. This would, of course, be contrary to established rules of constitutional construction, and directly opposed to the well reasoned views in the *Cooley case*. The decision in which the assertion was made will be dealt with in the next section.

IV. Laws Establishing and Regulating Courts

The constitution of Minnesota vests the judicial power of the state in the supreme court, district courts, courts of probate, justices of the peace, "and such other courts, inferior to the supreme court, as the legislature may from time to time establish by a two-thirds vote."[32] Had there been no such provision in the constitution, the legislature would, on general principles, have had

[30]Dahlsten v. Anderson, (1906) 99 Minn. 340, 109 N.W. 697.
[31]See note 24 for list of cases.
[32]Minn. Const. art. 6, sec, 1.

ample power to create courts. The clause quoted must be construed not as a grant of power to the legislature, but as a restriction of its powers.[33] The purpose of the provision was to make the creation of courts a solemn act, and to prevent the unnecessary multiplication of courts, hastily created and as speedily destroyed. When the legislature establishes courts, it may do so only by a two-thirds vote. As a restriction of power, the clause must be strictly construed; the two-thirds vote requirement applies, therefore, only to the establishment of courts, not in any sense to the mere regulation of their affairs.[34] This is a line which the court has drawn very carefully. Because a mere regulation of the affairs of courts is not a matter of so serious import, it is not improper for the legislature to authorize home rule cities to impose duties upon the courts.[35] Such cities may even regulate the method of nominating and electing judges,[36] but they may not establish or disestablish municipal courts.[37]

We come then to the question of the relationship between the prohibition against special legislation and the power of the legislature to establish courts. In a leading decision, written by Judge Mitchell, it was held that the establishment of municipal courts is not a regulation of the affairs of cities, and that the constitution makes separate special mention of the power of the legislative body in this connection.[38] Therefore the express prohibition against special laws regulating affairs of cities does not forbid special laws for the creation of courts. Attention should then have been turned to the sweeping clause in order to ascertain whether it did not forbid the act in question. Without referring to this clause, however, the decision continued that "we could not say that the people, by adopting section 33, article 4, intended to limit the power of the legislature to establish new courts to the enactment of general laws

[33]"The provisions of a state constitution do not and cannot confer upon the legislature any powers whatever, but are mere limitations in the strict sense of that term, and the legislature has all the powers of an absolute sovereign of which it has not been divested by the constitution." State ex rel. Simpson v. City of Mankato, (1912) 117 Minn. 458, 136 N.W. 264.

[34]Dahlsten v. Anderson, (1906) 99 Minn. 340, 109 N.W. 697. See also State ex rel. Eastland v. Gould, (1883) 31 Minn. 189, 17 N.W. 276.

[35]State ex rel. Ryan v. District Court of Ramsey County, (1902) 87 Minn. 146, 91 N.W. 300; State ex. rel. Barber Asphalt Paving Co. v. District Court of St. Louis County, (1903) 90 Minn. 457, 97 N.W. 132; Minn. Laws 1921, ch. 343.

[36]Brown v. Smallwood, (1915) 130 Minn. 492, 153 N.W. 953, Ann. Cas. 1917C 474.

[37]State ex. rel. Simpson v. Fleming, (1910) 112 Minn. 136, 127 N.W. 473.

[38]State ex rel. Hagestad v. Sullivan, (1897) 67 Minn. 379, 69 N.W. 1094.

of uniform operation." The persuasive reason which led to this conclusion was stated as follows:

"Special circumstances frequently create a necessity for the establishment of a local court in one locality which does not exist in others. It would be very difficult, if not impossible, to meet all these diverse conditions by a general law of uniform operation throughout the state."

The answer to this line of argument is not hard to find. *First.* It has been held in this state that "municipal corporations are necessary to the welfare and prosperity of communities, and a judicial department of government is as essential in towns and cities as in a state."[39] It is hard to understand, therefore, why municipal courts which enforce municipal ordinances, should not be considered as one of the affairs of a city. *Second.* Section 33 expressly forbids the passage of any local or special law "regulating the powers, duties and practices of justices of the peace, magistrates and constables." In the act in question, passed three years after the amendment, the municipal court judges are entitled "magistrates" and this is not an uncommon designation. No doubt the word means the same wherever used in the laws. Furthermore, when municipal courts are created, they take the place of justices of the peace, and the legislature should not be permitted to do indirectly by abolishing the justices in a certain district, what it cannot do directly. Therefore, even if it could be argued that municipal courts are not municipal affairs, there would still be an express prohibition with reference to special laws regulating magistrates. Even if the latter is held not to apply to this case, it could be reasonably argued that municipal courts are so closely related in functions and powers to justices of the peace as to be brought under the rule against special laws by the sweeping clause, even if that clause be restricted by the rule of ejusdem generis. *Third.* "Special circumstances" exist not only with regard to courts but also in connection with practically every other municipal institution, which make almost every city think it needs something not possessed by others, yet with full knowledge of this fact the legislature and the people amended the constitution with a sweeping prohibition of special legislation. It was the old biennial volume of special laws to which the people were trying to put an end, and the special laws for municipal courts were numerous among these volumes. *Fourth.* The power to establish courts is no more sacred than the legislative power to create any other

[39]Tierney v. Dodge, (1864) 9 Minn. 166 (Gil. 153, 158).

institution or to do any other thing. The special mention of this power in the constitution is, as has been said, a mere restriction of the legislative power, and not a grant of power. Section 1 of article 6 says courts may be created only by a two-thirds vote. Section 33 of article 4, another restriction adopted many years later, says that no special law shall be passed in any case where a general law can be made applicable. It is hard to see why both rules should not apply with equal force. *Fifth.* The legislature did practically the thing which Judge Mitchell wrote would be "very difficult, if not impossible." It did pass a general law for the creation and the uniform regulation of municipal courts throughout all the smaller cities and villages of the state, to become effective at the option of the local authorities. This was the act which was raised in question. The only fact which made necessary at all the decision which is now being analyzed was the existence in Minnesota of the very questionable rule that an optional law is not "a general law of uniform operation throughout the state."[40] The decision is interesting because of the fact that it cites no authorities either for or against the propositions laid down.

The doctrines of the case just reviewed were carried to their logical conclusion about ten years later. In 1891, by special act, a municipal court was created for Duluth. In 1901, by another special law, the former act was amended to eliminate the provision as to appeals directly to the supreme court. Deprived of this privilege of appeal, a defendant claimed the right nevertheless on the ground that the act of 1901 was unconstitutional as special legislation. The brief decision of the court is astounding.[41] It holds that section 33 of article 4 has no application to legislation "authorized" by section 1 of article 6. The latter provision is clearly construed as a grant of power to the legislature. Furthermore, as was stated above, the court goes on to say that the prohibitions of section 33, article 4, "are specific, not general, and are limited by the courts to the subjects particularly enumerated." The statute questioned in this case, be it noted, was not one for the "establishment" of courts, but merely one for the regulation of their procedure. Such statutes, by the very decision now under review, do not come under the provision in section 1 of article 6 at all. Nevertheless, by this decision, all acts relating to courts and

[40]See discussion of "uniformity of operation" below.
[41]Dahlsten v. Anderson, (1906) 99 Minn. 340, 109 N.W. 697.

court procedure seem to be exempted entirely from the prohibition against special laws. The legislature has not been slow to take advantage of this waiver of the constitution. It enacts special laws of every description for courts, and not only for courts which it itself "establishes" under section 1 of article 6, but also for probate and district courts, which are established in the constitution. As far as this class of legislation is concerned, the bars are down completely. And yet, it might be asked, in what field is it more important for the individual to have uniformity of laws than in the realm of judicial organization and procedure?

V. General Laws Special in Form

The first decision in the *Cooley case* served to show the state the drastic character of the prohibition which had been adopted, but it was not final.[42] The attorneys for the court house and city hall commissioners returned to their offices to ponder the situation. Presently they had an inspiration, and taking down their case books they sought authority for a new line of attack. It was not long before they appeared in the supreme court for a rehearing of the case. The act in question, as was said before, named the commission, the city, and the county to which it was to apply. By no stretch of the imagination or of language could it be construed to apply to any others. Upon the first presentation of the case it was fully admitted by counsel that the act was special, but at the rehearing they put forward the audacious argument that in spite of all appearances and former admissions, the act was general in reality.

The reasoning in support of this new view was based upon the power of the legislature to classify the subjects of legislation, and upon a distinction between the form and the substance of laws. The familiar argument was put forth that, in order to be general, a statute does not need to be universal in its scope and operation. It is required only that it apply to the whole of a class or order. Classification is justifiable, and it is for the legislature to make classifications. The distinctions between classes must be substantial, however, and such as "make one class really different from another." If the classification is a proper one, and germane to the subject of the law, it makes no difference whether the class includes a thousand members or only one. The size of the class is immaterial if in fact the law applies to the entire class. All of

[42]State ex rel. Board of Court House and City Hall Commissioners v. Cooley, (1894) 56 Minn. 540, 58 N.W. 150.

these arguments the court accepted as beyond question. The logical structure was incomplete, however, until the following argument had been made. We state it in the words of the court, which assented even to this:

"The last proposition to which we will refer is that the character of an act as general or special depends on its substance, and not on its form. It may be special in fact, although general in form; and it may be general in fact, although special in form. The mere form is not material. To illustrate, suppose mountains were one of the subjects on which special legislation was prohibited, and that there was only one mountain in the state; a law referring to that mountain by name would be special in form, but general in fact, according to all rules."[43]

These principles were then applied to the case in hand. They seem almost to have been made to fit it. The court took judicial notice that the situation in Minneapolis and Hennepin county with reference to the court house and city hall was "the only one of the kind—the only member of the class—which now exists, or ever can exist. . . . Hence the classification is complete."[44] Consequently the act of 1893 was held to be general in fact though special in form. "No legislation more general in fact than the act of 1893 would fully meet the case. If that act had been general in form, it could not be more general in fact, and still fully cover the situation."[45] Now these are sweeping assumptions.

Let us then review the facts. The constitution forbids the passage of any local or special law "regulating the affairs of . . . *any* county, city," etc. The evil which was sought to be remedied by this amendment was the passage of numerous acts enacted for and made applicable to the particular places named therein. These acts were printed in separate volumes and were known as special or local laws. The act here in question, regulating the affairs of a particular county by name, was exactly of this description. It could apply to no other county. The fact that the county and city concerned were large and important, and that their problem was in some respects unique, may be admitted, yet the constitutional provision was adopted without making exceptions for such cases. Yet perhaps the most astounding part of the entire decision was the judicial assertion, which was based upon "judicial notice" and must have been entirely without proof, that the circumstances in Hennepin county constituted a situation which was "the only one

[43]Ibid. p. 552.
[44]Ibid. p. 554.
[45]Ibid. p. 553.

of the kind—the only member of the class—which now exists, or ever can exist." It is not surprising that a court which can take judicial notice of the entire sweep of present facts and future history, can also find a classification where there is only a name. This act was as defective as one with a time limitation, since no other community could ever enter the class.[46] It violated the rule that a law must appear on its face to be general and of uniform operation.[47] It constituted an amendment and extension of existing special laws, which is expressly forbidden by the constitution.

In vindication of the courts generally it should be said that the writer has found no case in which the judges of any other state have actually followed this unique Minnesota rule. There has been no further occasion for applying it even in this state. Dillon, in his last edition, quotes this portion of the *Cooley case* decision with approval, but contradicts this view in part in another place, and announces several rules incompatible with it in other parts of his text.[48] No doubt it is coming to be seen that the prohibition against special laws is essentially a prohibition against a *form* of legislation. Section 33 does not absolutely forbid legislation upon any subject. It merely requires that laws shall be general, not special, and that is a question of the form and the application of laws.

Following the second decision in the *Cooley case* the legislature would undoubtedly have been justified in continuing to enact statutes special in form, since the court had said that the mere form of the act was immaterial. There seems to have been a feeling, however, that the ruling was not sound. As in other states, so here, the legislature quickly fell into the practice of enacting laws, really intended for only one city or county, under the guise of general laws intended for a class of cities or counties. With the passage of time and the accumulation of experience, legislators became wonderfully bold and skillful in the making of classifications which would accomplish their objects and yet probably stand the test of the courts. In other words the legislature began to attempt to do indirectly what it was forbidden to do directly. The courts were called upon, properly enough, to

[46]Marwin v. Board of Auditorium Commissioners, (1918) 140 Minn. 346, 168 N. W. 17.

[47]State ex rel. Childs v. Copeland. (1896) 66 Minn. 315, 318, 69. N.W. 27. 61 A.S.R. 410, 34 L.R.A. 777; Bowe v. City of St. Paul, (1897) 70 Minn. 341, 344, 73 N.W. 184.

[48]1 Dillon, Mun. Corps., 5th ed., secs. 142, 147, 148, 156, 158, 160, 163.

decide in a number of cases whether laws general in form were not special in fact, whether the classifications upon which they were based were not tantamount to the actual designation of a place. The problems of classification and of uniformity of operation which were raised were exceedingly intricate, and constituted an extra burden upon an always overworked court. So slight were the distinctions between one case and another that to have settled every case with entire accuracy the judges would have needed the mental and visual equipment attributed to Hudibras:

He could distinguish, and divide
A hair 'twixt south and south-west side.

Not having been blest in all cases with minds constructed like micrometers, the judges may occasionally have made a decision on one side of the line which should have been made on the other. Considering the interests at stake, however,—principally the controversial questions of local government,—it must be said that a slight mistake now and then in the application of the rules has not cost the state very dear. In the main the Minnesota court has followed carefully the rules as to classification which are generally accepted in the states. However, it has also developed several rules which are more or less peculiar to this state. It is to the latter that attention will here be given, since they involve new problems.

(*To be continued.*)

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SEARCHES AND SEIZURES—EVIDENCE—SELF-INCRIMINATION —ADMISSIBILITY OF PROPERTY SEIZED THROUGH ILLEGAL SEARCH.—The many attempts of perhaps over-zealous persons to stop violations of the eighteenth amendment by making searches without search warrants have brought to the foreground the long-standing controversy as to how the privileges against unreasonable searches and against compulsory self-incrimination, which are guaranteed by the fourth and fifth amendments to the federal constitution, affect the law of evidence. The federal decisions on this point are not necessarily binding on the state courts, because the fourth and fifth amendments are limitations on the federal government only. Nor do these guarantees come within the "privi-

leges and immunities of citizens of the United States" which the fourteenth amendment forbids the states to abridge.[1] But inasmuch as the principles of the fourth and fifth amendments have found their way into all state constitutions or bills or rights,[2] the same question arises in the state courts as in the federal courts.

The seeds of the controversy in question were sown in 1765 when Lord Camden linked the two privileges together, saying, in effect, that the attempt to introduce in evidence against a defendant property that had been illegally seized from him or from his premises was a violation of his right to be free from compulsory self-incrimination.[3] This supposed interdependence of the two rights[4] was asserted by the United States Supreme Court in 1885,[5] was apparently repudiated in 1904,[6] was re-established in 1914,[7] and now is well-settled law in the federal courts,[8] and is followed in some of the state courts.[9] These jurisdictions refuse to sanction convictions secured through unlawful seizures, on the theory that to do so is to compel a defendant to testify against himself. The fact that a guilty person will go unwhipped of justice is immaterial.[10] But to entitle the accused to the benefits of this rule, he must make a seasonable demand[11] for the return[12] of the seized

[1]Johnson v. State, (1921) 151 Ga. 21. 109 S.E. 662, 19 A.L.R. 641, and note.

[2]See, Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, n. 1.

[3]Entick v. Carrington, (1765) 19 How. St. Tr. 1030, 1073.

[4]As to the history of these two rights, see 4 Wigmore, Evid. 3126.

[5]Boyd v. United States, (1885) 116 U.S. 616, 6 S.C.R. 524, 29 L.Ed. 746.

[6]Adams v. New York, (1904) 192 U.S. 585, 24 S.C.R. 372, 48 L.Ed. 575.

[7]Weeks v. United States, (1914) 232 U.S. 383, 34 S.C.R. 341, 58 L.Ed. 652, L.R.A. 1915B 834, Ann. Cas. 1915C 1177.

[8]Silverthorne Lbr. Co. v. United States, (1920) 251 U.S. 385, 40 S.C. R. 182. 64 L.Ed. 319; Gouled v. United States, (1921) 255 U.S. 298, 41 S.C. R. 261, 65 L.Ed. 647; Amos v. United States, (1921) 255 U.S. 313, 41 S. C. R. 266, 65 L. Ed. 654; Holmes v. United States, (1921) 275 Fed. 49.

[9]The State of Iowa v. Sheridan, (1903) 121 Ia. 164, 96 N.W. 730; Hess v. State, (Okla. 1921) 202 Pac. 310; Callender v. State, (Ind. 1922) 136 N.E. 10; State v. Andrews, (W.Va. 1922) 114 S.E. 257; Youman v. Comm., (1920) 189 Ky. 152, 224 S.W. 860, 13 A.L.R. 1303, and note; cf., Dukes v. Comm. (Ky. 1922) 244 S.W. 74. Some courts require that the objection to the evidence be made before trial. People v. Marxhausen, (1919) 204 Mich. 559, 171 N.W. 557, 3 A.L.R. 1505, and note; State v. Peterson, (Wyo. 1920) 194 Pac. 342, 13 A.L.R. 1284, and note.

[10]United States v. Bookbinder, (1922) 278 Fed 216, 218.

[11]See 6 MINNESOTA LAW REVIEW 245, showing the disintegration in the federal courts of the "seasonable demand" rule.

[12]It has been held that property illegally seized will not be returned if the possession will be unlawful. O'Connor v. Potter, (1921) 276 Fed. 32; United States v. Rykowski, (1920) 267 Fed. 866. See 21 Col. L. Rev. 291; 15 Ill. L. Rev. 393; United States v. Bookbinder, (1922) 278 Fed. 216, 219.

property, in which event neither the property itself[13] nor testimony relating thereto[14] can be used in evidence against him.

This federal rule, is, however, subject to many variations. Searches and seizures that are reasonable[15] are not contemplated by the fourth amendment, and so may be made without a warrant.[16] And if the owner[17] of the premises consents to the illegal search, he waives thereby its illegality.[18] But the intention to consent must be shown by clear and positive testimony.[19] Proof of mere acquiescence is not sufficient.[20] A person's right to be free from illegal search extends to his garage,[21] but not to a distant woodland on his property.[22] He cannot complain of the seizure of property that does not belong to him,[23] or of property that does belong to him, but which is located on the land of another, the latter having voiced no objection to the search.[24] The right extends to baggage that is being carried.[25] But if a person is arrested, incriminating evidence found upon his person or in his immediate presence is

[13]See cases cited in footnotes 8 and 9, supra.

[14]Flagg v. United States, (1916) 233 Fed. 481, 147 C.C.A. 367; Tucker v. State, (Miss. 1922) 90 So. 845.

[15]Whether a search is reasonable is not a legislative, but a judicial question, People v. Case, (Mich. 1922) 190 N.W. 289, 292, and, of course, depends on the particular facts of each case.

[16]Thus, if contraband property is open to the eye and hand, no warrant is needed, Vachina v. United States, (1922) 283 Fed. 35; Bowling v. Comm., (1922) 193 Ky. 642, 237 S.W. 381; State v. Quinn, (1918) 111 S.C. 174, 97 S.E. 62, 3 A.L.R. 1500, and note; as also where the officer's sense of smell leads him to the contraband property. United States v. Borkowski, (1920) 268 Fed. 408; but see United States v. Kelih, (1921) 272 Fed. 484, 490. See, also, Salt Lake City v. Wight, (Utah 1922) 205 Pac. 900; State v. Llewellyn, (Wash. 1922) 205 Pac. 394.

[17]Ordinarily the consent cannot be given by the wife. United States v. Rykowski, (1920) 267 Fed. 866; Amos case, cited in footnote 8, supra; contra, The State v. Griswold, (1896) 67 Conn. 290, 34 Atl. 1046, 33 L.R.A. 227 (agent); Smith v. McDuffee, (1914) 72 Ore. 276, 142 Pac. 558, 143 Pac. 929 (wife).

[18]Dillon v. United States, (1921) 279 Fed. 639; People v. Ferrise, (Mich. 1922) 189 N.W. 56.

[19]United States v. Lydecker, (1921) 275 Fed. 976.

[20]Dukes v. United States, (1921) 275 Fed. 142.

[21]United States v. Slusser, (1921) 270 Fed. 818.

[22]Brent v. Comm., (Ky. 1922) 240 S.W. 45.

[23]State v. Laundy, (Ore. 1922) 204 Pac. 958, 976; accord, Haywood v. United States, (1920) 268 Fed. 795, 803; Anderson v. United States, (1921) 273 Fed. 20; contra, O'Connor v. Potter, (1921) 276 Fed 32. In the first two federal cases the property seized belonged to an association of which the defendant was a member. They are therefore hard to reconcile with the Silverthorne case, cited in footnote 8, supra, where seized property owned by a corporation was held inadmissible.

[24]Copeland v. State, (Tex. Cr. App. 1922) 244 S.W. 818.

[25]People v. Foreman, (1922) 218 Mich. 591, 188 N. W. 275; see Town of Blacksburg v. Beam, (1916) 104 S.C. 146, 88 S.E. 441, L.R.A. 1916E 714, and note; but, see State ex rel. Neville v. Mullen, (Mont. 1922) 207 Pac. 634.

admissible against him,[26] but he must first be arrested,[27] and the arrest must be lawful,[28] and not made on mere suspicion.[29] But even then the right to search does not extend to the arrested person's house,[30] unless he is arrested therein by officers who enter under the belief that a crime is being committed therein.[31] But the evidence so obtained is not admissible for the prosecution of a crime other than that for which the arrest is made.[32] Where entrance to the house is gained by trickery [33] or by a false claim of right to search,[34] the evidence seized is not admissible. But if an officer is lawfully in the house, and sees evidence of the fact that a crime is being committed, he may make a seizure without a warrant.[35] Nor is testimony inadmissible when obtained by watching the defendant through a peephole in the wall of his premises.[36] Furthermore, there is no violation of the constitutional rights of a bootlegger when an officer purchases liquor from him, and later, on the information thus gained, secures a search warrant, searches the premises, and seizes incriminating evidence.[37] Automobiles on the highway[38] or other public place[39] may be searched without a warrant. Finally, seizure by private individuals or by state offic-

[26]Commonwealth v. Riley, (1921) 192 Ky. 153, 232 S.W. 630.

[27]People v. Margelis, (1922) 217 Mich. 423, 186 N.W. 488; but, see United States v. Snyder, (1922) 278 Fed. 650, where an officer lifted a bottle out of the defendant's pocket, saw that it was full of whiskey, put it back, made the arrest, and then made a thorough search.

[28]Ash v. Comm. (1922) 193 Ky. 452, 236 S.W. 1032; State v. Gibbons, (Wash. 1922) 203 Pac. 390; contra, Calhoun v. The State, (1916) 144 Ga. 679, 87 S.E. 893, where, however, the federal rule does not prevail.

[29]State v. Willis, (W. Va. 1922) 114 S.E. 261; but, see Hughes v. State, (Tenn. 1922) 238 S.W. 558, 20 A.L.R. 639, and note.

[30]State v. Rowley, (Ia. 1922) 187 N.W. 7.

[31]United States v. Borkowski, (1920) 268 Fed. 408; Green v. State, (Tex. Cr. App. 1922) 241 S.W. 1014. See generally, on this point, note 5 A. L. R. 263.

[32]Gouled case, cited in footnote 8, supra, apparently overruling on this point United States v. Murphy, (1920) 264 Fed. 842.

[33]Gouled case, cited in footnote 8, supra, apparently overruling on this point United States v. Maresca, (1920) 266 Fed. 713.

[34]United States v. Abrams, (1916) 230 Fed. 313; Wiggin v. State, (Wyo. 1922) 206 Pac. 373, 377.

[35]State v. Magnano, (Conn. 1922) 117 Atl. 550; People v. Woodward, (Mich. 1922) 190 N.W. 721; cf., People v. Margolis, (Mich. 1922) 190 N. W. 306.

[36]Cohn v. State, (1907) 120 Tenn. 61, 109 S.W. 1149, 17 L.R.A. (N.S.) 451, and note, 15 Ann. Cas. 1201, and note.

[37]People v. Christiansen, (Mich. 1922) 190 N.W. 236.

[38]Lambert v. United States, (1922) 282 Fed. 413; United States v. Bateman, (1922) 278 Fed. 231; accord, if the driver is legally arrested prior to search, People v. De Cesare, (Mich. 1922) 190 N.W. 302; but compare this last case with People v. Case, (Mich. 1922) 190 N. W. 289, where the owner of the car was not arrested prior to the search.

[39]People v. Case, (Mich. 1922) 190 N.W. 289.

ers does not render the evidence inadmissible if the prosecution is in the federal courts.[40] Similarly, seizures by private persons or by federal officers does not affect prosecution in the state court.[41] But in both these situations the evidence is not admissible if there is prior authorization[42] or subsequent ratification[43] of the seizure, so as to make the person seizing the property in effect the agent of the prosecutor.[44]

In contradistinction to the federal rule, the majority of state courts hold that if a given piece of evidence is competent, relevant, and material, and offered in the orderly course of trial, it will be received regardless of the manner in which it was procured, primarily for the reason that courts will not inquire into collateral issues at the trial.[45]

Suggestions that the courts are inconsistent in their application of the federal rule may be explained by observing certain dis-

[40]Burdeau v. McDowell, (1921) 256 U.S. 465, 41 S.C.R. 574, 65 L.Ed. 1048, 13 A.L.R. 1159, discussed in 6 MINNESOTA LAW REVIEW 70.

[41]Gindrat v. People, (1891) 138 Ill. 103, 109, 27 N.E. 1085.

[42]United States v. Falloco, (1922) 277 Fed. 75.

[43]Flagg v. United States, (1916) 233 Fed. 481, 147 C.C.A. 367. But is not every use of the seized property by the prosecutor a ratification of the other act?

[44]See in this connection the strong dissenting opinion in Kanellos v. United States, (1922) 282 Fed. 461, 464, 467, where Waddill, J., suggests that since the eighteenth amendment confers concurrent power of enforcement on the state and federal governments, illegal seizures of liquor by state officers should be no more admissible in federal courts than unlawful seizures by federal officers.

[45]4 Wigmore, Evid., sec. 2264; State v. Strait, (1905) 94 Minn. 384, 389, 102 N.W. 913, cited with approval in State v. Hesse, (Minn. Dec. 22. 1922); The State v. Pomeroy, (1895) 130 Mo. 489, 32 S. W. 1002; State v. Wallace, (1913) 162 N. C. 622, 78 S. E. 1, Ann. Cas. 1915B 423; State v. Fleckinger, (La. 1922) 93 So. 115; Banks v. State, (Ala. 1922) 93 So. 293; see, for full collection of cases, Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A.B.A. Journ. 479. In City of Sioux Falls v. Walser, (S. Dak. 1922) 187 N.W. 821, the court put its decision on the ground that even though the search was illegal, the seizure was not, because the goods seized stood forfeited to the government by virtue of the Prohibition Law. But see United States v. Bush, (1920) 269 Fed. 455; see, also, Gamble v. Keyes, (1915) 35 S.D. 644, 153 N.W. 88. In People v. Mayen, (Cal. 1922) 205 Pac. 435, it was held that the proceeding to recover illegally seized property is independent of the criminal proceeding, and hence is not reviewable upon appeal from conviction in the court below. Accord, State ex rel. Samlin v. District Court, (Mont. 1921) 198 Pac. 362; and see Ciano v. State, (Ohio 1922) 137 N.E. 11. In State v. Magnano, (Conn. 1922) 117 Atl. 550, it was said that even though a moonshine still is unlawfully seized, it nevertheless is admissible in evidence, because it is not a "paper" on which are written or printed words or statements which might be considered the words or statements of the accused, and therefore inadmissible as violative of the right against self-incrimination. In this general connection it is significant that the Louisiana state constitutional convention of 1921 refused to insert into the constitution a prohibition against the use in evidence of property that has been illegally seized. See State v. Fleckinger, (La. 1922) 93 So. 115, 116.

tinctions. As pointed out above, if the search is a reasonable one, there is no call for the application of the federal rule. And even if the evidence is discovered in an unlawful way, it is admissible if the defendant himself was not compelled to produce it, or if the unlawful act of the officer in making the search did not in and of itself disclose the crime of the defendant.[46] It has been suggested, with respect to the federal holding that the evidence is inadmissible only when the illegal search and seizure has been made by a federal officer, that if the supposed interdependence of the fourth and fifth amendments actually exists, this distinction is illogical, and that the inconsistency of the court on this point is evidence of the fundamental unsoundness of the claim of such interdependence.[47] In further support of the state rule it is said that the law is not solicitous to aid suspected criminals to conceal the evidence of their iniquity; that the whole system of espionage rests largely upon deceiving or trapping the wrongdoer into some involuntary disclosure of his guilt; that from the necessities of the case, crimes against society being always done in darkness and concealment, devious methods of procuring evidence ought to be countenanced; that, even admitting the gravity of the offense which an illegal search perpetrates upon the rights of an individual, justice should not be cheated, and society should not be penalized for the wrongdoer's acts, the true remedy for the wrong being against the wrongdoer, and not the exclusion of pertinent evidence.[48] But, in behalf of the federal rule, it is answered that total exclusion of such evidence is the only effective means of protecting one's constitutional rights, of discouraging unauthorized raids, and that an action against the wrongdoer is but a mocking recompense to an innocent man.[49]

Inasmuch as Congress and the several states have concurrent power to enforce the eighteenth amendment, and that both sets of officers are supposed to co-operate therein, it seems unfortunate that a uniform rule concerning the admissibility of evidence has not been developed in state and federal courts.

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[46]This latter distinction apparently justifies the holding of the Cohn case, cited in footnote 36, supra.

[47]31 Yale L. J. 518, 522; see, also, 9 Ill. L. Rev. 43.

[48]Per Sloane, J., People v. Mayen, (Cal. 1922) 205 Pac. 435, 440.

[49]10 Cal. L. Rev. 165, 167; see, also, 8 Cal. L. Rev. 347. In this connection it is to be noted that Congress, by Act of Nov. 23, 1921, has declared that any federal agent who shall search a private dwelling without a search warrant, or who shall without a search warrant maliciously and without probable cause search any other building or property shall be guilty of a misdemeanor.

WILLS—REVIVAL OF REVOKED WILL—EFFECT OF EXPRESS REVOCATION IN A SUBSEQUENT WILL.—In the case of *In re Tibbett's Estate*,[1] the Minnesota supreme court was confronted with the vexatious question of whether a will, declared in a subsequent will to be revoked, can be revived without re-execution. The testatrix executed a will in 1915, complying with all statutory prerequisites.[2] In 1918, she executed a second will in due form which contained a clause revoking all prior wills. In 1920, for the purpose of revoking the second will and leaving the first will in force, she burned the second will in the presence of two disinterested witnesses whom she had called in to witness the destruction and to whom she declared her purpose in destroying it. On the submission of the first will for probate it was objected that the revocation in the second will operated to annul the first will. It was held, that the first will was properly admitted to probate. The decision is based on the fact that wills *in their entirety* are ambulatory and consequently the revocatory clause in the second will was ineffective, the will containing it having been destroyed, animo revocandi. Assuming that a will is ambulatory,[3] the "revival" of the prior will is but the result of an application to the second will of the rules governing revocation, and not, as the term "revival" suggests, the result of the direct application to the first will of a doctrine of "revivor." Whatever may be said concerning the legislative intention as expressed by the various statutes governing wills, and the general tenor of such acts, a study of the common law and the American decisions shows that the position of the Minnesota court is logical and supported by authority.

In England the law courts applied the rule that the express revocation contained in the second will was of no effect whatsoever, the second will having been destroyed, animo revocandi, and the first will, being in existence, was given effect.[4] The hardship

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[1](Minn. 1922) 189 N.W. 401.

[2]G.S. Minn. 1913, sec. 7250.

[3]If a will is in all respects ambulatory the sole question to be discussed would be the revocation of the second will, but, as brought out later in the discussion, under the ecclesiastical rule, at least partial effect is given to the revocatory clause in the second will at the time of the execution of the second will and for this reason a secondary question arises as to what fact, independent of revocation, revives the first will.

[4]1 Williams, Executors 152; Glazier v. Glazier, (1770) 4 Burr. 2512 (note that while it does not appear in the reported case that the revocation was by an express clause, it is admitted by the court in a subsequent decision that such was the case.) Goodright, Rolfe v. Harwood, (1774) 3 Wils. 501); Harwood v. Goodright, (1774) 1 Cowp. 87. This rule is a rule of law and all evidence of the testator's intention is arbitrarily excluded.

caused by the application of this arbitrary rule in cases where the testator had not desired that his first will be given effect led to the development in the ecclesiastical courts of rules[5] that gave effect to the testator's actual intention at the time the second will was destroyed.[6] In the earlier cases under this rule a presumption was recognized that the testator did not intend to have his first will carried out,[7] but this presumption was abandoned[8] and the intention of the testator was ascertained from all the surrounding circumstances at the time of the destruction of the second will.[9] The Statute of Wills,[10] however, enacted in 1837, expressly designated re-execution as a prerequisite to the validity of a will that had once been revoked.

A number of states in America have precluded all difficulty by the enactment of statutes similar to the English Statute of Wills.[11] Considerable confusion has resulted from the holding of the Connecticut court in *James v. Marvin*[12] that re-execution of the prior will is essential. Re-execution was not required by express statute, nor did the testator under the Connecticut statutes have the power to revoke a will by "a writing other than a will".[13] Aside

[5]These rules are adopted from the civil law. See Taylor v. Taylor, (1820) 2 Nott. & M. (S.C.) 482.

[6]The various elements considered in determining this intention, and the weight given such elements are not considered in this note.

[7]Helyar v. Helyar, (1754) 1 Lee Eccl. Rep. 472; Moore v. Moore, (1817) 1 Phillim. 406.

[8]Wilson v. Wilson, (1821) 3 Phill. Eccl. 543, 544.

[9]Usticke v. Bawden, (1824) 2 Add. Eccl. Rep. 116, 125.

[10]1 Vict. c. 26, sec. 22.

[11]Matter of Stickney, (1899) 161 N.Y. 42, 55 N.E. 396, 76 A.S.R. 246, construing acts re-enacted in N.Y. Cons. Laws 1909, 505; Clark v. Hugo, (Va. 1921) 107 S.E. 730, construing Va. Code 1919, sec. 5234. Similar statutes are in force in California, Kansas, Kentucky, Indiana, Missouri, Oregon, Ohio, South Dakota, Washington and Georgia.

[12](1819) 3 Conn. 576. This decision was repudiated in Whitehill v. Halbing, (Conn. 1922) 118 Atl. 454, but see the able dissenting opinion by Chief Justice Wheeler. See also a discussion of this case in 32 Yale L.J. 70.

[13]For an explanation of the effect of the existence of such a statute of revocation, on revival and re-execution, see infra, text and cases cited in footnote 18.

In addition to the confusion caused by the case designated, James v. Marvin, several cases that might have been explained under statutes controlling revocation, were not so explained by the courts deciding the respective cases and the language used by the courts leaves no doubt that it is their intention to decide the case in accord with James v. Marvin. In Scott v. Fink, (1881) 45 Mich. 241, the court without citing any statute on revocation says that the express revocation has "immediate effect", and approve expressly James v. Marvin. This decision is approved in Stevens v. Hope, (1883) 52 Mich. 65, without comment. The explanation under the statute governing revocation is conceived at a later date. Danley v. Jefferson, (1908) 150 Mich. 590, 114 N.W. 470. In Harwell v. Lively, (1860) 39 Ga. 315, 319, it is said that "the last will is necessarily and per se a re-

from this difficulty, the question first presented in an analysis of American decisions is whether the rule of the law courts or that of the ecclesiastical courts has been adopted. The latter rule has been more generally adopted[14] and with its adoption is introduced the hopeless conflict as to what weight shall be given certain items of evidence, e.g., the fact that the first will was retained by the testator, the destruction of the second will, the revocation expressly stated in the second will,[15] in determining the actual intention of the testator at the time the second will was destroyed. Such conflict has the effect of creating confusion as to which fundamental rule is being applied and as to just what that rule is. Even though this difficulty is evaded by the adoption of the rule that was applied in the law courts of England, there remains for consideration the question of the effect of various forms of statutes enacted in this country governing revocation. Where statutes provide only for revocation "by burning..., or by some other will or codicil," the decisions are uniform that the revocatory clause in a will

vocation of the former." The English Statute of Wills of 1837, footnote 10, supra, is quoted with approval and "calculated as it is to subserve and enforce the spirit and tenor of our own legislation, and to give to our people the full benefit of the two hundred years experience of the mother country. . .," it is held that re-execution is essential. Although several cases attribute this case to the enactment of a statute similar to the English statute, the case does not suggest such a statute, and research has failed to disclose such a statute existing at the date of this case.

[14]Ecclesiastical rule applied. Pickens v. Davis, (1883) 134 Mass. 252, 45 Am. Rep. 322; Williams v. Williams, (1886) 142 Mass. 515, 8 Atl. 424; Williams v. Miles, (1903) 68 Neb. 463, 94 N.W. 705, 96 N.W. 151, 62 L. R. A. 383, 4 Ann. Cas. 306, 110 A.S.R. 431; Lane v. Hill, (1895) 68 N.H. 275, 44 Atl. 393; McClure v. McClure, (1887) 86 Tenn. 174, 6 S.W. 44; Colvin v. Warford, (1863) 20 Md. 357, 391; In re Gould's Estate, (1900) 72 Vt. 316, 47 Atl. 1082; see, also, Marsh v. Marsh, (1855) 3 Jones L. (N. C.) 77, 64 Am. Dec. 598; Randall v. Beatty, (1879) 31 N.J. Eq. 643; In re Moore's Will, (1907) 73 N.J. Eq. 371, 65 Atl. 447, wherein the courts, as in the principal case, were not forced to choose between the two rules. In Matter of Diament, (1915) 84 N.J. Eq. 135, 92 Atl. 952, however, New Jersey apparently adopts the common-law rule. In Blackett v. Ziegler, (1911) 153 Ia. 344, 133 N.W. 901, 37 L.R.A. (N.S.) 291, the ecclesiastical rule is applied. By the Iowa statute it is provided that a will may be revoked "by burning. . ., or by the execution of" subsequent will revoking the same The court expressly recognizes that "it is the execution of the instrument [will] in proper form which effectuates the revocation." If the revocation has been effected, can the ecclesiastical rule be applied?

Common-law rule applied. Stetson v. Stetson, (1903) 200 Ill. 601, 66 N. E. 262, 61 L.R.A. 258; Moore v. Rowlett, (1915) 269 Ill. 88, 109 N.E. 682; Bates v. Hacking, (1908) 20 R. I. 1, 68 Atl. 622, 14 L.R.A. (N.S.) 937; Taylor v. Taylor, (1820) 2 Nott. & M. (S.C.) 482; Dawson v. Smith, (1864) 3 Houst. (Del.) 92; Whitehill v. Halbing, (Conn. 1922) 118 Atl. 454. While the court in the Connecticut case does not state which rule they apply, evidence of the intention of the testator at the time of the destruction of the will was excluded as "immaterial", and the prior will was admitted to probate.

[15]See footnote 6.

is ambulatory, and the courts may apply either the common-law or ecclesiastical rule.[16] Where, however, statutes provide for revocation "by burning..., or by some other will or codicil, *or by some other writing,*... executed with the same formality as a will," as is the case in Minnesota, the authorities are divided as to the effect of an express revocatory clause. Under this form of statute the weight of authority holds that the fact that the statute gives a testator the *power* to revoke his will instantly, by an instrument that is effective by the mere execution of the instrument, as contrasted with the operation of a will which is only effective if it remains unrevoked at the death of the testator, does not warrant the assumption that a revocatory clause, if contained in a will, shall have full effect at the time of the execution of that will.[17] Under such a statute, however, there is respectable authority to the effect that as the testator had the *power* to effect an immediate and unconditional revocation by a clause executed independent of the will, the mere fact that the clause was incorporated in a will does not make it ambulatory, and the revocation is complete on the execution of the subsequent will containing the clause.[18]

Under the Minnesota statute the Minnesota court had the opportunity of adopting one of three rules. The rule adopted by Michigan, Wisconsin, and other states, that an express revocation in a will takes immediate effect, and consequently that re-execution of a prior will is necessary, is rejected. Having accepted the rule that the revocation is ambulatory, the question still remained whether the common law or ecclesiastical rule shall be adopted,

[16]Moore v. Rowlett, (1915) 269 Ill. 88, 109 N.E. 682; Whitehill v. Halbing, (Conn. 1922) 118 Atl. 454; McClure v. McClure, (1887) 86 Tenn. 174, 6 S.W. 44.

[17]Pickens v. Davis, (1883) 134 Mass. 252, 45 Am. Rep. 322; Williams v. Williams, (1886) 142 Mass. 515, 8 Atl. 424; Lane v. Hill, (1895) 68 N.H. 275, 44 Atl. 393; In re Gould's Estate, (1900) 72 Vt. 316, 47 Atl. 1082; Matter of Diament, (1915) 84 N.J. Eq. 135, 92 Atl. 952; Colvin v. Warford, (1863) 20 Md. 357, 391.

[18]In re Noon's Will, (1902) 115 Wis. 299, 91 N.W. 670, 95 A.S.R. 944; Cheever v. North, (1895) 106 Mich. 390, 64 N.W. 455, 37 L.R.A. 575, 58 A. S.R. 499; Danley v. Jefferson, (1908) 150 Mich. 590, 114 N.W. 470; Hairston v. Hairston, (1885) 30 Miss. 276; Hawes v. Nicholas, (1889) 72 Tex. 481, 2 L.R.A. 863; see, also, the cases cited in footnote 13, supra. Note that In re Cunningham, (1888) 38 Minn. 169, 36 N.W. 269 does not hold that an express revocation in a will takes immediate effect, as stated in 32 Yale L. 73, and in numerous cases. In that case the second will was not legally revoked. The testator having become insane and incompetent to make a revocation, tore it up, and the only question before the court is whether an express clause of revocation may be proved by parol evidence to defeat the former will. In theory of law the second will is subsisting, and if its contents can be proved in part or in whole, it will be carried into effect to that extent.

whether the first will is ipso facto revived whether its revival depends upon the actual intention of the testator at the time of the destruction of the second will, such intention to be determined from all the surounding circumstances. As there was ample evidence of intention to revive in *In re Tibbett's case,* the court was not compelled to choose between these latter rules. The objections to the common-law rule are not as numerous and substantial as are those to the ecclesiastical rule. While these two rules are spoken of as materially similar, the fundamental difference between the two should be noted. Under the common-law rule the sole question to be considered is whether the second will is revoked. But under the ecclesiastical rule the revocatory clause in the second will is *not,* strictly speaking, considered ambulatory. The first will *stands revoked* upon proof of a subsequent will containing a revocatory clause, and, unless the affirmative fact is found that the testator intended to revive the former will when he destroyed the second will, the first will is not given effect. This affirmative fact, the intention of the testator at the time of the revocation of the second will as derived from the surounding facts, is the legal act that gives vitality to the first will as a testamentary document even though the existence of such legal act is not assured by statutory formalities. As has been stated,[19] the common-law rule has the merit of stating a definite legal rule, which factor, in this field of law, would seem to outweigh the consideration of any benefit which the testator derives under the ecclesiastical rule. Further, the ecclesiastical rule is not in harmony with the general spirit of the statute of wills in permitting this unattested legal act to give effect to the will.[20] For these reasons it is submitted that it is preferable that the comon-law rule be adopted should the occasion arise demanding its application. But, further, was not the Wisconsin and Michigan rule, the rule rejected by the Minnesota court, preferable to either the common-law or ecclesiastical rule?

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[19]32 Yale L.J. 70, 74.

[20]See the excerpt from Harwell v. Lively in footnote 13, supra. See In re Penniman's Will, (1874) 20 Minn. (Gil.) 220, 226.

What dangers are so prevalent at the time of the original execution of the will that are not also present at the time of the destruction of a second will? If it is so highly desirable to guard against fraud in the first instance, why is it not equally desirable in the second instance? Was it ever intended under our statutes that a man should execute three wills, and then state: "I will keep the three until I make up my mind which I want, and then I will destroy the two I do not want." Williams v. Williams, (1886) 142 Mass. 515, 8 N.E. 424. Of what significance is the duly attested signature of the testator where the attestation does not at all substantiate the legal act that puts the will into effect?

However sound on theory and susceptible of application the common-law rule may be, the historical facts remain that it was abandoned by the ecclesiastical courts and has not been accepted by the weight of authority in America. The objections to the ecclesiastical rule have been considered. As contrasted with the ecclesiastical rule, the rule proposed does not make the vitality of a testamentary document depend on unattested proof of an indefinite fact. Under this rule the facts to be proved are the execution of a second will, which must have been duly attested, and the existence in that instrument of an express clause of revocation. And of paramount consideration is the fact that the Michigan and Wisconsin rule carries into effect the general spirit of our statutes governing the exercise of this statutory power of testamentary disposition, which statutes comprise a *statute of frauds*.[21]

RECENT CASES

BANKRUPTCY—EXEMPTION OF INSURANCE POLICIES WHERE RIGHT TO CHANGE BENEFICIARY IS RESERVED.—The insurance policy of a bankrupt living in Minnesota named his wife as beneficiary but contained a clause reserving to the insured the right to change the beneficiary. This right had not been exercised at the time of bankruptcy. *Held*, that the cash surrender value of the policy is not exempt under the Minnesota statute, and that it therefore passes to the trustee in bankruptcy. *Aberle v. McQuaid*, (C.C.A., Eighth Circuit, 1922) 283 Fed. 779.

The Federal Bankruptcy Act, sec. 6, U.S. Comp. St. sec. 9590, provides that exemptions are saved to a bankrupt as prescribed by state law. Sections 3455 and 3466, G.S. Minn. 1913, provide, in effect, that a beneficiary, other than the insured, shall be entitled to the proceeds of the insurance policy as against creditors of the insured. It is to be noted that these sections do not expressly cover the situation in the instant case, namely, where the right to change the beneficiary has been reserved to the insured. The court in this case stated that, since the Minnesota supreme court has not construed these statutes on this particular point, it must be guided by its own construction. The Minnesota supreme court, shortly prior to the decision in the instant case, held that the statute is one of exemption, that the policy, so long as it remains without change of beneficiary, is exempt from the claims of creditors, and that the power to change the beneficiary does not make the contingent interest of the person insured liable to the claims of his creditors. *Murphy v. Casey*, (1921) 150 Minn. 107, 184 N.W. 783. The effect of the bankrupt law upon this statute was not considered

[21] See footnote 12, supra, as to the trend of modern legislation. The result of the Michigan and Wisconsin decisions differs from the result of statutes such as the English act only where the revocation is by inconsistent provisions in the second will. In this situation the express statute on revival would require re-execution, Goods of Hodgkinson, L.R. [1893] 339, but the other would not. Cheever v. North, (1895) 106 Mich. 390.

in that case, since it arose in a controversy between the beneficiary and an execution creditor, but the position of the trustee in bankruptcy is substantially that of a judgment creditor holding an execution duly returned unsatisfied, and the state court reached its conclusion upon a consideration of the federal decisions under the bankrupt law. If the federal courts are to be governed by the construction of the state courts, as the court in the princpial case professes to be, it would seem that an opposite result should have been reached. See 6 MINNESOTA LAW REVIEW 304, 313.

BANKS AND BANKING—AUCTIONS—EQUITABLE AND LEGAL ASSIGNMENTS—BANK AS ASSIGNEE OF AUCTION ACCOUNTS IS LIABLE ON VENDOR'S WARRANTIES.—The plaintiff bank entered into an oral agreement with a farmer to clerk and finance his auction sale. To enable him to realize immediate cash thereon, the bank agreed to carry the notes of purchasers. These notes were to be made payable directly to the bank which in turn would pay over the equivalent in cash to the farmer. The defendant, in reliance on the express warranties of the farmer, purchased a tractor at the sale giving his note to the bank. In a suit on the note, the defendant pleaded breach of the warranties. *Held,* that the bank, as assignee of the auction accounts, is open to the defense on the warranties. *Welcome State Bank v. Martens,* (Minn. 1922) 190 N.W. 185.

This decision may occasion considerable surprise among country bankers who not infrequently underwrite auction sales as did the bank in the instant case. The theory of the court seems to be that the agreement, while executory, constituted an equitable assignment of the auction accounts; and that when a sale was consummated and a note given to the bank, a legal assignment of the sales account was effected. It would seem that it was never within the contemplation of the parties that the bank should be held on the warranties; nor, indeed, was any relation between the bank and the vendee contemplated other than that ordinarily arising when a person borrows money from his bank. It is true that no particular form is essential to the validity of an equitable assignment, *Holroyd v. Marshall,* (1861) 10 H. L. Cas. 191; 1 Pomeroy, Eq. Jur., sec. 368, but it is generally considered a question of intention when a thing constitutes an equitable assignment, such intention being construed in the light of surrounding circumstances. 3 Pomeroy, Eq. Jur., sec. 1282. The court in the instant case evidently concludes that regardless of the actual intention of the vendor and the bank, the surrounding facts are such as to effect an assignment, and once an assignment has been established, the rule that an assignee takes subject to the equities becomes applicable. The note sued on was not given because of any consideration passing between maker and payee, but solely because of consideration passing from the vendor to the vendee. The bank may be regarded as the vendor's nominee, standing in his shoes and subject to whatever defenses could be set up against him, including the right of rescission for breach of warranty. The note did not purport to state the whole contract, and parol evidence would therefore be admissible under proper pleadings to prove the agreement pursuant to which it was given. *Wheaton Roller-Mill Co. v. John T. Noye Mfg. Co.,* (1896) 66 Minn. 156, 68 N.W. 854; *Potter v. Easton,* (1901) 82 Minn. 247, 84 N.W. 1011. As

pointed out 2 Williston, Contracts 1245-1250, the parol evidence rule seems to have been more leniently applied in the case of negotiable instruments than in the case of other written contracts and possibly for the reason that it is recognized that the parties sacrificed elaboration to insure negotiability.

BANKS AND BANKING — TRUSTS — SPECIAL DEPOSIT — DEPOSIT FOR A SPECIFIC PURPOSE.—(a) The plaintiff deposited money in a bank to be used only in payment of shares of stock to be issued by that bank. This deposit was commingled with the general funds. Before such shares were issued the bank went into receivership. The plaintiff now claims a preference for the full amount of his deposit. (b) The plaintiff deposited money in a bank to be paid to a contractor on the fulfillment of a contract, the amount to be returned to the plaintiff in the event of failure of performance on part of the contractor. The identity of this deposit was lost in the general funds of the bank. Upon failure of the bank, plaintiff claims a preference. *Held,* (in both cases) that these were "special deposits" and as such constituted trust funds which could be followed and reclaimed from the assets in the hands of the receiver. (a) *Secrest v. Ladd,* (Kan. 1922) 209 Pac. 824; (b) *Lamb v. Ladd,* (Kan. 1922) 209 Pac. 825.

These decisions are based on a misconception of the true distinction between a "special deposit" and a "deposit for a specific purpose." The former is a pure case of bailment of the money; the latter involves passing title to the bank, in which case the deposit is commingled with the general funds. Under the facts of these cases, it seems clear that these were "deposits for specific purposes," but the error would seem to be one of terminology only, for if we regard these as "deposits for specific purposes," the same result could nevertheless be reached logically by considering the depositors and the bank as tenants in common of the commingled funds. The trust res in that case would be a portion of the fund, and this could be followed and reclaimed from the assets in the hands of the receiver, so far as they could be identified. The depositors' rights being in rem would take precedence over the creditors' rights which are in personam. See footnote 13, 6 MINNESOTA LAW REVIEW 306. The logical difficulty in cases of this kind consists in the fact that when a deposit is made for a specific purpose the relation of debtor and creditor arises between the depositor and the bank, the title passes to the bank, there being ordinarily no intention that the deposit shall be kept separate from the general funds of the bank. For fuller discussion, see 6 MINNESOTA LAW REVIEW 306, 590.

CORPORATIONS—LIABILITY OF STOCKHOLDERS—PROPRIETY OF ASSESSMENTS.—The defendant, a Minnesota mining corporation, capitalized at $1,000,000, owed over $500,000 and had assets of $2,800. In its articles of incorporation it had failed to limit its activities exclusively to mining; so the stockholders became individually liable for the claims of creditors. A creditor brought this action and had a receiver appointed, in pursuance of whose petition, the court ordered the levy of a 100% assessment on the stockholders. Until they learned of this assessment through the mails, the appellants were entirely ignorant of the proceedings. They

immediately intervened, asking for a vacation of the order levying the assessment, and for leave to contest the receiver's application therefor, on the grounds that a claim for $300,000 was pending against the United States; that the enforcement of the liability of stockholders who had fraudulently received their stock at less than par would realize $800,000; and that the assessment of $1,000,000 was excessive in view of the fact that the corporate debts were only $500,000. The trial court denied the interveners' petition, because the receiver showed that the claim against the United States would likely bring only $30,000; that inasmuch as nine-tenths of the stockholders were non-residents, the outcome of suits against them would be uncertain; and that since this fact of non-residence would render the assessment itself difficult of collection, such assessment properly had been made larger than was really necessary. On appeal from this judgment, it was *held*, that the trial court's action was correct, because from the showing made by the interveners it did not appear that the assessment was improper, unnecessary, or excessive. *Hosford v. Cuyuna Minneapolis Iron Co. (Wilder et al., Interveners)*, (Minn. 1922) 189 N. W. 1025.

For a general discussion of the Minnesota law on this point, see Ballantine, Stockholders' Liability in Minnesota, 7 MINNESOTA LAW REVIEW 79, 106.

CRIMINAL LAW—INDICTMENT AND INFORMATION—CONSTITUTIONALITY OF STATE STATUTE PERMITTING PROSECUTION OF CRIME BY INFORMATION.—The defendant arrested for having unlawfully sold intoxicants, waived preliminary examination and was bound over to the district court. Thereafter the county attorney filed an information charging him with the offense. The defendant, contending that he could be tried only by indictment, moved to set aside the information. On certification of the question to the supreme court, *Held*, that the prosecution by information was proper. *State v. Keeney*, (Minn. 1922) 189 N.W. 1023.

In the federal courts infamous crimes may be prosecuted only by indictment, because the fifth amendment of the federal constitution provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . ;" while misdemeanors punishable by fine, or by fine and imprisonment not exceeding one year, may be prosecuted by information. *Falconi v. United States*, (1922) 280 Fed. 766, 767; 14 R.C.L. 155; 22 Cyc. 184. The instant case, which is one of first impression in Minnesota, follows the well-established rule of the various state courts that a state statute authorizing the prosecution of felonies by information does not contravene the fifth amendment of the federal constitution, because that amendment is a limitation on federal power and not on state power. *LeClair v. White*, (1918) 117 Me. 335, 104 Atl. 516; *The State of Kansas v. Barnett*, (1865) 3 Kan. 244, 87 Am. Dec. 471; *The State v. Rudolph*, (1905) 187 Mo. 67, 81, 85 S.W. 584; 14 R.C.L. 153. Nor does such statute violate the due process clause either of the federal constitution, *Hurtado v. People of California*, (1884) 110 U.S. 516, 4 S.C.R. 111, 292, 28 L. Ed. 232, or of the particular state constitution. *State v. Stimpson*, (1905) 78 Vt. 124, 62 Atl. 14, 6 Ann.

Cas. 639, and note, 1 L.R.A. (N.S.) 1153, and note. The reasoning of these cases is that the words "due process" protect a citizen's rights to life, liberty, and property from the exercise of arbitrary governmental power, but do not restrict a state to a particular mode of criminal procedure. *Rowan v. The State,* (1872) 30 Wis. 129, 148, 11 Am. Rep. 559.

In the instant case the defendant admitted that a state could prosecute by information, but he contended that the Minnesota legislature has not authorized such procedure except where the accused makes a written request to plead guilty to the charge against him. But the court pointed out that G.S. Minn. 1913, sec. 9162, provides in part that an accused may request to plead guilty "to the charge made against him by complaint, indictment, or *information,*" provided that no complaint or *information* has been filed already, and provided further that the offense charged is not punishable by more than ten years' imprisonment. The court said that if an information could be filed only at the instance of the accused, the use of the term "information" in the foregoing would be of no force whatever. See *Katz v. Eldredge,* (N.J. 1922) 117 Atl. 841.

CRIMINAL LAW—MALICIOUS MISCHIEF—NECESSITY OF MALICE AGAINST THE OWNER IN A PROSECUTION FOR MALICIOUS MISCHIEF.—The prosecuting witness' greyhounds strayed onto the defendant's land. The defendant shot and killed one of the dogs. In a prosecution instituted for malicious destruction of property, under Rev. Laws, Okla., 1910, sec. 2765, the trial judge refused to instruct the jury that malice toward the owner was an essential ingredient of the offense charged. *Held,* that the refusal so to instruct was prejudicial error. *Thissen v. State, (Okla.* 1922) 209 Pac. 224.

Under the early English statutes, malice against the owner of the property injured was necessary to constitute the crime of malicious mischief, 2 East, P. C. 1062, 1063, 1072-1074; 67 Stat. at L. 197, but this rule was modified by the statute of 7 & 8 Geo. IV, c. 30, sec. 25, so that the malice now essential need not be against the owner of the property. A few jurisdictions in America follow the later English rule and hold that a malicious spirit of mischief is sufficient. *State v. Boies,* (1903) 68 Kan. 167, 74 Pac. 630, 1 Ann. Cas. 491, and note; see *State v. McCollister,* (1909) 7 Pennewill (Del.) 301, 76 Atl. 226. The instant case, however, is supported by the weight of American authority. 8 R. C. L. 299; *State v. Leslie,* (1908) 138 Iowa 104, 115 N. W. 897, 128 A. S. R. 160, and note; *United States v. Gideon,* (1856) 1 Minn. 292; see, also, *Price v. Denison,* (1905) 95 Minn. 106, 103 N. W. 728. The majority view is supported either under a common law indictment without the aid of statute, *Johnson v. State,* (Ala. 1921) 88 So. 348; *State v. Robinson,* (1838) 3 Dev. & Battle (N. C.) 130, 32 Am. Dec. 661, and note, or under statutes which define the crime in general language, leaving to the decisions the determination of the nature of the requisite malice. 2 Wharton, Criminal Law, 11th ed., 1526; *State v. Minor,* (1908) 17 N. D. 454, 117 N. W. 528, 19 L. R. A. (N. S.) 273; *State v. Wilcox,* (1832) 11 Tenn. (3 Yerg.) 278, 24 Am. Dec. 569. Some statutes expressly call for malice against the owner of the property. *State v. Rector,* (1870) 34 Tex. 565. Two reasons have been given

for the majority view. As stated in the preambles to the early statutes, the object of enacting the statute was to protect the king's subjects from "black" band raids which were made with the sole intention of impoverishing their fellow subjects. 2 East, P. C. 1063, 1071. And in the second place, because of the severity of the penalties imposed, the judges, assuming that it was not intended that an ordinary trespass be punished so severely, naturally inclined to an interpretation that would tend to save the life of the defendant. *Brown v. State,* (1875) 26 Ohio St. 176. And while today the statutory penalties are not so severe, yet the courts assume that the legislatures did not intend to impose an added punishment for an ordinary trespass.

ESCHEAT—TENURE—TIME WHEN TITLE VESTS IN STATE.—In 1879, the owner of the land in question died without heirs. Twenty years later the city of New York opened an avenue across it, after condemnation proceedings, making an award to the unknown owners. Twenty years after this the state got judgment in ejectment for the abutting lots, establishing its title to the fee for defect of heirs. In a suit by the state to recover the award made when the avenue was opened, with interest, the city seeks to set off against the claim taxes and assessments levied against the land between the death of the owner and the opening of the avenue. *Held,* that title, by escheat, vested immediately, on the death of the owner, in the state, and its property could not be taxed. *In re Melrose Avenue in Bronx,* (1922) 234 N.Y. 48, 136 N.E. 235.

The constitution of New York abolishes all feudal tenures, art. 1, sec. 11, and provides that escheat shall be an incident of sovereignty. Art. 1, sec. 12. This nomenclature disregards the common-law conception that escheat is an incident of feudal tenure, Hardman, Law of Escheat, 4 Law Quar. Rev. 318, 326, and that consequently interests in land not based on tenure could not escheat to the overlord. See *Burgess v. Wheate,* (1759) 1 Wm. Bl. 123, 163, 164. This rule was changed in England in 1884. Stat. 47 & 48 Vict. c. 71, sec. 4; Williams, Real Property, 23rd ed., 202. The result of the English Act was reached in this country without express statutory provision, *Johnson v. Spicer,* (1887) 107 N.Y. 185, 13 N.E. 753, which would seem to be correct when escheat is not based on tenure. See *Matthews v. Ward,* (1839) 10 Gill. & J. 443; 2 Tiffany, Real Property, 2nd ed., 2142; but see *State v. American Colonization Society,* (1918) 132 Md. 524, 104 Atl. 120. Where escheat is no longer an incident of tenure it is a right of succession, Everett Fraser, Future Interests in Minnesota, 3 MINNESOTA LAW REVIEW 320, 327, and the state takes as ultimate heir. *Christianson v. King County,* (1915) 239 U.S. 356, 370, 36 S.C.R. 114, 60 L. Ed. 327. In feudal escheat it was doubtful whether or not title always vested immediately on the death of the owner without heirs. Where there was no one in possession, it seems that title vested immediately, see *The Warden & Commonalty of Salder's Case,* (1594) 4 Coke 54b, 58a, and inquest of office was not an essential condition thereto. Hardman, Law of Escheat, 4 Law Quar. Rev. 318, 336. Where someone was in possession, at least, an inquest of office was necessary to perfect the title. See *Doe v. Redfern,* (1810) 12 East 96, 110; 2 Blackstone, Comm. 244, 245; stats. 8

Hen. VI c. 16, 18 Hen. VI c. 6. At the present time the rule is that the title vests immediately in the state, without inquest of office, 4 Kent, Comm. 424; *Van Kleek v. O'Hanlon,* (1845) 21 N.J.L. 582, 587; see *Croner v. Cowdrey,* (1893) 139 N.Y. 471, 476, 34 N.E. 1061, 36 A.S.R. 716, because the fee cannot be in abeyance. See *Ettenheimer v. Heffernan,* (1873) 66 Barb. (N.Y.) 374. The instant case is correct on authority and principle, and should settle the law on this point. Decisions apparently contra can be explained on other grounds. If any one is in possession, the state may not enter with a strong hand, and it cannot grant title until an inquest of office has been had. *Wilbur v. Tobey,* (1834) 16 Pick. (Mass.) 177. Where it is provided that bank accounts shall escheat to the state where for a period of twenty years the deposit is undisturbed and the owner has asserted no claim of ownership during that time, the state does not get title until a judicial proceeding is had. *State v. Savings Union Bank, etc., Co.,* (1921) 186 Cal. 294, 199 Pac. 26. Forfeiture of lands held by aliens, *Sands v. Lynham,* (1876) 27 Gratt. (Va.) 291, 21 Am. Rep. 348, or by unauthorized corporations, *Louisville School Board v. King,* (1908) 127 Ky. 824, 107 S.W. 247, 15 L.R.A. (N.S.) 379, is governed by different principles.

FORFEITURE UNDER LAND CONTRACT—RIGHTS OF HEIRS OF VENDEE—POSITION OF VENDEE IN POSSESSION ANALOGOUS TO THAT OF A MORTGAGOR IN POSSESSION.—The period of redemption from a mortgage foreclosure being about to expire, extinguishing the interest of the decedent, life-tenant, and the plaintiff's, step-children, remaindermen, the defendant agreed with the decedent to purchase the property and to sell it to the decedent on such installment payments as would enable the decedent to keep his home. The step-children were not parties to this arrangement, and made no effort to prevent the loss of the property through the foreclosure. The defendant refused to take a mortgage and would enter into the contract of sale only on condition that a stipulation be contained therein for an absolute and immediate forfeiture of all rights in the property and sums paid under the contract if payments were not completed prior to the death of the life-tenant. He died without having paid in full. The plaintiffs claim (1) that upon the death of the decedent they succeeded to his rights under the contract; (2) that the contract constituted an equitable mortgage. *Held,* (1) that the plaintiffs' interest was forfeited in accordance with the terms of the contract; (2) that the contract was not an equitable mortgage. *Kreuscher v. Roth et al.,* (Minn. 1922) 188 N.W. 996.

Though not appearing in the opinion, the record of this case discloses that two separate suits had been instituted against the defendant Roth in the court below, one suit by the children of the decedent, the other by his step-children. The trial court held that the contract cut off the interests of both groups. The natural children did not appeal, but the step-children, appellants in the instant case, joined them as co-defendants. This fact, together with the language in the opinion, seems to convey the impression that the rights of both groups are being adjudicated. This being so, the rights of each group should be treated separately. The

claim of the step-children is clearly unfounded. When they failed to redeem under the mortgage, their rights immediately terminated; nor can they claim as heirs of the vendee under the contract of purchase, inasmuch as step-children are not heirs. Furthermore, if this contract be considered an extension of the period of the equity of redemption, it was granted to the decedent only, giving the step-children no rights thereunder.

A different problem, however, arises as to the claims of the natural children. To determine their rights necessitates an examination of the contract. The provision thereof that the title should fail and all sums paid be forfeited if payment in full were not made prior to the vendee's death may mean either a forfeiture for default, or it may constitute a condition subsequent. If the former, the statute regarding the termination of land contracts only by thirty days' notice (Minn. G.S. 1913, sec. 8081) would apply, and, no notice having been given, the right to complete the payments would still exist either in the plaintiffs or in the heirs of the vendee. But since there was no default, the statute can have no application. It seems clear that this provision constituted a condition subsequent, and, as such, all rights of the vendee and his heirs would terminate upon his death. Equity however, will relieve against a forfeiture under a condition subsequent provided money damages are adequate and provided, further, that the parties did not intend the full effect of their language, but intended merely to have the condition stand as security for the performance of the contract. *Maginnis v. Knickerbocker Ice Co.,* (1901) 112 Wis. 385, 88 N.W. 300, 69 L.R.A. 833, note; Story, Equity, 14th ed. sec. 1725, 1726, note. In the instant case, the contract showed clearly that a forfeiture was contemplated, and the court rightly denied relief.

One of the judges, though concurring in the result, advances the view frequently urged that the relation between a vendee in possession and the vendor is analogous to that of mortgagor and mortgagee; that since the law will not countenance a clogging of the equity of redemption in the case of a mortgage, it should with equal care guard the interest of the vendee by disregarding a provision in the contract forfeiting the vendee's estate if he fail to complete his payments during his lifetime.

For a full discussion of the subject of forfeitures, see Ballantine, Forfeiture for Breach of Contract, 5 MINNESOTA LAW REVIEW 329, 466; see, also, 6 MINNESOTA LAW REVIEW 421; 32 Yale L. J. 65.

PHYSICIANS AND SURGEONS—CONSTITUTIONAL LAW—DELEGATION OF POWER TO MEDICAL BOARDS.—A Kansas statute, after providing that license to practice medicine in the state may be granted by the state medical board without examination, to graduates of high grade medical colleges, stipulates that all candidates, except as provided, must pass an examination embracing subjects generally required by reputable medical schools, and further states that the board shall formulate rules to govern its own actions. The board promulgated a rule whereby only class "A" colleges, which are those approved by the unofficial "American Medical Association," should be recognized. Consequently, it refused even an examination to the plaintiff who was graduated from a medical school which had previously been inspected and approved by the state board, but which had refused to

allow an inspection by the "American Medical Association." *Held*, that the board acted within its discretionary power. *Jones v. Kansas State Board of Med. Reg.*, (Kans. 1922) 208 Pac. 639.

Although at common law there were no restrictions on the right to practice medicine, the legislatures have found it advisable to limit by statute the practice of the profession to persons who possess certain qualifications. Such statutes, when reasonable, not discriminatory, and such that a person can by reasonable application and study meet the requirements, are almost invariably held to be constitutional as a valid exercise of the police power. *Dent v. West Virginia*, (1889) 129 U. S. 114, 9 S. C. R. 231, 32 L. Ed. 623. See generally, 7 Mich. L. Rev. 295-317; note, 1 Ann. Cas. 18; 1 MINNESOTA LAW REVIEW 378. Most courts hold that the legislature may delegate to some board the power to issue and revoke licenses in accordance with the statutory provisions, and may also delegate broad discretionary powers of determining whether or not applicants possess the requisite statutory qualifications. Note, 2 Ann. Cas. 427. The board may thus determine whether a school is reputable, *State v. Vandersluis*, (1889) 42 Minn. 129, 43 N. W. 789, 6 L. R. A. 119, or whether the applicant is grossly immoral. *Meffert v. State Board*, (1903) 66 Kan. 710, 72 Pac. 247, 1 L. R. A. (N. S.) 811, affirmed, 195 U. S. 625, 25 S. C. R. 790, 49 L. Ed. 250. See contra, *Hewitt v. State Board*, (1906) 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 7 Ann. Cas. 750, and note, 113 A. S. R. 315; note 5 A. L. R. 74. The power of such a board is generally considered to be quasi-judicial, and its discretionary ruling will not be disturbed unless it is clearly arbitrary and unreasonable. *State v. Chittenden*, (1906) 127 Wis. 468, 107 N. W. 500. See 6 Mich. L. Rev. 242-5, as to extent of control by mandamus. Most states, by statute, require not only an examination, but a diploma from an approved school as a basis for the issuance of a license to practice medicine. See table in Laws Regulating the Practice of Medicine in the United States and Elsewhere, 12th ed., 124. Under such statutes, it is clear that the medical board may pass upon the reputation of the various schools. Note in 22 L. R. A. (N. S.) 735. But the court in the instant case, notwithstanding the fact that the statute requires examination only, has attempted to accomplish the same result by construing the powers of the board broadly enough to permit it to prescribe an entirely new qualification not contemplated by the legislature, by allowing it to refuse examination to one not a graduate of a school approved by it. This in effect overrules the old statute, and, it is submitted, incorrectly gives the board power to make law, which is a legislative and not an administrative function. *State v. Chittenden*, (1906) 127 Wis. 468, 107 N. W. 500.

QUASI-CONTRACTS—CHATTEL MORTGAGE ON STOLEN GOODS—RECOVERY OF PAYMENT BASED ON MUTUAL MISTAKE OF FACT—APPLICATION OF RULE. —One Hughes obtained a loan from the defendant and gave in return his note, secured by a chattel mortgage on an automobile he had stolen. Hughes later sold the machine to the plaintiff who paid part of the agreed purchase price directly to the defendant in satisfaction of the note and mortgage, and the balance to Hughes. Both parties were ignorant of

Hughes' thievery. After the true owner had reclaimed the car, the plaintiff sued the defendant for the money he had paid him. *Held,* that the plaintiff cannot recover. *Gaffner v. American Finance Company,* (Wash. 1922) 206 Pac. 916.

The court in the instant case expressly declines to follow the Minnesota holding in *Grand Lodge, A.O.U.W. v. Towne,* (1917) 136 Minn. 72, 161 N.W. 403, L.R.A. 1917E 344, discussed in 1 MINNESOTA LAW REVIEW 376, where it was held on similar facts that restitution should be allowed, for the reason that the payment of the money by the plaintiff to the defendant was under a mutual mistake of fact as to the validity of the defendant's mortgage. The Minnesota decision is supported by *Strauss v. Hensey,* (1896) 9 App. D.C. 541, where the facts are identical with those of the instant case. A contrary result is reached in *Walker v. Conant,* (1888) 69 Mich. 321, 37 N.W. 292, 13 A.S.R. 391; and *Ex Parte Richard and Thalheimer,* (1913) 180 Ala. 580, 61 So. 819, where recovery is refused on the ground that even though the plaintiff paid the money directly to the defendant, still the transaction is, in legal theory, a payment to the defendant by the plaintiff as agent for the wrongdoer who really owns the money paid over, and that therefore the rule allowing recovery of money paid under mutual mistake of fact has no application. In the instant case the court asserts that the case under consideration can be distinguished from the *Grand Lodge Case.* In the latter case the notes and mortgage, for the release of which the plaintiff paid money to the defendant, were forged by one who purported to act for the real owner of the mortgaged property. As a result the mortgage was invalid and *no debt* existed. In the instant case, the note and the mortgage were given by the thief in his own name. Thus, although there was a mistake as to the validity of the mortgage, there was no mistake as to the existence of a debt, for the note created a valid obligation against the maker, and the mortgage is but an incident of the debt. It is submitted, however, that the plaintiff's purpose in making the payment was to relieve the property of a lien, and not primarily to wipe out the particular debt, and that therefore there is no true distinction between the two situations.

QUASI-CONTRACTS—WORK AND LABOR—RIGHT OF PERSON FRAUDULENTLY INDUCED TO ENTER INTO ILLEGAL MARRIAGE TO RECOVER FOR SERVICES RENDERED.—The decedent fraudulently induced the plaintiff to marry him by showing her a decree of separation from bed and board forever from his former wife, representing it to be an absolute divorce. The plaintiff, being ignorant of the legal effect of this decree, married him and lived with him until his death, when she learned that the first wife was still living. She now sues the decedent's estate in quasi-contract for the value of the household services she rendered. *Held,* that she may recover. *In re Fox's Estate,* (Wis. 1922) 190 N. W. 90.

It is the universal rule that no recovery can be had for services when they are rendered without expectation of receiving payment, the reason being that it is not unjust to allow a defendant to keep that which the plaintiff intended to give him. Keener, Quasi-Contracts 315, 324; 3 Page, Contracts 2472. But one exception thereto, recognized in the apparent

majority of cases, exists where, as in the instant case, a person, fraudulently induced to enter into an illegal marriage, renders household services. *Sanders v. Ragan,* (1916) 172 N. C. 612, 90 S. E. 777, L. R. A. 1917B 681, and note; *Fox v. Dawson's Curator,* (1820) 8 Mart. (La.) 94; *Higgins v. Breen,* (1845) 9 Mo. 493 (dictum); and see, *Boardman v. Ward,* (1889) 40 Minn. 399, 42 N. W. 202, 12 A. S. R. 749; *Hickam v. Hickam,* (1891) 46 Mo. App. 496. The reason for this exception is that since the defendant's fraud vitiates the plaintiff's intention to make a gift, it is unjust that the defendant retain the benefit without making adequate compensation for the benefit derived. Keener, Quasi-Contracts 324. In determining whether a plaintiff may thus waive the tort (deceit) and sue in quasi-contract, the question is, not whether the plaintiff suffered damage, but whether the defendant was unjustly enriched. Keener, Quasi-Contracts 160. In a situation like that of the principal case some courts reach a contrary result, *Payne's Appeal,* (1895) 65 Conn. 397, 32 Atl. 948, 33 L. R. A. 418, 48 A. S. R. 215, on the theory that the plaintiff's remedy for the wrong is not an action in quasi-contract, but an action in deceit, the services rendered being elements of damage. *Cooper v. Cooper,* (1888) 147 Mass. 370, 17 N. E. 892, 9 A. S. R. 721. It has been suggested that the reason why these courts refuse to permit the tort to be waived and assumpsit to be brought where the plaintiff seeks to use the count of work and labor is illogical but rests on a historical basis, in that the count for work and labor came later, was used less often, and was treated less favorably by the courts than the other common counts. 3 Page, Contracts 2589. Cases involving express contracts, or contracts implied in fact, are of course, not in point. Similarly, cases involving the situation where both parties have knowledge of all the facts, or where there is a mutual mistake of law, or where one party is ignorant of the law but the other has no knowledge of such ignorance, are to be distinguished from the instant case, which involves a mistake which is induced by the defendant's fraud.

RECEIVERS—RIGHT OF ELECTION TO PROCEED WITH OR REJECT CONTRACT—IMPLIED ELECTION.—The defendant corporation succeeded to the rights and obligations of a Minnesota corporation which had contracted with the interveners for the purchase of steel wheels, stipulating terms of payment. Receivers, subsequently appointed for the defendant, negotiated with the interveners for the purchase of wheels on terms different from those specified in the original contract. *Held,* that the receivers appointed for the buyer could elect to continue or reject the contract, and that the negotiation for purchase on different terms in effect rejected the old contract. *Minneapolis Iron Store Co. v. E. G. Staude Mf'g Co., (French et al., Interveners),* (Minn. 1922) 189 N. W. 596.

It is undoubtedly the rule, that a receiver of a corporation, whether the corporation is solvent or insolvent, has the right to elect within a reasonable time to proceed with or repudiate the executory contracts of the corporation existing at the time of his appointment. *U. S. Trust Co. v. Wabash R. Co.,* (1893) 150 U. S. 287, 37 L. Ed. 1085, 14 S. C. R. 86; *Maxwell v. Missouri Valley Ice & Cold Storage Co.,* (1917) 181 Iowa 108, 164 N. W. 329. This doctrine, however, is anomalous and confers

no reciprocal right on the other party to the contract. *Crawford v. Gordon,* (1915) 88 Wash. 553, 153 Pac. 363, L. R. A. 1916C 516; see 1 Tardy's Smith on Receivers, 2nd ed., 142, 148. It is to be noted that the right of the receiver to elect does not impair the obligations of the existing contract in any way, but merely relieves the receiver from personal liability; and in case the contract is discontinued, the other party may recover damages for the breach, either against the corporation or the receiver in his official capacity. *St. Louis, etc., Co. v. Ravia Granite Ballast Co.,* (Okla. 1918) 174 Pac. 252; *Wolf v. Nat'l Bank of Illinois,* (1899) 178 Ill. 85, 52 N. E. 896; see notes 3 A. L. R. 627; 12 A. L. R. 1079; 8 A. L. R. 441. In the principal case the nice question is raised: What is sufficient to constitute an election by implication? Mere silence of the receiver, where no benefits are enjoyed, has been held not to be of itself an election to continue with the contract, although it might endanger the right to proceed with the contract later on, for an unreasonable silence might release the other party. *Menke v. Willcox,* (1921) 275 Fed. 57. Neither is the taking of possession sufficient to constitute an adoption. But the continued use and possession of property held under a contract and failure to repudiate within a reasonable time does give rise to an implication that the receiver has elected to continue with the contract, *Crawford v. Gordon,* (1915) 88 Wash. 553, 153 Pac. 363, L. R. A. 1916C 516, except, however, where the court's order appointing the receiver provides otherwise. *Birmingham, etc., Co. v. Atlanta, etc., R. Co.,* (1921) 271 Fed. 731. The whole question is one of intention. It seems warranted that the court in the instant case should treat the later contract, which was on a basis entirely different from the former, as an indication of the receiver's implied intention to repudiate the original one.

SEARCHES AND SEIZURES—EVIDENCE—SELF INCRIMINATION—ADMISSIBILITY IN EVIDENCE OF PROPERTY ILLEGALLY SEIZED.—While the defendant was absent from his automobile truck, which he had parked on the county fairgrounds, the county sheriff without a search warrant searched it and seized intoxicants found therein. The defendant, having been indicted, moved the court for the return of the liquor seized. The motion was denied. On his trial the liquor was received in evidence over his objection, and he was convicted. On appeal from the rulings of the trial court, it was *held,* three justices dissenting, that the evidence was properly admitted. *People v. Case,* (Mich. 1922) 189 N. W. 289.

For a discussion of the principles involved, see NOTES, p 152.

TRUSTS—DOCTRINE OF CY-PRES—CHARITIES—EQUITY—WILLS. — The testator devised his entire estate to the Grand Lodge of the Independent Order of Odd Fellows as trustee for the purpose of erecting an orphans' home and a sanitarium where diseases should be treated by "oriental philosophy." Because of a compromise settlement made with the widow and the heirs, and because of numerous law suits, the estate was so reduced as to render impossible the execution of the testator's purpose. *Held,* that the trustee may apply the proceeds from the remainder of the estate *cy-pres* for the maintenance of the existing Odd Fellow orphanage. *McCarroll v. Grand Lodge, I. O. O. F.,* (Ark. 1922) 243 S.W. 870.

The doctrine of cy-pres has been defined as the doctrine of approximation, and while generally considered as applying exclusively to charitable trusts, see 3 Pomeroy, Equity Jurisprudence, 4th ed., sec. 1027; 3 Story; Equity Jurisprudence, 14th ed., secs. 1554, 1555, 1556, there is some authority that it is a basic principle of equitable jurisprudence applicable to all contracts and devises which contain provisions for the future. See *City of Philadelphia v. Girard's Heirs,* (1863) 45 Pa. 9, 28, 84 Am. Dec. 470; Bogert, Trusts sec. 63.

Where an instrument creates a charitable trust but the specific directions cannot be executed by the trustees because of the inadequacy or illegality of the mode or means of carrying out the settlor's intention, will the property result to the settlor or his heirs, or will equity decree that it be given to some charity of similar purpose? It is firmly established that the doctrine of cy-pres is founded on the intention of the settlor. The problem, then, is one of construction. In construing the will or other instrument it is often said that the settlor had two intentions: "A general charitable intent and a particular intent to have his gift take effect in a particular mode." 33 Harv. L. R. 598, 601; see *Keene v. Eastman,* (1909) 75 N.H. 191, 72 Atl. 213. If the particular intent becomes impossible of execution as in the instant case, the court concludes that the settlor intended his general intent to become operative. To carry out this general intent, the courts seek to apply the property to some charity as closely conformable to the settlor's intent as possible. The English courts have construed this general intent most liberally. In *The Ironmonger's Co. v. Attorney-General,* (1844) 10 Cl. & F. 908, money dedicated to the purpose of freeing slaves in Turkey and Barbary, was applied to the support of schools in England. See, also, *Biscoe v. Jackson,* (1887) 35 Ch. Div. 460; *In re Queen's School, Chester,* [1910] 1 Ch. Div. 796. In the recent case of *In re Peel's Release,* [1921] 2 Ch. Div. 218, the doctrine was strained to the utmost, if not completely over-ridden, when the court held that the property should be applied cy-pres despite the fact that the settler had provided that if the precise object could not be executed, the property should result to the settlor, his heirs and assigns. In these cases it should be noted that the English courts applied the judicial power of cy-pres which should not be confused with the prerogative cy-pres under the sign manual, which was an arbitrary power of the crown under the statute of 43 Eliz. c. 4, and did not involve a construction of the settlor's intent. See, *Da Costa v. De Pas,* (1754) 1 Amb. 228. While the doctrine is recognized generally throughout the United States, *In re Roger's Estate,* (1899) 123 Cal. 614, 56 Pac. 461, 44 L.R.A. 364; *Heuser v. Harris,* (1867) 42 Ill. 425, the power is not exercised with the degree of liberality evidenced by the English decisions. *Eliot v. Trinity Church,* (1919) 232 Mass. 517, 122 N.E. 648; *Allan v. Trustees of Nasson Inst.,* (1910) 107 Me. 120, 77 Atl. 638. The subject is covered by express statute in at least two states. Cons. Laws of N.Y. c. 50, sec. 133; Gen. Laws R. I. (1909) c. 259, sec. 9. Since charitable trusts unfortunately are abolished by G.S. Minn. 1913, sec. 6701, the doctrine clearly has no general application in Minnesota. Whether it would be applied under G.S. Minn. 1913, sec. 6710 (7), as amended in 1917 Supp. sec. 6710 (7), which provides for the creation of certain enumerated charitable trusts, remains

an open question. See Thurston, Charitable Gifts in Minnesota, 1 MINNESOTA LAW REVIEW 201.

WILLS—REVIVAL OF REVOKED WILL—EFFECT OF EXPRESS REVOCATION IN A SUBSEQUENT WILL.—The testatrix executed a will in 1915, complying with all statutory prerequisites. In 1918, she executed a second will in due form which contained a clause revoking all prior wills. In 1920, for the purpose of revoking the second will and leaving the first will in force, she burned the second will in the presence of two disinterested witnesses whom she had called in to witness the destruction and to whom she declared her purpose in destroying it. On the submission of the first will for probate it was objected that the revocation in the second will operated to annul the first will so that re-execution was essential. *Held*, that the first will was properly admitted to probate. The fact that under the statute governing the revocation of wills, the testatrix had the power to execute an instrument not a will and thus effectuate an immediate revocation not conditional on its existence at death, does not warrant the inference that if a revocatory clause is put in a will it shall have immediate effect. The second will in its entirety is ambulatory, and its destruction, animo revocandi, deprives it of all effect, and the first will is unaffected by the temporary existence of the second will. *In re Tibbetts' Estate*, (Minn. 1922) 189 N. W. 401.

For a discussion of the principles involved, see NOTES, p 158.

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ILLINOIS REJECTS A NEW CONSTITUTION

BY WALTER F. DODD*

THE constitutional convention which assembled in Illinois on January 6, 1920, held a number of sessions running until September 12, 1922. On September 12 a proposed constitution was finally agreed upon for submission to the people on December 12, 1922. The chief reasons for calling a constitutional convention were (a) to modernize the tax system of the state; (b) to obtain a better and more simplified judicial organization; (c) to produce a short ballot, so that the voter would be able better to perform his duties; and (d) to provide an easier method for future amendments to the constitution, so that changes in the fundamental law of the state could be made when desired by the deliberate sentiment of the people.

The issue of Cook County representation became a serious one immediately upon the meeting of the convention; and this issue was largely responsible for numerous sessions and recesses. Under the constitution of 1870 all parts of the state are to be equally represented in proportion to their population. However, no reapportionment has taken place in Illinois since 1901, and Cook County though now having about forty-seven percent of the population has grown more rapidly than the remainder of the state and still has but thirty-seven percent of the representation in the two houses of the general assembly. The failure to reapportion the state as required by the constitution after each decennial cen-

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sus has been due to a developing fear upon the part of the rest of the state that Cook County will dominate both houses of the general assembly, and that a union of Cook County members may control the policy of state legislation with respect not only to Cook County but with respect to the remainder of the state as well. Many of the delegates to the Illinois constitutional convention from outside of Cook County felt for this reason that it would be necessary to limit Cook County representation permanently in both houses of the general assembly. Until it was possible to agree upon a compromise the other work of the convention was for a long time at a standstill.

The compromise finally agreed upon by the convention limited Cook County permanently to one-third of the members of the state senate; and provided that all parts of the state should be equally represented in the house of representatives upon the basis of voting strength rather than of population. The adoption of voting strength (the vote for governor being taken as a basis) would have reduced the representation of Cook County and of all other large industrial communities of the state, as well as certain mining communities, because of greater alien population in these parts of the state. Aliens of course count in the total population of the several counties, but a large proportion of aliens who cannot vote would reduce the representation of these areas. Cook County, for example, although entitled to forty-seven percent of the representation upon the basis of population, would upon voting strength have been entitled to between forty-one and forty-two percent.

The framers of the proposed constitution also provided that in a future constitutional convention the representation of Cook County should be forty-five out of one hundred twenty-one members, approximately thirty-seven percent. This was the proportion in which Cook County was represented in the constitutional convention of 1920-22, and would have been a permanent limitation. Under it Cook County would in a future convention for the revision of the constitution, have had thirty-seven percent of the total membership even though the population of this county may have advanced to perhaps sixty percent of the population of the state as a whole.

To some extent related to the issue of representation, was that as to the membership of the supreme court. The supreme court is composed of seven members, one chosen from each of

seven supreme court districts. The theory of the constitution of 1870 was that these districts should be substantially equal in population, but under the census of 1920 the seventh district (having one member of the supreme court) contained fifty-one percent of the population of the state. The constitutional convention provided that the membership of the supreme court should be increased to nine and that three of these nine should be elected from the seventh district, but provided further that not more than two of the three members from this district should at the time of their election be residents of the same county.

Until a compromise was reached upon the issues of representation, it was difficult for the convention to reach an agreement upon other matters. Upon the larger issues which occasioned its assembling, the work of the convention was not fully satisfactory.

Next to representation, the issue of taxation was the most important and took the greatest amount of time. Illinois still relies for state and local revenue primarily upon the general property tax. Under this tax, intangible personalty largely escapes taxation, tangible personalty escapes to a large extent, and the methods of valuing real property are unsatisfactory. Many interests in the state were, however, opposed to the abolition of the general property tax, and felt that to abolish this tax would increase the burdens upon land. The plan finally agreed upon by the convention permitted the substitution of an income tax upon the income of intangibles for the taxation of such property on the basis of value. The proposed constitution also permitted, in addition to other taxes, the imposition of a general income tax upon all net incomes, and provided by its own terms for the exemption which might be made and for rates of progression, should the general assembly provide for this additional income tax.

With respect to judicial organization the work of the convention was more satisfactory than elsewhere. The proposed constitution would have permitted the consolidation of the courts of Cook County, the simplification to some extent of the organization of courts in other parts of the state, and would have given the supreme court power to make rules of pleading, practice and procedure. Although the theory of judicial rule-making power is a wise one, the proposed constitution was defective in that it sought to give the supreme court exclusive rule-making

power, without an effective check upon such power in the legislative department. In effect it would have set up two legislative departments for the state, with power over different aspects of the same matter, and would probably have led to serious difficulties. It is impossible to separate rules of procedure from the rules of substantive law, and to give one department of government exclusive authority over the one field, and another department exclusive authority over the other.

Under the existing constitution of Illinois cities have no home-rule powers. The proposed constitution would have given Chicago authority to frame its own form of government; and power, without the necessity for legislative action, to deal with certain of its purely local problems.

The necessity for a constitutional convention was largely occasioned by the difficulty of amending the constitution of 1870 through legislative proposal. But the framers of the proposed constitution were unwilling to propose an amending method much if any easier than that already in force.

There are styles in constitutions as in other human institutions. The recent constitutional convention in Illinois was a highly conservative group, more likely to follow the styles of the past generation than of the present. The initiative and referendum are present styles in constitution-making, but they found almost no support in this convention. Arguments in favor of the short ballot found little favor with the convention or in its proposals. In certain respects, however, present tendencies were influential. Something of municipal home rule was proposed for Chicago. Provisions for a more unified judicial system were agreed to, and the proposal to confer rule-making power upon the courts was approved. Unfortunately it is still the fashion to have detailed constitutions, and the proposal of the Illinois constitutional convention was in line with this policy; although as in other states there were some proposals leading toward increased power in the legislature. The amending process of the present constitution of Illinois belongs to the period of the Civil War, but the conservative group in the recent Illinois convention were opposed to anything that would materially if at all alter this situation.

When submitted on December 12, 1922, the proposed constitution was rejected by a majority of more than 700,000. No part of the state favored the new document. The popular major-

ity was against it in seventy-six of the one hundred and two counties. In Cook County it received the vote of only about one voter in seventeen.

The convention submitted its work as a single document, thus of necessity uniting all the forces opposed to any single change. It was urged to submit all important and controversial issues separately, as was done in 1870, but declined to adopt this policy. Had this been done, the people would probably have adopted a number of the proposed changes.

Another important factor in defeating the proposed constitution was the fact that in form it appeared to be an entirely new document. Where a state has been long in existence, a new constitution is in most of its provisions new only in name. This was true of the proposed constitution of 1922. Both the delegates to the convention and the people were satisfied with most of the provisions of the constitution of 1870 and did not desire to change them. But the convention decided that it could express many of these provisions in better form, and that they should be re-written. Were a constitution a mere literary composition, this decision would not have been dangerous. But a constitution is a legal document whose language had in large part been construed by the supreme court. To change it involved the danger of changing its meaning, unless the changes were made with great care; and great care was not exercised. Many voters for this reason rightly felt that adopting the proposed constitution was to embark upon an uncertain experiment. Not having the facilities for an intelligent judgment regarding each change, they suspected that in some cases concealed meanings had been introduced.

The chief factors in producing an overwhelming adverse vote may perhaps be summed up as: (1) taxation; (2) representation; (3) the fact that the voter must support or oppose as a whole, and (4) distrust (in many specific cases without basis but in others warranted) of a document whose language had been changed, even though admittedly no change of sense was intended.

The election upon the proposed constitution presents an interesting illustration of the operation of popular government. Inasmuch as the proposed constitution was submitted as a single document, the issues were too detailed and to complex to be understood by the voter. No one could understand all of the points presented without carefully analyzing every section of the

proposed constitution in relation to the constitution of 1870 and in view of the judicial decisions construing that constitution. The voters naturally and necessarily lined up in various groups, and this grouping was determined not so much by the merits of the case, as by the prestige of individual leaders and by party or other affiliations. There was some grouping also because of distrust of specific provisions of the proposed constitution.

The line of opposition to the proposed constitution was one of a type not often presented in an election. The organization of the democratic party was largely opposed because of the feeling that under the proposed constitution issues of apportionment and of supreme and appellate court membership would largely be determined by the dominant republican organization. The Small-Thompson factional organization in the republican party was opposed, apparently for political reasons, though ostensibly on matters of principle. The labor and radical groups were strongly opposed. The labor organizations opposed partly because of the feeling that increased power in the courts was in opposition to the interests of labor, and partly also because the conventions defeated the effort of labor organizations to have the terms of the constitution at least give some recognition to labor as a factor in the state. It may be interesting to remark that the colored voters of Chicago were more influential with the convention than were the labor forces. The colored influences obtained an express provision in the proposed constitution prohibiting discriminations on account of race or color. The labor forces found it impossible to obtain even a relatively meaningless provision with respect to themselves.

The teachers and various groups of other state and local employees opposed the proposed constitution on the ground that it would interfere with present laws with respect to employees' pensions. The fears in this respect were probably groundless, but had a large influence in bringing about the great majority against the proposed constitution.

The manufacturers and various other groups in the state opposed the proposed constitution on the ground that it was likely to increase the burdens of taxation. The same influence probably affected the professional groups and many people on fixed salaries.

The issue of Cook County representation was largely responsible for the tremendous vote against the proposed constitution in Cook County and the city of Chicago; though the tax

issue was also prominent, and the teachers and other governmental employees were highly influential.

It is perhaps more difficult to analyze the forces in favor of the proposed constitution, and less necessary because such forces were the less numerous. Some down-state support for the proposed constitution was obtained on the ground that it restricted the powers of Chicago and Cook County in the state legislature. This issue was expected by the supporters of the constitution to play a large and controlling part, but apparently did not do so in any part of the state. It was expected also that the farmers would be influenced in favor of the proposed constitution by the argument that the proposed document would make it more readily possible to tax intangible property, and would thus reduce the tax burden upon the farmers. However, it was urged on the other side that the farmers might be subjected to an income tax in addition to their property taxes, and the farmer vote was not decisively with the proposed constitution. The State Bankers' Association supported the proposed constitution as did also a referendum of the Chicago Bar Association.

Some civic organizations in Chicago were strongly in support of the proposed constitution. This support was based primarily on two grounds. The proposed constitution would have abolished the cumulative system for the election of the house of representatives. Some of these bodies regarded this as a sufficiently great gain to justify support. The proposed constitution would have given Chicago power to frame its own charter, and wider powers with respect to matters of a purely local concern. This was regarded by some as a highly desirable gain, and as compensating for the many serious defects of the proposed constitution.

The majority against the proposed constitution was united only in opposition, and not in the reasons for such opposition. In this case, as in most complex issues submitted to popular approval, the majority was but the combination of a series of more or less diverse minorities. The minority was also composed of diverse elements. There is no such thing as unified mass opinion controlling the settlement of complex governmental problems. The election upon the proposed constitution did not and could not turn on one issue alone. The mass decision of such a complex issue was of necessity more or less unintelligent. Few voters had the opportunity or possibility of deciding either for or

against the proposed constitution with reference to its merits as a whole. As in all other cases of such a character, the issue was settled by reasoned support of or opposition to the document as a whole, coupled with opposition or support because of specific reasons. And the great mass of voters, as usual, acted upon the basis of the old rule of "follow your leaders."

The assembling of the Illinois constitutional convention of 1920-22 will not have been in vain. The constitution of Illinois needs change as badly now as it did before; and the defeat of the proposed constitution was not an expression of satisfaction with things as they are. It may be remembered that a proposed constitution was rejected in this state in 1862, but a new constitution adopted in 1870. It is not likely, however, that another constitutional convention will be called in the near future. Effort will now be centered upon the attempt to obtain an easier method of amending the present constitution through legislative proposals.

The experience of Illinois raises an issue as to whether the constitutional convention is now as useful as in earlier days. Certainly there has been a tendency in recent years for conventions to submit their work as separate propositions, rather than to propose complete constitutional revisions. Illinois is for some years at least now forced back upon the individual amending process through legislative proposal. Unfortunately this process is in Illinois so hedged about that the amendment of the constitution is substantially impossible. Little enthusiasm can ordinarily be developed behind the proposal to change an amending process; for people are normally more interested in specific proposals than in the machinery by which later reform may be accomplished. However, a consistent effort will now be made in Illinois to amend the amending clause in such a manner that the more needed constitutional changes may be obtained through legislative proposal.

The Minnesota constitution is not so difficult to amend as that of Illinois, though the required popular vote does make serious difficulty. The Minnesota constitution is older than that of Illinois, and if numerous changes are desired it may be that a constitutional convention would be a useful instrument for governmental progress. If an amending system were relatively easy, the Illinois experience may well point to the desirability of using that machinery, unless such a complete overhauling of a con-

stitutional document is desired as to make the use of the amending process difficult and perhaps useless.

Certain local factors contributed to the failure of the recent Illinois convention. This body did not develop effective leadership, and popular respect was weakened because of its numerous sessions and recesses, covering a period of more than two years and a half. The most serious difficulty, that occasioned by the presence of one county containing nearly half of the state's population, fortunately does not present itself in many other states.

Leaving aside matters personal to the membership of the Illinois convention, and those peculiar to conditions in Illinois, it may be wise to suggest that conventions in other states will profit by avoiding certain serious blunders in the methods of the Illinois convention. The first of these serious blunders was that of attempting to rephrase all of the provisions of the constitution. Clear and satisfactory English is as important in a constitution as elsewhere; but when constitutional language is satisfactory and has been construed by the courts for a number of years, it is best to leave well enough alone. It is best to do this for two reasons: (1) Any effort to tinker with such language may lead to unforeseen results, however careful the drafting may be done; (2) The rephrasing of constitutional provisions whose meaning is not intended to be changed will almost of necessity lead to a suspicion on the part of the voters that some concealed design is being carried out through such change.

Drafting a constitution is not the mere preparation of a literary composition. The constitution is an important legal document, dealing with many technical matters. Nor can the framers of a constitution ignore the past. If framing a constitution for a new state, they will use language which has already been judicially construed in other states. If revising an existing constitution, they will be dealing with language already judicially construed in that state. To change language for the sake of change (even though its literary flavor may be improved) is to run the risk of overturning desired constructions, and sacrifices the important for the unessential.

The Illinois convention did not devote sufficient attention to the manner of presenting its proposal to the people. Beginning with Michigan in 1908, the framers of constitutional changes have in a number of instances adopted by official vote brief statements

of the purpose of each proposed change. Such notes aid not only in the popular presentation of a convention's work, but also in the subsequent judicial construction of that work if approved. An effort by the Illinois convention to explain each proposed change would have led to the detection of many defects in the proposed constitution before correction was too late. Not only did the convention not seek to explain its work in detail, but the official publications issued in support of the proposed constitution gave the impression of disingenuousness and concealment.

The recent Illinois experience also shows the danger of submitting as a single document the terms of a proposed constitution containing numerous controversial issues. New York in 1915 substantially adopted this plan, and the work of the New York convention met the same fate as that of the Illinois convention. Illinois in 1870 submitted a proposed constitution, but at the same time proposed for the separate vote of the people eight distinct questions which seemed more or less controversial or doubtful in character. This plan has the advantage of reducing the number of separate issues to be voted upon. The Ohio constitutional convention of 1912, the Massachusetts convention of 1917-18, and the Nebraska constitutional convention of 1920 all submitted their work in the form of separate and distinct amendments to existing constitutions. This plan involves the difficulty of submitting too many separate issues, if the proposed amendments are numerous; but has in recent years worked more satisfactorily than the plan of submitting the work of a constitutional convention as a single document.

SPECIAL LEGISLATION IN MINNESOTA†

BY WILLIAM ANDERSON*

VI. THE TIME FACTOR IN CLASSIFICATION.

QUESTIONS as to the legality of classifications become exceedingly complicated when the time element is introduced into a classification. The Minnesota court has been called upon to decide a number of such cases and has played a leading part in developing the law upon this subject. There are, for example, the not uncommon laws by which the legislature authorizes either all cities, or all counties or villages, or all of a certain population group, to perform certain acts within a certain number of months of the passage of the act, or before a certain fixed date. The effect of the time limit is to exclude from the class which will benefit by the law not only all cities, counties, or villages subsequently created, or which subsequently attain the required population, but also all of the given size at the time which are unable to act within the time given. Is such a law general and of uniform operation? Generally speaking, it has been held in this state that it is not, but the answer will depend in part upon the nature and purpose of the act.[49] The Minnesota court has ruled that where the purpose of the act is merely to give some temporary relief, such a time limit is not necessarily improper. Thus a law authorizing the funding of floating debts, or the refunding of a due or past due bond issue, might legally embody such a time limit.[50] Such financial practices are not to be encouraged even though they are occasionally unavoidable, and it would be unwise to validate them beyond the point needed for present relief. On the other hand, the establishment of new public offices, and the erection of auditoriums and contagion hospitals, are not temporary purposes.[51] To set a time

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†For the first installment of this article, see 7 MINNESOTA LAW REVIEW, 133. [Ed.]

[49]State ex rel. Douglas v. Ritt, (1899) 76 Minn. 531, 79 N.W. 535; Webb v. Downes, (1904) 93 Minn. 457, 101 N.W. 966 (a case of class legislation); 1 Dillon, Municipal Corporations sec. 152, 158; 6 R.C.L. 386-387 (Const. Law, sec. 378).

[50]Alexander v. City of Duluth, (1899), 77 Minn. 445, 80 N.W. 623.

[51]State ex rel Douglas v. Ritt, (1899) 76 Minn. 531, 79 N.W. 535; Marwin v. Board of Auditorium Commissioners, (1918) 140 Minn. 346, 168 N. W. 17; Roe v. City of Duluth, (Minn. 1922) 189 N.W. 429.

limit in such cases is, in the opinion of the court, to close the door arbitrarily to the future entrance of other cities into the benefited class when they attain the required population.

This distinction appears to be sound. Unfortunately it has not always been followed. In the case of *Farwell v. City of Minneapolis,* involving a statute which authorized cities of the first class to sell sewer bonds before a certain date, the court held the statute constitutional without adequate consideration.[52] There is much doubt, also, whether the creation of a permanent improvement revolving fund is a temporary purpose, as it was held to be in *State ex rel. Minnesota Loan & Trust Co. v. Ames.*[53] The court called the statute in the latter case a "remedial" one, which was equivalent to saying that Minneapolis urgently needed the money and that this was the quickest way to get it. The fund to be established, be it remembered, was a permanent one. In its most recent utterance upon such time limits the court has said that "It is not valid general legislation...to thus close the door against future cities whose growth might bring them into the class, except in cases where the purpose is curative or the relief temporary."[54] The provision of permanent improvements, however urgent the need for them, is not a temporary purpose.

VII. Curative Laws.

The problem of curative laws is very close to the question which has just been discussed. "A curative law is one intended to give legal effect to some past act or transaction which is ineffective because of neglect to comply with some requirement of law."[55] Embodied in the idea of curative law is the notion of an existing law under which some person, public or private, individual or corporate, has proceeded to do some legal act. Subsequently it is found that a mistake has been made. A document has been improperly made out, or there has been some other procedural error. Despite the innocence and good intentions of the parties, their acts are without legal force because of their negligence. What is the remedy? Frequently the courts can offer none. Consequently the practice has grown up of having the legislature pass what we know as "curative" acts, to give legal effect to the acts performed in such cases. In Minnesota before 1892

[52](1908) 105 Minn. 178, 117 N.W. 422.
[53](1902) 87 Minn. 23, 91 N.W. 18.
[54]Roe v. City of Duluth, (Minn. 1922) 189 N.W. 429.
[55]12 C.J. 1091 (Const. Law sec. 785). See also 2 W. & Phr. 1785; 6. R.C.L. 320 (Const. Law sec. 309); Cooley, Const. Lim, 7th Ed., 530.

many special curative laws were enacted to protect the rights of those who found themselves in need thereof. There must have been a feeling, however, that the legislature's power in this respect was in need of limitation, for section 33 contains the provision that the legislature shall pass no local or special law "giving effect to informal or invalid wills or deeds."

In the absence of a prohibition against special legislation, curative acts have generally, though often with some hesitation, been sustained by the courts as constitutional despite attempts to demonstrate that they violated the law of the land, or the due process clause, or the contract clause, or even the equal protection clause.[56] In Minnesota today curative acts generally begin by describing the acts to be cured and the class of persons by whom they were committed; they frequently state the time during which the acts occurred; and they close with a general statement validating the acts despite any defects in procedure. The classification is thus based upon the occurrence of some event in the past, and thus involves a time limitation, but since the purpose is purely retrospective and remedial it has been held that such acts may properly be considered general and constitutional for the ends which they subserve. There have been five cases in which the statutes involved were strictly speaking "curative;" that is to say they concerned acts which had taken place in the past and their whole purpose and effect was to validate such acts despite defects and irregularities.[57] They authorized nothing prospectively.

If there is any criticism to be directed against the court in this connection it is that the judges have been very loose in their use of the terms "remedial" and "curative," particularly the latter. Let it be remembered that the general rule in Minnesota forbids the basing of classifications upon events in the past.[58] The modification in favor of curative laws is distinctly an exception to the rule, and each exception should be closely scrutinized. One is reminded of the recipe for chicken broth which begins: "First catch

[56]See authorities cited in note 55.

[57]State v. Spaude, (1887), 37 Minn. 322, 34 N.W. 164; Flynn v. Little Falls E. & W. Co., (1898) 74 Minn. 180, 77 N.W. 38, 78 N.W. 106; State ex rel. Lee v. City of Thief River Falls, (1899) 76 Minn. 15, 78 N.W. 876; State ex rel. Skyllingstad v. Gunn, (1904) 92 Minn. 436, 100 N.W. 97; Calderwood v. Jos. Schlitz Brewing Co., (1909) 107 Minn. 465, 121 N.W. 221.

[58]Nichols v. Walter, (1887) 37 Minn. 264, 33 N.W. 800; Alexander v. City of Duluth, (1899) 77 Minn. 445, 80 N.W. 623; Hetland v. Board of Co. Commrs. of Norman County, (1903) 89 Minn. 492, 95 N.W. 305; Kaiser v. Campbell, (1903) 90 Minn. 375, 96 N.W. 916; Thomas v. City of St. Cloud, (1903) 90 Minn. 477, 97 N.W. 125.

your chicken." In this connection it is certainly important to ascertain first whether the law in question is really curative before it is given the benefit of the exception. From this point of view, if the facts are correctly reported, the decision in the leading case of *State ex rel. Board of Education of the City of Minneapolis v. Brown* is open to the gravest criticism.[59] Under the laws of 1893 and 1895 applicable to first class cities the voters of Minneapolis in 1904 voted on two separate school bond proposals. Neither proposition received the legal majority of two-thirds of the number of voters voting at the election, although each received two-thirds of those voting on the proposition. The laws had worked perfectly. The elections were legal in every detail. There were no oversights or omissions alleged. The simple fact was that the voters had refused by their abstinence to vote the bonds. None were issued and none could legally be issued. In 1905, however, the friends of school bonds, defeated at the election, repaired to the legislature and procured the enactment of two laws declaring that in any city in which a vote had been taken on such issues, and in which two-thirds of those voting thereon had voted favorably, the bonds in question might be issued and sold, and when so issued and sold they were to be deemed valid obligations of the city. The city comptroller refused to recognize the validity of the acts of 1905, holding them to be special legislation because based upon an act in the past. The court declared them valid, however, as "remedial, curative acts." "They resemble statutes which cure and make valid all deeds which are defectively executed or acknowledged."[60] Similarly, it may be said, a crow "resembles" a chicken, but it would probably make a poor broth. The acts of 1905 were in no legal sense curative laws. Their effect was entirely prospective. Not the votes of 1904, but the laws of 1905, made legal the issue of the bonds. No bonds could legally be issued under the votes of 1904. There was no defect, and there was nothing to cure, in connection with that vote. In fact, the size of the vote had nothing to do with the case. Under the theory stated by the court, the acts of 1905 would have been just as valid if they had stated that in every city in which a vote had been taken, whether the vote was favorable or unfavorable, the bonds might nevertheless be issued and be the legal bonds of the city. The court said that "the acts in question were simply curative acts, to rem-

[59](1906) 97 Minn. 402, 106 N.W. 477.

[60]State ex rel. Board of Education v. Brown, (1906) 97 Minn. 402, 415, 106 N.W. 477.

edy a bad situation, . . .and if possible to avoid its repetition."[61] In this sense almost every act ever passed in this state for the regulation of municipal affairs can be considered a curative act. The "bad situation" was that certain citizens of Minneapolis thought new schools were needed at once, but the voters had failed or refused to vote the bonds. The purpose was not temporary, for the schools and the cost of keeping them in repair would be practically permanent. As to preventing a repetition of the bad situation in Minneapolis, the laws of 1905 did nothing. They did not amend the laws of 1893 and 1895 to authorize the issuance of bonds upon a smaller vote in the future. They simply made a special exception for cases where in the past the required vote had not been obtained.

As has been said above, the Minnesota court has generally accepted the rule that a classification based upon an event in the past is invalid except where the act is curative or its purpose temporary.[62] The exception in favor of curative acts is not recognized in all of the states by any means, while the exception favoring acts of a temporary purpose appears to be a product of the Minnesota soil.[63] There is another rule, also apparently of indigenous growth, which has served to reinforce the exceptions rather than the general rule. In *Wall v. County of St. Louis* a highly complicated classification, based in part upon past events, was sustained as constitutional.[64] The court reached this conclusion by finding that "the reference in the statute to the previous authorization of the construction of the building is not an element in the classification."[65] A similar position was taken in a somewhat different case,[66] yet it is a little difficult to reconcile some of the decisions.[67] If the court may say that certain provisions of an act do not constitute any part of the classification, even when they exactly describe the conditions under which an act shall become operative, or the persons, things, or places to which it shall apply, it is a little hard to see how validity or invalidity can be aught but the will of the judges.[68]

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[61]Ibid. p. 415.
[62]See the cases cited in note 58, above.
[63]25 R.C.L. 823 (Statutes, sec. 70); 22 L.R.A. (N.S.) 534; Dillon, Municipal Corporations sec 156.
[64](1908) 105 Minn. 403, 117 N.W. 611.
[65](1908) 105 Minn. 403, 405, 406, 117 N.W. 611.
[66]Le Tourneau v. Hugo, (1903) 90 Minn. 420, 97 N.W. 115.
[67]Thomas v. City of St. Cloud, (1903) 90 Minn. 477, 97 N.W. 125.
[68]Some difficulty has arisen in the cases in construing such words as "last preceding census," etc. See State ex rel. City of St. Paul v.

VIII. Uniformity of Operation.

We have spoken up to this point of the prohibition against special legislation. Section 33 of article 4 ends with the following two sentences:

"Provided, however, that the inhibitions of local or special laws in this section shall not be construed to prevent the passage of general laws on any of the subjects enumerated. The legislature may repeal any existing special or local law but shall not amend, extend or modify any of the same."

Section 34, which was adopted in 1881, provides that the legislature shall provide general laws for the transaction of any business prohibited in section 33, and that "all such laws shall be uniform in their operation throughout the state." Other state constitutions contain similar provisions, but unfortunately the decisions interpreting these provisions are not uniform.

The words quoted are not self-explanatory. We can understand them better if we understand the intentions of their framers. From territorial days down to 1892, cities, villages, and even counties were governed by a complicated network of special laws, with a general law interspersed here and there amidst the confusion. Diversity was the rule, almost chaos. In 1891 the stream of special laws was still flowing with unmitigated force. From two sources seem to have come the demands for a dam to check the flow. First, there were those who wished to see the legislature freed from the sordid interests which often labored to procure the passage of special and local laws. Second, there were those in the cities who desired to end the pernicious interference of the legislators with purely local affairs which they did not understand. They wished to end an immediate evil. They do not appear to have had in mind any constructive remedy for a serious situation. There is almost nothing to prove that they desired a rigid, uniform municipal code. No such code was proposed. That absolute, compulsory uniformity in local institutions was not the aim is proved by the fact that the legislature only four years later, apparently moved by the same forces of opinion, proposed a municipal home rule amendment to the constitution. A uniform, compulsory municipal code, and the scheme of constitutional municipal home rule, stand at opposite poles. The legislature would hardly have jumped from one to the other in four years. Un-

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District Court of Ramsey Co., (1901) 84 Minn. 377, 87 N.W. 942; 1 Dillon, Municipal Corporations sec. 152.

doubtedly some uniformity was recognized as desirable, but it has not been the habit of the legislature in this state to compel it.

The question is, what is meant by "uniform in their operation throughout the state?" This language seems to add something to the notion of a "general law," but just what or how much is not clear. Perhaps the stress should be on the phrase "throughout the state," signifying that there should be no territorial limits to the operation of the act, no north, no south, no east and no west. The word "operation" means "working," "mode of action," "the act or process of operating." The stress is on the action, and not on the effect thereof. The laws shall work or operate uniformly in all parts of the state. If things are alike to begin with, a uniform operation on them will leave them still alike. The result will be entirely different if we begin with such a diversity as existed in local institutions in Minnesota in 1892. A uniform operation upon things which are different may leave them as dissimilar as before, or it may increase or decrease the differences. Suppose that all mayors in the state received a uniform annual salary of $1,000. A law doubling mayors' salaries, or halving them, or adding a certain sum to them, would have not only a uniform operation, but would also leave the salaries still uniform. But suppose that one gets $500, another gets $1,000, and still another $1,500. A law doubling salaries would have a uniform operation, yet it would increase the differences in salaries in dollars per year; a law halving salaries would decrease those differences; and a law adding $500 to the salary of each would leave the differences just as they were before. Such laws would "operate uniformly," but the effect would not be to make mayors' salaries uniform. On the other hand, a law saying that hereafter all mayors shall receive a salary of $1,000 per year would, indeed, establish a uniform salary for mayors, but it would not *operate* uniformly since it would raise some salaries, reduce others, and leave some unchanged. If uniformity in institutions was the thing aimed at, then the words "uniform in their operation" were not wisely chosen. We should presume, however, that the legislators knew not only the meaning of the words they chose, but also the conditions under which they would be applied. The conclusion would then be that they did not intend to bring about an absolute uniformity of institutions.

The difficulty which is here suggested presents a problem which the courts do not seem to have been able to solve. The first important litigation to arise in this connection in Minnesota raised

the issue whether a law could be general and uniform which was to be carried out in different places according to existing diverse special laws.[69] The legislature had passed an act authorizing cities to construct tunnels under navigable waters. Instead of providing an independent method of procedure for doing this work which would be uniform in all cities, the act simply provided that all proceedings with reference to such improvement should correspond as nearly as possible with existing procedures for street improvement in the various cities. The court took judicial notice of the diversity existing among cities with reference to procedure in such cases, as provided by special laws. "This is certainly special legislation which the legislature could not now pass, and which it is expressly prohibited from amending, extending, or modifying." In this case, instead of passing a general law of uniform operation, the legislature was held to have

"Attempted, as to all matters specified in the second section, to adopt this whole mass of existing diverse special legislation, and extend its application to another and new class of cases, so that in proceedings to construct tunnels, under the act, there will be as many different laws as there are special charters. This cannot be done."

And the court went on to say:

"Our view is that, under this constitutional amendment, any legislation touching any branch of city government must reduce all cities, or all cities of the same class, to uniformity in respect to the particular with which the legislation deals, and that this uniformity in the exercise of a granted power must be produced as to the mode, as well as the causes, of its exercise."[70]

The decision must certainly be considered a drastic one. The first of a series upon this subject, it served as a guide-post pointed sternly and straight in the direction of uniformity of institutions. If followed in all its implications, this decision would mean that no local affair already dealt with in special laws could be regulated at all except by the repeal of such existing special laws and the passage in lieu thereof of general laws creating uniform institutions.

The next law to be questioned in this connection was found easy to sustain under the rule in the *Alexander case*.[71] It was a general law repealing all inconsistent acts and requiring the payment of $2 per day to jurors in the district courts "in any county within this state." Ramsey county alone had previously paid

[69]Alexander v. City of Duluth, (1894) 57 Minn. 47, 58 N.W. 866.
[70]Alexander v. City of Duluth, (1894) 57 Minn. 47, 58 N.W. 866.
[71]State ex rel. Baker v. Sullivan, (1895) 62 Minn. 283, 64 N.W. 813.

jurors at a different and lower rate. It alone was affected. The new statute brought it into line, and made jurors' fees uniform throughout the state. Yet the statute cannot be said to have "operated" uniformly, since it really changed the situation in only one county.

There followed a case which the rule did not fit.[72] An act of 1893 relating to reassessments for local improvements provided that " all municipal corporations" were to follow a procedure laid down in the act for such cases. But the act contained no repealing clause. There was no evidence of any intention to overrule such special procedures as already were provided in the charter of St. Paul and possibly in the charters of other cities. Ignoring the general law, the St. Paul authorities proceeded under their own charter. Thereupon the state, upon the relation of a taxpayer, attempted to compel conformance to the general law. The court held, however, that under ordinary rules the St. Paul charter provision could not be considered to have been repealed by implication.[73] The act was held to be designed for such cities as did not previously have the power to reassess. So construed the act did not, of course, apply to "all municipal corporations." Could it then be considered uniform in its operation? To this the court replied by quoting a rule from a Pennsylvania case to the effect that "a statute general in form is not to be regarded as special simply because of the intervention of some unrepealed local statute, which prevents it from having general effect."[74] This does not seem to be to the point, for in Minnesota the constitution requires not only that laws be general but also that they be uniform in their operation. These two requirements are distinct. In conclusion it may be said that the decision in this case is very far indeed from that in the *Alexander case,* above. The court is beginning to depart from its route as originally marked out.

In 1895 the legislature passed several acts relating to the salaries of the employees and officers of St. Paul and Ramsey county, under thinly disguised classifications.[75] Several persons whose

[72]State ex rel. Putnam v. Egan, (1896) 64 Minn. 331, 67 N.W. 77.

[73]Repeals by implication will not be implied, and are generally to be frowned upon. This rule has been invoked many times in Minnesota. See State ex rel. Stortroen v. Lincoln, (1916) 133 Minn. 178, 158 N.W. 50, and cases there cited.

[74]Evans v. Phillipi, (1887) 117 Pa. St. 226, 11 Atl. 630.

[75]The St. Paul act applied to cities having from 100,000 to 165,000 population. Ramsey county was covered by an act applicable to counties of 100,000 to 185,000 people. These classifications were sustained, though each class included but a single member.

pay was reduced attacked these acts as special and not uniform on account of the fact that they were based on previous special legislation.[76] In two separate decisions parts of two acts were declared unconstitutional on this ground. In one case a particular salary was to be not greater "than is now paid for such purpose." This provision was held to be neither general nor uniform. The St. Paul charter provided one rate of pay. Duluth might soon enter this class of cities having from 100,000 to 165,000 people with a charter providing a different rate of pay for the same office. Another possibility was that some of the special laws involved might be repealed. Such arrangements could not be allowed, said the court.

"A general law cannot be based on special laws, even though its operation is general when passed, if the legislature, by the future repeal of any or all of the special laws, may render the so-called general law special in its operation and effect. The act cannot be constitutional to-day and unconstitutional to-morrow. If it may in the future become unconstitutional, it is so when passed."[77]

Just how one can harmonize such a sweeping dictum with the express provision in section 33 that "the legislature may repeal any existing special or local law" it is beyond the powers of the writer to comprehend.

But the line of decisions begun in the *Alexander case* was fast riding to a fall. The legislature of 1899 enacted two almost identical statutes relating to school taxes.[78] One authorized cities of over 50,000 inhabitants, and the other authorized school districts of the same size, to levy a one and one-half mill tax for school purposes "independent of and in addition to other sums" levied for that purpose. Neither act provided any independent machinery for levying, collecting, and administering the tax. It was, therefore, necessary for the three cities concerned to resort to existing and diverse special laws for this purpose. Upon attempt being made to carry out the first of these laws in St. Paul, action was brought to test its validity on the grounds that it was not uniform in operation and that it adopted and extended existing special laws.[79] Four judges heard the case in the supreme court, and their views were so much at variance that each filed a separate opinion. Three judges held the statute unconstitutional

[76]Bowe v. City of St. Paul, (1897) 70 Minn. 341, 73 N.W. 184; State ex rel. Anderson v. Sullivan, (1898) 72 Minn. 126, 75 N.W. 8.

[77]Bowe v. City of St. Paul, (1897) 70 Minn. 341, 73 N.W. 184.

[78]Minn. Laws 1899, chs. 40, 77.

[79]State ex rel. City of St. Paul v. Johnson, (1899) 77 Minn. 453, 80 N.W. 620.

as an extension and modification of existing special laws. Chief Justice Start, dissenting, stated that in his opinion the act was not dependent upon pre-existing special laws, but was a uniform grant of powers to cities of the class designated.

The action contesting the validity of the second act did not reach the supreme court until the next year.[80] In the meantime Judges Mitchell, Canty, and Buck had been replaced by Judges Brown, Lovely, and Lewis. Chief Justice Start and Judge Collins remained. The litigation in this case arose in Minneapolis, but the facts were hardly distinguishable from those in the St. Paul case. The briefs in both cases appear to have presented the same arguments. The decision in the second case was, however, a complete reversal of that in the first. Chief Justice Start, writing for the majority in this case, which consisted of himself and the three new judges, held that too much weight had been given in the former action to the words "but shall not amend, extend, or modify any of the same," and too little to section 34, which authorizes the legislature to pass general laws of uniform operation on all subjects as to which special legislation is inhibited. It would be nearly impossible, it was said, to pass any such laws without in some degree recognizing existing special laws.

The result of this decision, be it noted, was not merely to reverse the decision of the preceding year, but practically to reverse the whole line of decisions based upon the original rule in the *Alexander case*. It can no longer be said to be the rule in Minnesota that a law is unconstitutional merely because it refers to or is partly rested upon existing special laws. With the demolition of that idea a great inroad is made upon the notion that a law, to be general and uniform in operation, must bring about complete uniformity of institutions. The court is swinging around to the view that if the law itself operates uniformly, other considerations are of little moment.

Several interesting cases have arisen which involve the uniformity of operation of acts which are made subject to adoption by the local authorities. In the absence of constitutional provisions to the contrary, it is generally accepted that laws relating to local affairs may be conditioned upon their acceptance, in one manner or another, by the localities concerned.[81] This is an accepted de-

[80]State ex rel. Board of Education v. Minor, (1900) 79 Minn. 201, 81 N.W. 912.

[81]McBain, The delegation of legislative power to cities, 32 Pol. Sci. Quar. 276-295, 391-411; 6 R.C.L., 166-169, (Const. Law, secs. 167,

viation from the rule against the delegation of legislative powers, and is based on immemorial usage and also, in a number of cases, upon a somewhat artificial distinction between the actual making of a law and the putting of the law into effect. The action of the local electors or authorities is construed to be a sort of future contingency upon which the enforcement or execution of the law is made to depend. The question arises, however, whether this is still permissible when the constitution not only forbids special legislation as to the subject matter, but also requires the general laws upon that subject to be uniform in their operation throughout the state.

In the leading Minnesota case upon this subject the legislature had enacted a law authorizing the city council in any city of 100,000 population and over to adopt its provisions, and thereby to create for the city a department of public works with prescribed powers and organization.[82] When the St. Paul city council took advantage of this act, a contest arose between the old board of public works and the new department, the former claiming that the act under which the department was created was not a general act of uniform operation. The decision of the court is labored and confused, but the conclusion was that the statute was invalid as special legislation, and also as an illegal delegation of legislative power. There were only two cities of the given size in the state. Should one adopt the provisions of the act and the other not, there would not only be diversity between the two but also there would be a partial repeal of special laws which would constitute in effect a modification or amendment of special laws, contrary to the constitution. This reasoning was based upon the assumption that the act in question dealt with charter matters and not with such subjects as are ordinarily covered by mere by-laws. The court was very clear that as to the latter the legislature might make a law which empowered cities, without compelling them, to adopt certain local ordinances.

"The distinction is between what is properly legislation and what is properly or necessarily a local by-law. That it is not a delegation of legislative power to grant to some designated body powers which the legislature cannot themselves practically or efficiently exercise is laid down... This distinction between what the legislature can do and what they cannot exists in the nature of

168); State ex rel. Hilton v. City of Nashwauk, (Minn. 1922) 186 N.W. 694.

[82]State ex rel. Childs v. Copeland, (1896) 66 Minn. 315, 69 N.W. 27.

things, and has not been eradicated by the constitutional provisions prohibiting special legislation and requiring legislation of uniform operation."[83]

It is evident that two entirely distinct propositions are here hopelessly jumbled together. First comes the question of the delegation of legislative power. The making and amendment of charters is a legislative power, formerly exercised almost exclusively by state legislatures.[84] There has been a marked tendency in recent years to provide in various ways for the reference of charter questions to the localities concerned. In this connection, however, the courts have begun to feel their way toward a distinction between reference to the local electorate, which is generally sustained, and reference to councils or other local authorities, which is usually frowned upon when the question comes up.[85] After all, while a usage of long standing may justify the delegation to local authorities of the power to make ordinances, there is no such time-honored practice to support the reference of charter questions to them. This is the distinction which Judge Canty attempted to express in the *Copeland case*. It was somewhat vaguely in the mind of the court in a recent case involving the power of the legislature to authorize the council in a home rule city to amend a home rule charter.[86] It is safe to say that the law is fairly well settled in Minnesota today that charter questions may be referred by the legislature to the local voters,[87] but not to the local officials. However, and this is a point upon which the cases seem irreconcilable, the setting up of a municipal court, an act which according to the utterances of the court is of far more serious import than a mere change in municipal organization, may be referred to the local council.[88]

The other principle involved in the quotation above is that as to uniformity of operation under sections 33 and 34. If the law

[83]State ex rel. Childs v. Copeland, (1896) 66 Minn. 315, 322-23, 69 N.W. 27.

[84]State ex rel. Luly v. Simons, (1884) 32 Minn. 540, 21 N.W. 750.

[85]McBain, The delegation of legislative power to cities, 32 Pol. Sci. Quar., 276-295, 391-411.

[86]Lodoen v. City of Warren, (1920) 146 Minn. 181, 178 N.W. 741.

[87]State ex rel. Hilton v. City of Nashwauk, (Minn. 1922) 186 N.W. 694. See also State ex rel. Young v. Henderson, (1906) 97 Minn. 369, 106 N.W. 348.

[88]State ex rel. Hagestad v. Sullivan, (1897) 67 Minn. 379, 69 N.W. 1094. The writer does not go into the refined distinctions sometimes made between a vote of the council or people which makes the law, and a vote which merely puts the law into effect. Chapters 228 and 229, Laws of 1895, were almost identical from this point of view, yet one was held unconstitutional in the Copeland case, and the other was proclaimed valid the next year in the Sullivan case.

is to be declared unconstitutional as not uniform in operation because one city may adopt it and another refrain from doing so, it can make very little if any difference whether the local authorities or the local electors are to do the adopting. As to this point the decision in the *Copeland case* seems to be based on the theory that uniformity of operation requires the establishment of uniform local institutions. The final effects are to be the test, not the working or operation of the law. If the final result of the law is the establishment of uniform institutions, the law is uniform in operation, otherwise not. In this respect the decision in this instance is very close to that in the case of *Alexander v. City of Duluth,* discussed above. As we have already pointed out, the court has already made considerable departures from the doctrine in the *Alexander case.* The judges were more canny in the *Copeland case.* They made exceptions from the beginning in favor of laws authorizing cities to adopt or not adopt local by-laws at their pleasure. Consequently, despite its obscurity, or perhaps because of it, the decision in the *Copeland case* has more successfully withstood the test of time than the more clear-cut and far-reaching decision in the *Alexander case.*[89]

IX. Classification and Uniformity of Operation Under Section 36.

In 1898 the voters adopted in its present form section 36 of article 4 of the constitution, usually called the municipal home rule provision.[90] On the one hand this section authorizes cities to make and adopt their own charters; on the other it reserves to the legislature complete legislative supremacy over all cities, whether they adopt their own charters or not. All home rule charters must be "in harmony with" or, differently phrased, "consistent with and subject to" the laws and constitution of the state. Furthermore:

"The legislature may provide general laws relating to affairs of cities, the application of which may be limited to cities of over fifty thousand inhabitants, or to cities of fifty and not less than twenty thousand inhabitants, or to cities of twenty and not less than ten thousand inhabi-

[89]It is by no means settled in other states that statutes conditioned upon local acceptance are necessarily special. Dillon argues against such a conclusion and the weight of authority seems to support him. I Dillon, Municipal Corporations sec. 155. See also 19 R.C.L. 741 (Mun. Corp'ns, sec. 47).

[90]In its original form this provision was proposed in 1895 and adopted in 1896. A later article in this series will deal with the judicial construction of the present provision.

tants or less, which shall apply equally to all such cities of either class, and which shall be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for."

The provision here quoted relates exclusively to legislation for "affairs of cities," and it must, therefore, modify in some respect without actually repealing the words in section 33 which provide that "the legislature shall pass no local or special law; regulating the affairs of...any...city." The authorization to cities to make their own charters is, of course, a reopening of the door to local variation. Section 33 forbids the *legislature* to make local and special laws for cities; section 36 transfers to cities the power to do this for themselves through the making and amendment of their own charters. Now, it appears that those who drafted section 36 were fearful lest there be too much diversity among cities. To avoid this possibility, to introduce some uniformity into their affairs, and to make more effective the legislature's control over them, cities were classified in section 36 itself into four groups, according to population, and the legislature was by the same provision authorized to make different laws, at its option, for each of these groups of cities. Such laws, if any are passed, must "apply equally to all such cities of either class." This clause is no clearer upon careful examination than the requirement of section 33 that general laws must be "uniform in their operation throughout the state."

It is with some hesitancy that the writer uses the words "the legislature was...authorized" in the preceding paragraph. Generally speaking, as has been said above, a constitutional provision is not a grant of powers to the legislature but a limitation of its powers.[91] However this may be, where a previous constitutional provision has been judicially held to put a restriction on the legislative power, a subsequent amendment may lift the barrier and become, in a sense, an authorization or a grant of power. It is in the latter light that the supreme court has construed the provision in section 36 relating to the four classes of cities.[92] Under the prohibition of special legislation, the classification of cities according to population, while not entirely illegal, would be valid only in case the classification were germane to the subject of the act in ques-

[91]Footnote 33, p. 145. See also Dodd, The Problem of State Constitutional Construction, 20 Col. Law Rev. 635-51; and Illinois Constitutional Convention Bulletins, pp. 578-587.

[92]Alexander v. City of Duluth, (1899) 77 Minn. 445, 80 N.W. 623; State ex rel. City of Virginia v. County Board of St. Louis County, (1913) 124 Minn. 126, 144 N.W. 756.

tion. The court has held, therefore, that the provision in section 36 must be considered as removing this obstacle and as authorizing the legislative classification of cities into the four population groups for any and all legislative purposes. The classes being designated in the constitution, the courts can no longer question their propriety for any purpose. One finds little reason to quarrel with this conclusion, despite the fact that there had been no decision of the Minnesota supreme court prior to the original adoption of section 36 in which any legislative classification of cities according to population had been held unconstitutional. The obstacle to such classification existed rather in the minds of the judges and in the decisions in other states than in any settled principle of law in Minnesota.[93] At the same time, when stress is put upon the grant of power in this provision, there is a tendency to underemphasize its importance as a limitation. So far at least as classification of cities by population is concerned, the sentence quoted is certainly intended also to limit the legislature to the four classes named. Any attempt to subdivide these classes according to population would seem to be entirely contrary to the purposes of the amendment.[94]

Suppose, however, that the legislature makes subordinate classes based upon some other distinction. Cases have arisen, for example, involving (1) a law applicable to all cities of the first class in which no armory bonds have been issued under a certain law; (2) a law applicable to cities of the first class having patrol limits; and (3) a statute applicable to cities of the fourth class in which the city council also serves as the school board. Can such laws be said to "apply equally to all such cities of either [population] class," as required by the constitution? In the first of the cases mentioned above, decided in 1904, the statute in question was sustained on the ground that there was a "substantial distinction" between cities which had and those which had not issued armory bonds under the previous law.[95] In the second case, decided in 1906, the statute was held unconstitutional because it did

[93] The subject was casually mentioned in the Cooley case (1893) and in State ex rel. Childs v.Copeland, (1896) 66 Minn. 315, 69 N.W. 27, as well as in Bowe v. City of St. Paul, (1897) 70 Minn. 341, 73 N.W. 184; but there was no clearcut assertion on the subject until State ex rel. Anderson v. Sullivan, (1898) 72 Minn. 126, 75 N.W. 8, and State ex rel. Douglas v. Ritt, (1899) 76 Minn. 531, 79 N.W. 535.

[94] 1 Dillon, Municipal Corporations sec. 147; but see Beck v. City of St. Paul, (1902) 87 Minn. 381, 92 N.W. 328; State ex rel. Hilton v. City of Nashwauk, (Minn. 1922) 186 N.W. 694.

[95] State ex rel. Corriston v. Rogers, (1904) 93 Minn. 55, 100 N.W. 659.

not "apply equally" to all the cities of the 50,000 class.[96] Summing up its objections to the act the court said that the act could apply only to Minneapolis, and that it "was aimed to meet a special contingency, and was not expected to have general application to all the members of the class—cities of fifty thousand population."[97] This decision is difficult to reconcile with that in the earlier case, and suggests the idea that the court held the theory that a law for any one of the four population classes of cities must be positively workable in each city within the group. It is highly disconcerting, therefore, to read in the same volume of Minnesota reports that the third of the statutes mentioned above is held valid.[98] The act in question did not apply to all cities of the fourth class, but only those in which the city council acted also as the board of education. It is hard to see in what respect this was a more valid distinction between cities of the fourth class than the distinction of the possession or non-possession of patrol limits would be among cities of the first class. Yet the court found no difficulty in sustaining the statute.

"The act purports on its face to apply to all cities of the state having a population of ten thousand inhabitants or less in which the common council performs the duties of the board of education. . . . Similar legislation respecting the cities of St. Paul, Minneapolis, and Duluth has been sustained, when it was apparent that the particular legislation could only apply to one of these cities; but in each instance the legislation was general and brought within its operation all cities of the particular class."

In partial justification of the decision in the last case it may be said that the act did operate to reduce the diversity existing among school systems in small cities. It tended toward uniformity of institutions. On the other hand, it is somewhat surprising to find the court accepting the statute practically at its face value, as what it "purports on its face" to be, in spite of arguments advanced by counsel to prove that it was something different.[99] The decision is all the more surprising, however, in view of the fact that the

[96]State v. Schraps, (1906) 97 Minn. 62, 106 N.W. 106.

[97]This act was held invalid because it "was aimed to meet a special contingency." A few years later another act was held valid where "the purpose of the statute was to meet the exigencies due to a peculiar city charter." Gould v. City of St. Paul, (1910) 110 Minn. 324, 125 N. W. 273.

[98]State ex rel. Young v. Henderson, (1906) 97 Minn. 369, 106 N.W. 348.

[99]In general, and quite properly, the court will take judicial notice of facts which may help to sustain an act, but will insist that any allegation of unconstitutionality must be proved. See State ex rel. Skyllingstad v. Gunn, (1904) 92 Minn. 436, 100 N.W. 97; State ex rel. Arpin v. George, (1913) 123 Minn. 59, 142 N.W. 945.

act was not mandatory, but became operative in such cities only as adopted its provisions by popular vote. The court "distinguished" the act in this case from that in the *Copeland case,* and held that it "went into force and effect immediately upon its passage, and could be resorted to at any time thereafter by any city coming within its provisions." This distinction was purely formal, and had nothing to do with the substance of things.

The decisions just reviewed certainly lead to the conclusion that the legislature may subdivide each of the four classes of cities upon some other basis than that of population. The next decision went farther.[100] In 1907 the legislature passed an act to authorize the separation of agricultural lands from fourth class cities in certain cases. Section 4 of this act provided that:

"This act shall not be construed as in any manner superseding, repealing, amending or qualifying the provisions of any home rule charter heretofore adopted by any city or village under the laws of this state, and this act shall not in any manner apply to any such city or village."

In other words, the act applied exclusively to non-home-rule cities of the fourth class. It introduced the idea that each of the four classes might be thus subdivided into two divisions, home rule cities and others. Instead of four classes of cities, there would be eight. Under attack as special legislation, this act was fully sustained by the court.

"The placing of home rule charter cities having ten thousand or less inhabitants in a class by themselves is in accordance with the constitution (article 4 section 36) which provides, not only for the classification of cities by population, but also for a class of cities which have or may have home rule charters. This classification is not arbitrary, for it rests upon the obvious reason that, if such cities must be made subject to all general legislation affecting cities, then home rule charters would be of but slight, if any advantage. Again it would lead to confusion and conflict between the provisions of home rule charters and general laws, if cities having such charters could not be placed in a class by themselves and excepted from general laws relating to cities."[101]

Following this decision the legislature assumed that there were not four but eight different classes of cities. In numerous cases thereafter the legislature made laws applicable either to all home rule cities of the particular class, or to all others of that class. Since this sort of classification was apparently based upon the con-

[100]Hunter v. City of Tracy, (1908) 104 Minn. 378, 116 N.W. 922.

[101]Hunter v. City of Tracy, (1908) 104 Minn. 378, 381-82, 116 N.W. 922. See 1 Dillon, Municipal Corporations sec. 147.

stitution itself, it was vain to question whether the particular classification was germane to the purposes of the act. The results were very interesting, particularly as they affected the three first class cities. St. Paul and Duluth both adopted home rule charters in 1900. Minneapolis failed to do so until 1920. Minneapolis thus stood in a class by itself, as the only city of the first class without home rule. From about 1907 down through 1919 a great deal of legislation was enacted for Minneapolis alone under the guise of general legislation for all cities of its class. Special legislation, forbidden to enter at the front door, slipped in through a rear passage way unintentionally left open by the home rule amendment.[102]

The creation of four population classes of cities by section 36 has raised the important question of which census to apply. If the legislature may determine what census to apply, it may to that extent control the classification of cities. In 1905 a state census was taken. Winona was given a population in excess of twenty thousand. Under the law then in effect it entered the second class of cities. It was the only city in the class. During the years following the legislature enacted a number of laws for second class cities with the full knowledge that they would apply, at least for the time being, to Winona alone. In 1910 a federal census was taken. Winona was found to have dropped below twenty thousand population. Following the announcement of this fact the legislature enacted in 1911 a law saying that for purposes of classifying cities, the last *state* census should control. If valid this act would have the effect of keeping Winona in the second class, despite its decline in population between 1905 and 1910, and in keeping several smaller cities out of the third class, despite the fact that they had increased in the same period to more than ten thousand people. The statute was sustained as constitutional.[103] It was held that since section 36 did not itself lay down a rule for determining the census, the legislature must be presumed to have the power to do so. But the city of Virginia, which brought the action, claimed that since it had been legally in the third class for a

[102]But in a recent decision the court has refused to permit the application of a time limit to legislation for a particular class of cities under sec. 36. Had this been allowed still further subdivision of the four or eight classes would have been sanctioned. Roe v. City of Duluth, (Minn. 1922) 189 N.W. 429.

[103]State ex rel. City of Virginia v. County Board of St. Louis County, (1913) 124 Minn. 126, 144 N.W. 756. See also State ex rel. City of St. Paul v. District Court of Ramsey County, (1901) 84 Minn. 377, 87 N.W. 942.

short time in 1910-11, it was entitled to remain there, and that the act of 1911 was an illegal attempt to deprive it of its rights. The court held, however, that even this did not invalidate the act. "A city has no constitutional or vested right to any particular set of regulatory laws."

In the case just reviewed the court qualified its approval of the law by saying that, of course, the legislature could not adopt an arbitrary means of determining population. There was much to be said for the single standard of the state census. A double standard, including both state and federal censuses, might lead to confusion. It is a question whether the legislature has not gone too far in its recent legislation on this point. In 1915 no state census was taken. In 1920 Winona still had less than twenty thousand inhabitants, but by virtue of the act of 1911 still stood alone in the second class. Other and more thriving municipalities continued to be denied admission to higher classifications. By an unusually clever bit of legislation in the session of 1921, an attempt was made to satisfy all the communities concerned.[104] This act restores the old double standard of the last preceding state or federal census. At the same time it requires that, for purposes of determining classification, five per cent of the reported population of the city at either a state or federal census shall be added to such census. A city of 19,500 actual population will under this act be credited with 975 more inhabitants than it has, and become a city of 20,475 for classification purposes. By this rule, Winona with less than twenty thousand population in 1920, remains in the second class, while Brainerd, with less than ten thousand people, is lifted into the third class. This is, of course, sheer juggling with the census, yet plausible arguments can be advanced in favor of it not only on grounds of policy but also on grounds of constitutionality.[105]

There is little reason to doubt that the provision in section 36 establishing four classes of cities according to population was intended to be a means of bringing about a certain degree of uniformity of government and administration within the classes thus described. We have seen how the four classes have grown, in contemplation of law, into eight possible classes.[106] We have also

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[104]Minn. Laws 1921, ch. 12.

[105]The act provides that if the five per cent rule is declared invalid, the other provisions of the act shall nevertheless remain in effect. See also Anderson, City Charter Making in Minnesota, 31-36.

[106]In fact, however, there have never been cities in each of the eight classes. Winona is alone in class 2. The three first class cities

seen how by manipulations of the census, and by statutes determining which census shall apply it is possible for the legislature to keep cities in or out of particular classes. It is also evident that the rules for classification of cities which had been developed under section 33 were not repealed by the adoption of section 36. This makes possible the subdivision of each class according to other germane and reasonable bases of distinction. Instead of bringing about greater uniformity, therefore, the provision of section 36 which we have been reviewing, as it has been construed by the court, has really made possible an unexpected degree of classification. For some cities and for many purposes there has been a return almost to special legislation.

now all have home rule charters, and the same is true of the seven third class cities.

IMPROVING BAR ADMISSION REQUIREMENTS IN THE NORTHWEST

By Lauriz Vold*

A. Preliminary Sketch

The present law in most states requires little if any general educational foundation for admission to the bar but frequently requires either two or three years of study of law, either in law school or office.[1] The past generation has witnessed a steadily progressing movement for improving the standards of legal education for admission to the bar.[2] This movement culminated in the resolutions of the American Bar Association adopted at its annual meeting in 1921[3] wherein the call is made for two years of collegiate preparation and three years of full time work in a first class law school as a minimum educational qualification for admission to the bar, with a provision for correspondingly more time if part preparation is offered.

The American Bar Association also provided for the classification of law schools by its Council on Legal Education, with the avowed purpose of publishing annually for the benefit of intending law students what schools of law are worth attending. The work of classifying law schools in accordance with the American Bar Association standards is now going on.

The American Bar Association also recommended that the proper authorities in the different states should provide for rules for admission to the bar complying with these standards.

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[1]This article is a revision and condensation of an argument printed in the North Dakota University Quarterly Journal for October 1922 and January 1923 designed to advocate the adoption by the legislature of North Dakota of a proposed bill to carry into effect the American Bar Association standards for legal education.

[2]Mr. Alfred Z. Reed of the Carnegie Foundation, in an article entitled "Raising Standards of Legal Education," appearing in the November, 1921, number of the American Bar Association Journal (Vol. 7 pp. 570-578) reviews this movement in detail and gives fifty references to data upon it from Reports of the American Bar Association, and other sources. Extended historical information covering the whole of the last century's development of legal education may be found in Bulletin No. 15 of the Carnegie Foundation compiled by the same author.

[3]Reports of the American Bar Association (1921) pp. 37-47.

The Conference of Bar Association Delegates representing most of the state bar associations throughout the country and many of the county and city bar associations met in February 1922 in Washington D. C., and after elaborate discussion indorsed the action of the American Bar Association.[4] In a number of states the state bar associations in their annual meetings have already indorsed the American Bar Association standards, and sometimes have recommended draft statutes to carry those standards into effect in their particular states.[5]

With the American Bar Association, the delegates from the state and local bar associations, and many of the state bar associations themselves committed to this program of improving the training for admission to the bar it only remains for the local authorities, state legislatures or courts, to do their part in carrying out the proposed program. The action of the Council on Legal Education in classifying law schools and publishing its list of approved law schools for the information of intending law students will undoubtedly in large measure affect the choice of schools of law for the future. That work is now under way and will go on irrespective of local action. To make the work complete, however, the states ought to require that candidates for admission to the bar satisfy the requirements of two years of college and three years of full time law work and correspondingly more if it is only part time work as a minimum of preparation. It is therefore appropriate that in the various states the legislatures should pass the appropriate statute or the courts make the appropriate rules to carry into effect as the legal rule of the state the standards for admission to the bar set up by the American Bar Association approved both by the Conference of Bar Association Delegates from all parts of the country and by various state bar associations.

It is the purpose of this paper not to argue at length the reasons for and against improving standards for admission to the bar

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[4]See Proceedings of the Special Session on Legal Education of the Conference of Bar Association Delegates, p. 174.

[5]According to the notices of such matters that have appeared in the American Bar Association Journal up to November 1922, the American Bar Association educational standards for admission to the bar have been indorsed in California, Colorado, Michigan, Minnesota, Nevada, North Dakota, and Oregon. The notices appearing in that Journal, however, are not complete or all-inclusive. It is said to have been reported at the San Francisco meeting of the American Bar Association in the summer of 1922 that a dozen states had already at that time indorsed the recommended standards. The present writer has not, however, been able to find any published list of the indorsing states that purports to be complete.

but to point out some local considerations applicable to the discussion in the Northwest. While the specific details have been examined largely with reference to North Dakota conditions, it is believed that North Dakota conditions are for this purpose fairly typical of the Northwestern states. The general arguments for the proposition have been put so frequently in their various phases for the last generation and have been so effectually summarized in the report of the special committee to the Section on Legal Education of the American Bar Association and in the discussion by the Conference of Bar Association Delegates, available both in pamphlet form and in the 1922 volume of Proceedings of the American Bar Association that further repetition of the general arguments is here deemed unnecessary.

B. Need of Better Training for the Bar

The case for better training for the bar was summarized by Elihu Root, by Chief Justice Taft, by Professor Williston, and others, before the Conference of Bar Association Delegates. The substance of their arguments was that better training for the bar is needed under modern conditions, both for the sake of greater legal efficiency and for the sake of strengthening the moral caliber of the bar, to the end that the legal profession may render more effective and more reliable service to the community.

1. *Legal Efficiency.* Local considerations bearing upon the need for more thorough educational preparation in the interest of legal efficiency are in the Northwest sufficiently striking to be worthy of serious attention. Besides the domestic sons of the home states who are members of the bar there is constantly coming to the bar of this region large numbers whose training has been secured in other states, in other educational institutions with all of the preliminary and collegiate grades of preparation provided by the best equipment the entire country affords. Whether or not the home state require of its candidates for admission to the bar the collegiate and law school training set up as a standard by the American Bar Association large numbers of the candidates for admission who come here from outside the state will come equipped with this first class training. This will be so in increasing measure as the classification of law schools according to American Bar Association standards proceeds. It can readily be seen, therefore, that those who are called to the bar without such preparation are induced to begin their practice of law with a great handicap against their probable success in competition with the better train-

ed men who come from other states. Furthermore, it is easy to perceive that the home state clients and the home state public, as the larger factors involved in litigation, are likely to suffer through the relative incompetence of untrained members of the bar who have secured their license to practice in view of the low minimum requirements and who in the practice they succeed in picking up are unable to hold their own against the better trained attorneys who have come from outside the state.

Nor is it necessary to rest on mere personal impressions and personal judgments to determine that the greatest efficiency in the practice of law is shown by the lawyer equipped with a broad collegiate education. In the observations that were some years ago compiled by the present writer from official files and court records bearing upon the success in practice of North Dakota lawyers it appeared beyond question that the college graduate lawyers had on the average far exceeded the success of their less well-equipped competitors. As more elaborately set out in another place,[6] the range of success appearing in the actual achievements of North Dakota lawyers shows college graduates outclassing other practitioners by from fifteen to thirty percent. To put the contrast in relative terms, the college graduate lawyer has in North Dakota practice shown himself about a third more successful than his less well-equipped rivals. If the conditions in North Dakota are at all typical, which there is every reason to suppose that they are, this probably approximates the conditions in most of the states of the Northwest. It is therefore easy to see the importance of thorough educational foundations in securing efficiency in the service rendered by the legal profession to the public of clients whose concerns get involved in trouble or even precipitate them into litigation.

2. *Moral Character.* Statistical material on how far educational qualifications are reflected in the moral conduct of the bar is in the Northwestern states, as in most places, practically negligible. In the opinion of the present writer the moral standard of the bar of the Northwest is exceptionally high. The argument regarding the effect of improved educational qualifications upon the moral character of the bar can therefore not be emphasized in this region to the same extent as is proper in reference to some other places. The bar of the Northwest constitutes a fairly homogeneous body with common ideals, reflecting in this regard the analogous condi-

[6] 33 Harv. L. Rev. 168, 185-189.

tion of a fairly homogeneous rural population with common ideals of thrift, industry, and probity. The individual exceptions that can occasionally be pointed out represent unfortunate developments in a class of narrowly restricted cases rather than a chronically defective moral tone on the part of the bar of the Northwest as a whole.

Even slight consideration of the subject, however, must indicate that improved educational qualifications while not directly eliminating crooks from the profession have a strong tendency to prevent the development of crooked tendencies on the part of incoming members of the bar. In the first place, incompetent members carrying crooked tendencies would fail to qualify as members of the bar for lack of fulfilling the requisite educational preparation. While this feature may not be extraordinarily important taking the group as a whole it will have its good effect so far as it goes. In the second place, thorough educational training for the candidates for the bar who are successful in securing admission will stiffen their backbone and enlarge their range of information to prevent their going astray. Since the first departures from the road of strict uprightness are usully at the time regarded as insignificant or conceived of as justified by temporary emergencies or are simply due to ignorance and lack of attention, the importance of the training that shall reduce such first departures to the minimum can hardly be exaggerated. In the third place, since improved educational qualifications admittedly bring about greater efficiency for legal work on the part of those who profit by it, the greater success in honest practice resulting therefrom must necessarily tend to diminish the strain on the personal honesty of members who might otherwise be sorely tempted. For all these reasons, therefore, it is submitted that even in the Northwest the moral considerations applicable point to improved educational qualifications as appropriate means for improving the bar of the state for its public service to the community.

3. *Inadequacy of Office Training.* Mr. George W. Wickersham of New York, formerly attorney general of the United States says:[7]

"The law school became necessary because the growth and complexity of modern law made it impossible for a successful practitioner to give the time and attention to his students necessary

[7]Report of the Proceedings of Special Session on Legal Education of the Conference of Bar Association Delegates, p. 125.

to fit them to enter upon the profession when so much more was required than had been the case in earlier years."

Mr. William Draper Lewis of Pennsylvania sums up the matter in the following extract:[8]

"The system by which a young man learned law in a law office has been dead for decades. The illusion that it still exists is one of those things that impede legal educational progress. . . . The so-called office student of today learns his law not in the law office, but in the afternoon or evening law school. The law student has not left the law office, the law office left the law student. In the modern law office there is a place for a typewriter, a bookkeeper and a clerk; there is a very real place for the law school graduate who is well-grounded in legal principles and knows how to find the law; but there is no place at all for the young man who wants to sit around and pick up the odds and ends of practice while he reads examination cram books or good or bad legal text-books."

Local information for the Northwest emphatically bearing out the statement that law office preparation has become inadequate as a preparation for the practice of law is abundant. Taking the last twenty years as a whole, 741 candidates have been admitted in North Dakota on examination, of which only 66 have been exclusively office-trained men. This makes an average for each year of only three and a fraction office trained men. For the last twenty years, including the war years when law school training was for the most part suspended by students eligible for military service, less than nine percent of the lawyers admitted on examination have come exclusively by the office route. While others have from time to time registered as office students they have soon found that the so-called office training was not getting them anywhere, and have either dropped out altogether or have gone to some law school. In other words during the past twenty years the candidates for admission in North Dakota themselves have demonstrated that office preparation is by them regarded as inadequate as they have resorted without large exceptions to law schools of one type or another to get their legal preparation. If North Dakota experience is at all typical, this represents a course of development general throughout the Northwest.

Even the remnant of office-trained candidates that is left itself demonstrates, in the acts of its few members, the recognition of the inadequacy of office training. Thus in Bismarck, North Dakota, a few of the government clerks connected with the state departments have been registered as students in law offices. Because

[8]Ibid. p. 196.

of the felt inadequacy of attempted office training steps were taken among them to improvise a law school, thus pointedly illustrating locally the statement of William Draper Lewis of Pennylvania, already quoted, that "the so-called office student of today learns his law not in the law office but in the afternoon or evening law schools." Without pausing to discuss the question of the quality of instruction offered there, or the question of how such clerks in government employ can "actually and in good faith pursue a regular course of study of the law for at least three full years in the office of a member of the bar in regular practice" as the statute now requires, and at the same time be performing their duties as state employees, it is abundantly plain that those so-called office students are finding that office study as a means of legal preparation is sadly inadequate. While the indorsement of the American Bar Association standards was under debate at the meeting of the North Dakota State Bar Association practicing lawyers favoring the resolution declared emphatically their conviction without contradiction from anybody that no active practitioners in the state did in fact give any substantial attention to the training of students registered in their offices. If North Dakota experience is at all typical, similar development may on observation be found in the other states of the Northwest.

Another indication to the same effect is the effort occasionally made by office students to get personal assistance from the law schools. One such office student recently wrote to the University Law School as follows:

"I have registered with a local attorney as a law student and as such I would like to know just what subjects and the time of each such subject to legally meet the requirements of the state to take the bar examination."

Another recent letter to the present writer from a North Dakota office student in quest of information contains the following explanation for the request: "Of course I never had any instruction, or not to amount to anything. All I ever had to guide me was a law quizzer, text book, and code." In the face of such facts all who are not deliberately blind can see that while the system of office registration is still officially maintained in the Northwest, it constitutes only a trap for the unwary since substantial legal instruction to beginners in law offices as a matter of fact does not exist.

4. *The Educational Standard Required.* The American Bar Association standards for law schools, in accordance with

which classification of law schools is now going on and on the basis of which recommendations of schools are to be made, need not prolong the consideration of the question of improving bar admission requirements so far as the Northwest is concerned. Every Northwestern state provides a state university complying with the American Bar Association standards of college education and similarly provides a university law school complying with the American Bar Association standards for law school work. Northwestern law students can therefore not be seriously affected in their educational opportunities through requirements for admission to the bar embodying the American Bar Association standards. It may be added further that there are in other parts of the country numerous universities and first class law schools to which students from Northwestern states may resort and get first class legal education satisfying the American Bar Association standards if for any reason their plans should take them elsewhere than to their own home educational institutions.

C. Objections to the Raising of Bar Admission Requirements

The objections to the raising of bar admission requirements that are met with in various forms and under various disguises may be summarized under three general heads. In the first place it is contended that raising the requirements for admission to the bar is unjust in that it imposes the hardship of excluding the poor man's son who has to work for a living. In the second place it is contended that it would be undemocratic to raise the standard for admission to the bar beyond the reach of the bulk of the population. In the third place is inertia, the conservative attitude which instinctively objects to change because it is change. Attention may therefore appropriately be given to each of these objections in turn.

1. *Hardships on the Poor Boy.* This is the objection upon which most stress is laid by all who oppose improvement in bar admission requirements.[9]

[9]Thus practically all who spoke in opposition before the Conference of Bar Association Delegates in some form or other included this objection in their remarks. The commercial evening law schools of the larger cities also violently stress this supposed objection. Since the fact themselves do not when examined bear out any such objection it is small wonder that those whose financial interest is involved in opposition to the improved standards should try to make up in noise what they lack in substance when resorting to the age-old device of attempting to defeat a sound measure by arguments on the real merits but by specious arguments ad hominem.

The answers to the "poor boy" argument are at least three in number, which may be elaborated in turn.

a. *Facts Belie the Hardship.* The first answer to the "poor boy" argument is that it is not true. Granting that there may have been substance to the "poor boy" argument two generations ago or even one generation ago, the facts in the educational world have become so changed that at the present time no young man with sufficient ability to acquit himself creditably in the practice of law need go without the appropriate preparation of college and law school training. Not only are educational opportunities now universally accessible throughout the Northwest but the presence of opportunities for working one's way while he secures the education is also established by abundant demonstrations.

As appears more elaborately in the statistical tables appended in the note[10] educational opportunities are now practically universally accessible. High school education has in the last fifty years increased almost eight hundred percent in proportion to the popu-

[10]The following figures are taken from

The Department of Interior, Bureau of Education
Bulletin 1920,
No. 11.

Table I (pp. 4-5).

Year	Total population of the United States	Children enrolled in common and high schools	Children enrolled in public high schools	Percent of total population enrolled in common and high schools	Percent of pupils in public high schools
1870	38,558,371	6,871,522	80,227	17.82	1.2
1880	50,155,783	9,867,505	110,277	19.67	1.1
1885	56,221,868	11,398,024	160,137	20.27	1.4
1890	62,622,250	12,722,581	202,963	20.32	1.6
1895	68,844,341	14,243,765	350,099	20.69	2.5
1900	75,602,515	15,503,110	579,251	20.51	3.3
1905	82,584,061	16,468,300	679,702	19.94	4.1
1910	91,972,266	17,813,852	995,061	19.56	5.1
1915	100,399,318	19,704,209	1,328,984	19.63	6.7
1918	105,255,300	20,853,576	1,645,171	19.81	7.9

Comment on page six says the slight decrease in percent of total population enrolled in schools has not been due to less complete enrollment of school children but to the decreasing percentage of children in the total population.

Figure 3 page ten shows that in 1917-1918 the percent of North Dakota pupils enrolled in public high schools was 6.9.

lation in the country. North Dakota figures, as typical of the Northwest, indicate[11] that high school opportunities are universal in this region.

That college education, too, is universally accessible is at the present time readily demonstrable. While statistical data do not carry us back fifty years they show a striking improvement in the distribution of collegiate education throughout the population during the last thirty years. Greater detail is given in the statistical matter in the note.[12] Every state in the Northwest maintains its own state university and agricultural college, either as separate

[11]Counts made from the North Dakota Educational Directory of 1921-1922, issued by the State Department of Public Instruction, show one hundred and forty-seven recognized North Dakota high schools, and three hundred and sixty-eight consolidated schools so listed seventy-seven offer one year's high school work, all the other offering two or more years.

[12]The following figures are taken from
The Department of Interior, Bureau of Education
Bulletin (1920), No. 34, on Universities,
Colleges, and Professional Schools.
From Table I (part 1.) pages 6-8 and Figure 5 page 19.

Year	Total number of students enrolled in universities, colleges, and professional schools	Percent of population of college age (19-23) actually enrolled in universities, colleges, and professional schools
1890	156,499	3.4
1892	171,596	3.5
1894	183,583	3.6
1896	193,946	3.6
1898	187,533	3.3
1900	197,163	3.3
1902	208,765	3.4
1904	226,449	3.5
1906	258,603	3.8
1908	265,035	3.8
1910	274,084	3.8
1912	318,423	4.2
1914	334,978	4.3
1916	387,106	4.8
1918	375,359	4.6

Comment on pages sixteen and nineteen calls attention to fact that total collegiate, graduate, and professional attendance has increased from 1890 to 1918, at the rate of 139 percent, while total population in the country has increased 68 percent in the same period. Comment on pages twenty-eight and thirty estimates that there is now one college graduate for every 116 persons of total population, and one college graduate for every 61 adults.

institutions or in combination. In addition to these collegiate institutions each Northwestern state maintains various normal schools and other educational institutions doing work of college grade while junior colleges, offering two years of work of college grade, are rapidly developing in many of the larger cities. In addition to these public institutions there are also within the various states several privately endowed educational institutions to which students may resort for collegiate work if they so desire. The Northwest therefore presents no lack of substantial opportunities for collegiate training.

Law school training, similarly, is now universally accessible to those who desire to attend and are capable of doing law school work. There are in this country approximately one hundred and forty law schools, at least three fourths of which either are now complying with the American Bar Association standards of law school education or which may readily be brought up to these standards.[13] When put in figures of historical comparison it ap-

[13]The following summary table for contemporary law schools is given by Mr. A. Z. Reed, of the Carnegie Foundation, in the Carnegie Foundation Bulletin, No. 15, at page 441:

SUMMARY

High entrance full-time schools		
*IIIM3	2	
*IIIM3 or IIIM4	1	
IIIM3	4	
IIIA 3	1	
IIIM3 or IIM4	1	
IIM3	20	
IIM3 or equivalent	1	30 (21%)
Low-entrance schools offering full-time		
IM3	14	
IM3 or equivalent	2	
M3	17	
IM3 IE5	1	
IM3 E4	1	
IM3 or equiv. E4	1	
M3 A3	1	
M3 E4	2	
M3 A3 E3	2	41 (29%)
Part-time schools offering courses of standard length		
IA 3	2	
A 4E4	3	
A 3E4	1	
A 3	7	
A 3E3	10	
IIE 4	1	
E 4	16	
IIE 3	1	
E 3	14	55 (39%)
Short course schools		
M2	5	
M1	1	
A 2	1	
E 2	9	16 (11%)
Total number of schools		142 (100%)

I, II, III denote the number of academic years required to have been spent in a college prior to admission; *, that a college degree must have been obtained.

M (morning) denotes that the law course requires the student's full time; A (afternoon), E (evening), only part of his time, while in residence.

1, 2, 3, 4, denote the number of years residence required to complete the law course.

pears that during the last forty years the ratio of law students to the whole population and similarly the ratio of law school graduates has more than doubled.[14] The Northwestern states without exception maintain university law schools already complying with the American Bar Association standards. First class law school training, then, like preparatory and college training, conforming to the American Bar Association standards, is therefore in the Northwest universally accessible to those who desire to attend and are capable of doing the work.

The scores and hundreds of young men working their way in whole or in part through every reputable institution in this country demonstrates that poverty is no limitation to the capable and furnish one of the most encouraging aspects of the development of democracy. The practice of law requires hard work. Adequate preparation for the practice of law requires hard work. The poor boy who has learned how to work works his way through college and works his way through law school just as he works

"Equivalent" denotes a dovetailing of college and law school work, not affecting the total.

The symbols in all cases denote the requirements in force during the academic year 1920-21. Announcements of future changes are not included.

[14]The same compiler gives the following table in the same volume, at page 442.

	1850	1860	1870	1880	1890	1900	1910
Population	23,192,000	31,443,000	38,558,000	50,156,00	62,948,000	75,995,000	91,972,000
Number of lawyers	23,939	34,839	40,736	64,137	89,630	114,460	122,149
Number of lawyers to each hundred thousand of the population	103	111	105	128	142	151	133
Number of law schools	15	21	31	51	61	102	124
Number of law schools to each ten million of the population	6	7	8	10	10	13	13
Number of law school students .	400	1,200	1,653	3,134	4,518	12,516	19,567
Number of law school students to each hundred thousand of the population	2	4	4	6	7	16	21
Number of students graduating	....	....	....	1,089	1,424	3,241	4,233
Number graduating to each hundred thousand of the population ..	....	....	....	2	2	4	5

his way to fame and fortune in every line in activity and just as he works his way to success in the practice of law after his admission to the bar. A conspicuous example is just now at hand in the person of Governor Nestos of North Dakota. Irrespective of his political views Governor Nestos is a demonstration of the truth of the statement that the poor boy can work his way to education, fortune and fame. Governor Nestos immigrated to this country from Norway as a young man and not more than half a generation ago worked his way graduating both from the university academic course in Wisconsin and from the university law course in North Dakota.

That opportunities for working one's way through the required college and law school training are abundant, despite oft-repeated assertions to the contrary, can be made plain by a little investigation of the actual facts themselves.

Mr. William B. Hale of Illinois puts the case for his state as follows:

"One thousand and eighty-three replied to the question of whether they wholly supported themselves while they studied law. Of these 644 wholly supported themselves while they studied law. That is 60 per cent earned their own living while they studied law. Twenty-six percent partially supported themselves while they studied law, that is, 86 percent of all those who have come to the bar of Illinois in the last two years have either wholly or partially supported themselves during their law course. Only 14 percent not at all. Seventeen percent wholly supported someone besides themselves at the same time that they were studying law."

For the larger centers the Illinois showing is suggestive. For the more largely rural states of the Northwest North Dakota experience is roughly typical. It is estimated by the authorities in charge that approximately one half of the students at the University of North Dakota each year earn the whole or a substantial part of their expenses while carrying their regular college work. The business office of the University is in contact with many of such instances. The Y. M. C. A. and the Y. W. C. A. touch others. Lately a committee of the Commercial Club of Grand Forks has been acting to the same end. Roughly similar conditions are known to prevail at the other state universities of the Northwest. Besides these organized agencies, however, for connecting university students with jobs, open in every state in the Northwest, there is the largest factor of all in such matters, the determination and initiative of the student himself to keep his eyes open for opportunities and to grasp opportunities that are available.

For the North Dakota Law School students the data regarding their working their way have been gathered in considerable detail through a questionnaire circulated by the present writer to the graduates of the last decade so far as it was possible to reach them after the unsettled state of affairs left by the war. The replies indicate that of the 46 that could be reached, representing about 40 percent of the entire number, 20 were entirely self-supporting, 18 were self-supporting in substantial part while only 8 acknowledged themselves to have been entirely supported by their parents while doing their educational work. It is apparent that a very substantial fraction, if not indeed a large majority as the figures indicate, of those who have been graduated from the law school in North Dakota in the last decade have been dependent more upon their own efforts than upon anyone else for their means of subsistence. The writer knows of no reason to suppose that this proportion of self-supporting law students would not be substantially reproduced were the figures available for the other Northwestern states.

The following is the list of occupations referred to in their replies by the men themselves; waiting on table down town and at the Commons; library work in the general library, in departmental libraries and in the down town library; odd jobs; farming vacations; working for Commercial Club; collecting; university transfer; essay contest prize; janitor work for the university, for churches, for apartment houses, for down town offices; bookkeeping; stenography; clerking in confectionery store, in clothing store, in grocery store, in bank, in university offices; meter reading; singing in theaters; playing at dances, at theatres and at chautauquas; washing windows; mowing lawns; canvassing as book agents, aluminum salesman, etc.; editing student publications; playing professional ball; acting as secretary; working in hotel; auctioneering; federal seed loan office; saving before entering; business manager of publications; freight handling; legislative committee clerk; working as mason; caring for furnaces; shovelling snow; working in Y. M. C. A.; reporting for newspaper; collecting for newspaper; special contributor to press; agency for student supplies; surveying; laundry agency; fireman; electrician: night baggageman; university bake shop; R. O. T. C. supply department; travelling for machinery companies; assisting professors.

b. *Need of Standards to Protect the Poor Boy.* The second answer to the "poor boy" argument against improved bar admission requirements is that it is unfair hardship upon the poor boy

to mislead him by erroneous advice and low standards for admission to the bar into the delusive belief that complying with those formal minimum requirements is at all likely to open for him a successful career at the bar. Every passing year with the increased resort to college and law schools on the part of candidates for admission to the bar makes it increasingly harder for those who come with the exclusive office training to make good in the face of such competition. More than one of North Dakota's present leading attorneys of the older generation typical of the bar in the Northwest has stated the case in substance as follows:

"Had someone only told me, when I got my office training, how important it was to go to college, I would have been better off as a lawyer than I am now. Nor would the added preparation have deterred me. I would have sought the best, and got it."

Improvement of the requirements for admission to the bar therefore will start the poor boy in his practice with college and law school training and thus afford him at least a fair show of success as compared with his fellows whereas leaving the requirements as they are at present constantly tends to delude the uninformed poor boy into the belief that satisfying the minimum requirements of office training as now fixed by statute is enough for the occasion. This only leaves him to find out his mistake by discovering that he is in danger of failure in his practice when it is likely to be too late in his life to go back and start over again. It is granted that most poor boys are not at the present time thus deluded. They already see the necessity for collegiate and law school education but to the extent that the minimum standard now set by statute actually operates it tends to deceive poor boys to their sorrowful failure without any practical possibility of rectification later in life by a new start.

c. *Counterbalancing Hardship on the Public.* A third answer to the "poor boy" argument against improving requirements for admission to the bar is that the hardship on the public of clients who suffer from the malpractice of incompetent, insufficiently trained attorneys far outweighs any possible hardship that can under present educational conditions fall upon occasional individual candidates for admission to the bar through the requirements of American Bar Association standards of educational qualifications. The point of this feature of the case is grasped most easily when one looks at the situation among doctors and their patients.

If a patient is sick he requires treatment that will cure. A good doctor is required instead of a poor doctor in order to treat his

patient effectively. The incompetent doctor's mistakes are buried under six feet of earth and it is considered no answer to the harm done by a doctor's malpractice that that doctor may have learned something by the mistake in the killing of his patient and that he is therefore less likely to kill the next one. In other words, in the practice of medicine good doctors are required for the benefit of the public whom they serve and no one listens with the slightest patience to the suggestion that the field of practice ought to be open as it used to be to incompetent, untrained doctors in order to give them the opportunity to reap a rich harvest of fees at the expense of avoidable injury to their patients.

In the case of lawyers the argument for superior training in order to give the public that is served competent legal service is in many respects analogous to the case of doctors. Clients who get into difficulty whether in cases of criminal prosecution or in cases of civil litigation involving damages to person or property or involving their legal rights in other respects are practically dependent upon their attorneys in order to assure the maintenance of their legal rights. When a man's affairs are involved and he is in trouble with his fellows erroneous or blundering legal advice may lead not only to loss of the suit in litigation but to the sacrifice of his property and his home, may lead to destitution and want on the part of his family, and may in criminal cases lead to the loss of personal liberty or even of life itself. When such interests of the large public of clients are put in jeopardy by the admission of incompetent and insufficiently trained lawyers to the practice of law it is an entirely inadequate answer to make to suggest that these young practitioners ought to be given the opportunity just like others of securing fees in the legal profession. Legal blunders are hard to avoid even for competent and well informed lawyers. The opportunity to untrained individuals to secure fees in the practice of law is an insignificant consideration when weighed against the harm and the possibility of harm to the large public of clients which will be inflicted through excess of blunders by incompetent and ill-trained practitioners. Those who have suffered from blundering and erroneous legal advice can readily sympathize with these statements.

2. *Is It Undemocratic?* It is sometimes suggested as an objection to raising bar admission requirements to conform to the American Bar Association standards, that such requirements would tend to create a legal aristocracy consisting of the well-to-

do which it is said would be inconsistent with the spirit of free institutions in a democratic country as ours.[15]

Two misconceptions are responsible for the prevalence of this argument so far as the argument is made with sincerity. In the first place there is the misconception that nothing is involved beyond the question of closing the doors of opportunity to worthy young men, thus losing sight of the fact that the candidate himself and the public on which he will practice as already indicated have an interest in securing competent service from the legal profession. The second misconception is that the doors of opportunity would be closed to men capable and willing to work. Enough has

[15]Suggestions of this sort are even made by A. Z. Reed in the Carnegie Foundation Bulletin No. 15 to which reference has already been made. That bulletin was prepared, however, before the American Bar Association standards were formulated, and its suggestions of this character are made in connection with discussions of what the writer conceives as the impossibility of maintaining a unitary bar. This conclusion on the part of Mr. Reed has been widely condemned, has apparently found little if any following, and has been deliberately and purposely rejected in the formulation of the American Bar Association standards. Furthermore after the formulation of the American Bar Association standards, Mr. Reed himself, despite his theories about a unitary bar has in the article referred to in footnote 2, given his support toward the adoption of the American Bar Association standards for admission to the bar.

The most aggressive presentation of this objection that the present writer has seen is found in bulletins issued by the National Association of Evening Law Schools. While the language of those bulletins seems needlessly vituperative, it goes on the misconception of fact, there broadly asserted, that it is well nigh impossible for an unskilled youth to work his way through high school and college and that few men accomplished it. Similar statements, though much more moderate in tone, are also found in a little bulletin by Edward T. Lee, of the John Marshall Law School, one of the best evening law schools of Chicago.

These arguments proceed on the basis that as only two or three percent of the population goes to college, the rest have no opportunity to go, and decry the undemocratic character of rules they say are designed to make a favored class of the two or three percent. Such arguments overlook the patent fact that far more people than actually go have the opportunity to go to college if they choose to make the necessary sacrifice of time and effort. Since the extreme exclusion from educational opportunity which is thus denounced by the evening law schools in fact does not happen, as has already been amply demonstrated in the text, the rest of the emphatic argument seems like knocking down a straw man set up for the purpose. Not only is it plain that the fact thus asserted, that it is impossible to work one's way, is misconceived, but it seems fairly evident that a prime motive for the opposition to higher standards that is coming from the low-standard commercial evening schools is the desire to safeguard their own financial receipts. As it appears to the present writer, the financial interest of those evening law schools, masquerading under the camouflage of unsubstantial arguments for individual opportunity based on misconceived statements of facts is insisted upon without regard to the interest of the candidates themselves in a fair opportunity for success in practice through adequate training, and without regard to the public interest in efficiency of the bar in its service to the community.

already been said to indicate that both these misconceptions are without substantial foundation.

On the other side there is a very striking affirmative reason why improved requirements for admission to the bar should be insisted upon in the interest of that very democracy which it is sought to adduce in opposition. The point is tersely put by Clarence N. Goodwin of Chicago, chairman of the Conference of Bar Association Delegates in the following paragraphs:[16]

"It occurred to me then that this same principle of human equality must be a decisive factor in all our deliberations. We affirm that we believe in equality before the law. But how can equality before the law be possible when the rich and powerful are represented in court by highly educated, thoroughly trained and most competent members of the profession, while a large part of the poor and ignorant who frequently find themselves in court opposed to the more fortunate, are so often represented by ignorant, untrained and incompetent men who have, through the laxity of our methods, been commissioned by the state with authority to counsel and advise and represent them?

"The shrewd and powerful men and interests of large means are able to know who are competent and who are not, but how is the poor man, the ignorant man, to make any just estimate of who is capable of properly advising and representing him?

"During my years as a trial judge I was frequently distressed by the fact that one side or the other in the case before me was so incompetently represented by counsel or represented by such ignorant counsel that, owing to the learning and skill of the attorneys on the other side, it seemed impossible to get the case properly before the court, or keep error out of the record.

"During my years in the appellate court, we found ourselves constantly confronted with records which showed such palpable and unmistakable errors as to make it necessary to reverse the case, although it obviously had merit, and although it was almost a moral certainty that had the errors been eliminated the verdict and judgment would have been the same.

"These miscarriages of justice, due to ignorance and incompetence of counsel, are largely beyond the power of the judge to control, or rules of practice to remedy. It is to be remembered, however, that the men representing these unfortunate litigants were licensed by the state to practice law.

"It seems little less than a crime for the state to certify to the competency, to the learning and to the ability of a man to represent his fellow citizens in court who is not learned nor able nor competent to represent or advise anybody in any legal matter."

3. *Inertia.* The most serious practical objection to improving requirement for admission to the bar, in the opinion of the pres-

[16]Proceedings of the Special Session on Legal Education of the Conference of Bar Association Delegates, pp. 11-12.

ent writer, is the dead weight of inertia. The objection of inertia is well stated and answered by Mr. Elihu Root in his final statement before the Conference of Bar Association Delegates as follows:[17]

"Another class of objection was illustrated this forenoon by my friend, the former senator from Colorado, Mr. Thomas, for whom I have had for forty years or more, since we first met in the Supreme Court of the United States, not only great admiration, but warm friendship. Now my good friend was responding not to a study of this subject, but responding to the natural reaction of a man who rather dislikes to have the old traditions of his life interfered with by somebody else."

His answer to it is equally effective:[18]

"All that the opposition here comes to is simply to stop, to stop! to do nothing! stop the American Bar Association, disapprove them, tell them they should do nothing! How much better instead of beating over the prejudices and memories of a past that is gone, it is to take dear old Edward Everett Hale's maxim, "Look forward, not back; look upward, not down, and lend a hand."

D. Summary

The briefest cursory summary of the arguments here made for improved educational requirements for admission to the bar is that those who favor such improved requirements insist on their importance to the public of clients, in increasing the efficiency and strengthening the character of the bar while those who oppose such improved requirements insist on the supposed injustice of restricting individual opportunity to practice law. On matters of this sort, involving a weighing or balancing of opposing considerations it is not strange that the first instinctive responses of various individuals should differ. Painstaking investigation of the facts involved, however, as already set out in the foregoing pages, can hardly fail to justify the conclusion that increased efficiency and strengthened character of the bar in the interest of better administration of justice is greatly needed while the supposed restriction on individual opportunity to practice law is under present educational opportunities not serious. It is therefore submitted that the improved requirements for admission to the bar should be adopted, both in the interest of the candidates themselves who will thereby be assured of an even chance for success at the bar, and in the interest of the public in general, whether as litigating clients or as members of the community, whose well-being so largely depends on efficient administration of justice.

[17]Proceedings of the Special Session on Legal Education of the Conference of Bar Association Delegates, p. 172.

[18]Ibid, p. 173.

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CARRIERS—NEGLIGENCE—LIABILITY OF SLEEPING-CAR COMPANY TO PASSENGER ASSAULTED IN HIS BERTH BY FELLOW PASSENGER—DUTY TO KEEP WATCH.—The liability of a railroad company or a sleeping-car company[1] to a passenger, who, while asleep in his berth, is assaulted by a fellow passenger,[2] is a question

[1]Since in this situation the railroad company and the sleeping car company are jointly and severally liable, Calder v. Southern Ry., (1911) 89 S.C. 287, 297, 71 S.E. 841, Ann. Cas. 1913A 894, and note, writ of error dismissed, The Pullman Co. v. Calder, (1911) 223 U.S. 740, 32 S.C.R. 531, 56 L.Ed. 637, the words "carrier" and "company" will hereafter be used indiscriminately to signify either the railroad company or the sleeping-car company.

[2]This discussion excludes assaults by the carrier's employees.

of considerable interest and importance. It would seem to be closely related to the question of the carrier's liability for a passenger's property stolen from him while sleeping.[3] In cases involving this latter situation it is generally said that the sleeping-car company invites the traveler to enter its car to sleep, and thereby impliedly agrees to watch over his property.[4] Of course, the degree of vigilance required of the company is greater during the nighttime, when the passenger is asleep, than in the daytime, when the passenger necessarily is charged with the duty of exercising reasonable diligence for his own protection.[5] If his effects are stolen while he is asleep, the carrier must respond in damages for his loss, unless at the time of the theft the carrier was exercising due care to prevent it.[6] In other words, the carrier is not an insurer against the loss of property which a passenger takes with him into the sleeping-car. Its liability rests not upon the wrongful act of the thief, but upon its own negligence in failing to prevent the theft. In their efforts to determine whether or not a carrier is negligent in such a situation, the courts are, nominally at least, in conflict. Some jurisdictions impose upon the company the duty of keeping a continuous and active watch in the aisles of the car during the hours when its passengers are asleep;[7] other courts require merely that the company maintain a reasonable watch.[8] Of course, from the very nature of things the latter rule often closely approximates the former.[9]

As to the liability of a carrier for the assault of a passenger in his berth by a fellow passenger, there is a dearth of authority. A few courts hold the carrier liable if the commission of the assault was due to its negligence, and the presence of negligence is

[3]For a discussion of this particular point, see 2 MINNESOTA LAW REVIEW 223.

[4]Lewis v. New York Sleeping Car Co., (1887) 143 Mass. 267, 273, 9 N.E. 615, 58 Am. Rep. 135; Woodruff Sleeping, etc., Co. v. Diehl, (1882) 84 Ind. 474, 484, 43 Am. Rep. 102.

[5]Robinson v. Southern R. Co., (1913) 40 App. D. C. 549, 553, L.R.A. 1915B 621, Ann. Cas. 1914C 959; but see Robbins v. Pullman Co., (1917) 164 N.Y.S. 111.

[6]See cases cited in footnotes 7 and 8, infra.

[7]Pullman Car Co. v. Gardner, (1883) 3 Penny. (Pa.) 78; Carpenter v. The New York, etc., R. Co., (1891) 124 N.Y. 53, 26 N.E. 277, 11 L.R.A. 759, and note, 21 A.S.R. 644; Hill v. Pullman Co., (1911) 188 Fed. 497; Robinson v. Southern R. Co., cited in footnote 5, supra; Pullman Palace Car Co. v. Adams, (1898) 120 Ala. 581, 24 So. 921, 45 L.R.A. 767, 74 A.S.R. 53.

[8]Lewis v. New York Sleeping Car Co., (1887) 143 Mass. 267, 9 N. E. 615, 58 Am. Rep. 135.

[9]See Pullman Palace Car Co. v. Hunter, (1900) 107 Ky. 519, 54 S.W. 845, 47 L.R.A. 286; Pullman Co. v. Schaffner, (1906) 126 Ga. 609, 55 S.E. 933, 9 L.R.A. (N.S.) 407.

determined, as in the cases involving robbery, by the kind of watch the carrier was maintaining at the time the assault was committed.[10] The Tennessee court apparently has gone to the extent of holding that the carrier, if it keeps no watch at all, is an insurer of the passenger's safety.[11] Other courts, however, apply to this situation the so-called fellow-passenger rule, namely, that a carrier is liable to a passenger for his injuries only when the carrier has knowledge of the existence of danger, or of facts from which it might reasonably anticipate such danger. That is, they determine the carrier's liability not by whether it was keeping a negligent watch, but by whether it could foresee the injury. Thus, in a Virginia case,[12] where the plaintiff's intestate was killed, either while asleep in his berth, or in resisting a sneak thief,[13] the court, though recognizing the carrier's liability for robbery under such conditions, sustained the defendant's demurrer to the complaint, saying:

"Robbery is of frequent occurrence...murder is of infrequent occurrence. When, therefore, a sleeping-car company receives a passenger, and he retires to rest, it may well be assumed to anticipate and be required to guard and protect him against a crime which is likely to occur . . . It cannot be deemed to have anticipated nor be expected to guard against murder... There is no causal connection between the negligence pleaded [failure to maintain a proper watch] and the injury sustained."

But in answer to this, the rather pointed questions have been asked: Can it be said as a matter of law that personal violence is so unusual and so foreign even to stealthy robbery as to be wholly dissociated therefrom? Can one who is bound to keep watch against robbery shut his eyes to the possibility of violence accompanying that robbery?[14]

In *Hall v. Pullman Company,* [15] decided by the federal district court for the southern district of Florida, the court, arguing in a vein similar to that used in the Virginia case mentioned above, said:

"A criminal assault upon a female passenger, although there are only two persons in the sleeping car, is not within the rule en-

[10]Hill v. Pullman Co., (1911) 188 Fed. 497; Calder v. Southern Ry., cited in footnote 1, supra.

[11]St. Louis, I. M. & S. R. Co. v. Hatch, (1906) 116 Tenn. 580, 591, 94 S.W. 671.

[12]Connell's Ex'ors v. Chesapeake & O. R. Co., (1896) 93 Va. 44, 24 S.E. 467, 32 L.R.A. 792, 57 A.S.R. 786.

[13]The question decided was based wholly on the pleadings; so it is difficult to determine the exact facts of the case.

[14]Hill v. Pullman Co., (1911) 188 Fed. 497, 501.

[15](1918) 253 Fed. 297. The case came up on demurrer to the complaint.

forced in cases of larceny of the passenger's baggage, nor is the failure of the porter or conductor to answer the call bell the natural and probable cause of the injury complained of, which ought to have been foreseen in the light of the attending circumstances..."[16]

This contention is refuted by the Tennessee court when it says, in effect, that the porter and conductor in absenting themselves from the sleeper, and in failing to answer the numerous bells that were rung, were guilty of negligence as a matter of law.[17] The holding of the *Hall case* seems in itself a harsh doctrine; but the Florida state supreme court in a recent case[18] carried the doctrine to an unbounded limit. In that case the plaintiff, a sleeping-car passenger, was assaulted in her berth during the night by a man who was the only other passenger in the car. She rang the call-bell and screamed for the porter, and although she continued this for about ten minutes, no one came to her assistance. Then the man assaulted her a second time. The supreme court held that the trial court's action in directing a verdict for the carrier was entirely correct, because the plaintiff failed to show that the porter was on the car or heard the calls for help, and because recovery in a case like this can be had only if the injury is of such nature, and is inflicted under such circumstances as could be reasonably anticipated or naturally expected to occur.

Had the passenger been assaulted only once, the holding might be justified, but even then it would be contrary to the line of authority which requires that a vigilant watch be kept over the sleeping passengers. Here no watch at all was kept. Under the Tennessee view that fact would impose absolute liability upon the carrier. Be that as it may, it is submitted that the holding that *as a matter of law* there is no liability even for the second assault, which occurred about ten minutes after the first one, during which time the call-bell was being rung repeatedly, is a gross perversion of justice.

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[16]Accord, Tomme v. Pullman Co., (Ala. 1922) 93 So. 462, where, because of the meagre statement of facts, the kind of watch maintained by the carrier is not shown. But from the language used by the court, it apparently is laying down a rule as to assault that is different from that laid down for robbery in Pullman Palace Car Co. v. Adams, (1898) 120 Ala. 581, 24 So. 921, 45 L.R.A. 767, 74 A.S.R. 53.

[17]St. Louis etc., R. Co. v. Hatch, (1906) 116 Tenn. 580, 592, 94 S.W. 671.

[18]Hall v. Seaboard Air Line R. Co., (Fla. 1922) 93 So. 151. It is to be noted that the plaintiff in this case was the plaintiff in the Hall case cited in footnote 15, supra. Apparently the same question is being litigated here that was passed upon in that case.

VENDOR AND PURCHASER—SELLER AND BUYER—RESCISSION OF CONTRACT OF SALE—RIGHT OF PURCHASER TO LIEN FOR PAYMENTS MADE.—It is the almost universal rule that if a written contract for the sale of land fail because of some act or conduct of the vendor or his inability to perform it, the purchaser is entitled to an equitable lien on the land for what he has paid on the purchase price,[1] provided, of course, that he himself is not in default.[2] The lien attaches only to lands covered by the contract,[3] and only to the extent of the vendor's interest therein.[4] It is not dependent upon the purchaser's having gone into possession.[5] It includes interest on the amount paid,[6] and the value of permanent improvements,[7] less the rental value of the premises;[8] but apparently it does not include expenses incurred in examining the title.[9] The lien would seem to attach even though the contract is rescinded by agreement,[10] and even though rescinded by the purchaser under a power given him in the contract.[11] It has been held that the purchaser has no lien, if the title to the land has passed to him,[12] or if he treats the contract as still being in force.[13]

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[1]27 R.C.L. 628; 39 Cyc. 2031; 2 Jones, Liens, 2nd ed., 55. Also, a purchaser at an administrator's sale, Jones, Admr. v. French, (1883) 92 Ind. 138, or at a sheriff's sale, Seller v. Lingerman, (1865) 24 Ind. 264, is entitled to a lien if the sale is later set aside. It has been held that the assignee of the purchaser's "claim" to the sum paid has no lien. Murphy v. Hurley, (1913) 155 App. Div. 465, 140 N.Y.S. 514. Some courts withhold a lien from the vendee apparently because they also refuse the vendor a lien. Young v. Walker, (1916) 224 Mass. 491, 493, 113 N.E. 363; Ahrend v. Odiorne, (1875) 118 Mass. 261, 19 Am. Rep. 449.

[2]Dinn v. Grant, (1852) 5 DeG. & Sm. 451; Merrill v. Merrill, (1894) 103 Cal. 287, 35 Pac. 768, 37 Pac. 392.

[3]Robards v. Robards, (1905) 27 Ky. L. Rep. 494, 85 S.W. 718; Ayres v. The Graham Steamship, etc., Co., (1909) 150 Ill. App. 137, 141; Craft v. Latourette, (1901) 62 N.J. Eq. 206, 49 Atl. 711.

[4]Ramirez v. Barton, (Tex. Civ. App. 1897) 41 S.W. 508; Paton v. Robinson, (1908) 81 Conn. 547, 71 Atl. 730.

[5]Elterman v. Hyman, (1908) 192 N.Y. 113, 84 N.E. 937, 15 Ann. Cas. 819, 127 A.S.R. 862; Bullitt v. Eastern Ky. L. Co., (1896) 99 Ky. 324, 36 S.W. 16.

[6]Foster v. Gressett's Heirs, (1856) 29 Ala. 393; Everett v. Mansfield, (1906) 148 Fed. 374, 78 C.C.A. 188, 8 Ann. Cas. 956, and note.

[7]Hagan v. Bowdoin, (1920) 79 Fla. 525, 84 So. 543; Gibert v. Peteler, (1868) 38 N.Y. 165, 97 Am. Dec. 785; see Topliff v. Shadwell, (1904) 68 Kan. 317, 74 Pac. 1120.

[8]Gayle v. Troutman, (1907) 31 Ky. L. Rep. 718, 103 S.W. 342; Pilcher v. Smith, (1858) 2 Head (Tenn.) 208.

[9]Occidental Realty Co. v. Palmer, (1907) 117 App. App. Div. 505, 102 N.Y.S. 648, affirmed in 192 N.Y. 588, 85 N.E. 1113; but see Gerstell v. Shirk, (1913) 210 Fed. 223, 230, 127 C.C.A. 41.

[10]But see Scott's Admr. v. Griggs, (1873) 49 Ala. 185.

[11]Whitbread & Co., Ltd. v. Watt, L.R. [1902] 1 Ch. Div. 835.

[12]Clarke v. Mayberry, (1911) 165 Ill. App. 639, 644. But it has been held that the conveyance may be set aside and a vendee's lien adjudged. Wolfinger v. Thomas, (1908) 22 S.D. 57, 115 N.W. 100, 133 A.S.R. 900; Ft.

The lien is inferior to claims existing prior to the time of the payments,[14] but it is superior to subsequent claims,[15] providing such subsequent claimants had notice.[16] The better view seems to be that the vendee has a lien where he cannot get specific performance of the contract because of its unenforceability.[17] In case the contract is oral it has been held that the lien is dependent upon the vendee's having taken possession.[18]

New York and Michigan, in applying the general rule first above stated, draw a distinction between the case where the purchaser seeks the aid of equity merely to foreclose his lien and the case where he asks equity to cancel the contract and decree him a lien as well. In the former case, which is treated as an affirmance of the contract, a lien is given,[19] in the latter situation, it is denied.[20] This distinction is contrary to the great weight of authority.[21] It is based on the theory that the vendee's

Jefferson Improv. Co. v. Dupoyster, (1899) 108 Ky. 792, 51 S.W. 810, 48 L.R.A. 537.

[13]Haile v. Smith, (1896) 113 Cal. 656, 45 Pac. 872.

[14]Montgomery v. Meyerstein, (1921) 186 Cal. 459, 199 Pac. 800; Villone v. Feinstein, (1909) 132 App. Div. 31, 116 N.Y.S. 384; McWilliams v. Jenkins, (1882) 72 Ala. 480. A subvendee's lien precedes that of the vendee. Madeira's heirs v. Hopkins, (1852) 12 B. Mon. (Ky) 595, 608. Since the lien attaches at the time of payment, the vendee's failure to allege and prove the date of his alleged payment bars an investigation of his claim of priority. Green v. Linnhaven Orch. Co., (1918) 89 Ore. 513, 174 Pac. 620; First Sav. Bk. of Albany v. Linnhaven Orch. Co., (1918) 89 Ore. 354, 174 Pac. 614.

[15]Sautelle v. Carlisle, (1884) 13 Lea (Tenn.) 391; Stewart v. Wood, (1876) 63 Mo. 252; Shirley v. Shirley, (1845) 7 Blackf. (Ind.) 452.

[16]Voorheis v. Eiting, (1893) 15 Ky. L. Rep. 161, 22 S.W. 80; Newberry v. French, (1900) 98 Va. 479, 36 S.E. 519.

[17]King's Heirs v. Thompson, (1835) 9 Pet. (U.S.) 204, 220, 9 L. Ed. 102; Lockwood v. Bassett, (1883) 49 Mich. 546, 14 N.W. 492; North v. Bunn, (1898) 122 N.C. 766, 29 S.E. 766; Felkner v. Tighe, (1882) 39 Ark. 324, 36 S.W. 16; Pierson v. Lum, (1874) 25 N.J. Eq. 390; Sautelle v. Carlisle, (1884) 13 Lea (Tenn.) 391; Newman v. Moore, (1893) 94 Ky. 147, 21 S.W. 759, 42 A.S.R. 343; but see Wright v. Begley, (1907) 31 Ky. L. Rep. 53, 101 S.W. 342; Rumfelt v. Clemens, (1864) 46 Pa. 455.

[18]Elliott v. Walker, (1911) 145 Ky. 71, 140 S.W. 51; Wright v. Yates, (1910) 140 Ky. 282, 285, 130 S.W. 1111; but the Kentucky court reached a contrary result in Grace v. Gholson, (1914) 159 Ky. 359, 362, 167 S.W. 420; similarly, Foulkes v. Sengstacken, (1917) 83 Ore. 118, 134, 158 Pac. 952, 163 Pac. 311. See note, L.R.A. 1916D 468, 484.

[19]Elterman v. Hyman, (1908) 192 N.Y. 113, 84 N.E. 937, 15 Ann. Cas. 819, and note, 127 A.S.R. 862, and note.

[20]Davis v. William Rosenzweig Realty O. Co., (1908) 192 N.Y. 128, 84 N.E. 943, 20 L.R.A. (N.S.) 175, and note, 127 A.S.R. 890, and note; Mulheron v. Henry S. Koppin Co., (Mich. 1922) 190 N.W. 674, where the court explains that the contrary result reached in Culver v. Avery, (1910) 161 Mich. 322, 129 N.W. 439, was due to the fact that the point was not raised.

[21]The attempt has been made to cite only those cases involving a rescission of the contract. Goodrich-Lockhart Co. v. Sears, (1919) 270 Fed. 971, 982; Tudor v. Raudabaugh, (1922) 278 Fed. 254; Groves v.

lien arises out of the contract of sale, and cannot exist without it; so if it is rescinded, the lien is destroyed. The correctness of this theory would seem to involve a determination of the true nature of the vendee's lien. The decisions advance various theories. In the first place, the lien, unless created by statute,[22] is a creature of equity, and exists regardless of whether the vendee has an adequate remedy at law.[23] Some courts say that to the extent to which a purchaser has paid his purchase money, to that extent the vendor is a trustee for him.[24] But it has been said rather pointedly that if at the time of the contract the vendor becomes trustee for the vendee, as it is generally held, part payment of the purchase price cannot make him doubly a trustee of a portion thereof.[25] Another view is that the vendee's lien is the exact counterpart of the vendor's lien.[26] But the former is not in its origin the same as the latter.[27] The vendor's lien is an additional remedy given by equity to the vendor to secure money expressly agreed to be paid. It therefore arises out of the contract of sale, and is necessarily incident thereto. If the contract is rescinded, the lien ceases to exist. But the vendee's lien is given to secure a money return never contemplated by the contract of sale, and contrary to its terms. Thus, it is not the result of any

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Stouder, (1916) 58 Okla. 744, 751, 161 Pac. 239; Galbraith v. Reeves, (1891) 82 Tex. 357, 18 S.W. 696; Stockwell v. Melbern, (Tex. Civ. App. 1916) 185 S.W. 399; Costen v. McDowell, (1890) 107 N.C. 546, 12 S.E. 432; Smith v. Redmond, (1906) 134 Iowa 70, 108 N.W. 461; see also cases cited in other footnotes. It is true, as stated by the Michigan court in the Mulheron case, (Mich. 1922) 190 N.W. 674, that these cases do not discuss whether or not a different rule should apply where there has been a rescission of the contract. However, in Ihrke v. Continental L. Ins., etc., Co., (1916) 91 Wash. 342, 351, 157 Pac. 866, L.R.A. 1916F 430, where the plaintiff asked for a decree rescinding the contract and adjudging a lien on the land, the court said,"...it is urged that there can be no lien...[because the contract has been rescinded. But the contract has not been rescinded]...On the contrary the very suit is founded on the assumption of an existing contract...A rescission...may be part of the final decree, but it is plain that no rescission has as yet taken place." But compare this case with Adams v. Dose, (1915) 87 Wash. 575, 579, 152 Pac. 9.

[22]Cal. Civ. Code, sec. 3050; Idaho Rev. Codes, sec. 3445; Mont. Rev. Codes 1907, sec. 5804; N.D. Comp. Laws 1913, sec. 6865; S.D. Comp. Laws 1910, Civ. Code, sec. 2152. But the statute is not exclusive. Montgomery v. Meyerstein, (1921) 186 Cal. 459, 199 Pac. 800.

[23]Occidental Realty Co. v. Palmer; Gerstell v. Shirk, both cited in footnote 9.

[24]Rose v. Watson, (1864) 10 H.L. Cas. 672; Everett v. Mansfield, (1906) 148 Fed. 374, 78 C.C.A. 188, 8 Ann. Cas. 956, and note; Stewart v. Mann, (1917) 85 Ore. 68, 165 Pac. 590, 1169.

[25]8 Col. L. Rev. 571.

[26]3 Pomeroy, Eq. Jurisp., 4th ed., 3048; Davis v. Heard, (1870) 44 Miss. 50.

[27]See Wythes v. Lee, (1855) 3 Drew. 396, 403.

express agreement;[28] rather is it a right which has been invented by equity for the purpose of doing justice.[29] This right, upon the vendor's default, gives rise to a contract implied in law, based on the theory of unjust enrichment, to return the purchase money paid. It is this quasi-contractual obligation, then, which is the true basis of the vendee's lien. If this is correct, the New York and Michigan courts are wrong in their view that the rescission of the contract ipso facto destroys the vendee's lien. Under their rule it would be difficult to sustain the cases, mentioned above,[30] where the vendee is given a lien even though the contract was void ab initio. Further doubt arises as to the correctness of the theory that the so-called suit to enforce a vendee's lien is in affirmance of the contract. It would seem that when a plaintiff takes advantage of any of the quasi-contractual forms of action which the law allows him on a failure of consideration, he, in effect, is treating the contract at an end; so his position with regard thereto is the same irrespective of whether or not he asks equity for a rescission thereof.[31] Moreover, the New York view would seem contrary to the spirit and purpose of the rule that when a court of equity has once taken hold of a matter, it will continue to assert active jurisdiction over it until full justice has been meted out and the controversy settled. "Equity likes to do justice, and that not by halves."

Where the contract of sale involves both realty and personalty, and the purchase price is a gross sum, it would seem that the same question is presented as is presented where the contract involves realty only. In fact, it has been held that in such a case the vendee, upon the default of the vendor, may enforce an equitable lien against the land for the earnest money paid, if it clearly is shown that the payment made was less than the value which could have been placed on the land when the contract was made.[32] The reason for this latter qualification is apparently that equity, applying the doctrine of application of payments, presumes that the money paid was for the land. This fiction would be avoided if a lien were given on both the realty and the personalty in the pro-

[28]See the dissenting opinion in Davis v. William Rosenzsweig Realty Co., (1908) 192 N.Y. 128, 84 N.E. 943, 20 L.R.A. (N.S.) 175, 127A. S.R. 890.

[29]Whitbread & Co., Ltd. v. Watt, L.R. [1902] 1 Ch. Div. 835, 838; and see Wolfinger v. Thomas, (1908) 22 S.D. 57, 64, 115 N.W. 100, 133 A.S.R. 900.

[30]See text to footnote 17.

[31]8 Col. L. Rev. 571, 573.

[32]Gerstell v. Shirk, (1913) 210 Fed. 223, 127 C.C.A. 441.

portion which the value of each bears to the gross valuation. This latter possibility involves, of course, the right of a buyer to a lien on personalty, a question on which there is some conflict of opinion.

One line of cases awards the buyer a lien where the purchase was induced by fraud.[33] Wisconsin has adjudged a lien where the seller was insolvent.[34] The fact that the seller is a non-resident has been held not to raise an equity in the buyer's favor sufficient to justify the establishment of a lien.[35] It is, of course, a general rule that when a person seeks a rescission of a contract, he must tender back what he has received under the contract, but many courts hold that if the buyer has paid the purchase price in whole or in part, he may qualify the tender by a retention of possession until restitution is made by the seller.[36] This doctrine defeats the seller's attempt to replevy the goods.[37] But the buyer has been denied a lien by one of the federal circuit courts of appeal, and by the Michigan and Mississippi courts.[38] The question is covered by the Uniform Sales Act, which adopts the rule that where the buyer is entitled to rescind the sale and does so, the seller must repay what has been paid, concurrently with the return of the goods, and if he refuses to accept the buyer's offer to return the goods, the buyer shall thereafter be deemed to hold the goods as a bailee of the seller, but subject to a lien to secure the repayment of any part of the price that has been paid.[39]

[33]Scott v. Clarkson's Exec., (1808) 1 Bibb (Ky.) 277; Armstrong & Co. v. Darbro, (1889) 10 Ky. L. Rep. 984; Alexander v. Walker, (Tex. Civ. App. 1922) 239 S.W. 309, 312.

[34]Hall v. Bank of Baldwin, (1910) 143 Wis. 303, 310, 127 N.W. 969.

[35]Hackney Mfg. Co. v. Celum, (Tex. Civ. App. 1916) 189 S.W. 988, 992.

[36]24 R.C.L. 359; Jesse French Piano, etc., Co. v. Bradley, (1903) 138 Ala. 177, 35 So. 44; Levy v. Chonavitz, (1917) 163 N.Y.S. 658; compare Goldman v. Karger, (1915) 174 N.Y.S. 715.

[37]White Sewing M. Co. v. McBride, (1887) 27 Mo. App. 470; Hamilton v. Singer Mfg. Co., (1870) 54 Ill. 370.

[38]People's Elec. R. Co. v. McKeen Motor Car Co., (1914) 214 Fed. 73, 130 C.C.A. 513, where the court said that a lien, being a right of property, cannot be created by the courts merely from a sense of justice in particular cases; National Cash R. Co. v. Hude, (1919) 119 Miss. 36, 80 So. 378, 7 A.L.R. 990, and note; Ryan v. Wayson, (1896) 108 Mich. 519, 66 Mich. 370, but apparently this case is no longer law in Michigan, for in 1913 the Uniform Sales Act was adopted.

[39]Uniform Sales Act, chap. 69 (4), (5); G.S. Minn. 1917 Supp., sec. 6015 (4), (5).

RECENT CASES.

ATTACHMENT—GARNISHMENT—BILLS OF LADING—GOODS IN TRANSIT. —The plaintiff procured a foreign attachment under which a sheriff seized goods which were being transported under an order bill of lading, which, at the time, was in the possession of a bank. Copies of the writ of attachment were served upon the bank. The railroad obtained a rule to show cause why the attachment should not be quashed, on the ground that the plaintiff had not surrendered the bill of lading or enjoined the negotiation thereof, according to the provisions of the Uniform Bills of Lading Act, sec. 24. *Held,* that the rule should be made absolute. *Pottash v. Albany Oil Co.,* (Pa. 1922) 118 Atl. 317.

The basis for the decision in this case is found in the mercantile theory that an order bill of lading is a document of title, and, as such, the only representative of the goods while they are in transit. Williston, Sales 697. If this theory were carried to its logical conclusion, there could be no attachment or garnishment of the goods while the negotiable document of title was outstanding as the bill itself would be regarded as the res subject to the process. But it does not appear that the mercantile theory was intended to be carried to its logical extent in the Bills of Lading Act, since it is provided in section 24 of that act, that the goods may be attached if the negotiation of the bill is enjoined, 4 Uniform Laws, Annotated, 45, which necessarily implies an effectual restraint on negotiation. See *Brimberg v. Hartenfeld Bag Co.,* (1918) 89 N.J.Eq. 425, 429, 105 Atl. 68. The necessity of a prior injunction is obvious if attachment is to be allowed. The maker of a negotiable promissory note cannot be garnished as a debtor of the payee while the note is current as negotiable paper, because of the possibility that the note may get into the hands of a third party, whom the maker, by making a negotiable note, has contracted to pay, and to whom he would be liable. Drake, Attachments, 7th ed., 520; Daniel, Negotiable Instruments, 5th ed., 797. As an order bill of lading is negotiable, the same difficulties present themselves where goods under an order of lading are to be attached. As stated in the instant case, a bill in equity is the only satisfactory means of enjoining further negotiation. Where a bill of lading is in a different jurisdiction from that of the creditor, considerable hardship and expense may be involved in obtaining an injunction against its negotiation, but such considerations are subordinated to the paramount purpose of the act, which is to protect carriers and bona fide holders of order bills of lading. See *Brimberg v. Hartenfeld Bag Co.,* (1918) 89 N.J.Eq. 425, 429, 105 Atl. 68, and *Stamford Rolling Mills Co. v. Erie R. Co.,* (1917) 257 Pa. 507, 101 Atl. 823.

BANKS AND BANKING—ESTOPPEL—EFFECT OF FAILURE TO EXAMINE PASS BOOK AND RETURNED VOUCHERS—The plaintiff, the United States, brought an action against the defendant bank to recover a certain amount,

plus interest, on the ground that the defendant bank had wrongfully paid and charged to its account two checks, in each of which the payee's name had been unlawfully changed after the checks had been signed. The bank's teller had exercised reasonable care in paying the checks, and the cancelled checks together with a statement of account were returned to the plaintiff within one week after they had been cashed. The plaintiff shortly afterwards discovered the forgery but the bank was not given notice of it until six months thereafter. *Held,* that the depositor by failing to give the bank notice of forged checks within a reasonable time discharged the bank from liability. *England Nat. Bank v. United States,* (C. C. A. 1922) 282 Fed. 121.

The instant case is in accord with the great weight of judicial opinion in the United States in imposing a duty upon the depositor of a bank to examine with reasonable care his account as shown by pass book and cancelled checks, in order to detect forgeries, alterations or fraudulent charges, and to report same within a reasonable time. *Leather Mfr's Nat'l Bank v. Morgan,* (1886) 117 U.S. 96, 6 S.C.R. 657, 29 L. Ed. 811; *First Nat. Bank v. Farrell,* (C. C. A. 1921) 272 Fed. 371, 16 A. L. R. 651; *Brown v. Lynchburg Nat. Bank,* (1909) 109 Va. 530, 64 S.E. 950, 17 Ann. Cas. 119, and note; note 15 A.L.R. 159. See contra, *Kepitigalla Rubber Estates v. Nat'l Bank,* [1909] 2 K.B. 1010; *Rex v. Bank of Montreal,* (1906) 11 Ont. L. Rep. 595, affirmed, (1906) 38 Can. Sup. Ct. 258. But this duty of examination does not extend to the payee's endorsement on returned vouchers unless the depositor has actual knowledge, because a drawer cannot be expected to know the payee's signature. *Prudential Ins. Co. of America v. Nat. Bank of Comm.,* (1920 227 N.Y. 510, 125 N.E. 824, 15 A.L.R. 146, and note 166; *Los Angeles Invest. Co. v. Home Savings Bank,* (1919) 180 Cal, 601, 182 Pac. 293, 5 A.L.R. 1193; *City of St Paul v. Merchants Nat'l Bank,* (Minn. 1922) 187 N. W. 516. A breach of the depositor's duty results in a prima facie admission of the correctness of the account stated, and, provided the bank itself has not been negligent, the depositor will be estopped to show that the account is not correct, if the bank would be prejudiced thereby. *Kenneth Investment Co. v. National Bank,* (1902) 96 Mo. App. 125, 70 S. W. 173; see, also, *Merchants Nat. Bank v. Nichols and S. Co.,* (1906) 223 Ill. 41, 79 N. E. 38, 7 L. R. A. (N. S.) 752. What is sufficient to constitute *prejudice* in order to give rise to an estoppel is subject to a conflict. See, Ewart, Estoppel 146; note, 20 L. R. A. (N. S.) 79. The instant case supports the rule that loss of opportunity to sue the forger, whereby the bank might have recuperated its losses, is sufficient, although this might have been of no actual benefit to the bank. *Leather Mfr's Nat. Bank v. Morgan,* (1885) 117 U.S. 96, 6 S.C.R. 657, 29 L. Ed. 811; *Bank of Black Rock v. Johnson, etc., Tie Co.,* (1921) 148 Ark. 11, 229 S. W. 1. But some courts maintain that there is no *prejudice* until actual damage is shown and that the possibility of recovery against a forger is too conjectural. *Janin v. London & S. F. Bank,* (1891) 92 Cal. 14, 27 Pac. 1100, 14 L. R. A. 320, 27 A. S. R. 82. Some courts, in cases involving a series of forgeries by an employee, though recognizing the doctrine of estoppel in pais, hold that no recovery can be had on the theory of estoppel, for checks paid before the date the principal is charged with constructive notice of his employee's conduct, in that their *payment* was not induced by

any conduct of the principal's. This results from a failure to observe the basis of the estoppel here discussed which is inaction inducing the bank, not *to pay,* but not to take action against the forger. *First Nat. Bank v. Allen,* (1893) 100 Ala. 476, 14 So. 335, 27 L. R. A. 426, 46 A. S. R. 80; *Israel v. State Nat. Bank,* (1909) 124 La. 885, 50 So. 783. G. S. Minn. 1913, sec. 6378, provides that no bank which has paid a forged or raised check issued in the name of a depositor shall be liable to said depositor unless notified of the forgery within six months after the return of the vouchers and statement or notification that such statement is ready for delivery. The dictum in *State v. Merchants Nat. Bank of St. Paul,* (1920) 145 Minn. 322, 325, 177 N. W. 135, to the effect that this statute by its terms applies only to a forgery of the name of the depositor obviously seems to be an inadvertent misstatement. The statute is broad enough to apply to any change of the tenor of the instrument, such as in the principal case, changing the payee's name on the face of the instrument. Furthermore, although no authority in point has been found, it is submitted that this statute merely has the effect of barring an action by the depositor after the expiration of the statutory period, and does not purport to establish an arbitrary definition of what is a reasonable time. Thus, even though the bank be notified within the statutory period, it is not deprived of its defense of failure of the depositor to notify within a reasonable time, a question to be determined in each case by the jury. Business custom repels the idea that a notice given five months after receipt of the statement, which notice would be within the statutory period, should in every case be a reasonable notice.

CARRIERS—NEGLIGENCE—LIABILITY FOR ASSAULT OF FELLOW PASSENGER UPON PASSENGER ASLEEP IN BERTH.—The plaintiff, a sleeping-car passenger, was assaulted in her berth during the night by a man who was the only other passenger in the car. She rang the call-bell and screamed, but it was ten minutes before the porter arrived, during which time the man made a second assault. In her action against the railroad company, it was *held,* two justices dissenting, that the trial court properly directed a verdict for the defendant, because the attack could not have been anticipated and because there was no proof that the porter was on the car or that he heard the bell or the calls for help in time to have prevented the assault. *Hall v. Seaboard Air Line R. Co.,* (Fla. 1922) 93 So. 151.

For a discussion of the principles involved, see NOTES, p. 227.

COMITY—ACTION ON SHERIFF'S BOND GIVEN IN ONE STATE CANNOT BE MAINTAINED IN ANOTHER.—Plaintiff, a resident of Mississippi, having been injured by a deputy sheriff in that state sued the sheriff and his bondsman in Tennessee. The bond, running to the state, was given pursuant to the Mississippi statute, which required that suit thereon be brought in the name of the state. *Held,* that Tennessee courts will not entertain the action. *Brower v. Watson,* (Tenn. 1922) 244 S.W. 363.

The general rule is that courts on principles of comity will enforce rights not in their nature local, and not contrary to the policy of the

government of the tribunal, no matter where arising, and without regard to whether they are of common law or statutory origin, *Usher v. West Jersey R. Co.*, (1889) 126 Pa. St. 206, 17 Atl. 597, 12 A.S.R. 863, 4 L.R.A. 261; *Midland Co. v. Broat*, (1892) 50 Minn. 562, 52 N.W. 972, 17 L.R.A. 312; but not rights based on the penal laws of another state., *Wisconsin v. Pelican Ins. Co.*, (1888) 127 U.S. 265, 8 S.C.R. 1370, 33 L. Ed. 239; *Patterson v. Wyman*, (1919) 142 Minn. 70, 170 N.W. 928; and that contracts, valid where made, are valid and will be enforced everywhere. In the instant case, the court refuses to enforce a sheriff's bond, authorized and required by the statute of another state, upon the grounds, (1) that, running to the state and enforceable only in the name of the state though intended for the protection of any person injured by a breach of the sheriff's official duty, it was intended to be sued upon only in the courts of the state; (2) that it was required and given as a means of inducing the performance by a public official of his duty, as a measure adopted by the state to regulate its internal affairs, and hence local in its nature. The court bases its decision upon *Pickering v. Fisk*, (1834) 6 Vt. 102 the opinion in which case it adopts in its entirety. That court regarded such a bond as part of the internal police of the foreign state, "widely different from those contracts, which, having for their objects private and individual interests alone, are enforceable everywhere." The Vermont court laid emphasis upon the fact that if the bond were permitted to be sued upon in that state, "and a judgment rendered for the plaintiff, that judgment must extinguish the bond and all future remedy upon it," thus not only interfering with the internal police of another state but withdrawing from its courts a matter exclusively within their cognizance. The Vermont court by dictum applied its rule to the case of suit on a probate bond of another state, but excluded from its operation a bond given under Vermont law for the liberties of a prison; it suggested that if a foreign sheriff should purloin funds of the state entrusted to his official care, an action might be brought on his bond in Vermont, the courts treating the plaintiff as trustee for the state, and the bond as a common-law contract. "Wherever a bond, although taken in pursuance of a statutory provision, is left, as to its operation and effect, to be governed by common-law rules, there can be no obstacle to enforcing it anywhere, like any other instrument of the kind." *Pickering v. Fisk*, (1834) 6 Vt. 102, 112.

In Minnesota, the sheriff is required to give a bond payable to the state, Minn. G.S. 1913, sec. 925; likewise the county treasurer, G.S. 1913, sec. 842. Actions on these bonds, as in the case of public officials generally, may be brought by any person entitled to the benefit of the security, in his own name, Minn. G.S. 1913, sec. 8243. These bonds are required and given as a means of inducing the performance of official duty and as a part of the internal police of the state, but they are within the exceptions noted in the Vermont dictum. The Tennessee court seems to consider as vital the distinction as to whether or not the bonds must be sued in the name of the state, refusing to regard this as a mere formality of procedure. It is settled in the federal courts that where action is brought in a jurisdiction other than that in which the cause of action arose, such provisions of the law of the latter place as can be deemed to be merely procedural may be treated as non-essential. *Spokane, etc., R. Co. v. Whitley*, (1915) 237 U.S.

487, 25 S.C.R. 655, 69 L. Ed. 1060, L.R.A. 1915F 737; *Stewart v. Baltimore, etc., R. Co.,* (1897) 168 U.S. 445, 18 S.C.R. 105, 42 L.Ed. 537; *Atchison, etc., R. Co. v. Sowers,* (1909) 213 U.S. 55, 29 S.C.R. 397, 53 L. Ed. 695; *Tennessee Coal & I. Co. v. George,* (1904) 233 U.S. 354, 34 S.C.R. 587, 58 L. Ed. 997, L.R.A. 1916D 685, note p. 688. In the *Sowers case,* the Supreme Court announced the general rule that a transitory cause of action can be maintained in another state even though the statute creating the cause of action provides that the action must be brought in domestic courts. In the *George case,* the statute of Alabama creating the cause of action provided that the action must be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere, yet a judgment obtained in Georgia was sustained by the United States Supreme Court. The Supreme Court in the *Stewart Case* held that an action for wrongful death occurring in one state can be sued in another in the name of the personal representative, though the statute creating the cause of action required suit to be brought in the name of the state. In the light of these cases it may be questioned whether the requirement of the statute in the instant case that action be brought in the name of the state and so by inference in its own courts, is not a mere matter of procedure, rather than of substance. The right of an execution creditor whose money a sheriff has embezzled to sue his bondsman in a foreign state should not be defeated by the fact that the bond runs to the state or that by the statute requiring the bond action is to be brought in the name of the state. If the plaintiff's cause of action in such a case is based on the common law and not on the statute, his right to sue the bond anywhere seems even more clear.

CONFLICT OF LAWS—JURISDICTION FOR DIVORCE—FOREIGN DECREE BASED ON CAUSE OCCURRING IN BUT NOT RECOGNIZED BY STATE.—A New Jersey statute (2 N.J. Comp. St. 1910 p. 2041) provides that if an inhabitant of the state goes to another jurisdiction to obtain a divorce for a cause occurring while the parties resided in New Jersey or for a cause not ground for divorce there, the decree so obtained shall be of no force or effect in New Jersey. The court found that the defendant had obtained a divorce in Nevada in violation of this statute. Though the fact was doubtful the court assumed the defendant had acquired an actual domicil in Nevada. His wife sued him in New Jersey for separate support on the theory that the Nevada decree was void. *Held,* that the plaintiff recover. *Sechler v. Sechler,* (N. J. Ch. 1922) 118 Atl. 629.

A sharp distinction should be drawn between the problem of what sovereign shall determine a case and what law that sovereign shall apply in doing so. Obviously only the former is a jurisdictional matter. In the United States the general rule is that the sovereign of the domicile of the libellant has jurisdiction to grant a divorce. *Ditson v. Ditson,* (1856) 4 R. I. 87; *Gildersleeve v. Gildersleeve,* (1914) 88 Conn. 689, 92 Atl. 684. See 1 Wharton, Conflict of Laws, 3rd ed., secs. 463, 475 and cases cited. Even though the motive in acquiring domicile is to obtain a divorce the jurisdiction is unaffected. *Gildersleeve v. Gildersleeve, supra.* See Minor Conflict of Laws 111. To compel recognition of a divorce decree under the "full

faith and credit" clause a much criticised case holds that the sovereign must also have personal jurisdiction over the defendant. *Haddock v. Haddock,* (1906) 201 U.S. 562, 26 S.C.R. 525, 50 L. Ed. 867. Most states, however, voluntarily recognize decrees where no such personal jurisdiction existed. *Gildersleeve v. Gildersleeve, supra*; *Felt v. Felt,* (1900) 59 N. J. Eq. 606, 45 Atl. 105, 49 Atl. 1071. See Beale, Constitutional Protection of Decrees for Divorce, 19 Harv. L. Rev. 586. On the question which law shall decide what constitutes ground for divorce, it is generally agreed that the sovereign of the domicile is most interested in the existence of the marriage status and hence its rules should govern. See 1 Wharton, Conflict of Laws, 3rd ed., 489 and cases cited; Minor, Conflict of Laws 183. See also, Dicey, Conflict of Laws, 3rd ed., 418. This is held to be so even when the cause occurred during an antecedent domicile elsewhere and was not there grounds for divorce. *Rose v. Rose,* (1916) 132 Minn. 340, 156 N.W. 664. See 1 Wharton, Conflict of Laws, 3rd ed., secs. 231, 232 and cases cited. Further, this principle has been followed in the state of antecedent domicile even though that state had a statute like the New Jersey one. *Gregory v. Gregory,* (1884) 76 Me. 535. See *Dickinson v. Dickinson,* (1896) 167 Mass. 474, 475, 45 N.E. 1091. See also 1 Wharton, Conflict of Laws, 3rd ed., sec. 229. The court's sound reasoning was that if an actual domicile had been acquired where the decree was rendered so that state had jurisdiction of the case the statutory provisions were not applicable. See 1 Wharton, Conflict of Laws, 3rd ed., sec. 229. It thus reaches a conclusion which would be constitutionally imperative even in New Jersey if the foreign state also had personal jurisdiction over the wife. *Haddock v. Haddock,* (1906) 201 U.S. 562, 50 L. Ed., 867, 26 S. C. R. 525. The principal case, by ignoring the fundamental distinction stated at the outset, reaches a result undoubtedly constitutional but unfortunate in that it holds a couple to be married in one state though validly divorced in others.

CONSTITUTIONAL LAW—DELEGATION OF POWERS—THE POWER OF A MUNICIPAL CORPORATION TO DEFINE A CRIME.—The defendant, while violating a motor speed ordinance of the city of Cincinnati, killed a pedestrian. On an indictment for involuntary manslaughter the state attempts to introduce the ordinance in evidence to establish the fact that there was an "unlawful killing" within the meaning of the statute defining the crime. *Held,* that, "as a predicate or basis for the proof of the commission of the unlawful act," the ordinance was improperly excluded. Three justices, dissenting, contend that this is an unconstitutional delegation of legislative power, for in effect the city of Cincinnati by its local ordinance defines the crime of manslaughter. *State v. O'Mara,* (Ohio 1922) 136 N.E. 885.

It is a well recognized rule that a legislature cannot delegate its legislative duties. Cooley, Constitutional Limitations, 7th ed., 163. There is, however, the equally well recognized exception that the legislature may delegate to a political division the power to pass laws of purely local concern. *The City of Chicago v. Stratton,* (1896) 162 Ill. 494, 44 N.E. 853, 35 L.R.A. 84, 53 A.S.R. 325; *Wolfe v. City of Moorhead,* (1906) 98 Minn. 113, 107 N.W. 728. Further, the operation of a statute may be made con-

tingent or conditional on the existence of a certain state of facts, the existence of such circumstances to be determined by a body appointed by the legislature or by an executive named. *Field v. Clark,* (1891) 143 U. S. 649, 12 S.C.R. 495, 36 L.Ed. 294. *Union Bridge Co. v. United States,* (1906) 204 U.S. 364, 27 S.C.R. 367, 51 L.Ed. 523. The operation of a statute may be made conditional on the acceptance of such statute, the statute only to be in force in communities that adopt it by majority vote. See 29 Harv. L. Rev. 780. Local option laws, however, may be held unconstitutional if the subject matter of the law is one of general interest as contrasted with matters of purely local concern. *State v. Hayes,* (1881) 61 N.H. 264; Cooley, Constitutional Limitations, 7th ed., 168. While a legislature may delegate administrative duties, *Elwell v. Comstock,* (1906) 99 Minn. 261, 109 N.W. 698, 9 Ann. Cas. 270, the power cannot be delegated to such administrative body to make a violation of the rules which it promulgates, a criminal offense. *United States v. Eaton,* (1892) 144 U.S. 677, 12 S.C.R. 764, 36 L.Ed. 591; *United States v. Maid,* (1902) 116 Fed. 650. The legislative body itself, however, in delegating such administrative duty may provide that it shall be a criminal offense to violate any rule that shall be promulgated by the administrative body. *United States v. Grimaud,* (1910) 220 U.S. 506, 31 S.C.R. 480, 55 L.Ed. 563. Even in this latter situation, however, the cases do not warrant the conclusion that *major crimes* may be so created. Further, the municipality in exercising powers of local government is not in the same position as an administrative board or officer. So, even if the statute of Ohio had provided that the violation of any ordinance passed by any municipality shall constitute an "unlawful act" within the meaning of the statute defining involuntary manslaughter, it is doubtful whether on authority there is any basis for the decision in the instant case. In the absence of such provision, the delegation of power held constitutional in the instant case seems without precedent or analogy and unsound on principle.

CONSTITUTIONAL LAW—POLICE POWER—DUE PROCESS—MINING—SURFACE SUBSIDENCE.—The plaintiff purchased land from the defendant coal company, waiving all claim to damage arising from mining the coal. Similar contracts were made with other landowners and the city. Later, a statute, known as the Kohler Act, was passed by the state legislature, prohibiting, in certain prescribed areas, the mining of coal in such a way as to cause the subsidence of any structure used as a human habitation or any public place. An injunction was allowed as the coal company was about to mine coal and cause a subsidence of the plaintiff's house. *Held,* Brandeis, J., dissenting, that the act is unconstitutional. Police power is the right to regulate only, and as soon as it goes so far as to constitute a taking, the fourteenth amendment of the federal constitution is violated. *Pennsylvania Coal Co. v. Mahon,* (1922) 43 S.C.R. 158, reversing (Pa. 1922) 118 Atl. 491.

The result reached in this case seems in accord with settled principles. It is clear that many rights in property and contract can be taken away by regulation. *Barbier v. Connolly,* (1884) 113 U.S. 27, 5 S.C.R. 357, 28 L.Ed. 923; *Powell v. Pennsylvania,* (1888) 127 U.S. 678, 8 S.C.R. 992, 32 L.Ed.

253; *Mugler v. Kansas,* (1887) 123 U.S. 623, 8 S.C.R. 273, 31 L.Ed. 205. But there are cases which go very far toward a taking in the name of the police power. In *Block v. Hirsh,* (1921) 256 U.S. 135, 41 S.C.R. 458, 65 L.Ed. 865, and the other famous "rent cases," property owners were compelled to allow tenants to hold over their terms, paying only a reasonable rental. In *Plymouth Coal Co. v. Pennsylvania,* (1914) 232 U.S. 531, 34 S. C. R. 359, 58 L.Ed. 713, the coal company was compelled to leave a pillar of coal to protect the miners. And in *Bowditch v. Boston,* (1879) 101 U.S. 16, 25 L.Ed. 980, it is held that a house may be destroyed to prevent the spreading of a conflagration. It should be noted that in these cases the public interest was great and imperative. A consideration of these cases, however, shows that no definite line can be drawn at which regulation becomes a taking and therefore unconstitutional. Each case must be determined on its own merits. *Stone v. Mississippi,* (1879) 101 U.S. 814, 25 L.Ed. 1079. It has been stated that mere public need never warrants an exercise of the police power and that it can only be exercised to protect the public safety, health, or morals, and must be an appropriate means to the public end, *Lawton v. Steele,* (1894) 152 U.S. 133, 14 S.C.R. 499, 38 L.Ed. 385, but this limitation almost certainly was exceeded in the "rent cases." The real test is one of reasonableness, taking into consideration both the public interest and the degree of regulation. *Martin v. District of Columbia,* (1906) 205 U.S. 135, 27 S.C.R. 440, 51 L.Ed. 743, but as stated by Justice Holmes in the instant case: "As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."

CONTRACTS—DAMAGES—ACCELERATION CLAUSE IN A NOTE THAT DOES NOT BEAR INTEREST IS A PENALTY.—The plaintiff contracted to sell a manufacturing plant to the defendant, part of the price being paid, the balance to be paid in monthly installments represented by notes which did not bear interest. The contract contained an acceleration clause which provided that if the purchaser should default in the payment of taxes or any installment and such default continue for thirty days, the vendor should be entitled to declare the full amount unpaid immediately due and payable. The defendants were in default in the payment of taxes for more than thirty days, whereupon the plaintiff served notice of his election to declare the balance, represented by the notes, due and payable. The taxes amounted to $1,343.15. The use of the unpaid purchase money for the time of the contract, computed at 6%, would be worth $6,064.80 to the vendee. This action is instituted to foreclose the contract. *Held,* that the acceleration clause constituted a penalty and therefore is unenforceable. *Minn Billiard Co. v. Schwab et al.,* (Wis. 1922) 190 N. W. 836.

The instant case presents an unusual situation for the application of rules relative to penalties and liquidated damages. The problem of dis-

tinguishing between provisions for penalties and for liquidated damages has been a troublesome one for the courts, and has been treated in various exhaustive notes and articles. See 13 L.R.A. 671; 34 L.R.A. (N.S.) 4; L. R.A. 1915E 384, 390; 10 Ann. Cas. 225; Ann. Cas. 1912C 1021; 1 Am. Dec. 331; 30 Am. Rep. 28; 108 A.S.R. 46; 2 Williston, Contracts, sec. 777, 778. The courts are generally agreed on the abstract principles relative to this problem, but differ in their application. See note, 34 L.R.A. (N.S.) 4. In the principal case no sum was stipulated as a penalty or liquidated damages, *but the effect is* that the vendee loses a large sum of money in the form of interest. The provision, apparently, was not inserted as a bona fide pre-estimate of the damage that the vendor would suffer from delay in payment, but as a provision in terrorem, which is a penalty. *Tiernan v. Hinman,* (1855) 16 Ill. 400; but see *Russell v. Wright,* (1909) 23 S.D. 338, 121 N.W. 842. The form of a contract cannot make a penalty enforceable. 2 Williston, Contracts, sec. 782, 793; 5 MINNESOTA LAW REVIEW 466. Thus an extreme discount for prepayment but a comparatively short time before the obligaton falls due by its terms has been held to constitute a penalty. *Goodyear Shoe Machinery Co. v. Selz,* (1894) 157 Ill. 186, 41 N.E. 625. The situation in the instant case must be distinguished from one where the installments bear interest, for in such case there is no forfeiture of anything but a right of credit. See, 2 Williston, Contracts, sec. 787. Cases apparently conflicting with the instant case, as *Berrinkott v. Traphagen,* (1875) 39 Wis. 219; *Sheffield-King Milling Co. v. Jacobs,* (1920) 170 Wis. 389, 175 N.W. 796; see also 4 MINNESOTA LAW REVIEW 455, where the amount forfeited is even more out of proportion to the actual damage than in the instant case, are explained on the theory that where the damages are uncertain and speculative, the court will sustain the terms of the contract if the provision for damages is a bona fide pre-estimate of the probable damage. For a discussion of the problem of forfeitures, and related questions of penalties and liquidated damages, see 5 MINNESOTA LAW REVIEW 329, 341.

ELECTION OF REMEDIES—ELECTION OF SUBSTANTIVE RIGHTS—AFFIRMANCE OR DISAFFIRMANCE OF A CONTRACT VOIDABLE FOR FRAUD—LIMITATION OF ACTIONS.—The defendant obtained patents from the United States to certain timber lands. More than six years later the United States instituted a suit in equity for the cancellation of the patents upon the ground that they were obtained by fraud. The statute of limitations was pleaded, the United States carried the action to trial, and judgment was rendered dismissing the suit. This action was later instituted at law for the recovery of damages for fraud. *Held,* that the present action is in affirmance of the contract and barred by the election to pursue the equitable remedy, which was founded on disaffirmance of the contract and hence inconsistent with the position now maintained. Taft, C. J., Brandeis and Holmes, JJ., dissent, on the ground that the decree in the equitable suit definitely establishes the fact that the plaintiff did not have an available equitable remedy, and therefore the alleged choice of the equitable remedy was "not an election, but an hypothesis," and the substantive rights of the plaintiff remain un-

affected by the equitable action. *United States v. Oregon Lumber Co.*, (1922) 43 S.C.R. 100.

As pointed out in 6 MINNESOTA LAW REVIEW 341, 358, the instant case, technically speaking, does not involve an election of remedies but the question of election of substantive rights. As analyzed by the dissenting justices, it would seem that the substantive rights of the parties were not affected in the least by the impotent act of the plaintiff. It was not within the plaintiff's power at the time the equitable suit was instituted to disaffirm the contract, and hence the situation is not analogous to one wherein a party has the power to affirm or avoid a voidable contract by a decisive act on his part. See 6 MINNESOTA LAW REVIEW 341, 350. For a complete analysis of the Minnesota decisions on election, see, 6 MINNESOTA LAW REVIEW 480.

HUSBAND AND WIFE—MARRIAGE—DIVORCE—COMMON-LAW MARRIAGE EFFECTED BY HABIT AND REPUTE AFTER REMOVAL OF IMPEDIMENT.—The plaintiff married the defendant before an absolute decree of divorce was granted to the defendant from a former husband. Both the plaintiff and the defendant knew that the law of New York prohibited such marriage until the decree was made absolute but acted under the impression that they could be legally married in New Hampshire where the ceremony was performed. They intended to live as husband and wife from the first. Later the parties were notified by their lawyer that the decree of divorce was made absolute and were advised to re-marry. The plaintiff insisted that they were already married and they continued to live as husband and wife, and hold each other out as such. *Held,* that the fact that both parties knew when the impediment was removed and held each other out as husband and wife and regarded each other as such, justifies the finding that the parties, after the impediment was removed, deliberately agreed to live as husband and wife. *Leeds v. Joyce,* (1922) 195 N.Y.S. 468.

Confusion is avoided by carefully distinguishing the question involved in the principal case from the question involved where it is not definitely proved in a civil action that an impediment existed at the time of the second marriage. In this latter situation, as a *rule of evidence,* it will be presumed that the second marriage is valid. This presumption is one of the strongest known to the law and it will be presumed either that the former spouse was dead at the time of the second marriage, or that the other spouse had secured a divorce. 6 MINNESOTA LAW REVIEW 599. Assuming that it is definitely proved that an impediment existed at the time the second marriage took place, "if the parties desire marriage, and do what they can to make their union matrimonial, yet one of them is under a disability, their cohabitation, matrimonially meant, will, as a matter of law, make them husband and wife from the moment the disability is removed, and it is immaterial whether they knew of its existence or its removal, nor is this a question of evidence." 1 Bishop, Mar. Div. & Separation 422. This rule is quoted with approval frequently and without qualification though the cases do not call for an extreme application of the rule, i. e., where both parties know of the existence of the im-

pediment and of its subsequent removal and do not then enter an express agreement. See the principal case, and also *Barker v. Valentine,* (1900) 125 Mich. 336, 84 N.W. 297, 51 L.R.A. 787, 84 A.S.R. 578. But, as in the principal case, the language of the courts in most cases does not warrant the conclusion that this rule is a *rule of law.* And so in *State v. Worthingham,* (1877) 23 Minn. 528, where both parties knew of the impediment and of its removal and desired from the first a marriage relationship, the court does not find that habit and repute, of itself, constitutes a marriage or even warrants the finding that there was a marriage, but emphasizes the fact that certain definite acts of the parties would justify a finding that after the removal of the impediment the parties actually entered into an express contract of marriage. On the theory that an actual agreement is necessary, habit and repute does not constitute proof of marriage where one spouse knows of the existence and removal of the impediment and does not re-marry. *Collins v. Voorhees,* (1890) 47 N.J. Eq. 555, 22 Atl. 1054, 14 L.R.A. 364, 24 A.S.R. 412, but see, *Schaffer v. Krestovnikow,* (1918) 89 N.J. Eq. 549, 105 Atl. 239. But Illinois holds that as the party knew of the removal of the impediment, the jury may find from evidence of habit and repute that an actual agreement of marriage was made after the impediment was removed. *Robinson v. Ruprecht,* (1901) 191 Ill. 424, 61 N.E. 631. Where the spouse does not know that the impediment was removed, it is obviously absurd to assume or permit the finding on mere evidence of habit and repute, that a second specific agreement was entered into. *Cartwright v. McGown,* (1887) 121 Ill. 388, 12 N.E. 737, 2 A.S.R. 105; *Randlett v. Rice,* (1886) 141 Mass. 385, 6 N.E. 238. The innocence of the parties, neither spouse having knowledge of the existence of an impediment or of its removal, however, has a material effect on the decisions, the removal of the impediment being sufficient to make the relationship valid. *Manning v. Spurck,* (1902) 199 Ill. 447, 65 N.E. 342; *Chamberlain v. Chamberlain,* (1905) 68 N.J. Eq. 736, 62 Atl. 680, 3 L.R.A. (N.S.) 244, 6 Ann. Cas. 483, 111 A.S.R. 658; *Rose v. Clark,* (1841) 8 Paige (N.Y.) 573. And in *Prince v. Edwards* (1912) 175 Ala. 532, 57 So. 714, where the parties only became aware of the impediment after their supposed marriage, it was held that habit and repute established a subsequent contract of marriage. And conversely some courts definitely state that because of the criminal act of the parties, where they know of the existence of an impediment, proof of habit and repute is insufficient and express proof is essential. *Clark v. Barney,* (1909) 24 Okla. 455, 103 Pac. 598. But if, as is admitted, the parties by an express agreement may marry despite the criminal act, what added force is given to the criminal law by denying the parties the right to prove the agreement by inference from habit and repute?

The rule suggested by Bishop is susceptible of uniform application and avoids confusion. Under this rule, however, the moral delinquencies of the parties are not disregarded. First, the jury must find that there is the habit and repute of a marriage relationship. Second, the jury must find that the parties from the first *desired* a marriage relationship and not a meretricious cohabitation. Some courts apparently assume from the fact that there was an impediment, especially where the parties, or one of

them, knew of its existence, that the relationship is *meretricious*, see *Thompson v. Clay*, (1919) 120 Miss. 190, 82 So. 1; *Randlett v. Rice*, (1886) 141 Mass. 385, 6 N.E. 238, but the question here is not one of the legal capacity of the parties but of their *desires*, for *meretricious* means "merely lustful and pertaining to the character of prostitution." *Manning v. Spurck*, (1902) 199 Ill. 447, 453, 65 N.E. 342. But the fact of knowledge of the existence of the impediment may be considered in determining whether the parties desired a marriage relation, 1 Bishop, Mar. Div. & Separation 423.

HUSBAND AND WIFE—RIGHTS AND PRIVILEGES—SELECTION OF DOMICILE —LIMITED DIVORCE—SEPARATE MAINTENANCE.—The defendant brought his wife, the plaintiff, to live on a farm owned by him and his brother, subject to a life estate in their mother. The defendant's mother and brother lived with them, the latter having joined with the defendant in a lease of the farm for two years. Dissension arose between the mother-in-law and the plaintiff, and the plaintiff and the brother were not on good terms. She went to her mother's home and refused to return unless the defendant would provide a separate home. The defendant offered to have his mother live elsewhere but insisted that the brother remain because of their joint interest in the farm and lease. The plaintiff sued for separate maintenance. The defendant answered asking for an absolute divorce on the grounds of desertion. *Held*, that the plaintiff should be granted separate maintenance and further that she is entitled to a permanent separation from bed and board. *Harer v. Harer*, (Minn. 1922) 190 N. W. 343.

There is no rule of general application as to what conduct of a husband's relatives will justify a wife in leaving the marital home. Each case must be decided upon its own facts and the court has large discretion. Certain principles are, however, generally recognized. The husband has the right to fix the family domicile, in correlation to his duty to make provision for the wife. Tiffany, Persons and Dom. Rel., 2nd ed., 58; *Price v. Price*, (1906) 75 Neb. 552, 106 N.W. 657; see note 13 L.R.A. (N.S.) 222. The right, however, cannot be exercised arbitrarily, *Hall v. Hall*, (1911) 69 W. Va. 175, 71 S.E. 103, 34 L.R.A. (N.S.) 758, and note; *Brewer v. Brewer*, (1907) 79 Neb. 726, 113 N.W. 161, 13 L.R.A. (N.S.) 222, and note, and if there is no necessity for creating the unpleasant situation, the courts will more readily grant relief. *Marshak v. Marshak*, (1914) 115 Ark. 51, 170 S.W. 567, L.R.A. 1915E 161, and note. It is often stated that the wife is entitled to a home, corresponding with the circumstances and social position of her husband, over which she may preside as mistress, and that the husband cannot compel her to live in a relative's home, especially in a subordinate capacity. *Brewer v. Brewer*, (1907) 79 Neb. 726, 113 N.W. 161, 13 L.R.A. (N.S.) 222; see the principal case. The intimation that the wife need not go to a home so provided is not supported by the decisions and the correct rule would seem to be that the wife must make a bona fide attempt to live in a home provided and is only justified in leaving when she can no longer remain there consistently with her health, or personal safety. *Thompson v. Thompson*, (1919) 205 Mich. 124, 171 N.W. 347, 3 A.L.R. 990, and note; *Giese v. Giese*, (1903) 107 Ill. App. 659;

Schindel v. Schindel, (1858) 12 Md. 294. If the wife is forced to leave for the causes mentioned, she is not guilty of desertion but the husband, as stated in the instant case, is guilty of constructive desertion, *Dakin v. Dakin,* (1901) 1 Neb. Unofficial 457, 95 N.W. 781; note, Ann. Cas. 1914B 629, or the wife may obtain a divorce on grounds of cruelty. The policy of the law does not favor separations. *Martinson v. Martinson,* (1911) 116 Minn. 128, 133 N.W. 460. In the principal case the wife's objection has been reduced to the presence of the defendant's brother and it does not appear that he aspires to be mistress of the house. Further, before the plaintiff married the defendant she knew she was expected to live with the defendant's relatives and in such case she may be said to have assumed, to a large extent, the possibilities of discord. *Buckner v. Buckner,* (1912) 118 Md. 101, 111, 84 Atl. 156, Ann. Cas. 1914B 629, and note.

INSURANCE—MUTUAL BENEFIT COMPANIES—CHANGE IN BY-LAWS—REDUCTION IN THE AMOUNT OF BENEFITS TO BE RECEIVED.—The plaintiff, a mutual benefit insurance company, finding that its rates were so low that it could not pay an old age benefit provision which as yet was not due to any members of the association, brought this bill in equity for declaratory relief. The premiums paid in the past are not high enough to secure payment of the old age benefit under any recognized method of insurance accounting. By the articles of incorporation the power is reserved to make such revisions of existing laws and to enact such additional laws as may be deemed to the best interests of the order. *Held,* that a by-law cancelling the provision before any member attained the age designated in such provision "was a change ex necessitate and a proper exercise of the reserved power to amend." *United Order of Foresters v. Miller,* (Wis. 1922) 190 N.W. 197.

While under a reserved power to amend, cancel, or enact new by-laws, vested interests cannot be impaired, 1 Joyce, Law of Ins., 2nd ed., sec. 379A, material alterations, in the contract between the mutual benefit company and the insured, a contract usually represented by the by-laws, may undoubtedly be made where the company, through the issuance of insurance on other than a standard basis of insurance accounting, is faced with the necessity of procuring additional funds or going out of business. The alteration is made in the interest of the members as a unit. By the great weight of authority the premium rate may be increased, *Reynolds v. Supreme Council of the Royal Arcanum,* (1906) 192 Mass. 150, 78 N.E. 129, 7 L.R.A. (N.S.) 1154, 7 Ann. Cas. 776; *Funk v. Stevens,* (1918) 102 Neb. 681, 169 N.W. 6, 11 A.L.R. 639, and note; *Case v. Supreme Tribe of Ben Hur,* (1921) 106 Neb. 220, 184 N.W. 75, 18 A.L.R. 1172, and note, "so long as such changes do not work an injustice between individual members, are not discriminatory, and are reasonable." Further, the increase is reasonable if essential to put the policy on a sound basis of insurance accounting and it will be presumed that the increase is reasonable in the absence of a showing to the contrary. With few exceptions, however, the courts hold that the benefits promised by the company cannot be reduced. *Stewart v. Thorburn,* (1916) 171 App. Div. 258, 157 N.Y.S. 242; *Wright v. Knights of the Maccabees of the World,* (1909) 196 N.Y.

391, 89 N.E. 1078, 31 L.R.A. (N.S.) 423, and note; *Maheu v. L'Union Lafayette,* (1916) 115 Me. 321, 98 Atl. 821, L.R.A. 1917C 625, and note; see also *Supreme Lodge Knights of Honor v. Bieler,* (1914) 58 Ind. App. 550, 557. There is authority supporting the decision in the instant case. *Stohr v. San Francisco Musical Fund Society,* (1890) 82 Cal. 557, 22 Pac. 1125; *Damasne Pain v. Société St. Jean Baptiste,* (1899) 172 Mass. 319, 52 N.E. 502. See, however, *Newhall v. Supreme Council American Legion of Honor,* (1902) 181 Mass. 111, 63 N.E. 1, confining the application of the *Damasne Pain case* to cases wherein the benefit is one given by the by-laws and not by an independent contract. The distinction between an increase in premiums and a decrease in benefits is based on a construction of the extent of the reservation to amend by-laws. It is said that this reservation contemplated the necessity of a change in the duties which the insured assumes as a member of the association, to make it possible to carry out the obligations of the organization, but that the promise to pay a certain benefit is not made to the insured in his capacity as a member of the organization and hence not subject to the reservation of power to change the by-laws. *Reynolds v. Supreme Council of the Royal Arcanum,* (1906) 192 Mass. 150, 78 N.E. 129, 7 L.R.A. (N.S.) 1154, 7 Ann. Cas. 776. Does this fiction serve any desirable purpose? Assuming that there is no unfair discrimination between members as to the new rates proposed or as to the benefit proposed to be cancelled, and also assuming that the proposed increase merely pays for the benefit to be retained, what element is it that makes the increase in premiums reasonable and the cancellation of the possible benefit, unreasonable?

LANDLORD AND TENANT—RE-ENTRY FOR BREACH OF CONDITION—DEPOSIT OF LESSEE ADVANCE RENT OR SECURITY—SECURITY DEPOSIT NOT FORFEITED.—The terms of a lease provided that the lessee "deposit with lessor $750 in payment of the last five months' rental of the five year term." The lessor agreed to pay $37.50 per annum as interest on this amount for four years and seven months of the lease. The lessor reserved right of re-entry should lessee assign for benefit of creditors. When one year of the lease had run lessee assigned and lessor re-entered. Lessee's assignee sued for recovery of the deposit. *Held,* that the assignee should recover. *Cain v. Brown,* (Ohio 1922) 136 N.W. 916.

If a lessor re-enters for breach of condition he cannot collect rent falling due thereafter. The forfeiture terminates the relation of landlord and tenant and no rent can subsequently become due. 1 Tiffany, Landlord & Tenant 1174; *Stees v. Krantz,* (1884) 33 Minn. 313, 20 N.W. 241. But the lessor may retain rent paid in advance according to the terms of the lease though the period for which it was paid has not expired at the time of the re-entry. *Hepp Wall Paper Co. v. Deahl,* (1912) 53 Colo. 274, 125 Pac. 491, 68 L.R.A. (N. S.) 234, Ann. Cas. 1915B 669. If, however, the tenant deposits the money with the lessor as security for the payment of rent and the performance of covenants in the lease and the lessor terminates the lease for breach of condition, the lessor may retain only so much of the deposit as will cover the damages he has suffered from the tenant's breaches. *Claude v. Shepard,* (1890) 122 N.Y. 397, 25 N.E. 358;

Caesar v. Rubinson, (1903) 174 N.Y. 492, 67 N.E. 58, 38 L.R.A. (N.S.) 848; 24 Cyc. 1143 (b).

It is sometimes difficult to determine whether the payment made is advance rent or security. If the deposit is the first periodic payment due and is to be immediately applied it is clearly rent in advance, and the rule that rent is not apportionable in respect to time is applicable. But if the agreement be that a sum be deposited to remain in the hands of the lessor, the current rent to be paid by lessee and the deposit to be applied to the rent of some future period of the lease as towards its end, is the deposit a security or payment of rent in advance? In *Galbraith v. Wood,* (1914) 124 Minn. 210, 144 N.W. 945, a lease for fifteen years at a rental of over $40,000 per year provided for payment of $20,000 "as an advance payment on rent which advance lessee will keep good during the first five years with privilege of reducing at the rate of $6,666.66 for the third, fourth and fifth year of said term." The lessee paid rent monthly in advance, as provided by the lease, for six months. The lessor entered in the seventh month under right reserved, on bankruptcy of the lessee. Suit to recover the deposit failed. The court said that "while the $20,000 may in fact have been paid as security ....on the pleadings and evidence we must hold that it was what the pleadings and evidence call it, an advance payment of rent."

In the instant case the court found "nothing in the lease to indicate that the deposit should be a payment or treated as a payment unless the lessee continued in possession until the last five months of the term." The decision seems correct. Though the payment was literally rent for the last five months of the term, it was in substance security. The rent for the last five months was not due until that time had come, and the security money was to be applied to its payment when it became due. Calling a deposit "liquidated damages" does not make it such, *Caesar v. Rubinson,* supra; "advance rent" should be no more conclusive. Forfeiture should not be sanctioned where the rule as to non-apportionment is inapplicable. But see *Evans v. McClure,* (1913) 108 Ark. 531, 158 S.W. 487; *Forgotston v. Brafman,* (1903) 84 N.Y.S. 237.

MORTGAGE REGISTRY TAX—PAYMENT DURING COURSE OF TRIAL.—The plaintiff, a vendor under an executory contract for the sale of land under which the vendee was in possession, sued the vendee for the first installment of the contract. The mortgage registry tax, required to be paid on such contracts, G.S. Minn. 1913, sec. 2301, had not been paid before the commencement of the trial. The defendant vendee objected to the introduction of the contract in evidence as G.S. Minn. 1913, sec. 2307 provides that, "no such document or any record thereof shall be received in evidence in any court, or have any validity as notice or otherwise" unless said tax shall have been paid. *Held,* that payment of the tax may be made at the trial, though objection is made, and the contract received in evidence. *Benjamin v. Savage,* (Minn.1923) 191 N.W. 408.

The holding in the instant case—novel in that it allows payment of the tax in question during the progress of the trial—has been fore-shadowed by holdings of the court in previously adjudicated cases. In the case of *Sit-*

tauer v. Alvin, (Minn. 1922) 187 N.W. 611, an executory contract for the sale of land on which the mortgage tax was paid after the action had been brought was held admissible as evidence. An action for specific performance of a contract has been held not subject to dismissal where the tax was paid after the action was brought but before the question of non-payment of the tax was raised. *John v. Timm,* (Minn. 1922) 190 N.W. 890. The case of *Pioneer Loan & Land Co. v. Cowden,* (1915) 128 Minn. 307, 150 N.W. 903, is analogous to the instant case in that the trial judge permitted the tax to be paid during the course of the trial and then admitted the contract as evidence. The upper court, however, did not decide the question of admissibility of the contract or failure to pay tax inasmuch as they held the contract to have been admitted by the pleadings in the case. The attitude of the Minnesota supreme court is that this tax is purely a revenue measure. *First State Bank of Boyd v. Hayden,* (1913) 121 Minn. 45, 140 N.W. 132; *Staples v. East St. Paul State Bank,* (1913) 122 Minn. 419, 142 N.W. 721; *John v. Timm,* (Minn. 1922) 190 N.W. 890. Failure to pay the tax does not affect the validity of the contract but only the remedy thereunder, such contract being unenforceable, unrecordable, ineffectual as notice, and inadmissible as evidence until the tax is paid. *Forest Lake State Bank v. Ekstrand,* (1910) 112 Minn. 412, 128 N.W. 455; *Engenmoen v. Lutroe,* (Minn. 1922) 190 N.W. 894. Therefore the primary consideration of the court in determining the effectiveness of a document as notice or its admissibility as evidence is whether or not the tax has been actually paid. The time of payment is, however, important in that a subsequent payment of the tax will not revive and give effect to an attempted cancellation of an executory contract. *Engel v. Mahlen,* (Minn. 1922) 189 N.W. 422; 7 MINNESOTA LAW REVIEW 70; *First State Bank of Boyd v. Hayden,* (1913) 121 Minn. 45, 140 N.W. 132; *Greenfield v. Taylor,* (1919) 141 Minn. 399, 170 N.W. 345; *Enkema v. McIntyre,* (1917) 136 Minn. 293, 161 N.W. 587, 2 A.L.R. 411. Neither will it give the effect of notice to a mortgage improperly recorded without payment of the tax. *Orr v. Sutton,* (1912) 119 Minn. 193, 137 N.W. 973, 42 L.R.A. (N.S.) 146.

NEGLIGENCE—GAS—DUTY TO INSPECT SERVICE PIPES ON PRIVATE PREMISES AFTER USE OF GAS HAS BEEN DISCONTINUED—DUTY TO CUT OFF GAS SUPPLY AT CURB OR MAIN.—The plaintiff is suing for damages to his intestate caused by the escape of gas from a pipe beneath the ground floor of the intestate's home. The pipes from the public main had been installed by the owner of the property and were his property. Fifteen years prior to the accident the use of gas on the premises had been discontinued, the meter had been removed, and the service pipe capped in the basement by the defendant gas company, but the gas was not shut off at the street main. There was no evidence of any notice to the defendant of any leak or defect in the pipes, nor does it appear that the leak was at the cap adjusted by the defendant. *Held,* that the defendant was liable for the damage resulting from the leak. *Reid v. Westchester Lighting Co. et al.,* (1922) 196 N.Y.S. 471.

By the weight of authority, a gas company, in the handling of gas, is only bound to exercise due care, commensurate with the dangerous nature

of the commodity, or a high degree of care in jurisdictions recognizing degrees of care. Thornton, Oil and Gas, 2nd ed., 686; *Barrickman v. Marion Oil Co.,* (1898) 45 W. Va. 634, 643, 32 S.E. 327, 44 L.R.A. 92; *Pine Bluff Water and Light Co. v. Schneider,* (1896) 62 Ark. 109, 34 S.W. 547, 33 L.R.A. 366. Under the doctrine of *Fletcher v. Rylands,* L.R. (1868) 3 E. & I. App. 330, the liability of an insurer has been imposed, *Belvidere Gaslight & Fuel Co. v. Jackson,* (1898) 81 Ill. App. 424, but the applicability of this doctrine is generally denied though a number of jurisdictions apply the doctrine of res ipsa loquitur. Thornton, Oil and Gas, 2nd ed., 703; *Manning v. St. Paul Gas Light Co.,* (1915) 129 Minn. 55, 151 N.W. 423, L.R.A. 1915E 1022. In the exercise of due care the gas company must inspect the piping on private premises before turning gas into such pipes, *Schmeer v. The Gas Light Co. of Syracuse,* (1895) 147 N. Y. 529, 42 N.E. 202, 30 L.R.A. 653 but as stated therein, the duty is not imposed to maintain or inspect such piping after the initial introduction, *Greed v. Manufacturers' Light and Heat Co.,* (1913) 238 Pa. St. 248, 86 Atl. 95, nor is there a duty to re-inspect where the use of gas has been discontinued for a period of time, the supply having been cut off at the main, and is turned on a second time. *Smith v. Pawtucket Gas Co.,* (1902) 24 R. I. 292, 52 Atl. 1078, 96 A.S.R. 713. Where, however, the use of the gas is discontinued and the supply is not cut off outside of the consumer's permises, there are several views as to the requisites of due care. While there is no duty to cut the supply off at the street and though it is not negligence per se to leave gas in the pipes, the gas company, by so using the pipe to store the gas, is bound to maintain it in safe condition, which involves inspection. See *Canfield v. West Virginia Central Gas Co.,* (1917) 80 W. Va. 731, 93 S. E. 815, L.R.A. 1918A 808. In *Louisville Gas Co. v. Guelat,* (1912) 150 Ky. 583, 150 S.W. 656, 42 L.R.A. (N.S.) 703, it is held that the company must maintain such pipes if the supply is left in them but that it is a question for the jury to determine whether or not it was negligence in the first place to leave the gas in the pipes. Contrary to the instant case and the last cases cited, it was held in *State of Maryland use of Brady v. Consolidated Gas Co. of Baltimore,* (1897) 85 Md. 637, 37 Atl. 263, that there was no duty to cut off the supply at the curb; that it is left on the consumer's premises for the consumer's convenience; that there is no duty to inspect in the absence of notice from the owner of a cause for inspection. If the pipes alone remain connected with the main, the property owner's interests are adequately taken care of, and his interests in no way necessitate the presence of gas in such pipes, and if the gas company has any interest in keeping gas in them, it would seem they are properly charged with the duty of maintaining such service pipe.

REAL PROPERTY—EASEMENTS—CREATION BY ORAL CONTRACT—DISTINGUISHED FROM LICENSES.—The A Mining Company acquired by oral contract from B and C the right to construct a standard gauge railroad over their property, thus connecting the mining property with a railroad. Not being allowed to construct a standard guage railroad during the period of governmental control of railways, they constructed and operated for over two years a narrow gauge road. Upon release of the railroads from

governmental control they began construction of a standard guage railroad. D, having acquired the property from B and C with actual knowledge of the oral contract and of the use by A, seeks to enjoin A company from operating the road or changing the construction thereof. The defendant claims that the contract has been executed on its part, entitling it in equity to be regarded as having acquired an easement. *Held,* that an easement may be created by parol grant notwithstanding the statute of frauds where the agreement has been partly performed, and that the parol grants authorized the mining company to construct a standard gauge railway. *Buckles et al. v. Kennedy Coal Corporation,* (Va. 1922) 114 S.E. 233.

This decision is consistent with the rule that the donee in a parol gift of land who has entered and made improvements acquires title regardless of the statute of frauds. *Hayes v. Hayes,* (1914) 126 Minn. 389, 148 N. W. 125; *Steinman v. Clinchfield Coal Corp.,* (1917) 240 Fed. 561, 153 C.C.A. 365; 6 MINNESOTA LAW REVIEW 604. There seems to be no inherent difference between the two situations requiring diverse rules, and it is difficult to see how a court can recognize title in a donee who has made substantial improvements, and refuse an easement—a lesser right—to one who has done likewise. Many courts are, however, in this inconsistent position, through adherence to the rule that an easement may be created only by a deed or grant in writing, or by prescription, presupposing a grant. Where the agreement lacks the formalities essential to the creation of an easement, courts are prone to call the interest a license, 3 Words and Phrases, 2309, and thus the law in this respect has become involved with that of licenses. So long as the agreement is executory, there is no objection to requiring compliance with such formalities; but once the agreement has been executed, to consider the right conveyed a mere license still is unjust to the grantee in that his rights under the agreement may be summarily determined at the will of the licensor. A minority of courts hold that a license partially executed may become irrevocable, and by so holding, as stated in the instant case, in effect permit the creation of an easement by parol. *Rerick v. Kern,* (1826) 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497; *Aterburn v. Beard,* (1910) 86 Neb. 733, 126 N.W. 379; see *Shaw v. Proffitt,* (1910) 57 Ore. 192, 109 Pac. 584, 110 Pac. 1092, 26 Ann. Cas. 63, and note. But the majority of jurisdictions hold that a license is revocable at will regardlesss of the fact that it has beeen acted upon. *Yeager v. Tuning,* (1908) 79 Ohio St. 121, 86 N.E. 657, 19 L.R.A. (N.S.) 700, and note; *Hicks Bros. v. Swift Creek Mill Co.,* (1901) 133 Ala. 411, 31 So. 947, 57 L.R.A. 720, 91 A.S.R. 38; *Baynard v. Every Evening Printing Co.,* (1910) 9 Del. Ch. 127, 77 Atl. 885. In *Minneapolis Mill Co. v. Minneapolis, etc., R. Co.,* (1892) 51 Minn. 304, 53 N.W. 639, the Minnesota supreme court expressly repudiated the doctrine of *Rerick v. Kern,* (1826) 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497, holding a license given a public railroad revocable at the will of the licensor regardless of expenditures. However, in *Hanson v. Beaulieu,* (1920) 145 Minn. 119, 176 N.W. 178, an oral party wall agreement which was executed was held to have created "property rights in the wall" (syl.) which equity will protect despite the statute of frauds. See 4 MINNESOTA LAW REVIEW 370. The effect of many of the decisions under the majority view is to make compliance or non-compliance with formalities the test of whether a right is an easement

or a license. The view typified by *Rerick v. Kern,* (1826) 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497, seems more equitable in that it looks more to the intention of the parties, as a test of the right created, rather than to compliance with formalities.

TORTS—CORPORATIONS—INDUCING BREACH OF CONTRACT—LIABILITY OF MAJORITY STOCKHOLDER FOR CAUSING BREACH OF CORPORATION'S CONTRACT.—The plaintiff railroad contracted with a refining company for a supply of oil. The defendant corporation owned a majority of the stock in the refining company. The declaration stated that the defendants used their stock-ownership "not in the usual and normal manner," but so as to exercise "actual domination and control" over the refining company, and thus caused the latter to break its contract with the railroad. *Held,* that the complaint states a cause of action. *Gulf C. & S. F. R. Co. v. Cities Service Co., et al.,* (1922) 281 Fed. 214.

It is generally held that one who intentionally induces a promisor to break his contract is answerable in damages to the promisee, unless there is legal justification for the interference. *Wheeler-Stenzel Co. v. American Window Glass Co.,* (1909) 202 Mass. 471, 89 N.E. 28, L.R.A. 1915F 1076. The instant case seems to be the first attempt to hold a third party liable for interference with contract relations on the ground that he used his influence as controlling stockholder to induce a corporation to break its contract. This doctrine seems, at first glance, to violate the principle of separate corporate entity, and to enable a corporation's creditors to hold the stockholder, indirectly, by way of tort liability, for the corporation's breach of its contracts. But the stockholder, in influencing directors as to the policy of the corporation, acts, not as a stockholder, but as an outsider; he acts as a stockholder only in voting at stockholders' meetings. Acting as an outsider, he should then carry the liability of a third party for interference with contract relations. A director, on the other hand, ordering the breach of a contract, acts in his official capacity as part of the corporation, and should not be charged with tort liability.

TROVER AND CONVERSION—TRESPASS—LOGS AND LOGGING—TIMBER CONTRACT.—The plaintiff purchased standing timber from the defendant under a deed which called for removal within a designated time. The plaintiff failed to remove all he had cut within the time set. The defendant thereafter refused to allow the plaintiff to enter upon the land for any purpose. The plaintiff sues in trover. *Held,* three justices dissenting, that the plaintiff cannot recover. *McGill v. Holman,* (Ala. 1922) 93 So. 848.

The court in this case assumes that the timber cut but not removed is the property of the plaintiff. Such contracts sometimes take the form of conveyances of timber, sometimes a sale, coupled with a license to enter, sometimes a formal license to enter and cut, sometimes a reservation of the timber by the grantor in a conveyance of land. It seems to make little difference which form is adopted. *Adkins v. Huff,* (1906) 58 W. Va. 645, 648, 52 S.E. 773, 3 L.R.A. (N.S.) 649, 6 Ann. Cas. 246. Often both the cutting and the removal of the timber within a specified time is made a condition precedent to the passing of the title. *King v. Merriman,* (1889) 38 Minn. 47, 35 N.W. 570. With few exceptions the courts hold either that

the title to the timber never passes out of the grantor until the purchaser cuts and removes the timber within the time agreed upon, *King v. Merriman*, (1889) 38 Minn. 47, 35 N.W. 570; *Zirkle v. Allison*, (1920) 126 Va. 701, 101 S.E. 869, 15 A.L.R. 38, and note, or that upon failure so to cut and remove it, the rights of the purchaser are forfeited to the grantor. *Adkins v. Huff*, (1905) 58 W. Va. 645, 52 S.E. 773, 3 L.R.A. (N.S.) 649, 6 Ann. Cas. 246; *Clark v. Ingram-Day L. Co.*, (1907) 9 Miss. 479, 43 So. 813. Alabama is committed to the rule that where there is a conveyance of the standing timber, title passes at once and by failure to remove timber within the time limit, the purchaser does not forfeit his right and title to the timber, *Magnetic Ore Co. v. Marbury Lbr. Co.*, (1894) 104 Ala. 465, 16 So. 632, 27 L.R.A. 434, 53 A.S.R. 73; *Zimmerman Mfg. Co. v. Daffin*, (1906) 149 Ala. 380, 42 So. 858, 9 L.R.A. (N.S.) 663, 123 A.S.R. 58; so also is New Jersey, *Irons v. Webb*, (1879) 41 N.J.L. 203, 32 Am. Rep. 193, and New Hampshire, *Pierce v. Finerty*, (1911) 76 N.H. 38, 76 Atl. 194, 79 Atl. 23, 29 L.R.A. (N.S.) 547, and note. What, then, is the position of the owners of chattels which are on another's land without an express right to enter to remove them? Since the land has been burdened by the chattel owner's fault he has no right to enter and retake the goods, *Anthony v. Haneys*, (1832) 8 Bing. 186; *Roach v. Damron*, (1841) 2 Humph. (Tenn.) 425; 1 Cooley, Torts, 3rd ed., 67, and if he enters to remove them, he is liable for trespass to realty. *Hoit v. The Stratton Mills*, (1873) 54 N.H. 109, 20 Am. Rep. 119; see also *Mt. Vernon Lbr. Co. v. Shepard*, (1914) 190 Ala. 574, 575, 67 So. 286. Where the goods come on the land by the landowner's consent, 1 Cooley, Torts, 3rd ed., 66, or where the entry is made to preserve property from destruction, there is no liability for a trespass to realty, *Proctor v. Adams*, (1873) 113 Mass. 376, 18 Am. Rep. 500, and this rule has been said to extend to cases where the chattel comes upon the land by accident. *Forster v. Juniata Bridge Co.*, (1851) 16 Pa. St. 393, 395, 398, 55 Am. Dec. 506; *Rightmire v. Shepard*, (1891) 59 Hun (N.Y.) 620, 12 N. Y.S. 800; see 38 Cyc. 1057. If the landowner's right of possession may be qualified where the presence of the chattel is due to accident, is there any greater difficulty in qualifying his right when the chattel owner is at fault? What is the policy of the law? Should it refuse to aid one in default under contract, where the result will usually be a forfeiture out of proportion to the possible damage to the landowner? *Halstead v. Jessup*, (1898) 150 Ind. 85, 87, 49 N.E. 821; see also *Anthony v. Haneys*, (1832) 8 Bing. 186, 193; *Thorogood v. Robinson*, (1845) 6 Q.B. 769; and *Dozier v. Pillot*, (1891) 79 Tex. 224, 226, 14 S.W. 1027. Equity early aided one in default, e. g., a common law mortgagor, and that in the face of an express contract. The landowner, as contended by the dissenting justices in the instant case, should be under a duty to deliver the goods to the owner, or to permit him to enter to take them, paying for any actual damage done, and upon a refusal of both, the landowner should be liable as a convertor.

VENDOR AND PURCHASER—FORFEITURES—REMEDY OF VENDOR OF LAND CONTRACT UPON VENDEE'S DEFAULT—STRICT FORECLOSURE.—The defendant, a vendee in possession under a contract for a deed, having paid part of the purchase price and expended in improvements an amount in excess of the unpaid balance of the purchase price, defaulted in his payments. The plain-

tiff gave the statutory notice of cancellation of the contract, but the notice was abortive because of formal defects. The plaintiff then began this action to foreclose the contract. The trial court ordered strict foreclosure without any time for redemption. On appeal, *held*, that since the defendant's equity exceeded in amount the claim of the plaintiff, the decree of the trial court should be modified so as to allow the defendant to pay the balance of the purchase price in stated installments over a period of one year, and that in case he defaults as to any one of these payments, the plaintiff is entitled to immediate possession. *People's State Bank of Hillsboro v. Steenson*, (N. D. 1922) 190 N.W. 74.

The usual remedy to enforce a lien claimed by a vendor who has retained title to the land is by a bill in equity to have the land sold in satisfaction of the unpaid purchase money. 27 R.C.L. 603; 3 Story, Eq. Jur., 14th ed., 260; *Fitzhugh v. Maxwell*, (1876) 34 Mich. 137; see *Aycock Bros. Lbr. Co. v. First Nat. Bank*, (1907) 54 Fla. 604, 45 So. 501. A few jurisdictions, however, allow only the so-called strict foreclosure, whereby the court decrees, not that the premises be sold, and the debt paid, but that the full legal title vest in the vendor upon the vendee's failure to make his payments. *Button v. Schroyer*, (1856) 5 Wis. 598; *Todd et al. v. Simonton*, (1867) 1 Colo. 54. But many courts, though subscribing to the general rule of foreclosure by sale, allow strict foreclosures wherever, in the sound legal discretion of the court, it would be inequitable to refuse them. *Harrington v. Birdsall*, (1893) 38 Neb. 176, 186, 56 N.W. 961; *Flanagan Est. v. Great Cent. Land Co.*, (1904) 45 Ore. 335, 77 Pac. 485; *Carns v. Sexsmith*, (Ia. 1922) 188 N.W. 657. But, as held in the instant case, a period of redemption must be allowed, and it must be a reasonable period. *Dickson v. Loehr*, (1906) 126 Wis. 641, 106 N.W. 793, 4 L.R.A. (N.S.) 986. The Minnesota court early recognized the doctrine of strict foreclosure. *Drew v. Smith*, (1862) 7 Minn. 301 (Gil. 231). However, Minnesota Laws of 1897, chap. 223, now G.S. 1913, sec. 8081, provided a method of cancellation of the contract upon default of the vendee by the vendor's giving him thirty days' notice. This method has been likened by the court to a strict foreclosure. *Needles v. Keys*, (1921) 149 Minn. 477, 479, 184 N.W. 33; see, Ballantine, Forfeiture for Breach of Contract, 5 MINNESOTA LAW REVIEW 329, 350. The greater convenience of this statutory proceeding accounts for the infrequent resort to the suit for strict foreclosure, but the case of *Eberlein v. Randall*, (1906) 99 Minn. 528, 109 N.W. 1133, shows that the Minnesota court may still give relief in the latter form.

VENDOR AND PURCHASER—FRAUD OF VENDOR—CANCELLATION OF CONTRACT OF SALE BY PURCHASER—RIGHT OF PURCHASER TO LIEN ON LAND FOR PAYMENTS MADE.—After the plaintiffs, purchasers under a contract of sale, had gone into possession and paid part of the purchase price, they discovered that the vendor had made certain misrepresentations. Thereupon, they brought this suit for cancellation of the contract, for an accounting, and for a decree adjudging a lien upon the premises for the amount found due them. *Held*, that the trial court properly granted a cancellation of the contract, but improperly awarded a lien. *Mulheron v. Henry S. Koppin Co.*, (Mich. 1922) 190 N.W. 674.

For a discussion of the principles involved, see NOTES, p. 231.

BOOK REVIEWS

THE CONTROL OF FOREIGN RELATIONS, by Quincy Wright. The MacMillan Company, 1922. 412 pp.

The appearance of this scholarly volume is doubly welcome in view of the reviving interest in international affairs. The Senate has had frequent occasion to discuss many of the constitutional and international problems involved in the conduct of our foreign relations, but unfortunately, most of these discussions have served to produce partisan heat rather than to throw scientific light upon the questions at issue. Professor Wright's work serves as an excellent corrective to many of the hazy or misleading ideas that have been prevalent in respect to the powers and responsibilities of the government on matters of war, peace, treaty making, and foreign affairs in general.

The present study first appeared in the form of an essay to which the Phillips Prize was awarded by the American Philosophic Society in 1921. The author has since seen fit to add still further to the value of his thesis by a careful revision and amplification of certain phases of the subject in the light of more recent events. The study has indeed been worthy of this signal recognition. Throughout its pages may be found manifold evidences of a scholarly breadth of view combined with a masterly technique in the handling of material. The author has apparently covered all the literature on the subject, official as well as secondary. He has drawn most extensively upon the decisions of our courts, acts of Congress, treaties, presidential messages, diplomatic correspondence, Congressional debates, reports and documents, as well as the unofficial writings of American statesmen and the standard works of Corwin, Willoughby, Crandall and Hayden in their particular fields. This volume now stands forth as the most complete and authoritative exposition of the law and practice of this country in the conduct of its foreign affairs.

The author has not been satisfied with a mere description and examination of the organization, working operation and constitutional powers of the various departments of government in respect to international matters, such as is presented in Professor Mathews' careful study on "The Conduct of American Foreign Relations." He has been primarily concerned with the vital problem of reconciling the constitutional powers of our government with the performance of its international obligations. The primary difficulty of the existing system in his judgment, is the dual position of the foreign relations power, inasmuch as "the organs conducting foreign relations have their responsibilities defined by international law, while their powers are defined by constitutional law." This difficulty is present in almost all constitutions to a greater or less extent but is particularly acute in our own government by reason of our constitutional theories of a limited government and the separation of powers. To avoid an almost inevitable conflict in the application of these two bodies of law, the author seeks to set up certain constitutional and international understandings by means of

which the conflicting points of view may be reconciled. "Constitutional understandings," in the words of the author, "suggest modes of exercising constitutional powers out of respect for international responsibilities. International understandings suggest a tolerant attitude towards certain deficiencies in the meeting of international responsibilities out of respect for constitutional limitations." Such is the author's thesis and there is no doubt but that he has succeeded in making out a most convincing case.

After an excellent analysis of the nature of the foreign relations power, the author proceeds to describe the position of this power from the standpoint of international law. The constitutional aspects of the problem are next set forth with the same meticulous care. This method of treatment undoubtedly contributes largely to the clarity and precision of the argument, but at the same time it must be admitted involves a considerable amount of overlapping of material and undue repetition of details. In short, the literary form of the book has been sacrificed to the more scientific presentation of the material.

Although much of the material is of a controversial character, the treatment throughout is marked by a high degree of judicial impartiality and scientific accuracy. Upon many of the points at issue the author has not hesitated to pronounce judgment, as for example, in respect to the constitutionality of the Covenant of the League of Nations and the proposed Senate amendments thereto, but these judgments will always be found to be supported by precedent and sound reasoning. The author is singularly well equipped to perform this judicial function inasmuch as he brings to his task the factual knowledge of the historian, the comparative point of view of the political scientist and the legal understanding of a careful student of international law.

One of the outstanding features of the work is the excellent analysis of the constitutional limitations on the treaty-making power. Upon this much controverted subject the author concludes that the only important legal limitations arise out of the doctrine of the separation of powers.

A too rigid application of the doctrine of separation of powers will inevitably produce friction between the departments and impair the ability of the government rapidly and efficiently to meet international responsibilities and to decide upon and carry out national policies. This difficulty may be greatly reduced through the legal observance by each organ of certain constitutional understandings directing the method by which a discretionary power ought to be exercised. Thus before making a decision, each independent organ ought to consider the views of other independent organs whose cooperation will be necessary in order to carry out such decisions; and after a decision has been made by any organ acting within its constitutional powers, all other independent organs ought to consider themselves bound to so exercise their powers as to give that decision full effect. The development of, and adhesion to these understandings, is most essential if foreign relations are to be carried on successfully by a government guaranteeing the separation of powers by its fundamental law."

Of equal value are the discussions on the enforcement of international law through executive and judicial action and on the powers of the president in respect to the direction of foreign affairs. Upon the latter point the author holds that the president must needs be the dominant factor in our system.

"The dominant position of the president in foreign relations results from his initiative and this is a necessary consequence of the position he

occupies as the representative authority of the United States under international law. His office is the only door through which foreign nations can approach the United States. His voice is the only medium through which the United States can speak to foreign nations. Moreover, the fathers appear to have intended him to occupy this position and subsequent history has shown his exercise of the initiative and essential control. On occasions when foreign affairs have not pressed, he has subordinated his initiative to Congressional policies, but always when crises have arisen he has met them with a prompt decision and adequate resources of power. Only rarely has the veto of coordinate departments destroyed his achievements."

The final chapter is devoted to an elaboration of the understandings of the constitution by means of which the author hopes to reconcile the constitutional powers and the international responsibilities of our government. No constitutional changes are necessary, in his judgment, to bring about the necessary cooperation among the several departments. All that is required is the development of a body of well understood conventions of the constitution which will supplement in practice the law of constitution, as is the case in England. To this end, Professor Wright ventures to suggest a number of specific understandings more or less novel in character, upon the value of which there will doubtless be decided differences of opinion.

The author has left the critics but few opportunities for questioning the accuracy of his facts. Here and there, however, a statement may be found which is somewhat too general in character and requires a slight modification in some particular. In a footnote, (p. 16) he declares that "the responsibility of the British government for acts of the self-governing dominions has never been questioned and apparently remains, even though these dominions are given independent representation in the League of Nations." This statement is doubtless correct so far as the United States Government is concerned, but is altogether too sweeping if applied to the relations of the dominions to other members of the League. The dominions, for example, receive their mandates directly from the League and are solely responsible to that body for the administration of the same. The English Government has no legal or political responsibility whatsoever for these mandates. The author likewise lays down (pp. 28-31) that the president is the sole and exclusive agency for foreign communication. The general rule in this case ought, however, to be limited to the official communication of views on matters of public policy, since on one or two occasions, Congress has sent or received formal resolutions of congratulation or condolence to or from the heads of representatives of foreign states. This principle, moreover, scarcely gives due consideration to one of the most striking political tendencies of the day, namely, the tendency towards the internationalization of politics. It is becoming increasingly common in fact, for the heads of representatives of one country to address themselves directly to the people of another in flagrant disregard of the regular diplomatic organs of the respective governments. Even more surprising is the sweeping generalization (p. 144) that even during the nineteenth and twentieth centuries the prerogative in foreign relations has been exercised by the Crown in Council quite independently both of party politics and parliamentary responsibility. That the Crown has exercised a

large measure of independent authority in matters of foreign affairs is undoubtedly true, but the author seems to have overlooked the fact that more than one cabinet has been overthrown during this period because of public dissatisfaction with its foreign policy. The recent defeat of Lloyd George is a striking illustration of party or parliamentary intervention in international affairs.

A more serious criticism, however, may be directed against an occasional tendency on the part of the author to lapse into a certain haziness of expression in dealing with legal principles where definiteness and precision of statement are demanded above everything else. Perhaps the most striking illustration of this tendency will be found in the statement (p. 47) "that the treaty-making power and the president are not legally bound to follow the judicial decisions as to the scope of their powers in conducting foreign relations." It is very evident that the author does not intend to question the power of the courts to pass upon the constitutionality of executive action, but in the absence of any explanation as to the particular meaning to be attached to this statement, it is difficult for the reader to understand what the author has in mind.

It is probably safe to predict that the chief criticism will be directed against the author's proposal for the mutual accommodation of the legislative and executive departments in the conduct of foreign affairs. Professor Wright's general formula has all the attractiveness, but at the same time all the weakness of the celebrated fourteen points. (p. 346); it looks plausible in theory but the difficulty is one of practical application. No political convention could possibly solve the personal and psychological problems involved in the controversy over the League of Nations. Unfortunately, the so called "understandings" of our constitution are not yet sufficiently strong in many cases to stand up against partisan determination to insist upon the maintenance of constitutional rights at times of intense political feeling. Of the specific proposals of the author, undoubtedly the most interesting is that for the enlargement of the cabinet during the consideration of foreign problems, by the addition of a few leading members of the House and Senate, in particular the chairmen of the foreign relations committees of the two Houses. But this suggestion, it is submitted, is questionable, both from the standpoint of constitutional theory and political expedience. To make this suggestion effective would require not only that the two houses should be of the same political complexion as the president, but also that there should be continuity of executive policy on international questions. But it is on these very issues that we have had some of the most marked divisions of political opinion in recent years. It could scarcely be expected that a Republican or Democratic president, as the case may be, would welcome the presence in his cabinet of a chairman of the Senate committee on foreign affairs who belonged to the opposite party and whose views on foreign policy were in open conflict with his own. By the constitution the president is alone responsible for foreign policy and he cannot, and it is safe to say, would not, share that responsibility with his political opponents. To attempt to make such a combination would more likely produce a chronic state of war within the cabinet than promote harmony between the departments.

But none of these criticisms materially affects the outstanding merit of the work as a whole. This volume, we can only repeat, stands in a class by itself. It is the one indispensable work in the field of foreign affairs, at once the most scholarly and the most original contribution to the literature of the subject. Although designed primarily for special students in diplomatic history and constitutional and international law, it will be found of almost equal value to those who are generally interested in the conduct of our foreign relations. By this work, Professor Wright has placed himself at the very forefront of students of international law in this country.

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CASES IN BUSINESS LAW, By Wm. E. Britton and Ralph S. Bauer. West Publishing Company, St. Paul, 1922, pp. XXIX. 1563.

Departments of business administration and schools of commerce recently established in our universities have created a demand for some sound basis of instruction in the legal relations and methods with which the business man needs to be familiar. This case book is designed for a complete course on business law, as it is usually given in schools of commerce. It is a book of a different type from the regular law school case book, and contains some interesting features.

It is a great question with many teachers of non-professional courses whether the case method or a combination of text and lecture method ought to be adopted. It is confidently believed by the reviewer that some such adaptation of the case method to meet the needs of non-professional courses will be as triumphantly successful in them as it has been in law school courses, if competent teachers can be secured.

Nowhere can the student of business find such an instructive statement of business situations, problems, and instrumentalities as in the reported cases. Nowhere else can he find so searching an analysis of the complex business relations with which he will have to deal, such as arise between vendor and purchaser, mortgagor and mortgagee, drawer and endorser, landlord and tenant, stockholder and corporation. This material if properly selected cannot be matched elsewhere. The business law case books which have been produced by Britton, Spencer, Schaub and Isaacs, and Bays, show an appreciation of the value of this material.

Professors Britton and Bauer have had wide experience in teaching courses in business law and show careful thought in adapting their materials to the needs of the student. The book is very comprehensive in scope, and deals with contracts, agency, negotiable instruments, sales, partnership, and corporations. No one could properly cover it all in three hours per week during one college year. The editors probably intended to afford material for a possible extension of the course to four hours for two semesters. It may be that the general required course should end with the first four topics, and that partnership and corporations should be an elective for senior students. It is unfortunate to attempt to cover all these topics in a single course.

Some text material is interspersed with the cases, particularly as introductory to each subject and the different topics under each subject. The primary purpose of these introductions is to call attention to the nature of the problems developed in the cases. A perception of the problems at issue will tend to stimulate interest in the students and help them to get the point from the cases by studying them with some objective in view. The existence of a question in the mind is a condition precedent to learning. In later editions this text material might well be carried still further and made more concrete and specific, especially in the latter portions of the book. It is doubtful whether the historical and philosophic tone of some portions of the text material will mean much to the student. What the business student needs would seem to be the concrete and practical problems of the law, not a shadowy, abstract historical and philosophic background.

In the selection of cases the editors have evidently regarded them as presenting a series of problems with respect to the legal or business situations under discussion. Recent cases are naturally preferred, as students are more readily impressed by something that springs out of present day affairs and presents a typical situation of business activity. Several cases were no doubt selected because of their interesting facts, such as one that pictures an Italian Count in his attempt to acquire by marriage an American fortune. In the discussion of these cases the students will get some idea of the methods of legal reasoning and analysis, a sharpening of the wits, and a power of application, which the glittering generalities of the text or the lecture would never give. It would be well if the editors would supply a number of simple concrete problems for purposes of review and drill in the application of the principles brought out in the cases.

In the codified subjects the setting out of the text of the uniform act in bold faced type has great advantages. In some cases, however, related sections are too much scattered.

An excellent feature is the dictionary of legal terms which is abridged and adapted from Black's Law Dictionary.

This book is a product of much thought and experience. There can be no doubt that with it a competent teacher will be able to get excellent results, and furnish both information and training of the greatest possible value to the future business men in the understanding and conduct of important transactions, and the avoidance of costly errors and litigation.

HENRY W. BALLANTINE.

University of Minnesota.

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WHAT BAR ORGANIZATION MEANS TO MINNESOTA

BY MORRIS B. MITCHELL*

THERE is now pending in the 1923 legislature a bill, which, if passed, will mark a distinct epoch in the legal history of Minnesota. The bill was introduced in the House by the chairman of its judiciary committee, and is known as House File No. 465. Its short title is the "Bar Organization Bill," and what it does, generally speaking, is to recognize the bar of Minnesota as part of the state's judicial machinery, to organize it as a unit, and to grant to this organized bar certain powers of discipline over its members.

If the bill receives from the lawyers of the state the support which it merits, it will pass. Without this support, it will fail. This article is written in the belief that if the bar can be made to understand the bill and what it will accomplish, they will give it the support necessary to insure its passage.

SHORT STATEMENT OF PURPOSES

The proponents of the bill believe it will do the following:

First,—by giving the bar power to make rules of professional conduct for lawyers and to enforce these rules by disciplinary action, many petty acts of professional misconduct which now go unnoticed can be eliminated, and serious misconduct can be more effectively dealt with.

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Second,—by organizing the bar, a body of trained men will be created which will be working constantly towards the betterment of our courts and laws.

Third,—by bringing all the lawyers of the state into one organization, the friendships therein formed will not only be worth while to lawyers personally, but will facilitate settlement of cases outside of court.

History of the Bar Organization Idea

The idea of an organized state bar originated with the American Judicature Society, an organization composed of a number of men interested in promoting the efficient administration of justice, among the most active directors of which have been Chief Justice Harry Olson, of the municipal court of Chicago, Governor Woodbridge Ferris, of Michigan, the late Chief Justice John B. Winslow, of the Wisconsin supreme court, Dean Roscoe Pound, of the Harvard Law School, and Dean John H. Wigmore, of the Northwestern University Law School. The idea was suggested by the Judicature Society to the Conference of Bar Delegates, a section of the American Bar Association to which state and local bar associations send delegates. At the 1919 meeting of this Conference, a committee was appointed to work on the matter and report back the next year. This committee was headed by Judge Clarence N. Goodwin of Chicago, who, with other members of the committee, spent much time in considering the various angles of the proposal, and finally drafted a bill in about the form of the bill now before the Minnesota legislature.

In Minnesota, the question of bar organization was first considered at the 1920 and 1921 meetings of the State Bar Association, the idea being approved at both meetings, and a committee appointed to frame a suitable bill. The bill proposed by Judge Goodwin's committee put the control over *admission* to the bar, as well as bar discipline, into the hands of the organized bar. When the question was first discussed in Minnesota, some question was raised as to the advisability of placing the control over admissions in the hands of the bar, and inasmuch as the State Bar Association committee felt that this matter was being well handled by the Board of Law Examiners, it was decided to eliminate the control over admissions from the bill. At its 1922 meeting, the State Bar Association unanimously approved the bill in its present form.

Constitutional Theory of the Bill

The Bar Organization Bill is drawn on the theory that the bar of the state constitutes an integral part of the judicial depart-

ment, and is, therefore, inherently a body politic; consequently, a provision for the organization and regulation of this branch of the judicial department is not special legislation nor the creation of a private incorporation by a special act.

General Provisions

The provisions of the bill are simple. A board of nine commissioners is created, these to be elected by the entire bar of the state from its membership, in an election in which every member of the bar is entitled to vote by mail. Nominations are made in the same manner. The supreme court still retains final control of rules of conduct and disciplinary matters. Subject to such control and approval, the commissioners are given power, first, to make rules of conduct for the bar, and, second, to discipline attorneys guilty of professional misconduct, either by public or private censure, by suspension, or by disbarment. Committees may be appointed by the commissioners in the various local districts of the state, such committees to be the local representatives of the commissioners; but no action of such local committees involving suspension or disbarment would be effective until approved by the commissioners. In practice, the chairman of each local committee would probably be the commissioner from that section of the state, thus providing a connecting link between the local committee and the state-wide board.

Any action of the board of commissioners, or of any committee, may be appealed to the supreme court, in which case the supreme court is to consider the whole matter de novo, with power to take additional testimony if it so desires. There is a provision for reference of the hearing on any complaint, the referee to be appointed by the commissioners, with the provision that upon the filing of an affidavit of prejudice against the referee appointed by the commissioners, another referee shall be appointed by the supreme court. The power to subpoena witnesses is given both the commissioners and the accused, and a complete record is required in every case. An annual license fee of $5.00 is provided for, to be paid by every member of the bar to the state treasurer, to be disbursed on order of the board of commissioners for the running expenses of the organized bar. A provision for an annual meeting of the entire state bar is also included.

Why the Bill is Necessary

The natural remark for a lawyer to make upon hearing of this bill is this: "Why do we need such a bill? Aren't we getting

along well enough now without it? Why should we try something that we don't know anything about, and which may not prove at all satisfactory?" Such questions are reasonable, and, if they cannot be answered, the argument for the bill fails. But they can be answered.

Criticism of the Bar

There has become evident in the past few years a reaction on the part of the bar against the frequent unjust and unfounded criticism of the integrity of the profession. It is inevitable that such broadsides against lawyers as were referred to by Judge Edward Lees, of the Minnesota supreme court, in his address to the 1922 meeting of the State Bar Association, should arouse resentment on the part of every member of the bar. Judge Lees quotes from "Letters of an American Farmer," written in 1787, as follows:

"Lawyers are plants that grow in any soil that is cultivated by the hands of others... [They] promote litigiousness and amass more wealth than the most opulent farmer with all his toil... What a pity that our forefathers who expunged from their new government so many errors and abuses...did not also prevent the introduction of a set of men so dangerous."

He also quotes from the following article of John Adams, written before he was admitted to the bar:

"Let us look upon the lawyer. We see him fumbling and raking amidst the rubbish of writs, indictments, pleas—and a thousand other lignum vitae words which have neither harmony nor meaning. He often foments more quarrels than he composes, and enriches himself at the expense of impoverishing others more honest and deserving than himself."

Criticism and jibes such as these are continually heard from professional humorists, yellow journalists, soap-box demagogues, general-store philosophers, street-corner autocrats, chronic dyspeptics, and many others belonging to the same school of criticism. Such remarks naturally make any lawyer who takes them seriously "see red." But regardless of their lack of foundation, it cannot be gainsaid that this general attitude towards lawyers is that of an altogether too numerous portion of our population today.

General Integrity of the Bar is High

Certainly no one can do other than sympathize with the lawyer who resents such attacks as this on his profession. The great majority of attorneys-at-law are men of absolute honesty

and high integrity. Most fair-minded laymen will admit that the standards and ethics of the legal profession are as high, if not higher, than those of any other profession, and certainly higher than those of business. Trickery and sharp dealing indulged in daily by business men without loss of caste would, if practiced by a lawyer, soon bring him into disrepute with all the reputable members of his profession. The critics of the legal profession lose sight of the fact that many of the sharp and dishonorable practices indulged in by certain disreputable members of the profession are directed and insisted upon by even more disreputable clients.

Peculiar Relations of Attorney and Client

But, just as in tort actions, a man who professes skill is held to a higher degree of care than is required of the "ordinary prudent man," so the lawyer, by virtue of his relation, is held to a higher degree of integrity and honesty than the layman. The relation of attorney and client is one of trust and confidence. When one man deals with another in business, he knows he is dealing at arm's length, and must be on his guard. But when he goes into a lawyer's office, he goes there with his defenses down, and his cards on the table. Caveat emptor should not apply to the buyer who is purchasing legal services.

Mr. Osborn, in his recent work on "The Problem of Proof," says in this connection:[1]

"There is no other relation in human affairs exactly analogous to that of attorney and client. It is a relation that in its intimacy and responsibility is an example of supreme trust and confidence. By it we ask another for the time and the occasion to be ourselves. It is as if for the time being we transfer our individuality to another who then becomes our mind, our voice, and even in a degree, our conscience. It is not strange that this relation from the earliest times has been most closely guarded, and that there are inseparably connected with it certain rules of honor which to disregard puts the brand of infamy upon the transgressor. To violate this sacred trust and be disloyal to a client is deservedly the unpardonable sin of an attorney. By this betrayal he sinks lower than by any other act of dishonor.

In the early history of advocacy this relation of advocate and client was not one of ordinary humdrum affairs. It was a noble service of honor, and, if need be, of self-sacrifice of the strong for the weak, of the able for those who could not protect themselves."

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[1]Osborn, The Problem of Proof, 223.

Before the legal profession has any right to feel satisfied with itself so far as the integrity of its members is concerned, and before it can justly rest in its efforts to purify its ranks, it must bring the profession to such a state that any man can go into any lawyer's office and know that he is going to get a square deal. That desired condition does not exist today.

Specific Instances of Current Misconduct

In support of the last statement, let us cite two recent illustrations of its truth, one of which occurred in Minneapolis and the other in St. Paul. The one in Minneapolis came to the writer's personal attention within the past sixty days. An attorney of Minneapolis undertook the defense of a young man charged with embezzlement of funds, knowing at the time that he had no money for attorney's fees, but being promised compensation as soon as he or his wife could earn the money. While the accused was in jail, the attorney went to the wife, and demanded a definite sum of money, stating that if it was not forthcoming immediately he would undo all that he had done towards getting the prisoner freed of the charge. (It afterwards appeared that he had done nothing, so this threat was not as vicious as it sounded.) Upon the wife stating to this attorney that she had no money and no way of getting any immediately, the attorney demanded her engagement ring, and upon her refusal to surrender it, attempted to take it off her finger by force.

The St. Paul instance was learned of through one of the judges of the Ramsey County district court, and happened while this judge was handling the criminal calendar. A woman was brought in charged with making moonshine for the personal consumption of herself and her husband. She told the court that she had no money to hire an attorney, and was ready to plead guilty. The judge felt that she should consult with counsel before pleading guilty, and appointed an attorney, who was then in the court room, to act as her counsel, the assumption being, of course, that his fees would be those provided by statute in such cases, and would be paid by the county. After a few moments conference with the attorney, she plead guilty, and the judge thereupon ordered an investigation of the case by the probation officer, which investigation later resulted in probation for the accused. A few days later, the woman came into the judge's office, and asked what the attorney he appointed for her should have charged her for the services rendered. Upon being informed that

all fees of an attorney thus appointed were paid by the county, the woman told the judge that, upon leaving the court room with this attorney, following her plea of guilty, he had demanded $100 as attorney's fees, had told her that he had a "stand-in" with the judge, that if she paid this she would be let out on probation, and if not that she would be sent "over the road." She managed to get the amount demanded from her friends and relatives, and made the payment. The judge called in the attorney, and ordered him to refund the money, which he immediately did.

These are only two of numerous similar instances which are happening daily in Minnesota. Most lawyers can cite instances which have come to their attention involving similar moral turpitude and lack of appreciation of the true nature of a lawyer's duties. The files of bar association grievance committees are replete with records of misconduct of this nature. Why then, some one asks, are not such men disbarred? There are several reasons. In the first place, where the misconduct relates to financial dealings with a client (as do a big majority of the complaints), after the client has made a complaint and the grievance committee has commenced an investigation, the attorney usually makes some sort of a financial adjustment with the client, and the client thereupon refuses further to prosecute the charges. Secondly (and this is the most important reason), many of the complaints relate to misconduct of such nature that, although reprehensible and deserving of censure, does not warrant disbarment proceedings.

It is such misconduct as this, however, that brings lawyers as a class into disrepute with certain members of the community. People who are the victims of this misconduct generally broadcast their tale of woe among those with whom they come in contact, and, inasmuch as it generally makes a pretty good subject of conversation, many of those who hear it take care to pass it on. There is thus created in the minds of a great many people a distrust and dislike of the entire legal profession. The honorable lawyers are made to suffer for the acts of the scalawag. Such an attitude of mind on part of the people referred to undoubtedly keeps many of them who are really in need of legal counsel from consulting a lawyer.

Preventive Effect of the Bill

The immediate danger to the legal profession arises from the fact that if some action is not taken to check this kind of petty dishonesty, trickery, chicanery, extortion, and other similar mis-

conduct, it is bound to increase. Some of these practices (such for instance as the splitting of fees in criminal cases between jail and police officials, on the one hand, and certain attorneys to whom they refer prisoners in search of counsel, on the other) are undoubtedly profitable and tempting to young men newly admitted to practice. These neophytes at the bar during their first years of practice, and while they are having a hard time making enough to live on, can scarcely be blamed for following in the steps of older lawyers, when they see these older men engaging in such questionable practices and "getting away with it" without even being censured. Thus the tendency, if such practices are not checked at the outset, is for them to spread like an epidemic until the whole moral structure of the profession has become infected with the virus.

It is to check such a moral disintegration of the bar, and to bring the standards of the entire profession up to the standards now maintained by the big majority of lawyers, that the proposed bill is aimed. The authors of the bill believe that if the profession were given the power to set its own standards of conduct, and require adherence to them, the mere announcement of the standards would in most cases check many of the questionable practices that are now indulged in by certain attorneys. Men of long experience in grievance committee work have told the State Bar Association committee that, in their opinion, under the proposed organization, the powers of suspension and disbarment would not need to be used to even as great an extent as they are at present. This is because many of the detours from the straight and narrow path are made by lawyers who do it because they see other lawyers doing similiar things without being called to account. Once let it be known that certain acts are beyond the pale and would not be countenanced, and most of the present offenders would abide by the standards set by the rest of the profession. This would doubtless be particularly true after one or two inveterate offenders had been shown the efficiency of the fumigating provisions of the new system.

Professional Esprit de Corps

In other words, more can be accomplished towards raising professional standards by the building up of a strong esprit de corps among the legal fraternity than by coercive measures. Every member of the bar will feel himself a part of the organization—"one of the gang," so to speak—that makes the rules of conduct

and enforces them. The report of the Bar Organization Committee to the 1920 Conference of Delegates, speaking on this same point, says the following:

"In this connection we suggest that, as man is a social being, he is influenced largely by the general opinion of those with whom he is associated; consequently when he is made a part of an officially organized public body, in the government of which he has a share, he normally is affected by its esprit de corps, and as a part of it, feels an obligation to sustain its highest traditions.

"Within the last few years we have seen millions of young men give an inspiring example of the effect of membership in an organization having great purposes and traditions. The most potent cause of unethical conduct in our profession is that the young lawyer does not become a part of an officially organized bar, and in the ordinary case does not even become a part of a voluntary professional organization. He remains isolated without anything to make him conscious of his relation to the bar as a whole, without being brought in contact with its great traditions, and without anyone authorized by law to advise him with reference to his duties.

"Thus when green in judgment and often needy in circumstances, he is called on to decide the most delicate questions of professional conduct, and for the most part, is obliged to work them out alone. Is it any wonder that in such circumstances and being so isolated, he sometimes becomes an Ishmaelite, with his hand against every man and every man's hand against him? Is it not reasonable to argue that, if millions of young men of all sorts and conditions, when brought into our military organizations, responded with enthusiasm to their high traditions of conduct and took the keenest interest in upholding the reputation of the units to which they belonged, likewise if young lawyers, by the very fact of their admission to the bar, become a part of an officially organized Supreme Court bar and are given a voice in the selection of its governors and the establishment of its ethical code, they will support with enthusiasm the high tradition of their profession?

"We therefore submit that the real need is to bring the entire bar into one body, to make every lawyer feel the duty which he owes it, to give the members a source of authority in matters of ethical conduct and to authorize its governors, not merely to disbar, to punish, to discipline, and to censure, but in a most friendly and helpful way, to advise as officials having authority."

The Organization Feature Considered

Perhaps equally important with the disciplinary provisions of the bill is the organization of all the lawyers of the state into one unit. If the power to make rules and enforce them were entirely eliminated from the bill, this organization feature, standing alone, would seem to make the legislation worth while.

It is a matter of common observation that lawyers greatly outnumber any other profession or business in public office. The reason for this is obvious. By reason of their training, and of their daily work, lawyers acquire a knowledge of the structure of government and of public affairs in general that no other class of citizens possess.

What an opportunity the state is missing by not organizing this group of men and forming them into a body of trained helpers and advisors in the problems of government. At present, the bar in this respect may be likened to a group of trained soldiers without any officers or organization—as a fighting organization, nothing more than a mob. Organize these soldiers into a military unit, give them something definite to do, and you have an efficient fighting machine. Organize the bar in the same manner, direct their collective energies toward the improvement of the administration of justice and the judicial code of the state, and you will have developed an efficient and powerful force, working constantly toward the end of better government. Of late the state has been awakening to the possibilities of its unharnessed water-power. Here is an unharnessed man-power which, if put to work, will develop a tremendous force for good government in Minnesota.

Think what such an organized bar could do towards improving the administration of justice. Being daily in contact with the courts, lawyers know their defects better than any one else. Give them an onganization through which they can act in remedying these defects,—a strong organization, the voice of which will carry some weight—which can speak as the bar of Minnesota, and can announce with authority "so saith the bar"—give them such an organization, one which is strong enough and influential enough to attract the best energies of capable lawyers, and you will have loosed a force which will eventually bring our court system close to that ideal which is the aim of all conscientious members of the bench and bar—namely, the equitable and perfect dispensation of justice between man and man.

Experiences in Hennepin County

The above prediction is not mere groundless conjecture. It is based on what has actually happened in Hennepin County since the organization four years ago of a live local bar association. The founders of the association were told on all sides that the new association would never attract the interest of any substantial

number of lawyers. There was difficulty at first. But as the association grew in numbers and prestige, lawyers who had never before taken any visible interest in bar association work came forward voluntarily with numerous suggestions for improvement in the judicial machinery, and, when put on committees to bring about such improvements, rendered excellent and painstaking service.

Weakness of Present State Bar Association

With all possible respect and praise for the unselfish and efficient service of the men who are and have been active in the affairs of the Minnesota State Bar Association, there is no denying the fact that, due to its relatively small numerical strength and to its lack of financial support, the State Bar Association is practically impotent, and does not attract the serious attention and services of more than a handful of lawyers. No one appreciates this fact better than the men who are active in the Association, particularly those who, as members of its committees, have approached legislative bodies or courts in behalf of proposals sponsored by the Association. The general attitude is that such representatives of the State Bar Association do not speak for more than a small proportion of the lawyers of the state, and are not entitled to extended consideration. This condition is due to no fault of the personnel or management of the Association, but is characteristic of all voluntary state bar associations. The remedy clearly is to create an organization which can voice the sentiments of the entire bar of the state, and which, by virtue of the increased strength and prestige thus acquired, could call for and would receive the serious attention and services of all the bar of the state.

Social Features

Lastly, there is the social feature of the organized bar, i. e. the opportunity for getting better acquainted with one's brothers-at-the-bar, and of spending many profitable and pleasant hours together at the meetings of the state-wide bar, or at meetings of the local divisions of the bar, which divisions will undoubtedly be formed. Beyond the incidental personal pleasure of knowing better the men with whom one comes in contact in litigation, there is an undoubted advantage to the state in having the various members of the bar acquainted with one another. Many actions which would otherwise be tried are now settled out of court to the great advantage of attorneys, clients and the public treasury—settled mainly because counsel for the opposing parties are acquainted

and are able to get together in a friendly way and agree on terms fair to both parties. Nothing is more conducive to conciliation than a friendship between the attorney for the plaintiff and the attorney for the defendant. The friendships formed and strengthened at the meetings and in the work of the organized bar would be of great service in keeping unnecessary litigation out of the courts. Besides this, lawyers who have attended bar association meetings will need no argument to convince them of the pleasure and value of these meetings, and will certainly lend their hearty support to a movement which aims to extend the benefits to the entire bar of the state.

A Vision That Can Be Realized

This article has merely attempted to suggest a few of the advantages to Minnesota, its people, its courts and its lawyers, which it is believed would follow the passage of the bill organizing the Minnesota bar. Perhaps the bill would not work out in every respect as suggested, but it is difficult to see what harm it could do. Certainly no reputable attorney who deals fairly with his clients need fear it, and any one of the suggested results of its passage would seem to make it worth while trying. If it should not work, it could be repealed in two years.

There will be those who will think that the change and improvement claimed as a result of the passage of this bill is visionary and chimerical—a mere dream. Perhaps it might prove to be a dream. But if the lawyers of Minnesota will see that their representatives in the legislature help pass the bill—and if they will then put their shoulders to the wheel and help work out the idea embodied in it, they can make this dream become a reality.

THE HISTORY OF THE SUPREME COURT IN RESUMÉ

By Robert Eugene Cushman*

The Supreme Court of the United States has by no means been neglected by historical writers. Its influence and its work have of necessity formed an important part of the substance of our political and constitutional history. The lives of its great men loom large in the annals of American biography. And yet of the Supreme Court as an institution, its origin, the development of its work, its personnel, its methods, the continuity and growth of its life as an organ of government, there has been no systematic or connected chronicle of permanent value. There has been plenty to read about Marshall or Taney, or about the *Dartmouth College case* or the *Dred Scott case*, but for the history of the Court as a court one has had to be content with Carson's saccharine eulogies of the Supreme Court justices[1] or with the sour-spirited economic determinism of Gustavus Myers.[2] Between these two poles there was nothing. The completion in 1919 of Mr. Beveridge's Life of John Marshall showed that a real history of the Supreme Court was not an impossible achievement; for that admirable work was not only a biography of Marshall but a history of the Court upon which for thirty-four years Marshall had sat. And now Mr. Charles Warren has presented to the historian, the lawyer, and the layman a systematic, scholarly, and readable account of the Supreme Court and its work from its origin in 1789 to the year 1918.[3]

Before proceeding to a consideration of the story which Mr. Warren has told, a word may be said of the way in which he has told it. To begin with, he has told it at considerable length; al-

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[1]The History of the Supreme Court of the United States with Biographies of all the Chief and Associate Justices, by Hampton L. Carson. This was published in 1891 at the time of the centennial of the federal judiciary.

[2]History of the Supreme Court, by Gustavus Myers (1912). This was written from the socialistic point of view.

[3]The Supreme Court in United States History, by Charles Warren. Little, Brown, and Company, 1922. Mr. Warren is the author of The History of the Harvard Law School (three volumes, 1909), and The History of the American Bar, Colonial and Federal, to 1860 (1911). He was assistant Attorney General of the United States from 1914 to 1918. He is now engaged in the practice of law in Washington, D. C.

though the three large volumes with their sixteen hundred pages have hardly proved sufficient for the purpose. The detailed narrative of the Court's history, term by term, is brought to a conclusion at the death of Chief Justice Waite in 1888. The thirty-year period succeeding is sketched in two final chapters which naturally do not aim to do more than mention some of the more conspicuous decisions and call attention to some of the recent tendencies in the development of judicial power and construction. It was inevitable that Mr. Warren should find his task growing more and more complicated as he reached the middle and later periods in the history of the Court. The cases become more numerous and more technical, the arguments of counsel and the opinions of the judges become briefer and more prosaic, and, the formative period of our constitutional development being largely passed, the decisions themselves seem less epoch-making than those which the Court rendered in the days of Marshall or Taney. To regret, therefore, that the necessary process of selection and compression has allowed but ten lines of comment upon cases which one would like to see discussed through ten pages is merely to regret that Mr. Warren did not write ten volumes instead of three.

The author's method has been that of the careful scholar and in somewhat lesser degree that of the man of letters. The book is the product of an appalling amount of careful and detailed research. No source of information apparently was too remote or too inaccessible to be consulted. Letters, manuscripts, memoirs, contemporary newspapers, have all been made to render up their secrets. By his consistent use of long quotations from these obscure sources, particularly the early newspapers, Mr. Warren has earned the gratitude of the historian, if not of the casual reader. And yet in spite of this stylistic liability, consciously incurred for a worthy purpose, he has written a book which is thoroughly readable and intensely interesting.

It is not the purpose of this paper to enter into an extended criticism of Mr. Warren's book. It would certainly not be difficult to expatiate at length upon the excellence of its substance and its craftsmanship; and whatever imperfections it has could, by sufficient avidity of effort, be exposed. The fact remains that it is a book of very great importance. The writer has accordingly set himself the task of introducing it to the readers of the MINNESOTA LAW REVIEW in sufficient detail to encourage those to read it who have the leisure, and to give those who do not enjoy that luxury at least some idea of its contents.

In order to do this it will be convenient to devote the first part of this paper to a very brief resumé of the Court's history in terms of the facts, conditions, and episodes upon which Mr. Warren's historical scholarship has shed new light or shed the light for the first time. This will be followed in the second part by a summary of certain broad conclusions respecting the influence, traditions, personnel, and general repute of the Court, gleaned from the author's portrayal of its entire history.

I. A Synopsis of Supreme Court History

A. *The Pre-Marshall Period.* From the time of its first session in February, 1790, to the accession of Marshall in 1801, the Supreme Court remained a very modest and inconspicuous institution. It was obviously feeling its way. It lacked leadership; it lacked traditions; it lacked work. Three of its members left it to accept positions in the governments of their respective states.[4] Its most important decision, *Chisholm v. Georgia,*[5] was generally regarded as erroneous and was promptly overruled by constitutional amendment. And yet certain foundations were laid during this period, and certain events transpired, which deeply influenced the future development of the Court. Some of these merit brief comment.

In the first place, it was during this period that the Court established the important principle that judicial opinions would be expressed only in cases of actual litigation coming before the Court in the usual manner. As early as 1790 Hamilton had tried to persuade Jay to have the Supreme Court join with the executive and legislative branches of the government in protesting against certain resolutions adopted by the Virginia Legislature denouncing as invalid the proposed congressional legislation for the assumption of state debts. Jay refused to accept Hamilton's suggestion.[6] In 1792, however, the trustees of the National Sinking Fund, comprising Jay himself as Chief Justice, the vice-president, and three cabinet members, asked Jay for an opinion upon the construction of the law governing their duties, and Jay wrote an opinion.[7] In July, 1793, came Washington's famous letter to

[4]Robert H. Harrison was appointed and confirmed in 1789 but preferred to accept the chancellorship of Maryland. Warren, I, 42. John Rutledge resigned in 1791 to become chief justice of South Carolina. Warren, I, 56. Jay resigned in 1795 to become governor of New York. Warren I, 124. Cushing ran for the governorship of Massachusetts in 1794 but was not elected. Warren, I, 275.

[5](1793) 2 Dall. (U.S.) 419, 1 L. Ed. 440.

[6]Warren, I, 52.

[7]Warren, I, 110, note 1.

the Court asking its opinion upon twenty-nine questions relating to international law, neutrality, and treaty construction. Jay, speaking for the Court, declined to consider the questions on the ground that such an extra-judicial function was not within the proper sphere of the Court's power.[8] Thus did good judgment save the Court from the colossal blunder of taking sides gratuitously in one of the bitter partisan controversies of the day. Six years later, when asked by two circuit court litigants to pass on the applicability of a state statute to an agreed statement of facts, the Court said it was unwilling to "take cognizance of any suit or controversy which was not brought before it by the regular process of law."[9] And yet the Court's idea of what constituted a moot case can hardly be be called overstrict. In *Hylton v. United States,*[10] the carriage-tax case and the first case in which the Court passed squarely upon the validity of an act of Congress, it took jurisdiction of a controversy presented upon an agreed statement of facts which was false and known to be false (alleging that the defendant kept one hundred and twenty-five chariots for his personal use and not for hire!) and which was argued by counsel employed for both sides by the government.

It is worth noting in the second place, that during this period the stage was being set for the firm establishment of the Court's power of judicial review. The very first case on the docket, *West v. Barnes,* would doubtless have raised the question of the Court's power to invalidate a state statute had it not been dismissed on a technical ground.[11] The federal circuit courts, however, did not escape the issue; and Mr. Warren finds five cases in which state statutes were declared by those courts to be invalid as violating the United States constitution or treaties[12] before the

[8]Hamilton had protested against referring the question to the Court. Washington had decided to do so in deference to Jefferson's desires and Hamilton accordingly drafted the questions. Warren, I, 109.

[9]Dewhurst v. Coulthard, (1799) 3 Dall. (U.S.) 409, 1 L. Ed. 440. The question raised was whether the bankruptcy statute of Pennsylvania could operate to discharge a citizen of the state from obligations owed to a citizen of New York. This was one of the important questions which the Supreme Court passed on in Sturgis v. Crowningshield, (1819) 4 Wheat. (U.S.) 122, 4 L. Ed. 529.

[10](1796) 3 Dall. (U.S.) 171, 1 L. Ed. 556. The case was decided by three of the six justices, Ellsworth, Wilson, and Cushing not participating. Warren I, 146-149.

[11](1791) 2 Dall. (U.S.) 401, 1 L. Ed. 433. The case involved the application of the legal tender law of Rhode Island which had been invalidated by the Rhode Island supreme court in 1786 in the case of Trevett v. Weeden, 1 Thayer, Cases on Constitutional Law 73.

[12](1796) 3 Dall. (U.S.) 199, 1 L. Ed. 568. The cases in the circuit courts were as follows: (1) a case in May, 1791, holding void a Connecticut statute as a violation of the treaty of peace; (2) a case in which

Supreme Court decided the famous case of *Ware v. Hylton* in 1796. It is very interesting that not one of the states whose legislation was at this time held void by an inferior federal court raised its voice in protest. Equally interesting is the fact that when in *Hayburn's Case*[13] a federal circuit court held an act of Congress unconstitutional and refused to enforce it, its action was greeted with enthusiastic approval by the Anti-Federalists, who later became such bitter opponents of judicial authority, but was viewed with grave concern by the Federalists, who feared the judiciary was becoming the ally of localism and strict construction.

One is impressed further by the fact that during the ten years under review the federal circuit courts, upon which, of course, the Supreme Court justices were sitting, rather overshadowed the Supreme Court. They were deciding more cases, exercising broader powers, and incidently stirring up more bitter and widespread opposition to the federal judiciary than was the Supreme Court itself. It was out on the circuit that the justices delivered their sometimes indiscreet charges to grand juries, enforced the detested Alien and Sedition Acts, and assumed jurisdiction under the doubtful and certainly unpopular doctrine of the existence of a federal common law.[14] There is a touch of irony in the fact that it was the circuit court duty which they loathed and the constitutional propriety of which they doubted that won for the Supreme Court judges their unpopularity, and which, through the belated efforts of Congress to abolish it, made the Court itself the object of the bitter partisan hostility of Jefferson and his followers.[15]

Justice Iredell invalidated a Georgia statute upon similar grounds in 1792; (3) a similar decision by Justice Paterson in the circuit court in South Carolina in 1793; (4) Alexander Champion and Thomas Dickason v. Silas Casey, not published in the reports, (1792), invalidating a Rhode Island act as impairing the obligation of contracts; (5) Van Horne's Lessee v. Dorrance, (1795) 2 Dall. (U.S.) 304, 1 L. Ed. 391, in which Justice Paterson instructed a federal jury to consider a Pennsylvania statute void. This last case aroused some Federalist opposition.

In 1799 a statute of Vermont was invalidated as an impairment of the obligation of contracts. There were other cases in which similar issues were raised but the statutes were upheld. For all of the foregoing see Warren, I, 65-69, and footnotes.

[13](1792) 2 Dall. (U.S.) 409, 1 L. Ed. 436. Warren, I, 70-81.

[14]In commenting on Chief Justice Ellsworth's decision in United States v. Williams, (1799) 2 Cranch, (U.S.) 82, note, 2 L. Ed. 214, Wharton, State Trials, 652, denying to American citizens the right of expatriation on the ground that no such right existed in common law, Mr. Warren says: "No decision by any federal judge had ever aroused so great and widespread resentment." Warren, I, 159-161.

[15]The federal Judiciary Act of 1801, one provision of which relieved the Supreme Court justices of circuit duty, precipitated Jefferson's attack

B. *The Rule of Marshall.* For a third of a century John Marshall's personality and broad judicial statesmanship dominated the Supreme Court. With telling blows he spiked down the foundation planks of our constitutional system. He fixed the Supreme Court in a position of dignity and authority; he established the doctrine of judicial review; he laid down the principles of nationalism and federal supremacy; he freed interstate commerce from the shackles of state monopoly; and he relentlessly defended the sanctity of contracts.[16] Space does not permit even a brief summary of Mr. Warren's valuable treatment of these matters. But a few interesting situations upon which he has shed new light may be singled out for comment.

We are given, in the first place, a somewhat new political setting for the case of *Marbury v. Madison*[17] and the doctrine of judicial review. Contemporary opinion seems to have been neither surprised nor disturbed to have the Court announce its power to invalidate an act of Congress. Until the acrimonious debates in Congress in 1801 upon the Judicial Repeal Act the Court's right to exercise that power seems not to have been challenged. The Republicans themselves had applauded the circuit judges for overriding a congressional act in the *Hayburn Case*[18] and had loudly abused the courts for not invalidating the hated Alien and Sedition Acts. In this connection Mr. Warren shows that the famous Kentucky and Virginia Resolutions of 1798 and 1799 asserting the states' authority to disregard acts of Congress which they deemed unconstitutional were not in reality denials of the power of judicial review, as has been sometimes asserted, but were merely declarations of the right of the states to act in such cases in the event that the courts had failed to do so. In short, Republican antipathy to the idea of judicial review seems to have originated from the concrete fear that the Court might declare unconstitutional the law repealing the obnoxious eleventh-hour Judiciary Act of 1801. Marshall's opinion in *Marbury v. Madison* infuriated Jefferson and his followers not because it established the judicial veto over legislation but because Marshall went out of his way to tell Jefferson that he had no legal right to withhold Marbury's commission. It was because the Court dared thus

on the judiciary. Warren, I, chap. IV: Beveridge, Life of John Marshall, III, Chap. I, II.

[16]For a summary of Marshall's work, see the writer's article, Marshall and the Constitution, 5 MINNESOTA LAW REVIEW 1.

[17](1803) 1 Cranch (U.S.) 137, 2 L. Ed. 60.

[18](1792) 2 Dall. (U.S.) 409, 1 L. Ed. 436.

to interfere with the executive that the Republican editors and politicians hurried to the attack; and practically the only criticism against the case on the basis of its doctrine of judicial review appeared in the columns of a federalist newspaper.[19] Mr. Warren sums this point up in a paragraph which may well be quoted:

"The fact is that the opposition to the judiciary during the early years of the nineteenth century, found in both the Republican and Federalist parties, was directed not so much at the *possession of the power* of the Court to pass upon the validity of the Acts of Congress, as at the *effect of its exercise* in supporting or invalidating some particular measure in which the particular political party was interested. So far from denying the existence of the power to pass upon the constitutionality of the detested Sedition Act or of the obnoxious United States Bank Charter, the Republicans in 1800 and in 1819 complained of the federal Court for its failure to declare these Acts to be unconstitutional; and prior to 1800 (as has been shown in a previous chapter) it was the Republicans (or Anti-Federalists) who had especially championed the right of the Court to protect the people and the states against the passage of unconstitutional laws by the legislatures. So, in the same manner, the Federalists in 1808 assailed the federal courts for failing to hold the hated Embargo Act unconstitutional. Unquestionably, if the Court had held either the Sedition Act, the Embargo, or the Bank Charter unconstitutional, the party opposing those laws would have warmly applauded its action, and would have been little concerned over the question of the existence of the power of the Court. This history of the years succeeding 1800 clearly shows that, with regard to this judicial function, the political parties divided not on lines of general theory of government, or of constitutional law, or of nationalism against localism, but on lines of political, social or economic interest."[20]

In connection with the case of *McCulloch v. Maryland*[21] and its setting it is worth noting that the doctrine of implied powers and liberal construction had been clearly enunciated by Marshall as early as 1804 in the case of *United States v. Fisher*.[22] Furthermore, in 1809 in *Bank of United States v. Deveaux*,[23] the question of the right of a state to tax a branch of the Bank of the United States had been involved. The Court dismissed the case for want of jurisdiction, holding that to give the federal courts jurisdiction

[19]Warren, I, 243-268. Mr. Warren calls attention to the fact that within six months of the decision in Marbury v. Madison the circuit court for the District of Columbia upon which Marshall sat invalidated an act of Congress in the case of United States v. Benjamin More. Although published widely this decision received no criticism. Warren, I, 255.

[20]Warren, I, 266-267.

[21](1819) 4 Wheat. (U.S.) 316, 4 L. Ed. 579.

[22](1805) 2 Cranch (U.S) 358, 3 L. Ed. 304.

[23](1809) 5 Cranch (U.S.) 61, 3 L. Ed. 38.

on the ground of diversity of citizenship it must be affirmatively shown that all stockholders of a corporation are citizens of a state other than that of the opposing party to a suit. This case had two important consequences: it kept corporation cases out of the federal courts for nearly forty years,[24] and it postponed the decision of the issue in *McCulloch v. Maryland,* respecting state authority, for nine years. Mr. Warren thinks that if the Court could have met this issue under the more auspicious circumstances of 1810 the whole course of our legal history might have been different.[25] The decision in *McCulloch v. Maryland* was, of course, received with a storm of protest by the Republicans. Interestingly enough, the point of bitterest attack seems to have been the doctrine of implied powers and the failure of the Court to invalidate the act chartering the bank, although there was at the same time plenty of protest against that portion of the decision invalidating the taxing act of Maryland, protest emanating particularly from the seven other states which had passed laws designed to exclude the bank or cripple its activities.[26] It must be kept in mind that this decision was rendered only a year before the enactment of the famous Missouri Compromise Act of 1820, and the slavery issue was already becoming acute. The southern leaders viewed with alarm the pronouncement of the broad doctrine of implied powers because they feared that it might serve as the constitutional basis for congressional interference with slavery.[27]

The slave states also viewed with bitter resentment the decision in *Gibbons v. Ogden,*[28] holding the New York steamboat monopoly an unconstitutional interference with interstate commerce. In most parts of the country the decision was received with great rejoicing, for, as Mr. Warren says, "It was the first

[24]This doctrine as to the citizenship of corporations was abandoned in Louisville, etc., R. v. Letson, (1844) 2 How. (U.S.) 497, 11 L. Ed. 353.

[25]Had the Court sustained the jurisdiction of the circuit court and decided the important constitutional questions involved, the course of legal history would have been radically changed. McCulloch v. Maryland would have been anticipated by ten years; Congressional power to charter a bank would have been upheld: the long debates in Congress between 1810 and 1816 over this power would not have occurred; the charter of the old bank would probably have been renewed; the tremendous difficulties in the financing of the War of 1812 would have been obviated; the feelings of state jealousy over the denial of the state powers of taxation would have been less vigorous than they were ten years later, after a series of state laws had been set aside by the Court." Warren, I, 392.

[26]These states were Indiana, Illinois, Tennessee, Georgia, North Carolina, Kentucky, and Ohio. Warren, I, 505-506.

[27]Warren, II, 2.

[28](1824) 9 Wheat. (U.S.) 1, 6 L. Ed. 23.

great 'trust' decision in this country, and quite naturally met with popular approval on this account."[29] But the South saw that the doctrines laid down placed in the hands of Congress control over foreign and interstate slave trade. Nor was this mere speculation. Eight months before, Mr. Justice Johnson in the circuit court had held unconstitutional a South Carolina statute forbidding the entrance into the state of free negroes on the ground that the statute impaired the freedom of commerce.[30] The state, violently protesting against outside interference, continued to enforce this law for over twenty-five years in open defiance of the court's decree.

C. *Taney and the Slavery Issue.* If the history of the Supreme Court were to be dramatized, practically every one north of the Mason and Dixon line would unhesitatingly select Chief Justice Taney for the rôle of villain. So inextricably has history linked his name with the *Dred Scott case* that all the rest of his twenty-eight years on the Bench counts for nothing. Mr. Warren does valuable service in making evident the high character of Taney's judicial service in general and by tracing the interesting history of the slavery issue in the courts.

No justice ever took a seat on the Supreme Court in the face of more bitter opposition than did Marshall's successor. In January, 1835, Jackson had nominated Taney, his secretary of the treasury, to the associate justiceship left vacant by the resignation of Mr. Justice Duval. The Senate by a close vote rejected the nomination. Nearly a year later, after Marshall's death, Jackson nominated Taney to the chief justiceship. A violent struggle ensued for over two and a half months, but Taney's appointment finally was confirmed. Deep was the gloom of the Whigs. Forgetting that the new chief justice had for years shared with Wirt the leadership of the brilliant bar of Maryland, they could see in the appointment only a political henchman receiving his reward; and they predicted the early reversal of the sound constitutional doctrines which Marshall had established.[31]

These gloomy prophesies were never realized. Marshall's work was not destroyed. Private rights were not endangered; and the principles of nationalism, if somewhat modified, were still

[29]Warren, II, 76. "For the one and only time in his career on the Supreme Bench Marshall had pronounced a 'popular' opinion. The press acclaimed him as the deliverer of the nation from the thralldom to monopoly." Beveridge, op. cit., IV, 445.

[30]Warren, II, 84.

[31]"Judge Story thinks the Supreme Court is gone, and I think so too" was Webster's comment. Warren, II, 284, and notes.

not reversed. Yet the attitude of the Court did change, as was more or less inevitable; and while those changes did not find favor in the eyes of Story and Kent, the more impartial student of history at the present time will hardly feel like asserting that they were changes to be deplored. Mr. Warren compares Taney's Court with that of Marshall in a paragraph so penetrating in its analysis and so admirable in its expression as to warrant its quotation in full:[32]

"There was, however, no real relaxation in the determination of the Court to uphold the National dignity and sovereignty, in any case where it was really attacked; and in fact, in the succeeding years, Chief Justice Taney went even further than Marshall had been willing to go in extending the jurisdiction of the federal courts in admiralty and corporation cases and in many other directions. If any real change in the course of the Court in cases affecting the National powers can be detected, between the thirty years after 1836 and the years prior, it may be said to amount only to this: that in doubtful cases, the Court possibly tended to give the benefit of the doubt to the state more than in Marshall's time, and even this statement cannot be made without qualification. But Taney differed from Marshall in one respect very fundamentally, and this difference was clearly shown in the decisions of the Court. Marshall's interests were largely in the constitutional aspects of the cases before him; Taney's were largely economic and social. Marshall was, as his latest biographer has said, 'the Supreme Conservative'; Taney was a Democrat in the broadest sense, in his beliefs and sympathies. Under Marshall, the 'leading doctrine of constitutional law during the first generation of our national history was the doctrine of vested rights.' Like his contemporary in England, Sir Robert Peel, he believed that 'the whole duty of government is to prevent crime and to preserve contracts.' Under Taney, however, there took place a rapid development of the doctrine of the police power, 'the right of the state legislature to take such action as it saw fit, in the furtherance of the security, morality and general welfare of the community, save only as it was prevented from exercising its discretion by very specific restrictions in the written constitution.' 'The object and end of all government,' Taney has said with great emphasis in the *Charles River Bridge case*, 'is to promote the happiness and prosperity of the community by which it is established and it can never be assumed that the government intended to diminish the power of accomplishing the end for which it was created... We cannot deal thus with the rights reserved to the states, and by legal intendments and mere technical reasoning take away from them any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity.' It was this change of emphasis from vested, individual property rights to the

[32]Warren, II, 307-310.

personal rights and welfare of the general community which characterized Chief Justice Taney's Court. And this change was but a recognition of the general change in the social and economic conditions and in the political atmosphere of that period, brought about by the adoption of universal manhood suffrage, by the revolution in methods of business and industry and in names of transportation, and by the expansion of the Nation and its activities. The period from 1830 to 1860 was an era of liberal legislation—the emancipation of married women, the abolition of imprisonment for debt, the treatment of bankruptcy as a misfortune and not a crime, prison reform, homestead laws, abolition of property and religious qualifications for the electorate, recognition of labor unions, liberalizing of rules of evidence, and criminal penalties. It was but natural that the courts amid such progressive conditions should acquire a new outlook responsive thereto. As has been well said, at the very moment when the election of Jackson meant the supremacy of the doctrine of strict construction, there arrived an era in the national life 'when the demand went forth for a large government programme: for the public construction of canals and railroads, for free schools, for laws regulating the professions, for anti-liquor legislation, for universal suffrage.' Taney came to the Bench with the view that the states must possess the sovereign and complete power to carry out this programme and to enact useful legislation for their respective populations. To Taney, the paramountcy of national power within the sphere of its competence was of equal but no greater importance than complete maintenance of the reserved sovereignty of the states. Neither must be unduly favored or promoted."

The judicial history of the slavery controversy culminating in the *Dred Scott case*[33] can only be summarized briefly. It seems clear, in the first place, that the Supreme Court had early realized the explosive character of the slavery question and had wherever possible avoided it. Marshall himself in 1820 had discreetly sidestepped the question of the validity of a Virginia act forbidding the entrance of free negroes when that issue had arisen in the circuit court in the case of the *Brig Wilson*.[34] As he wrote to Story, with apparent relish:

"A case has been brought before me in which I might have considered its constitutionality, had I chosen to do so; but it was not absolutely necessary, and as I am not fond of butting against a wall in sport, I escaped on the construction of the act."[35]

As we have seen, however, Judge Johnson on the South Carolina circuit had been less fortunate.[36] In 1841 practically the same question, the power of a state to forbid the importation of slaves,

[33]Dred Scott v. Sanford, (1857) 19 How. (U.S.) 393, 15 L. Ed. 691.
[34](1820) 1 Brock. (U.S.C.C.) 423, Fed. Cas. No. 17,846.
[35]Warren, II, 86.
[36]Supra, p. 283.

came before the Supreme Court in the case of *Groves v. Slaughter*,[37] but a majority of the Court avoided a decision of the constitutional issue by holding the clause of the state constitution in question not self-executing. Ten years later there was presented to the Court in the case of *Strader v. Graham*[38] the precise issue raised in the *Dred Scott case*: namely, whether slaves taken from a slave state to a free state and then back to a slave state remained slaves or had acquired their freedom. The Court held unanimously that the status of the slaves in question was governed exclusively by the laws of Kentucky, the state to which they had been returned, and that no federal jurisdiction arose. While there was some criticism of the Court's decisions on the Fugitive Slave Law, it is clear that prior to the *Dred Scott case* the Court had managed fairly well to keep from getting itself embroiled in the slavery controversy.

A second important element in the situation stands out. This is the development of a movement amongst certain of the political leaders to force the Supreme Court to decide, whether it wished to or not, the bitterly controverted question of the power of Congress over slavery in the territories. A provision designed to accomplish this formed part of the compromise program of 1850.[39] The result of this was most unfortunate. The conservative Whigs together with the northern and southern Democrats favored the idea of shifting onto the Court the responsibility of settling the slavery issue and loudly professed their willingness to abide by its decision. Even Lincoln was converted to this point of view.[40] The Free-soilers, on the other hand, apparently fearing the outcome, protested vigorously. Convinced, however, that a decision would ultimately be rendered on the question, they set about systematically to discredit the Court and thus to forestall the influence of any adverse pronouncement it might make. For nearly nine years the Court was the target of the most malignant vituperation; with the result that by the time the *Dred Scott case* was actu-

[37](1841) 15 Pet. (U.S.) 449, 10 L. Ed. 800.

[38](1851) 10 How. (U.S.) 13, L. Ed. 337.

[39]In 1848 Senator Clayton introduced a bill for the admission of Oregon, one clause of which provided for appeals to the Supreme Court upon questions relating to the title to slaves, or to personal freedom arising on habeas corpus. The bill passed the Senate but not the House. Warren, II, 482-486. These same provisions, in substance, formed part of the Territorial Act of 1850 for Utah and New Mexico. See Report of Sen. Committee on Territories, Jan. 4, 1854. Senate Reports, No. 15, 33 Cong., I Sess. The text of these provisions is found in Allen Johnson's Readings in American Constitutional History (U.S.) 414.

[40]Warren, III, 52.

ally decided the Free-soil party had argued itself back into the old Jeffersonian-Jacksonian doctrine that a decision of the Supreme Court could not bind Congress in the exercise of its legislative authority.

The *Dred Scott case* itself need not be discussed at length. It was not, as has sometimes been alleged, framed by the slavery interests merely to get a decision on the slavery question. At the time of argument it attracted much less attention than the case of *Ableman v. Booth,*[41] which was also pending. It presented no new issue, for the facts were practically identical with those in *Strader v. Graham,*[42] decided in 1851. After the arguments in the *Dred Scott case* had been heard the judges agreed not to render an opinion upon the constitutionality of the Missouri Compromise Act of 1820, but to hold that, whatever the negro's status had been while residing in free territory, his present status was determined by the laws of Missouri; and since those laws held him a slave he could not sue in a federal court. Mr. Justice Nelson was designated to write the Court's opinion. Thus, again, the Court would avoid expressing itself squarely on the slavery issue. It was learned, however, that Justices McLean and Curtis were writing vigorous dissenting opinions in which they were discussing and upholding the Missouri Compromise Act. The majority, "forced up to this point by the two dissentients," apparently believing that a judicial decision on this vital question might settle it forever, determined finally to render an opinion covering the whole question of slavery in the territories. At this point a curious incident occurred. Mr. Justice Grier still felt that the Court should avoid the dangerous constitutional question. Accordingly Mr. Justice Catron wrote to Buchanan, the President-elect, telling him that the Court was going to pass on the validity of the Missouri Compromise Act and asking him to write to Grier urging upon him the necessity of settling the whole controversy by a clean-cut decision. This Buchanan did; and on February 23, 1857, Grier replied in a letter telling at length how the Court was to treat the case, and outlining what "you may safely say in your inaugural."[43] Thus is established, what was long denied,[44] that

[41](1858) 21 How. (U.S.) 506, 16 L. Ed. 169.
[42]Supra, p. 286.
[43]Warren, III, 17, note.
[44]"But however Buchanan got his intelligence, his character and that of Taney are proof that the chief justice did not communicate the import of his decision to the president-elect." Rhodes, History of the United States, II, 269.

the new President had advance knowledge of the Court's decision, although it is equally clear that the character of the decision was in no way influenced by Buchanan's own views or political desires.

The actual decision in the *Dred Scott case* was far less important than what people thought about it and thought about the Court for rendering it. The case settled nothing, not even the rights of Dred Scott, who was freed three months later. But it cost the Court the confidence of the country. Not only had they blundered, but they had needlessly gone out of their way to blunder. As Professor Corwin has put it:

"The Dred Scott decision cannot be, with accuracy, written down as usurpation, but it can and must be written down as a gross abuse of trust by the body which rendered it. The results from that abuse of trust were, moreover, momentous. During neither the Civil War nor the period of reconstruction did the Supreme Court play anything like its due rôle of supervision, with the result that during the one period the military powers of the President underwent undue expansion, and during the other the legislative powers of Congress. The Court itself was conscious of its weakness, yet notwithstanding its prudent disposition to remain in the background, at no time since Jefferson's first administration has its independence been in greater jeopardy than in the decade between 1860 and 1870. Slow and laborious was its task of recuperating its shattered reputation."[45]

After the *Dred Scott case* the Republicans and Free-soilers were in no mood to view with complacence the patently sound decision of the Court in *Ableman v. Booth.*[46] The supreme court of Wisconsin invalidated the Fugitive Slave Law and sustained the right of the state to release violators of that law from the custody of the federal authorities.[47] Abolitionists could think only in terms of abolition. Consistency was thrown to the winds. As war broke upon the scene we find the state of Wisconsin belligerently hurling forth from her courts and legislature the same doctrines of nullification which had brought such wide-spread rebuke upon the head of South Carolina in 1833; while Chief Justice Taney, popularly regarded as the arch-apostle of the states rights philosophy, was thundering back in terms of a nationalism which Marshall himself never exceeded.

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[45]"The Dred Scott Decision in the Light of Contemporary Legal Doctrine," 17 Amer. Hist. Rev. 52. Mr. Warren comments upon "the gross and willful perversion of a sentence in the Chief Justice's opinion" to the effect that "the negro has no right which the white man is bound to respect." This was not Taney's own view, but his description of the view generally prevalent during the eighteenth century. Warren, III, 25.

[46]Supra, p. 287.

[47]In re Booth, (1854) 3 Wis. 1.

D. *The War and Reconstruction.* Six weeks after the outbreak of hostilities in 1861, Chief Justice Taney, sitting in the circuit court, locked horns with President Lincoln in the famous *Merryman case*[48] over the right of the court to release on habeas corpus a prisoner in custody of the military authorities. The President ignored the court's action entirely, and Taney died three years later firmly believing, as Marshall had believed at his death nearly thirty years before, that the independent position of the judiciary was gone forever.[49] Other cases of interest rose during the war, but they are overshadowed in importance by the judicial history of Reconstruction. It may be noted that in 1863 the size of the Court was increased to ten. President Lincoln appointed five justices during his tenure of office and was able thus to reconstruct the Court.[50]

The decision in the case of *Ex parte Milligan,*[51] in 1866, marked the opening of a long battle between Congress and the Court in respect to Reconstruction, The Court unanimously vindicated Taney's position in the *Merryman case,* by holding that the president had no power to institute military trials in time of war in localities where the civil courts were open. A majority of the Court went on to say that Congress itself had no authority to establish military tribunals under such circumstances, an opinion from which four justices vigorously dissented.[52] This decision came too late to embarrass the conduct of the war, but it came just in time to serve notice upon Congress that its plans for Reconstruction through the establishment of military government in the South were in grave danger.[53] The reaction in Congress was

[48]Ex parte Merryman, (1861) Taney (U.S.C.C.) 246, Fed. Cas. No. 9, 487.

[49]Marshall's extreme pessimism during his last years is clearly brought out by Beveridge, op. cit. IV, Chap. X. Mr. Warren calls attention to two other cases in which the courts defied the military authorities. "Judge Treat of the United States district court in St. Louis issued a writ of habeas corpus in the case of Capt. Emmet Macdonald, who had been arrested and imprisoned by General Harvey, on charges of treason, and after lengthy arguments an order for Macdonald's discharge was issued and finally complied with by the Army." Warren, III, 91, note. See also In re Kemp, (1863) 16 Wis. 382, supporting Taney's views in the Merryman case and holding the president without power to suspend the writ of habeas corpus. Warren, III, 95, note.

[50]Lincoln's appointees, however, did not constitute a majority during Lincoln's own life.

[51](1866) 4 Wall. (U.S.) 2, 18 L. Ed. 281.

[52]The majority consisted of Justices Field, Davis, Nelson, Grier and Clifford. Justices Miller, Swayne. Wayne, and Chief Justice Chase dissented on the question of congressional power.

[53]The justices had aroused the ire of the radical Republicans by refusing to sit in the circuit courts in the Southern states as long as they were governed by military authority. Chase's refusal to hold court in Virginia

prompt and furious; and the ruffled feelings of the Republican majority were by no means soothed by the two decisions rendered eight months later, *Cummings v. Missouri* and *Ex Parte Garland*,[54] holding the state and federal test oath provisions to be bills of attainder and ex post facto laws. Congressional attacks on the Court now appeared in all the various forms which the enemies of Marshall had devised forty years before.[55] The Court wisely avoided trouble by holding in *Mississippi v. Johnson* and in *Georgia v. Stanton*[56] that they could not enjoin the president or his secretary of war from enforcing the Reconstruction Acts. But when shortly thereafter it was clear that the constitutionality of those acts was to come before the Court in *McCardle's Case*,[57] the Republicans in Congress, in spite of Democratic taunts that they were afraid to trust the decision of a court of which President Lincoln's five appointees now constituted a majority,[58] passed an act taking away the Court's appellate jurisdiction in habeas corpus cases, even in cases pending, and thus snatched the constitutional issue from the very grasp of the Court.[59] That tribunal has never been subjected to more humiliating treatment than that which it received at the hands of the Republican leaders in the late sixties.

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prevented the trial of Jefferson Davis for treason. Chase's theory seems to have been that Davis should be tried before a military tribunal; but he was obviously reluctant to sit in the case under any circumstances. Warren, III, 143. See also Salmon P. Chase, by Hart (Amer. Statesmen Series) 352-353.

[54](1867) 4 Wall. (U.S.) 277, 18 L. Ed. 366, and (1867) 4 Wall. (U.S.) 333, 18 Ed. 356.

[55]Warren, III, 168-176.

[56](1867) 4 Wall. (U.S.) 475, 18 L. Ed. 437, and (1867) 6 Wall. (U.S.) 50, 18 L. Ed. 721.

[57]Ex parte McCardle, (1868) 7 Wall. (U.S.) 506, 19 L. Ed. 264. The act of Feb. 5, 1867 provided for appeals from federal circuit courts to the Supreme Court in habeas corpus cases, in "all cases where any person may be restrained of his or her liberty, in violation of the constitution or of any treaty or law of the United States." The law had been enacted to aid in the enforcement of the Reconstruction Acts; it was seized upon in McCardle's case to contest the validity of those acts. Warren, III, 187.

[58]The death of Justices Catron and Wayne had reduced the membership of the Court to eight. The size of the Court had been fixed at seven by act of July 23, 1866 in order to prevent President Johnson from filling any vacancies thereon. Warren, III, 145.

[59]In the case of Ex parte Yerger, (1869) 8 Wall. (U.S.) 85, 19 L. Ed. 332, the Court held that it still had appellate jurisdiction in a habeas corpus proceeding under the provision of the federal Judiciary Act of 1789, and it looked as though the issue of the validity of the Reconstruction Acts would be passed upon. A bill was introduced in the Senate to deprive the Court of all appellate jurisdiction in cases arising from the Reconstruction Acts and another bill would have denied the Court the power to invalidate any act of Congress. The Yerger case was compromised and these bills never came to a vote. Warren, III, 213-219.

The Court's handling of the *Legal Tender Cases,* which now came on for argument, did not tend to strengthen its position in the public mind. In 1863 the question of the validity of the Legal Tender Acts had come before the Court in the case of *Roosevelt v. Meyer;*[60] but that case had been dismissed for want of jurisdiction. Had the question been decided at that time the acts would almost certainly have been held void by so large a majority of the Court that no attempt would have been made to have the question reopened. The issue arose again in *Hepburn v. Griswold,*[61] which was argued in 1867 and again in 1868. There were but eight judges on the bench at the time and the fear of an even division caused some delay in announcing the decision.[62] The Court finally lined up five to three against the validity of the statute; but the resignation of Mr. Justice Grier, who had been one of the majority, took place before the decision was made public, so the case was finally disposed of by a four-to-three division of the judges. On the day on which the *Hepburn Case* was decided President Grant nominated Bradley and Strong to vacancies on the Court;[63] and immediately a movement was set on foot to have the legal tender issue reopened for argument in cases still pending. By the aid of the two new justices a rehearing was forced over the protest of four justices; and in April, 1871, the Court by a five-to-four division, Bradley and Strong voting with the majority, reversed the decision in *Hepburn v. Griswold* and sustained the validity of the Legal Tender Acts.[64] The charge was made then and has been renewed many times since that President Grant had deliberately "packed" the Court by the appointment of two men whose views on the legal tender issue he had ascertained in advance. Mr. Warren rejects this view and points out that the decision to nominate Bradley and Strong had been reached before the president had any knowledge of how the case of *Hepburn v. Griswold* was to be decided. He feels that the fact that the two

[60](1863) 1 Wall. (U.S.) 512, 17 L. Ed. 500.

[61](1870) 8 Wall. (U.S.) 603, 19 L. Ed. 513.

[62]Mr. Warren calls attention to two unreported cases in 1870 in which statutes were upheld by an evenly divided Court. In the Test Oath Case, Blair v. Thompson Ridgely, the validity of a Missouri statute denying the right to vote to persons not taking an oath that they had not participated in rebellion, was sustained by a four-to-four decision. Another four-to-four decision upheld the constitutionality of an act of Congress "forbidding suits against the United States officers who took or destroyed property in the South as a war measure." Warren, III, 232, and note.

[63]The Court had been increased to nine by the act of April 10, 1869. Warren, III, 223.

[64]Knox v. Lee, (1871) 12 Wall. (U.S.) 457, 20 L. Ed. 287.

judges shared Grant's views on the question proves nothing; for in the existing state of public opinion on the question the president could hardly have found two Republicans of Supreme Court calibre who believed the legal tender legislation to be unconstitutional.[65] Among thoughtful people, however, the Court's blunt reversal of a decision not fifteen months old under the circumstances described was looked upon with grave concern. Whatever may have occurred actually, the whole situation had an ugly look. A most unfortunate precedent had been set. The Court has been criticized more bitterly on other occasions, but it has probably never come nearer deserving criticism than in this case.

In spite of its humiliation in the *McCardle case*,[66] the final victory on the constitutional issue of Reconstruction was to lie with the Court. There can be no doubt as to what the radical Republican group in Congress was trying to do. By the fourteenth and fifteenth amendments and by the various statutes passed for their enforcement the protection of civil rights was to be placed directly in the hands of the federal government. That this would have worked a complete and undesirable revolution in our federal system is certainly true; it seems no less true that such a revolution was what Congress desired. But by one decision after another the whole congressional program was emasculated. The process began in the *Slaughterhouse Cases*[67] in 1875, in which the Court held that the privileges and immunities of citizens of the United States which the fourteenth amendment had forbidden the states to abridge did not comprise civil rights generally but only such rights as owed their existence to the national government. It was practically completed in the *Civil Rights Cases*[68] in 1833, in which Congress was held to possess no power to protect the negro against racial discrimination practiced by individuals. Despite the aston-

[65]There could have been no doubt as to Strong's views as to the constitutionality of the Legal Tender Acts since the Pennsylvania supreme court, of which he was chief justice had upheld their validity in the case of Shellenberger v. Brinton, (1866) 52 Pa. St. 9. In fifteen states the supreme courts had upheld the validity of the Legal Tender Acts; while in two states adverse decisions had been rendered. The cases are cited in 2 Carson, The History of the Supreme Court of the United States, 450, note.

[66]Supra, p. 290.

[67](1873) 16 Wall. (U.S.) 36, 21 L. Ed. 394. As is well known the Court expressed a view as to the scope of the equal protection of the law clause of the fourteenth amendment so narrow that it was later obliged to abandon it. The Slaughter House Cases would probably be decided the other way today upon the basis of due process of law.

[68](109) U. S. 3, 27 L. Ed. 835, 3 S. C. R. 18. Other cases of interest in this connection are discussed in Warren, III, Chap. 34.

ishment and chagrin of the Reconstruction leaders these decisions had the salutary effect of eliminating the negro from national politics, of putting the responsibility for his protection primarily upon the states, and of restoring southern confidence in the Court and the federal government.

E. *Nationalism and the Growth of Judicial Power.* Even before the bitterness engendered by the war had wholly abated, the country had become engrossed as never before in industrial and commercial activity. The issues which came before the Court ceased in the main to have sectional or partisan implications, and came more and more to involve economic and social problems. Only a few of the more conspicuous lines of constitutional development during this later period can be mentioned.

In the first place, there occurred an enormous expansion of federal authority under the commerce clause of the constitution. Prior to 1860 only twenty-five cases involving the construction of this clause had come before the Court; now its docket was crowded with them. Not only did the Court support the extension of congressional authority over many matters only somewhat indirectly connected with the processes of interstate commerce itself, but it relentlessly blocked all efforts upon the part of the states to pass laws which would in any way interfere with or burden that commerce.

In the second place, there occurred under judicial sanction a marked increase in the sphere of the implied powers of Congress. Here may be noted the case of *Juillard v. Greeman,*[69] holding in substance that Congress could issue legal tender notes in time of peace, and suggesting that one basis for that power was the fact that it was enjoyed by other sovereign governments. Moreover, it was by boldly resorting to the doctrine of implication that Congress has been able to build up a genuine police power based on its delegated authority over commerce, taxation, and the post office.[70]

One of the most interesting phases of the Court's work during this period has been its supervision under the clauses of the fourteenth amendment of the social and economic legislation passed under the police power of the states. This supervision began only after a period of judicial uncertainty and experimentation as to what the fourteenth amendment really meant;[71] but now the valid-

[69](1884) 110 U. S. 421, 28 L. Ed. 204, 4 S. C. R. 122.

[70]See the writer's Studies in the Police Power of the National Government 3 MINNESOTA LAW REVIEW, 289, 381, 452 and 4 MINNESOTA LAW REVIEW 247, 402.

[71]The trial and error method by which the Court developed its interpretation of the fourteenth amendment is exceedingly interesting. The

ity of practically every new exercise of the states' police power is tested sooner or later before the Supreme Court as to its possible denial of either due process of law or the equal protection of the law. In one or two cases of this sort the Court has held state statutes void upon grounds so narrow and legalistic in character as to merit criticism;[72] but the outstanding feature of the Court's decisions on the police power has been the broad liberality with which, in contrast to some of our popularly elected state courts, it has recognized that genuine social interests must be paramount over any conflicting interests of the individual. The Court will prevent legislative invasion of private rights which it regards as clearly arbitrary; but it has been willing to shift its definition of the term "arbitrary" to meeting the changing demands of modern social and economic problems.

The Court was not without its critics during this period, but in the year 1895 the attacks upon it became particularly virulent as a result of three decisions rendered that year. In the *Sugar Trust case*[73] the Court held that the corporations which were monopolizing the manufacture of sugar were not thereby engaged in interstate commerce, and hence were beyond the reach of the Sherman Act. This seemed to render the federal anti-trust legislation ineffective, and aroused resentment. In the *Income Tax cases*[74] the Court invalidated the Income Tax Law of 1894 a very popular statute. Hostility to the Court and its decision in this case was extreme. This was accentuated by the fact that in invalidating a statute which most people regarded as desirable the Court had to overrule its earlier decision sustaining the income tax passed during the Civil War, as well as by the further fact that this was a five-to-four decision in which Mr. Justice Shiras joined the majority after having changed his mind.[75] The decision was the target for

various phases of it are sketched in the writer's paper. The Social and Economic Interpretation of the Fourteenth Amendment, 20 Mich. L. Rev. 737.

[72]The most notable instance is the case of Lochner v. New York, (1905) 198 U. S. 45, 49 L. Ed. 937, 25 S. C. R. 539, 3 Ann. Cas. 1133, in which the New York ten-hour law for bakers was held void. See also Coppage v. Kansas, (1915) 236 U. S. 1, 59 L. Ed. 441, 35 S. C. R. 240 invalidating a Kansas statute penalizing the discharge of a workman because of membership in a labor union.

[73]United States v. E. C. Knight Co., (1895) 156 U. S. 1, 39 L. Ed. 325, 15 S. C. R. 249.

[74]Pollock v. Farmers' Loan & Trust Co., (1895) 158 U. S. 601, 39 L. Ed. 1108, 15 S. C. R. 912.

[75]The facts in regard to this are stated by Mr. Warren as follows: "At its first decision, April 8, 1895, the Court held a tax on real estate income unconstitutional, unless levied in the manner required for a direct tax; as to the other income, the Court was evenly divided, Judge Jackson being

partisan attack during the campaign of 1896, and the agitation against it culminated in the adoption of the sixteenth amendment in 1913. The *Debs case*[76] aroused the antagonism of organized labor by sustaining the right of the federal courts to issue injunctions in labor disputes for the protection of federal interests. At no time since 1895 has the Court been as unpopular with as many people as it was at the time of these decisions.

II Summarizing Observations.

A. *The Supreme Court and its Critics.* One of the illuminating facts which Mr. Warren brings out is that the Supreme Court has been the object of attack during almost its entire history. There have been one or two brief periods of respite; but in general it is safe to say that Senator La Follette and his friends in their recent onslaughts are merely preserving one of the Court's oldest traditions and are attempting to surround it with that same atmosphere of hostility in which it feels most at home and in which it has done its best work. There are certain facts about these criticisms and attacks on the Court which are worth noting.

One is impressed at the outset with the cosmopolitan character of the Court's critics. Every party which has ever been prominent in our political history, with the exception of the Whigs, has at some time or other strenuously attacked the Court's authority. That such opposition should be the meat and drink of the Jeffersonian Party as well as of their successors, the Jacksonian Democrats, was perhaps not wholly unnatural in view of the strong federalism of Marshall's Court; but the judicial enforcement of the Embargo Acts of 1807 and 1808 brought even the staunch New England Federalists to an attitude of open defiance of the Court's decisions.[77] On more than one occasion the southern Democrats set at naught the decrees of the Court; but their recalcitrant attitude was equalled and surpassed by the Free-soilers in their resistance to the Fugitive Slave Law decisions; while the Republican Party not only repudiated the Court's authority in the *Dred Scott case*,[78] to say nothing of the *Merryman case*,[79] but

absent owing to illness. A reargument being ordered, a second decision was made May 20, 1895, in which Judge Jackson (three months before his death) participated; but owing to the fact that Judge Shiras changed his mind after the first decision, the Court, by a vote of five to four, held the whole tax invalid." Warren, III, 421-422.

[76] In re Debs, (1895) 158 U. S. 564, 39 L. Ed. 1092, 15 S. C. R. 900.

[77] See Mr. Warren's summary of this situation quoted above, p. 281.

[78] Supra, p. 285, 287.

[79] Supra, p. 289.

was also guilty in *McCardle's Case*[80] of having directly interfered for partisan ends with the normal work of the Court. The Democratic Party loudly protested against the Income Tax decision of 1895;[81] and the Socialist and other radical parties of more recent origin have consistently opposed the exercise by the courts of the power of judicial review.[82]

Nor has opposition to the Supreme Court been confined to any one section of the country. North and South, East and West, have at various times defied its decrees. Not less than ten states[83] have openly denied its authority, in some instances successfully.[84] When the case of *Osborn v. The Bank of the United States*[85] came before the Court for argument in 1824, "seven states were formally in revolt against the national judiciary, and others were hostile;"[86] and as late as 1859 the legislature of Wisconsin adopted resolutions declaring that "this assumption of jurisdiction by the federal judiciary [in the case of *Ableman v. Booth*[87]] is an act of undelegated power, and therefore without authority, void, and of no force."[88]

It is interesting to note, furthermore, the variety of grounds upon which these violent attacks upon judicial authority have rested, and how little attention the critics of the Court have paid to the demands of logical consistency. The Jeffersonians, who came to regard the doctrine of *Marbury v. Madison* as anathema, violently assailed the Court for not invalidating the Alien and Sedition Acts and the act chartering the United States Bank. The Court was bitterly assailed for its decision in *Fletcher v. Peck*,[89] invali-

[80]Supra, p. 290.

[81]Supra, p. 294. See plank in Democratic Platform of 1896.

[82]Planks advocating the abolition of judicial review of acts of Congress are found in the Socialist platforms of 1908, 1912, 1916, and 1920.

[83]Georgia (1793, 1830-1832); Pennylvania (1807-1809); Ohio (1819-1821, 1854-1856); Kentucky (1821-1825); Virginia (1821); South Carolina (1823, 1832); New York (1830); New Hampshire (1842-1845); California (1854); Wisconsin (1854-1859). The resistance in some cases was by the legislature of states and in some cases by the courts. Documents relating to most of these controversies are reprinted in Ames, State Documents on Federal Relations.

[84]This was notably true in the case of the resistance of Georgia to the decisions of the Court in the Cherokee Indian cases in 1830-1832. Warren, II, 193-194, 205, 228-229. The resistance of South Carolina to Mr. Justice Johnson's decision invalidating the state statute prohibiting the entrance of free negroes was continuous over a long period of time. Supra, p. 283.

[85](1824) 9 Wheat. (U.S.) 738, 6 L. Ed. 204.

[86]Beveridge, op. cit. IV, 384.

[87]Supra, p. 287.

[88]Wis. Gen. Laws 1859, 247-8. See also Ames, State Documents on Federal Relations 303.

[89](1810) 6 Cranch (U.S.) 87, 3 L. Ed. 162.

dating, as an impairment of the obligation of contracts, a state law repealing a grant of land; and yet these same critics loudly complained because the Court refused to invalidate the original granting act on the ground that it was passed by fraud and bribery. The northern states, which openly denied the binding authority of the decisions upholding the Fugitive Slave Law, were equally willing to deny the Court's power to invalidate the Missouri Compromise Act of 1820 in the *Dred Scott case;* while the southern states, which in like manner belligerently asserted that no federal court had jurisdiction to invalidate their laws against the importation of free negroes, would have rejoiced to have the Supreme Court invalidate the Personal Liberty Laws passed in ten northern states for the purpose of defeating the enforcement of the Fugitive Slave Law.[90] And so it has gone throughout the Court's entire history. It has been under fire most of the time, but the attacks which have been made on it have not been based upon any common doctrine of opposition to judicial power, carefully thought out and consistently adhered to. They have been rather the sporadic protests of parties, of sections, or of interests upon whose toes the Court has trod in some of its decisions, and whose temporary resentment has blazed into an opposition to judicial authority in general.

Nor have the Court's critics managed to agree upon what ought to be done to avert the alleged abuses of judicial power. It is interesting to compare the variety and character of the constructive proposals which have been made to curb that power. First, it has been urged at various times that the Court should be "packed" with judges known to hold certain approved views. The Jeffersonians seem to have brought about the impeachment of Chase in 1805 with the idea that the procedure could be used as a means of getting rid of the Federalists and filling the Court with Republicans.[91] Many Republicans loudly advocated the "packing" of the Court in order to bring about the reversal of the *Dred Scott case.*[92] For years it was believed that President Grant had resorted to this questionable device in order to secure the reversal of the first

[90]Such laws were passed in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, Michigan, Wisconsin, Iowa, and Ohio. Warren III, 67, note. These laws which refused the assistance of state officials in the enforcement of the Fugitive Slave Law rested on Story's decision in Prigg v. Pennylvania, (1842) 16 Pet. (U.S.) 539, 10 L. Ed. 1060, holding the power of Congress over fugitive slaves to be exclusive.

[91]This is made very clear in Beveridge, op. cit. III, Chap. IV dealing with the impeachment of Chase.

[92]Warren, III, 29-32.

Legal Tender decision;[93] and there is no question but that Congress juggled the size of the Court in 1866 and 1867 in order to prevent President Johnson from filling vacancies on it with men who would oppose its views.[94] A second proposal has been made that the twenty-fifth section of the Federal Judiciary Act should be repealed, thus taking from the Supreme Court the right to pass upon the question of constitutionality of state statutes.[95] Sometimes this proposal has been accompanied by the suggestion that the Senate should be the court of final authority in all cases involving the validity of state laws.[96] In the third place, it has been urged that the power of judicial review be abolished entirely, either leaving Congress and the President the sole judges of their constitutional powers, or making the Senate the court of last resort.[97] A multitude of schemes have been worked out to require either that the Supreme Court must agree unanimously in order to invalidate a state or federal statute, or else that a certain extraordinary majority of the judges should concur in such a decision.[98] Finally, it has occasionally been suggested that the Supreme Court should be made elective for short terms, or appointive for short terms, in order to make it reflect more accurately the public opinion of the day.[99] None of the proposals has ever been enacted into law, and with the exception of the unfortunate lapse in connection with *McCardle's Case*[100] Congress has possessed self-re-

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[93]Supra, p. 291.

[94]See footnote 58, supra.

[95]This proposal was not infrequently made during Marshall's struggles with the various states. Bills to accomplish it were introduced into Congress in 1822 as a protest against the decisions in Cohens v. Virginia, (1821) 6 Wheat. (U.S.) 264, 5 L. Ed. 257, and Green v. Biddle, (1823) 8 Wheat. (U.S.) 1, 5 L. Ed. 547, (first decided in 1821 and reargued); similar bills were introduced in 1831 during the controversy with Georgia respecting the Cherokee lands; the same attempt was made in 1858 during the congressional discussion of the Dred Scott case and the Booth case.

[96]In 1821 Senator Johnson of Kentucky introduced a resolution for a constitutional amendment providing that in all cases in which a state is a party, "and in all controversies in which a state may desire to become a party in consequence of having the constitution or laws of such state questioned, the Senate of the United States shall have appellate jurisdiction." Warren, II, 117.

[97]Supra, p. 296. See the recent proposal of Senator LaFollette and his friends.

[98]This problem is somewhat extensively discussed in an article by the writer, Constitutional Decisions by a Bare Majority of the Court, 19 Mich. L. Rev. 771.

[99]Jefferson favored the appointment of the justices for a six-year term, and suggested that they be eligible for reappointment if approved by both houses of Congress. Warren, II, 116. The Socialist and Farmer-Labor Parties advocate an elective Court.

[100]Supra, p. 290.

straint enough to refrain from interfering with the exercise of the Court's authority.

B. *The Supreme Court and Politics.* The Supreme Court has very frequently had to deal with cases which have had definitely partisan implications. Persons who have been disappointed by its decisions have sometimes cast reflections upon its impartiality and have charged it with allowing the political views of its members to color its administration of justice. In a certain broad sense there was justice in Jefferson's complaint in 1801 that "the Federalists have retired into the judiciary as a stronghold...and from that battery all the works of republicanism are to be beaten down and erased."[101] For as long as the fundamental theories of government continued to form the basis of alignments between political parties it was of course inevitable that the Court should line up on one side or the other on those questions. And certainly Marshall had no compunctions about taking sides.[102]

But apart from this more general aspect of the case, the history of the Court is one long refutation of the charge that its decisions have been rendered for partisan ends or that its judges have been actuated in their judicial work by motives of political gratitude or political ambition. There have been men on the bench who have been politically ambitious, but those ambitions have not colored the performance of their judicial functions. This salutary tradition has developed in the face of the fact that more than one President has made his appointments to the Court in the hope and expectation that his own political views would be reflected in its decisions. Jefferson admittedly did this and urged Madison to do likewise;[103] but the small success he achieved in molding the political complexion of the Court is reflected in his gloomy comment on the occasion of Story's appointment in 1810, that "it will be difficult to find a character of firmness enough to preserve his independence on the same bench with Marshall,"[104]—a comment

[101]Beveridge, op. cit. III, 21.

[102]It is interesting speculation to consider what the constitutional development of the country might have been had Jefferson been able to appoint Spencer Roane, the ardent states' right advocate, to the chief justiceship of the Supreme Court in 1801 as he had hoped to do. No two men held more widely divergent views upon constitutional problems than Marshall and Roane.

[103]Jefferson, for instance, wrote Madison in 1810, "another circumstance of congratulation is the death of Cushing...which gives an opportunity of closing the reformation [the Republican victory of 1800] by a successor of unquestionable republican principles." Beveridge, op. cit. IV, 109.

[104]Beveridge, op. cit. IV, 59.

inspired no doubt by the independent attitude assumed by Mr. Justice Johnson upon Jefferson's embargo policy.[105] It seems likely that Jackson made his six Supreme Court appointments with a careful eye to the political views of the new justices as well as to their fitness; and yet the whole bench decided against him in the matter of the Spanish land claims.[106] Lincoln showed his freedom from narrow partisan bias in appointing Mr. Justice Field, a Democrat, to the Court as well as by giving the chief justiceship to Chase, who very obviously wanted to replace Lincoln as leader of his party. And yet in making the latter appointment Lincoln frankly wrote to a friend that he was influenced by the necessity of having a chief justice "who will sustain what has been done in regard to emancipation and the legal tender."[107] It was Chase, however, who helped invalidate the Legal Tender Acts, which as secretary of the treasury, he had urged Congress to pass;[107a] and it was Mr. Justice Davis, appointed by Lincoln and one of his closest personal friends, who wrote the opinion of the Court in the *Milligan case*.[108] It is needless to multiply examples of this sort of judicial independence. Mr. Warren has analyzed the leading decisions upon which a partisan alignment of judges would have been possible, and finds Republican and Democratic justices indiscriminately joined to make up the majorities and minorities.

"In fact," declares Mr. Warren, "nothing is more striking in the history of the Court than the manner in which the hopes of those who expected a judge to follow the political views of the president who appointed him have been disappointed."[109]

C. *The Personnel of the Court.* The present and former members of the Supreme Court do not constitute a very numerous body of men. Mr. Justice Sanford is the seventy-third justice to take his seat upon the Bench.[110] Twenty-six of these men have

[105]In 1808 Mr. Justice Johnson issued a mandamus compelling the collector of the port of Charlestown to clear a vessel which was being held under the authority of instructions issued by Jefferson for the enforcement of the Embargo Act of 1808. Jefferson's order was held illegal and void. Mr. Warren says: "The episode forms one of the most striking illustrations of judicial independence in American History." Warren, I, 324, et, seq.

[106]Warren, II, 241-245.

[107]Lincoln added to this statement the comment: "We cannot ask a man what he will do, and if we should, and he should answer us, we should despise him for it. Therefore, we must take a man whose opinions are known." Warren, III, 123.

[107a]He had, however, assumed this position very reluctantly.

[108]Supra, p. 289.

[109]Warren, I, 22.

[110]This figure is reached by counting Rutledge but once. He served for two brief periods, first as associate justice, and later as chief justice.

served twenty years or more,[111] and eight have served thirty years or more.[112] After the initial manning of the Court by Washington it has so far fallen to the lot of only three Presidents, Jackson, Lincoln, and Taft, to appoint a majority of the justices,[113] although Presidents Grant, Cleveland, Harrison, and Harding (to date) have each appointed four. The change in the Court's personnel has been greater in recent years than during the period prior to the Civil War, probably due to the fact that the later appointments have gone to much older men.[114]

Various considerations have entered into the selection of Supreme Court justices. There has always been a sectional influence arising out of the fact that prior to 1869 the justices were generally expected to be chosen from the part of the country in which they did their circuit court duty, one justice being assigned to each circuit. Even after they were relieved of duty in the circuit courts the tradition of a sectional distribution of members of the Court has persisted, as is evidenced by some of the recent appointments of President Harding.[115] Such a policy limits the range of choice and may prevent the selection of the men best fitted for the office. It is but natural that personal friendships and political affiliations should have actuated many appointments to the Court. Some men have been selected upon these grounds who were at the time of their elevation to the bench by no means conspicuous for their learning or judicial experience. Furthermore, it must not be forgotten that nominations to the Court must be ratified by the Senate, and the president has on many occasions been obliged to sacrifice his own desires with reference to the

[111]These justices were Cushing, Washington, Marshall, Johnson, Story, Duval, Thompson, McLean, Wayne, Taney, Catron, Nelson, Grier, Clifford, Swayne, Miller, Field, Bradley, Harlan, Gray, Fuller, Brewer, White, McKenna, Holmes, Day.

[112]These are Justices Washington, Marshall, Johnson, Story, McLean, Wayne, Field, Harlan.

[113]Jackson appointed Justices McLean, Baldwin, Wayne, Taney, Barbour and Catron; Lincoln appointed Justices Swayne, Miller, Davis, Field, and Chase; Taft appointed Justices Lurton, Hughes, Van Devanter, Lamar, Pitney and elevated Mr. Justice White to the chief-justiceship.

[114]See the interesting article, The Ages of the Justice by Walton H. Hamilton, The New Republic, Oct. 11, 1922. Mr. Hamilton states that the average age of all the justices appointed during the first forty years of the Court's history was forty-seven. No man over sixty was appointed until 1870. In 1921, just before adjournment the average age of the members of the Court was sixty-nine.

[115]At present the geographical representation on the Court is as follows: Chief Justice Taft (Connecticut), McKenna (California), Holmes (Massachusetts), Van Devanter (Wyoming), McReynolds (Tennessee), Brandeis (Massachusetts), Sutherland (Utah), Butler (Minnesota), Sanford (Tennessee).

choice of a new justice in order to secure senatorial approval. Although in recent years the president's nominations have with few exceptions been ratified without much protest, this has by no means been the rule throughout the history of the Court. There are twenty cases in which men have been formally named as justices and have failed to receive the approval of the Senate,[116] the last instance of such rejection occurring in 1894. And finally the range of choice of members of the Court has been further narrowed, especially in earlier times, by the unwillingness of some of the outstanding leaders of the bar to accept positions upon it. The list of those who have been offered justiceships and have declined them for various reasons includes such names as those of Patrick Henry, John Quincy Adams, Clay, Seargant, Binney.[117]

In view of what has been said of the efforts to use the appointments to the Supreme Court for partisan purposes and in view of the fact that the considerations which have governed those appointments have not infrequently resulted in the selection of men of not much more than average legal ability, how can we account for the fact that the Court has to such an astonishing degree avoided partisanship or political bias and has at the same time been able to bring to the solution of our great constitutional problems a broad-minded statesmanship of the highest order? The answer is not to be found alone in the genius of the great leaders like Marshall or Story, nor in the lofty traditions which the Court has developed in large measure. The answer is to be found in the

[116]These cases, with the date of nomination and the name of the President making it in parenthesis, are as follows: John Rutledge (1795, Washington), rejected, 10 to 14; Alexander Wolcott (1811, Madison), rejected, 9 to 24; John J. Crittenden, (1828, J. Q. Adams), Senate, 23 to 17, refuses to act; Roger B. Taney (1835, nominated as associate justice by Jackson), indefinite postponement by vote of 24 to 21; John C. Spencer (1844, Tyler), rejected 21 to 26; Reuben H. Walworth, and Edward King (1844, Tyler), nomination laid on table; John M. Read (1845, Tyler), Senate adjourns without action; George W. Woodward (1845, Polk), rejected 20 to 29; Edward A. Bradford (1852, Fillmore), Senate fails to act before adjournment; George E. Badger and William C. Micou (1853, Fillmore), Senate refuses to act; Jeremiah S. Black (1861, Lincoln) rejected 25 to 26; Henry Stanberg (1866, Johnson), Senate votes to reduce size of Court to seven to prevent appointments by Johnson; Ebenezer R. Hoar (1869, Grant), rejected 24 to 33; George H. Williams (1873, nominated chief justice by Grant), nomination withdrawn to avoid rejection; Caleb Cushing (1874, nominated chief justice by Grant), nomination withdrawn to avoid rejection; Stanley Matthews, (1881, Hayes), not acted upon (appointed by Garfield and confirmed in 1881); William B. Hornblower (1893, Cleveland), rejected 24 to 30, through "senatorial courtesy" as a result of the struggle between Cleveland and Senator Hill of New York; Wheeler H. Peckham (1894, Cleveland), rejected 32 to 41 for same reasons as Hornblower.

[117]Appointments were also tendered to Levi Lincoln, Martin Van Buren, Buchanan, and Conkling.

fact that the holding of high judicial office seems to generate in the man who holds it, no matter who or what he is, a sense of responsibility, a desire to dispense justice, and an ambition to contribute to the beneficent development of the law, which places him above partisanship or favoritism and which endows him with a mental energy and ability of which he may not have dreamed himself capable.

D. *Supreme Court Mores.* Attention may be called in closing to the way in which certain customs or traditions have been evolved with respect to the work of the Supreme Court and the activities of its members which have solidified into a sort of customs code of official ethics. In some instances this has come about as the result of popular criticism and the demand of public opinion; in other cases it has been due merely to a recognition upon the part of the Court of what is suitable and proper.

In the first place it looked at the outset as though it might become customary to seek appointments to the Court by direct application. Washington appointed two justices in response to their own requests,[118] and refused a third.[119] Fortunately, this undignified procedure was soon abandoned and it is safe to say that at present a man desirous of securing a seat on the Supreme Court could do nothing more calculated to injure his prospects than to make any efforts in his own behalf.

In the second place we recognize at present an unwritten law forbidding a justice of the Supreme Court from engaging in political activity of any sort, to say nothing of holding political office. Even the decorous and punctilious behavior of Mr. Hughes at the time of his nomination to the presidency in 1916 did not fail to elicit charges that he had violated the proprieties by allowing his name to be considered while still on the Bench.[120] And yet during the early period no such tradition seemed to exist. Both Jay and Marshall for brief periods held at the same time the offices of secretary of state and the chief justiceship of the United States;[121] and Jay, as we have seen, served also as one of the

[118]James Wilson and John Rutledge. Rutledge offered himself to Washington to succeed Jay as chief justice in 1795. Warren, I, 33, 127.

[119]Thomas McKean, chief justice of Pennsylvania, asked for an appointment in 1789. Warren, I, 40-41.

[120]Cf. the statement by Chief Justice Waite in 1875 refusing to allow his name to be considered as a possible presidential candidate. Warren, III, 285-286.

[121]Jay had been secretary for foreign affairs under the Confederation, and continued to act in that capacity until Jefferson's return from France in the spring of 1790. Washington offered Jay his choice of offices under

trustees of the national sinking fund.[122] Both Jay and Ellsworth while on the Bench were sent on diplomatic missions to foreign countries.[123] Both Jay and Cushing ran for the governorships of their respective states without resigning their judicial positions.[124] Both Bushrod Washington and Chase electioneered vigorously in the presidential campaign of 1800.[125] Mr. Justice McLean was either actively or passively a candidate for the presidency in practically every campaign after his appointment by Jackson in 1829, and openly denied that such a course was in any sense improper.[126] Mr. Justice Davis, without resigning from the Court, accepted the presidential nomination of the Labor Reform Party in 1872; and when elected to the United States Senate in January, 1877, continued on the Bench until March 4, of that year.[127] But increasing resentment has been called forth by each successive instance of such political activity on the part of Supreme Court justices.

Nor did the members of the Court in the earlier period observe the salutary custom of refraining from unofficial expressions on public questions. The abuses which arose out of the early charges to grand juries in the circuit courts are matters of common knowledge.[128] In 1808 Mr. Justice Johnson issued to the press a long reply to those who had criticized his decision in the case of *Ex parte Gilchrist*.[129] Marshall was so aroused by the bitter attacks upon the Court for its decision in *McCulloch v. Maryland* that he published under the nom de guerre "A Friend of the Union" a series of articles defending his position.[130] On several occasions Mr. Justice McLean expressed himself publicly upon the slavery issue, and was particularly criticized for giving his views on the power of Congress over slavery in the territories in 1848, at a time

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the new government and Jay chose the chief justiceship. Pellew, John Jay (Amer. Statesmen's Series) 235-236. Marshall held both offices during the last four weeks of Adams' administration. Beveridge, op. cit. II, 558.

[122]Supra, p. 277.

[123]Jay was sent to England in 1794 to negotiate the treaty which bears his name. Ellsworth had been appointed envoy to France in 1799 and never resumed his duties on the Court. For contemporary criticism of the dual appointments, see Warren, I, 167.

[124]Warren, I, 76, 275.

[125]Bushrod Washington had electioneered for Charles C. Pinkney. Warren, I, 275. Chase had worked for Adams. Warren, I, 156.

[126]Warren, II, 543-544, and note.

[127]Warren, III, 287, and note.

[128]For accounts of this interesting practice see Warren, I, 59, 60-61, 165-167.

[129]Supra, note 105. Johnson's reply is commented on, Warren, I, 334.

[130]Beveridge, op. cit. IV, 318-323.

when it was generally understood that that question would ultimately come before the Court for decision.[131]

Finally, the Court now exercises every precaution to prevent the escape of any advance information as to its decisions. A "leak" as to a Supreme Court decision would be regarded as a most unfortunate and reprehensible occurrence. But Story seems to have discussed the outcome of pending cases rather freely in his private correspondence; and other justices of his time and even of later times did the same.[132] The correspondence between Buchanan and Justices Catron and Grier with respect to the *Dred Scott case* probably did not constitute any very serious deviation from what the traditions of the Court at that time would have sanctioned.[133] Chief Justice Chase told Boutwell, Grant's secretary of the treasury, two weeks in advance, how the case of *Hepburn v. Griswold* was to be decided.[134] Since that time, however, there seems to be no conspicuous instance of a breach of the rule of strict secrecy respecting pending decisions.

These customs and traditions are perhaps not intrinsically of vital importance. An occasional breach of one or more of them would probably not interfere with the impartial administration of justice. They do, however, help the Court to keep itself above suspicion. They protect its reputation in the eyes of the country. And therein lies their value and their importance; for, all things considered, the measure of confidence which people have in the disinterestedness and integrity of the Supreme Court, is hardly of less moment than the actual impartiality and efficiency with which it does its work.

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[131]Warren, II, 544-546.

[132]One is impressed by the freedom with which Story expressed himself on any and every question which interested him, a freedom which would now be regarded as indiscreet and improper. "Life and Letters of Joseph Story" by William Story, *passim*.

[133]Supra, p. 287.

[134]Warren, III, 239, note.

MUNICIPAL HOME RULE IN MINNESOTA†

By WILLIAM ANDERSON*

I. The Problem of Home Rule

The constitutional amendment authorizing cities to adopt and to amend their own charters followed hard upon the heels of the sweeping denial to the legislature of the power to enact special legislation.[1] In the circumstances, the one was the logical outcome of the other. The legislature of 1893, chosen in 1892 at the very election in which the voters ratified the present section of the constitution forbidding special laws, had not had time to forget the popular mandate. With all good intentions of observing the constitution, its members resisted practically all efforts of special groups to have their wishes enacted into laws. The flow of special laws was suddenly stopped. It was not until several sessions later that the legislators began to learn how they could, by shrewd classification, make laws which seemed to be general but were actually special. From the point of view of relieving the legislature, the result of the prohibition of special legislation was, at the outset, almost wholly beneficial. On the other hand, counties, cities, villages, and school districts, the principal recipients of

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†This article, although complete in itself, is intended as the third in a series, the first two under the title "Special Legislation in Minnesota," being printed in the January, 1923, and February, 1923, issues of the Minnesota Law Review, Vol. 7, pp. 133-151, 187-207. [Ed.]

Special Legislation.—A Correction. In the first part of my article on "Special legislation in Minnesota" occur several errors which should be corrected. Judge Daniel Fish of the Hennepin County Bar alone conducted the case for the courthouse commissioners in State ex rel. Board of Court House and City Hall Commissioners v. Cooley, (1894) 56 Minn. 540,58 N.W. 150. My reference to counsel in the plural was inexcusable. In the published opinion the court states that when the case was first argued both parties admitted that the act in question was special, and very clearly implies that on reargument it was represented to the court as being general in fact. I am glad to say, however, that the printed briefs show no such radical shifting of ground on the part of counsel. In both his first and second briefs Judge Fish asserted that the act in question was of sheer necessity "plumply and unevasively" special. I regret to have been misled into giving a renewed currency to the court's misinterpretation of the argument. *Author.*

[1]Anderson and Lobb, A Hist. of Const. of Minn., 169-171, 220-223; Anderson, City Charter Making in Minn., 13-19; State ex rel. Getchell v. O'Connor, (1900) 81 Minn. 79, 83 N.W. 498.

special legislation in the past, were fairly amazed at the results. They found that section 33 had forbidden too much. The highly complicated special charters under which many cities and even villages had been operating were full of restrictive provisions which the legislature had formerly been able to amend from time to time as need arose. With the change in the constitution, no alteration of these charters could be made except by general laws. This was equivalent to saying that in many cases there could be no changes at all, since it was well-nigh impossible to devise general laws which would fit particular circumstances. The impasse which resulted, particularly for cities and villages, could be broken in either one of two ways. Either the power to amend charters by special law would have to be restored to the legislature, or else it would have to be lodged in some other place. A return to the old evils of special legislation was not seriously considered. Neither the legislators nor the voters desired it. The solution adopted was one which, first devised in Missouri in 1875, had spread before 1895 to California and Washington, and has now in various forms become a part of the constitution of a dozen states.[2] The Minnesota legislature of 1895 proposed that cities and villages be permitted, by an appropriate constitutional amendment, to make and amend their own charters as cities, under certain limitations. This proposal was adopted by the voters in 1896 as section 36 of article 4 of the constitution. It was modified in some respects by a new amendment in 1897-98.[3] No cities provided themselves with charters under the 1896 provision, but since 1898 sixty-five cities have adopted so-called "home rule" charters.[4]

The constitutional provision under discussion nowhere uses the term "home rule." It is the power to adopt and amend charters which is granted. "Any city or village in this state may frame a charter for its own government as a city consistent with and subject to the laws of this state." Then follows a brief description of the procedure of charter commissions in drafting and submitting charters. Upon adoption by the requisite majority of the voters, such charter "shall...become the charter of such city or village as a city, and supersede any existing charter and

[2]Missouri, California, Washington, Minnesota, Colorado, Oklahoma, Arizona, Oregon, Michigan, Ohio, Nebraska, and Texas. See McBain, The Law and the Practice of Municipal Home Rule, New York, 1916, the outstanding treatise on the subject.

[3]Anderson and Lobb, A Hist. of Const. of Minn., 221-223, gives both provisions.

[4]Anderson, City Charter Making in Minn., 17-20, 178.

amendments thereof." A home-made charter may also be amended locally, "but such charter shall always be in harmony with and subject to the constitution and laws of the state of Minnesota." It is the general rule, previously stated in these articles, that a state legislature has all the legislative power of the state, except as it is restricted by the federal and state constitutions.[5] The legislative power includes the power of charter-making for cities and villages. In other words, a charter is itself legislation.[6] Hence it follows that a constitutional grant of powers to cities to make and amend their own charters is a limited grant to them of legislative power. Differently stated, it is a transfer of a definite part of the legislative power of the state away from the legislature to the municipalities themselves. A constitutional provision authorizing municipal home rule involves a fundamental change in the constitutional law of the state, since, for charter making purposes, it raises up a whole series of separate legislative authorities within the state's domain.

Numerous and closely interwoven as are the constitutional questions which arise in this connection, they fall more or less definitely under three important heads. First, shall the grant of power to cities to make their own charters be construed strictly against the grantees, as are the charters of corporations, or shall it be construed as having considerable elasticity, as in the case of the grant of legislative power to congress in the federal constitution? Second, what relationship exists between the reserve legislative powers of the state legislature and the powers conferred upon cities to make their own charters? Third, how shall the home rule provision of the constitution be construed in relation to other sections of the constitution which touch upon related matters? Is it superior to such provisions, or subject to them? It is hardly necessary to say that in such a new field as this, there are few general principles to guide us. We have little but the intent of the framers, and the exact words of the amendment, to show us the way.

II. Scope of a Home Rule Charter

A charter is defined as "an act of a legislative body creating a municipal or other corporation and defining its powers and privi-

[5]Supra, p. 144-145, footnote 33.

[6]State ex rel. Luly v. Simons, (1884) 32 Minn. 540, 21 N.W. 750; State ex rel. Freeman v. Zimmerman, (1902) 86 Minn. 353, 90 N.W. 783; Grant v. Berrisford, (1904) 94 Minn. 45, 101 N.W. 940, 1113; Park v. City of Duluth, (1916) 134 Minn. 296, 159 N.W. 627.

leges."[7] It is "a written document constituting the persons residing within a fixed boundary, and their successors, a body corporate and politic for and within such boundary, and prescribing the powers, privileges, and duties of the corporation."[8] In 1895, when municipal home rule was being proposed in Minnesota, the supreme court declared that:

"The charter provisions need not be comprised in a single act...Parts of the charter may be found in independent legislative acts, the charter not being named in their titles. If independent acts relate to the rights, powers, duties, and obligations of the city, they are to be regarded as parts of the city charter."[9]

Since a home rule charter, when properly adopted, supersedes "any existing charter and amendments thereof," it follows that the entire mass of legislation here described as constituting the actual charter, would be supplanted by the home made document. If this is the case, it would also seem to follow that the home rule charter may deal with all the subjects formerly dealt with in acts relating to the rights, powers, duties, and obligations of cities.

There is little question that in the days when the legislature made city charters it had an almost unlimited discretion as to the powers which it might confer upon cities by general or special law. Some of the charters which it conferred in early years were short and granted few powers. In later years, as the needs of urban communities multiplied, charters became longer and more comprehensive. Many new municipal functions were given legislative approval. Since the constitution itself does not name the subjects which may be dealt with in home rule charters, the question comes up as to what powers home rule cities may confer upon themselves and upon the local authorities. This question was left, by section 36, to the legislature itself. Before any city could adopt a home rule charter under the amendment, the legislature was to enact an enabling law, which was to "prescribe...the general limits within which such charter shall be framed." In enacting this law in 1899 the legislature saw fit to impose a debt limit on cities, and to provide for a few other restrictions, but with these exceptions it enacted that a home rule charter

"May provide for any scheme of municipal government not inconsistent with the constitution, and may provide for the establishment and administration of all departments of a city govern-

[7]Webster, New International Dictionary.
[8]Cooley, Mun. Corps., 119.
[9]State ex rel. Arosin v. Ehrmantraut, (1895) 63 Minn. 104, 65 N.W. 251.

ment, and for the regulation of all local municipal functions, as fully as the legislature might have done before the adoption of section 33, article 4, of the constitution."[10]

This exceedingly liberal provision, the substance of which has not been changed in over twenty years, besides clearly evincing the intent of the legislature, has served as a guide-post for the courts in numerous adjudications.

In the leading case of *State ex rel. Getchell v. O'Connor*,[11] the supreme court had to consider whether the St. Paul charter of 1900 was valid, in view of the allegations that the enabling act under which it had been adopted was too brief and liberal and "insufficient to sustain a charter, because it does not include a general framework delegating powers within the limits of which the charter should be framed." The contention was that under section 36 the legislature is required "to prescribe general and uniform limits or a broad framework on each topic to which the charter may relate, prescribing in detail the powers and authority within which the charter must be framed." The court refused to concur in this view.

"To adopt it would wholly nullify the purposes intended to be subserved and secured by the constitution. A 'broad framework for each topic' pertaining to a city charter would in itself be a charter, and render the act of the city in framing one nothing more than adopting therefor the legislative grant of power, and, instead of exercising the right to 'frame their own charter,' cities would be confined to what the legislature saw fit to grant them, and nothing more. The general power and authority to frame city charters is granted by the constitutional amendment, and ex necessitate extends to all powers properly belonging to the government of municipalities,..."[12]

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[10]Minn., Laws 1899, ch. 351; Minn., Laws, 1921, ch. 343.

[11](1900) 81 Minn. 79, 83 N.W. 498.

[12]But suppose the legislature had enacted a complete and elaborate municipal code and had required every home rule city to adopt it as a part of its charter. McBain asserts that it would have been impossible for the court to have dissected such a statute and to have held some parts invalid. In other words he considers the Minnesota grant of municipal home rule "a mere form of words, of no practical value." McBain, The Law and the Practice of Municipal Home Rule, 466-467, 484-485. It is certainly an unusual rule of constitutional construction which flouts the entire purpose of a grant of powers, and subordinates all the substance of such a grant to the subsidiary provision reserving certain power to the legislature. In endeavoring to stress the important reserve powers of the legislature, this writer has simply gone to the other extreme of denying that there is in Minnesota any real power of municipal home rule. An act fully defining the powers and organization of home rule cities, and requiring all home rule cities to adopt it as their charter without additions or subtractions, and forbidding them to amend it, would certainly violate the constitution.

And in a later case the court said:

"The people of a city in adopting a charter have not power to legislate upon all subjects, but as to matters of municipal concern they have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld."[13]

Indeed home rule charters "have all the force and effect of legislative enactments,"[14] and "the rule which requires a statute to be so construed as not to infringe constitutional inhibitions, if reasonably susceptible of such construction, is equally applicable to such charters."[15]

What are, then, some of the subjects which may be regulated in home rule charters? A summary of the cases will not supply us with any positive rule or test for determining these subjects, but it will at least provide us with pertinent illustrations as to the types of powers and functions which the court considers it proper for cities to exercise or perform. (1) A number of cases have dealt with the municipal *police power*. Thus it has been held that a department of health "very properly belongs and is incident to the government of municipalities;" that such a department may be provided for in a home rule charter; and that it may be authorized to require vaccination as a condition precedent to the admission of children to schools.[16] In 1911 a fourth class city was held within its rights in regulating the liquor traffic in a manner slightly different from that provided for in the general law,[17] and in 1916 Duluth was held to be exercising a proper municipal power conferred upon it by its charter in voting out the saloons without general statutory authority.[18] In two cases involving the St. Paul charter it was apparently not questioned that a home rule city has as much police power over woodyards within its limits, and as complete authority to establish a building code, as any other city.[19] (2) Another group of cases has dealt with various phases of the power of *taxation*. Home rule cities have been held

[13]Park v. City of Duluth, (1916) 134 Minn. 296, 159 N.W. 627.

[14]State ex rel. Freeman v. Zimmerman, (1902) 86 Minn. 353, 90 N. W. 783.

[15]State ex rel. Oliver Iron Mining Co. v. City of Ely, (1915) 129 Minn. 40, 151 N.W. 545.

[16]State ex rel. Freeman v. Zimmerman, (1902) 86 Minn. 353, 90 N.W. 783.

[17]Thune v. Hetland, (1911) 114 Minn. 395, 131 N.W. 372.

[18]State ex rel. Zien v. City of Duluth, (1916) 134 Minn. 355, 159 N.W. 792.

[19]City of St. Paul v. Schleh, (1907) 101 Minn. 425, 112 N.W. 532; State ex rel. Granville v. Nash, (1916) 134 Minn. 73, 158 N.W. 730.

to be fully within their rights in providing for local improvements by special assessments,[20] in levying such assessments without a preliminary petition of the property owners affected,[21] in distributing the burden of such assessments according to the frontage rule,[22] and also in dividing the city into sewer districts and levying special taxes therein for relief sewers.[23] The Duluth charter having provided for a wheelage tax not authorized by general state law, the supreme court not only declared it to be valid but broadly intimated that it was competent for a home rule city to provide in its charter for its own system of local taxation.[24] (3) The St. Paul charter provision authorizing the city to exercise the power of *eminent domain* having been attacked, the court ruled in an appropriate proceeding that this power "is essential and necessary to the very life and well-being of city government, for upon it its welfare and progress beyond question depend."[25] (4). A home rule charter may regulate the subject of the *presentation of claims* against the city,[26] (5) it may require, and determine the conditions of, *bonds* to be given by municipal contractors for the benefit of laborers and materialmen,[27] and (6) it may even *limit* its own common law *liability for torts* arising out of the negligent maintenance of streets and sidewalks, by requiring that the city shall have had ten days written notice of the existence of the defect *before the injury was sustained* as a condition precedent to recovery of damages.[28] In the latter case the court said there could be "no serious question" as to the right to insert such a provision in a home rule charter. (7) The home rule charter may also regulate the conduct of *local elections,* even the election

[20]State ex rel. Ryan v. District Court of Ramsey County, (1902) 87 Minn. 146, 91 N.W. 300; Wolfe v. City of Moorhead (1906) 98 Minn. 113, 107 N.W. 728; State ex rel. Oliver Iron Mining Co. v. City of Ely, (1915) 129 Minn. 40, 151 N.W. 545.

[21]Wolfe v. City of Moorhead, (1906) 98 Minn. 113, 107 N.W. 728.

[22]State ex rel. Oliver Iron Mining Co. v. City of Ely, (1915) 129 Minn. 40, 151 N.W. 545.

[23]In re Delinquent Taxes in Polk County, (1920) 147 Minn. 344, 180 N.W. 240.

[24]Park v. City of Duluth, (1916) 134 Minn. 296, 159 N.W. 627.

[25]State ex rel. Ryan v. District Court of Ramsey Co., (1902) 87 Minn. 146, 91 N.W. 300.

[26]State ex rel. Barber Asphalt Paving Co. v. District Court of St. Louis Co., (1903) 90 Minn. 457, 97 N.W. 132; Peterson v. City of Red Wing, (1907) 101 Minn. 62, 111 N.W. 840.

[27]Grant v. Berrisford, (1904) 94 Minn. 45, 101 N.W. 940; Standard Salt & Cement Co. v. National Surety Co., (1916) 134 Minn. 120, 158 N.W. 802.

[28]Schigley v. City of Waseca, (1908) 106 Minn. 94, 118 N.W. 259.

of municipal judges,[29] and (8) it may impose duties upon local courts and officials to any extent needed for its purposes.[30] Finally, a home rule city may not only confer upon itself the power to regulate the service and rates of local *public utilities*,[31] but may also empower itself, without statutory authority, to own and operate a coal and wood yard, and to buy and sell fuel.[32]

Upon reading these cases, all of which have sustained the powers of the cities, one gets the impression that the supreme court has been no less liberal than the legislature toward the principle of local self-government. Within the field of true municipal functions, which is a rapidly growing domain, cities are given substantially the same power to confer authority upon themselves by home rule charters as the legislature formerly exercised. The fact that the cities charter themselves instead of receiving their powers directly from the legislature is a distinction without a real difference.[33] It remains, then, to examine a small number of cases in which certain powers have been denied to cities under home rule charters.

III. Non-Municipal Functions

Establishment of Municipal Courts. We called attention in a previous article to the decisions which have exempted acts relating to municipal courts from the prohibition against special legislation.[34] The principal ground for this conclusion is that municipal courts are not municipal affairs. Other decisions have held that acts relative to such courts are not a part of the city's charter.[35] Adhering closely to this line of reasoning the supreme court ruled in 1910 that the attempt of the city of Virginia to set up a municipal court under its home rule charter, to take the place of one already established by state law, was entirely void.

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[29]Farrell v. Hicken, (1914) 125 Minn. 407, 147 N.W. 815; McEwen v. Prince, (1914) 125 Minn. 417, 147 N.W. 275; Brown v. Smallwood, (1915) 130 Minn. 492, 153 N.W. 953.

[30]State ex rel. Ryan v. District Court of Ramsey Co., (1902) 87 Minn. 146, 91 N.W. 300; State ex rel. Barber Asphalt Paving Co. v. District Court of St. Louis Co., (1903) 90 Minn. 457, 97 N.W. 132; Minn., Laws 1921, ch. 343.

[31]City of St. Paul v. Robinson, (1915) 129 Minn. 383, 152 N.W. 777; St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., (1915) 130 Minn. 71, 153 N.W. 262.

[32]Central Lumber Co. v. City of Waseca (Minn. 1922) 188 N.W. 275.

[33]State ex rel. Ryan v. District Court of Ramsey Co., (1902) 87 Minn. 146, 91 N.W. 300.

[34]Supra, p. 144-148.

[35]State ex rel. Shissler v. Porter, (1893) 53 Minn. 279, 55 N.W. 134; Gordon v. Freeman, (1910) 112 Minn. 482, 128 N.W. 834, 1118.

"The constitution required that all courts not specified shall be established by the legislature by a two-thirds vote. A vote of the electors of a city on the adoption of a charter is not the establishment of a court, as required by the constitution. A vote of the legislature with reference to other municipal affairs may be by a mere majority....The powers and duties of the courts provided for are purely and exclusively judicial. They have neither administrative nor legislative powers in the affairs of the municipality."

The words here quoted imply that such courts may be municipal affairs in a certain sense, yet they may not be established or disestablished by home rule charters.

The decision is so explicit that it is perhaps useless to present the considerations on the other side. Many of them have been given in an earlier article already referred to. It must be admitted that the decisions in other home rule states are similar to those in Minnesota, although the municipal home rule provisions in California and Colorado expressly confer upon cities certain powers with respect to municipal courts.[36] One may perhaps be forgiven for remarking that it is strange that the judicial function, which was so important in the early history of municipal incorporation in England, should be so rapidly passing out of the range of municipal functions in America. Fortunately this does not yet mean in Minnesota that home rule cities may not impose duties upon their local courts, nor that they may not regulate them in some important ways.[37]

Established Equitable Doctrines. In the case of *Laird Norton Yards v. City of Rochester,*[38] there was called in question a section of the city's home rule charter which provided that:

"Any contract made in violation of the provisions of [this] chapter shall be absolutely void, and any money paid out on account of such contract by the city, or any department or officer thereof, may be recovered by the city without restitution of the property or the benefit received or obtained by the city thereunder."

A contract for the sale of coal to the city having been adjudged void as in violation of the charter, the lower court denied the

[36]People v. Toal, (1890) 85 Cal. 333, 24 Pac. 603; Miner v. Justices' Court, (1898) 121 Cal. 264, 53 Pac. 795; In re Cloherty, (1891) 2 Wash. 137, 27 Pac. 1064; McBain, The Law and the Practice of Municipal Home Rule 654, 671. But see Ex Parte Kiburg, (1881) 10 Mo. App. 442.

[37]Schigley v. City of Waseca, (1908) 106 Minn. 94, 118 N.W. 259; Farrell v. Hicken, (1914) 125 Minn. 407, 147 N.W. 815; McEwen v. Prince, (1914) 125 Minn. 417, 147 N.W. 275; Brown v. Smallwood, (1915) 130 Minn. 492, 153 N.W. 953.

[38](1912) 117 Minn. 114, 134 N.W. 644.

right of the company to recover, but the supreme court reversed the decision, holding that since "the complaint alleged both an express and an implied contract," plaintiff not being required to elect, "the learned trial court was not warranted in holding that the case presented only the issue of the validity of an express contract." It said:

"Much stress is laid on section 287 of the charter above quoted. Any city may frame a charter; but it must be in harmony with and subject to the constitution and laws of the state. We conceive this to mean, not only the statute law, but the common law...as well.[39] It cannot be that under the provisions of home [rule] charters municipal corporations may abrogate the common-law rule of estoppel, or other settled equitable doctrines, in the conduct of quasi municipal enterprises into which they may embark. The section mentioned, in so far as it gives the municipality the right to recover money paid on a void contract, while permitted to retain the benefits received thereunder, must be confined to contracts ultra vires in the primary sense. And as to contracts which the city or the utility board have power to make, but in the attempted making unintentional irregularities and noncompliance with the charter provisions have occurred, this section prevents a recovery thereon, or the enforcement thereof in court, and gives any taxpayer the right to enjoin its performance. It cannot, as to last-mentioned attempted contracts, abrogate established equitable doctrines, which in certain cases permit a recovery of the reasonable value of goods delivered in good faith thereunder to the municipality, and by it used for authorized and legitimate purposes."

The decision in this case could easily have gone the same way upon a mere construction of the charter, not unduly strained. The charter did not, in fact, expressly prohibit a recovery of the value of goods delivered to the city; the stress was upon the nullity of the contract as such and the denial of the right to sue thereon. But instead of merely saying that this home rule charter did not abrogate any established equitable doctrine, the court said that a home rule charter may not do this, which is a different matter. There is little reason to doubt that the legislature in enacting municipal charters before 1892 might have inserted just such limitations. There is no denying the fact that the rules under which contracts may be made with the city constitute a municipal affair.[40] Hence, if a home rule charter is legislation,

[39]Compare Walter v. Greenwood, (1882) 29 Minn. 87, 89, 12 N.W. 145.

[40]Grant v. Berrisford, (1904) 94 Minn. 45, 101 N.W. 940; Standard Salt & Cement Co. v. National Surety Co., (1916) 134 Minn. 120, 158 N.W. 802.

as has been so frequently asserted, it follows that the home rule charter may cover the same ground, and as fully as the legislature might have done so in the past.

We find an interesting contrast to this decision in the case of *Schigley v. City of Waseca,* noted above.[41] In Minnesota the person injured as the result of defects in streets or sidewalks must establish the negligence of the city; no recovery of damages will be permitted without such proof.[42] At the same time, however, the law permits the proof of constructive notice.[43] Abrogating this rule as to itself, the city of Waseca in its home rule charter provided that it should not be liable for any such injuries unless it had actual notice in writing of the existence of the defect for at least ten days before the accident occurred. This charter provision was fully sustained, the court saying that there could be "no serious question as to the right to insert in a municipal home rule charter a provision prescribing the conditions under which any individual may maintain an action against the city for personal injuries caused by the failure of the authorities to keep the streets and highways in proper condition." Should the cities ever abuse the power to insert such provisions in their charters, the remedy is always in the hands of the legislature which may, by a proper general law, overrule any home rule charter provision.[44]

Contempt of Council; Investigation of Monopolies. It is difficult to ascertain the exact point upon which the decision turned in the case of *State ex rel. Peers v. Fitzgerald.*[45] Section 88 of the home rule charter of the city of Virginia attempted expressly to authorize the city council to punish a person for contempt for refusal to produce any books, papers, etc., demanded by the council. The latter body, having become interested in the high cost of meats, particularly as it was charged that there was a local monopoly in that business, proceeded to make an investigation, and one Robert Peers, a meat dealer, was ordered by the council to be imprisoned for his contempt in refusing to produce invoices showing how much he had paid for his meats. Two questions really arose: first, is it a municipal function to investigate a supposed monopoly in the necessaries of life, and second,

[41](1908) 106 Minn. 94, 118 N.W. 259.
[42]Dunnell, Digest, sec, 6818, and cases cited.
[43]Dunnell, Digest, sec. 6823, and cases cited.
[44]See, for example, Minn., Laws 1913, ch. 391; Minn., G.S. 1913, secs. 1786-89.
[45](1915) 131 Minn. 116, 154 N.W. 750.

may a home rule charter authorize the council to punish for contempt. Answering the second question first, the court said it was willing to concede "for the purpose of this case, that by law administrative boards and officers, including the governing board or council of municipal corporations, may be invested with authority to punish a contumacious witness who refuses to respond to proper inquiries concerning a subject which such board, council or officer is required to act upon. But we do hold, in view of our constitutional guarantees and the trend of legislation, that such power is not to be implied or inferred. That the citizen shall not be deprived of his liberty without due process of law has always been a cherished idea of framers of constitutions and laws in this country. The legislature of this state has carefully defined what constitutes contempt of its own authority and limited the punishment it may inflict" and the same was true in respect to contempt of court.

"When the legislature has been so careful by explicit statutory provisions to guard the liberties and rights of the citizen as against its own power and that of the courts in matters relating to contempt, we cannot conclude that villages and cities were intended to have free hand to vest the great coercive power to punish for contempt, so readily converted into an instrument of oppression, in its councils, or administrative boards or officers, ordinarily composed of or being persons of limited legal knowledge and experience...Authority to punish for contempt should not be left to inference, but must be expressly granted."

This reasoning leaves the reader only partially satisfied. What the court is discussing is the general trend or policy of legislation in this state with reference to contempt, and not the question of the power of the legislature or home rule cities to make express provision upon the subject. The charter in this case was itself a law. It left nothing to inference. It was explicit. The question is: Could the legislature in chartering cities have authorized city councils to punish for contempt, whether by express language or otherwise? In fact, the legislature did expressly confer this power upon city councils in a general act for the incorporation of cities enacted in 1895, under which five cities are now governed.[46] If this act is valid, so also must be the similar provisions in home rule charters, since such charters "may provide for the establishment and administration of all departments of a city government, and for the regulation of all local municipal func-

[46]Minn. Laws 1895, ch. 8, 124.

tions, as fully as the legislature might have done." It is hard to understand just what the court means when it says that the power in question "should not be left to inference." If it means that this power must be expressly conferred by the legislature upon home rule cities, it suggests that in addition to that class of municipal powers which a home rule city may confer upon itself, there is another group of powers closely related to municipal government but which, for some special reason, only the legislature may confer upon cities and that in express language. This view does not correspond with assertions in other decisions as to the wide scope of home rule powers.

The other question in this case is whether it is a municipal function to investigate monopolies with a view to prosecution. The decision might have turned upon this point alone. The statutes confer this power upon county attorneys and the attorney general.[47] It is one which has not been customarily conferred upon municipal corporations.

Venue of Actions Involving Real Estate Titles. The city of St. Cloud lies in several counties. Section 275 of its home rule charter provides that:

"All suits or proceedings by or against said city not brought before a city justice shall be brought in the district court of said Stearns county, and no other court whatever shall have original jurisdiction thereof."

The plaintiff in *Hjelm v. City of St. Cloud* brought action against the city in the district court of Benton county for a parcel of real estate lying in that portion of the city situated in the said Benton county.[48] His action was brought in accordance with the general statute which expressly provides for suits in the local forum in such cases, but the city demurred to the jurisdiction of the Benton county court, citing its own charter provision in its defense. While in no sense denying the right of a home rule city to make such provision in its charter, the court said that the section "should be held to apply to transitory actions and proceedings, including those arising in the carrying on of defendant's governmental function, and should not control those actions which, in equally strong terms, the legislature by general law, have assigned to a local forum." While this decision is primarily a construction of the charter provision concerned, yet it has also a

[47] Minn. G. S. 1913, secs. 3782, 8973-8989.

[48] (1915) 129 Minn. 240, 152 N.W. 408; (1916) 134 Minn. 343, 159 N.W. 833.

broader significance. It practically decides that it is not a municipal function to determine the venue of actions involving the title to real estate where there is already express statutory provision upon the subject. The matter involved was only incidentally a municipal affair. A city happened to be one of the parties. District courts are state courts; their jurisdiction is laid down in general state laws; and there are strong reasons why there should be uniform, state-wide rules upon such a subject matter as is here involved. There can be little doubt as to the soundness of the decision.

Exercise of Powers Beyond Boundaries. The constitutional provision authorizing home rule charters provides that: "Any city or village in this state may frame a charter for its own government." In 1900 Duluth adopted a home rule charter which provided among other things that the council might prohibit the storage of certain named explosives and highly inflammable substances within the city or within one mile from the limits thereof.[49] The council having passed an ordinance embodying this prohibition, one Orr was convicted in the local court of having committed acts in violation of it within the one mile zone. Upon appeal being taken, the supreme court held the ordinance invalid insofar as it applied to areas outside of the city limits.[50] The decision called attention to the fact that the constitution gave the city the power to make a charter "for its own government," and not for the government of others. Furthermore the charter provision was practically an extension of the boundaries of the city in violation of an express provision of the enabling act. Such extra-territorial powers, if sustained, would result in great confusion and "innumerable conflicts in authority."

This rule, which is undoubtedly sound, shows one point at which the city's power to make its own charter is more limited than that of the legislature. It is possible to cite a number of cases in which the legislature has conferred extra-territorial power on cities. Duluth itself formerly had the power to enforce its quarantine ordinances to a distance of three miles beyond its limits.[51] A general act previous to the county option law of 1915 gave an extra-territorial effect to a local option vote against saloons by any "town or municipality" to a distance of one-half mile beyond

[49]Charter, 1900, sec. 64, Fortieth.
[50]City of Duluth v. Orr, (1911) 115 Minn. 267, 132 N.W. 265.
[51]Charter, 1887, ed. of 1895, sec. 86, Thirty-second.

its boundaries.[52] Such acts have been sustained,[53] but it is settled by the *Orr case* that they must emanate directly from the legislature.

It is evident from what has been said that the courts have not as yet laid down any general rules as to what are proper municipal affairs. In a few states the constitution itself names certain functions as being appropriate for charter regulation. In Minnesota the supreme court has not had the benefit of any such guiding principles and hence it has been compelled to begin the process mentioned by Justice Holmes in *Noble State Bank v. Haskell,* of pricking out the lines "by the gradual approach and contact of decisions on the opposing sides."[54] With experiments in charter making going on in a large number of cities already, many cases will undoubtedly arise calling for decisions upon the question of what are municipal affairs, and we shall undoubtedly be able within a few years to make a long list of subjects which may be dealt with in home rule charters, and another list of those which are excluded from municipal control.

The process here mentioned has been somewhat hastened by the introduction into Minnesota of the principle of the short, sweeping grant of powers to cities. Duluth was the first city to take this step, adopting the following language in its charter of 1912:

"By and in its corporate name, it shall have perpetual succession; save as herein otherwise provided and save as prohibited by the constitution or statutes of the state of Minnesota, it shall have and exercise all powers, functions, rights and privileges possessed by the city of Duluth prior to the adoption of this charter; also all powers, functions, rights and privileges now or hereafter given or granted to municipal corporations of the first class having 'home rule charters,' by the constitution and laws of the state of Minnesota; also all powers, functions, rights and privileges usually exercised by, or which are incidental to, or inhere in, municipal corporations of like power and degree; also all municipal power, functions, rights, privileges and immunities of every name and nature whatsoever; and in addition, it shall have all the powers, and be subject to the restrictions contained in this charter."[55]

In the case of *Park v. City of Duluth,*[56] the court decided that

[52]Minn., G. S. 1913, 3142.
[53]State ex rel. Miller v. Carver, (1914) 126 Minn. 5, 147 N.W. 660.
[54](1911) 219 U.S. 104, 55 L. Ed. 112, 31 S. C. R. 186.
[55]Charter, 1912, sec. 1.
[56](1916) 134 Minn. 296, 159 N.W. 627.

a city might by a single charter provision adopt and carry over into its new charter all the powers previously possessed by it.

"This sort of carry-all provision may not be the most approved form of municipal legislation, for it compels resort to an abandoned charter to determine the extent of existing municipal powers, but the language is clear and unequivocal, and we must give it effect according to its terms."

In the case of *State ex rel. Zien v. City of Duluth*,[57] the court went even farther. This case involved the voting out of the saloons, and the contention of the state was that the charter conferred no power upon the city to take this step. It was conceded by the court that the charter contained no express power to this effect, and that the only provision of that document upon which this power could be made to depend was the clause declaring that the city should have "all municipal power, functions, rights, privileges and immunities of every name and nature whatsoever." The court expressed its view as follows:

"The fourth clause grants 'all municipal power' of every kind and nature whatsoever. What is meant by 'all municipal power' is not defined, but as here used the expression is obviously broad enough to include all those powers which are generally recognized as powers which may properly be given to and be exercised by municipal corporations. That it is generally recognized that the power to prohibit the liquor traffic within their respective territorial limits may properly be conferred upon and be exercised by the subordinate municipalities of the state, is evidenced by the uniform trend of legislation and of judicial decisions both in this state and elsewhere; and we think that the grant of 'all municipal power' of every name and nature whatsoever conferred the power to prohibit the liquor traffic."

This decision accomplished two things. In the first place it recognized the fact that cities do not need, as of yore, to specify in their charters, in detail, all the particular powers which they intend to exercise, but that they may by such brief, inclusive statements confer the broadest sort of municipal powers upon their local authorities. In the second place, though it is no longer of much importance, the power of cities to prohibit the liquor traffic was recognized as possibly existing even in the absence of express legislative grant. In other words, this was a "municipal affair." With other cities copying the Duluth form of grant of powers into their charters, it is easy to see how new occasions for the use of this broad municipal power may arise, and how the courts will be called upon again and again to decide just what are

[57] (1916) 134 Minn. 355, 159 N.W. 792.

municipal affairs. It is interesting to speculate as to what will happen to the old rule of strict construction of municipal charters, which led the legislatures in past years to load charters up with long enumerations of specific powers in order to be certain that no particular power had been omitted. The effect in the direction of shortening municipal charters is entirely evident.

IV. Power of Legislature to Overrule Home Rule Charters

We have dealt in the preceding section with the length and breadth of home rule powers. We must now consider their depth. It is obvious that there are very few governmental functions which are purely municipal. Most of the matters with which city governments deal have in them an element of general interest. The state at large is equally concerned with the city in such functions as police, health, and education, and but little less so in such matters as streets, parks, water works, libraries, and many others. Upon such subjects it is not surprising to find a growing body of state legislation of more or less general application. Consider also, in this connection, that home rule charters must be consistent with and subject to the laws of the state, and that section 36 expressly provides that "The legislature may provide general laws relating to affairs of cities,...which shall be paramount while in force to the provisions relating to the same matter included in the local charter herein provided for." Difficulties immediately present themselves. May a home rule charter in no case, even as to a matter primarily of municipal concern, provide a different rule or arrangement from that laid down in general laws? In case of conflict must the charter always yield?

The question here propounded first arose squarely in the case of *Grant v. Berrisford*.[58] The St. Paul home rule charter of 1900 required contractors to give bonds for the protection of laborers and materialmen in connection with all city contracts. There was a general state law upon the same subject, which contained the requirement, not included in the charter, that no action could be brought upon such bonds unless notice thereof was given within ninety days after the furnishing of the last item of labor or material involved. The action in this case was brought under the charter provision without the notice required by the general law and the defendants demurred to the suit. Their plea

[58] (1904) 94 Minn. 45, 101 N.W. 940.

was that the general law applied, and that the charter provision upon this subject was ineffective since it was not in harmony with the state law. The court's reasoning and conclusion upon this point is worthy of extended quotation.

"If this limitation on the power of cities in framing their charters is to be construed as prohibiting the adoption of any charter provisions relating to proper subjects of municipal legislation and matters germane thereto, unless they are similar to and contain all the provisions of the general laws on the subject, then, as said by the learned trial judge: 'All that the framers of a charter can do, where there is a law in existence at the time the charter is adopted, is to add such provisions as are not already contained in the law, and are not repugnant to it. If this is the extent of the power conferred upon cities to make their own charters, then the constitutional grant is a mere form of words, of no practical value.' It is clear that such is not a proper construction of the limitation. This limitation forbids the adoption of any charter provisions contrary to the public policy of the state, as declared by general laws, or to its penal code—for example, provisions providing for the licensing of prize fighting or gambling or prostitution, or those which are subversive of the declared policy of the state as to the sale of intoxicating liquor. But it does not forbid the adoption of charter provisions as to any subject appropriate to the orderly conduct of municipal affairs, although they may differ in details from those of existing general laws. This is necessarily so, for otherwise effect could not be given to the constitutional amendment which fairly implies that the charter adopted by the citizens of a city may embrace all appropriate subjects of municipal legislation, and constitute an effective code, of equal force as a charter granted by a direct act of the legislature... It follows that if the provisions of the charter of St. Paul as to contractors' bonds are germane to any proper subject for municipal legislation they supersede the provisions of the general law on the subject."

And it was so held. Indeed, the general law could not be considered in this case as even supplementing the charter provision, since the latter constituted a complete regulation upon the subject. The ruling in the *Grant case* has been quoted with approval and followed in a number of subsequent decisions. In fact, upon municipal matters, home rule charters are construed very much as special laws were in the past. The special provision constitutes an exception from the general. The general law continues to stand but has no application to a locality regulated by a special law or home rule charter upon the same subject.[59]

[59]In Turner v. Snyder, (1907) 101 Minn. 481, 112 N.W. 868, the court said that "where the charter covers the entire subject matter, the inten-

What becomes then of that provision in the constitution, quoted above, under which the legislature may enact general laws relating to municipal affairs which shall be paramount to municipal charters while in effect? McBain, the leading authority upon the subject, appears to have reached an untenable conclusion upon this point.[60] It seems to be his view that first the charter may overrule the general law and then the general law may be made to overrule the charter, and apparently that this process may continue indefinitely, or, in his own words, that the constitution "has merely established a game of shuttlecock between the city and the legislature." This is not the case. The provisions of the home rule section of the constitution are consistent with themselves upon this point, and so too are the decisions of the court. The intention of the constitution was to put the initiative in charter matters in the hands of the local citizenry while at the same time leaving a checking or overruling power in the hands of the legislature. The latter body may at any time overrule home rule charters by a general law, but it must be a law which expressly or by very clear implification is designed to supersede home rule charters. This rule was well stated in *American Electric Co. v. City of Waseca*[61] where the court said:

"We have held in recent cases that the provisions of home rule charters upon all subjects proper for municipal regulation prevail over the general statutes relating to the same subject-matter, except in those cases where the charter contravenes the public policy of the state, as declared by general laws, and in those instances where the legislature expressly declares that a general law shall prevail, or a purpose that it shall so prevail appears by fair implication, taking into consideration the subject and the general nature of the charter and general statutory provisions."

In other words, statutes relating to municipal affairs in Minnesota fall into two classes, those which express or show an intention to overrule even home rule charters, and those which show no such intention. It may be difficult in some instances to decide into which of these two categories a particular law shall be placed, but once it has been put into the first of these groups by a final judicial decision, no home rule charter provision may supersede it. The game of shuttlecock ends then and there.[62]

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tion to supersede all general laws on the subject will be presumed, unless otherwise expressed."

[60]McBain, The Law and the Practice of Municipal Home Rule 493-495.

[61](1907) 102 Minn. 329, 113 N.W. 899.

[62]The relationship here existing is similar to that between the federal and state governments in those fields where their powers overlap.

There have been several recent illustrations of the power of the legislature to enact laws superseding home rule charter provisions. It was entirely consonant with the laws upon the subject for home rule cities to prohibit the liquor traffic; that was a municipal affair. Upon the enactment of the county option law, however, the vote of a county to oust the saloons was the adoption of this state law locally and prevented even a home rule city within the county from re-establishing the liquor traffic within its limits.[63] The whole purpose of the law would have been frustrated otherwise. Likewise, it is entirely proper for cities to provide for systems of local taxation, including wheelage taxes, but the recent statute limiting the amount of local wheelage taxes to one-fifth of the amount of the state tax was clearly designed to make uniform the burdens upon automobilists, and its effect was to prevent home rule cities as well as others from imposing more onerous taxes.[64] No doubt the recent statute establishing a per capita tax limit for all cities and villages in the state is of the same general type.[65] There is every reason to believe that such laws will increase in number, and that their effect will be exactly what the constitution contemplates, namely a somewhat greater uniformity among our municipal institutions.

There is one phrase in the decision in *Grant v. Berrisford*[66] and *American Electric Co. v. City of Waseca*[67] which is likely to cause some trouble. The constitution declares that home rule charters must be consistent with and subject to the laws of the state, and must always be in harmony with and subject to the constitution and laws. The decisions referred to declare that such charters must not be contrary to the "public policy of the state, as declared by general laws," which may be an entirely different matter. This phrase really throws the doors wide open to judicial construction. Who shall say what is the public policy embodied in any general law? It is perfectly easy to see how a court inclined to look favorably upon home rule powers, as our su-

There can be no doubt that, upon a matter falling within the scope of its powers, the congress has power to enact laws which will be the supreme law of the land. Whatever powers the states may have exercised within such a field before the passage of the act in question, no one can doubt that thereafter the more general act will prevail.

[63] State ex rel. Smith v. City of International Falls, (1916) 132 Minn. 298, 156 N.W. 249.

[64] Minn., Laws 1921, ch. 454; Fairley v. City of Duluth, (1921) 150 Minn. 374, 185 N.W. 390.

[65] Minn., Laws, 1921 ch. 417.

[66] (1904) 94 Minn. 45, 101 N.W. 940.

[67] (1907) 102 Minn. 329, 113 N.W. 899.

preme court has generally been, might overlook actual violations of the letter of the law by cities so long as they did not violate the spirit or the policy of the law, as seen through the judges' eyes. At the same time it is not difficult to conceive of a court with a changed personnel taking just the opposite view and declaring charter provisions null and void which actually violated no law whatever on the ground that they were contrary to some supposed policy embodied in the laws. There is every reason to believe that the latter will not occur, since the legislature has such ample power to prevent excesses of power by cities that it is not really necessary for the courts to interfere in many cases.

V. The Constitution and the Local Government.

In general it may be said that the provisions of section 36 conferring charter-making powers upon cities and villages are inferior to other provisions of the constitution. Home rule charters must be consistent with and subject to the constitution as well as the laws. We have already seen that article 6, section 1, of the constitution, which provides that the legislature may establish courts by a two-thirds vote, is not considered to have been changed or overruled by the municipal home rule provision, since, according to the supreme court, municipal courts are not municipal institutions.[68] The express provision as to courts is not repealed or modified by the more general provision as to municipal charters. On the other hand, while section 1 of article 9 is also specific where it says that "the legislature may authorize municipal corporations to levy and collect" special assessments for local improvements, yet it has been held that a home rule city may endow itself with the power of special assessment without legislative action.[69] There appears to be some inconsistency in the decisions.

Several cases have come up concerning the form of the city government and the conduct of city elections which also involve a possible conflict of constitutional provisions. The constitution provides that every home rule city charter must provide, "among other things, for a mayor or chief magistrate, and a legislative body of either one or two houses." In a leading case[70] it was argued by the attorney general of the state that the commission

[68]Supra, pp. 144-48.

[69]State ex rel. Ryan v. District Court of Ramsey County, (1902) 87 Minn. 146, 91 N.W. 300.

[70]State ex rel. Simpson v. City of Mankato, (1912) 117 Minn. 458, 136 N.W. 264.

form of city government, which abolishes the separation of powers in city affairs by vesting both legislative and executive functions in one small body, of which the mayor is a member, was unconstitutional since both the words quoted above and also article 3 of the constitution require a separation of powers. The latter provision reads as follows:

"The powers of the government shall be divided into three distinct departments, the legislative, executive and judicial; and no person or persons belonging to or constituting one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the instances expressly provided in this constitution."

The answer of the supreme court to this contention was that article 3 applies to the state government only, and not to the local units, and that there is nothing in the municipal home rule provision to require the "mayor or chief magistrate" to be entirely separate from the council, nor to require the latter to be vested with all the local legislative power. A similar point was decided in an earlier case which sustained the St. Paul charter of 1900 in providing for a board of public works to exercise important local powers in addition to the council, and in a later case which upheld the initiative and referendum in the Duluth charter of 1912 as not in derogation of the constitutional requirement that a city must have a legislative department.[71]

Recent interest in this question has turned upon the requirement that a home rule city must have a "mayor or chief magistrate." In the city manager plan of government, now so much in vogue throughout the country, the mayor is the presiding officer of the council and the chief political officer of the city, but the actual administration of affairs is put into the hands of a business manager selected, appointed, and controlled by the council. It has been argued that this plan is unconstitutional in Minnesota for the reason that when the constitution uses the term "mayor" or "chief magistrate" it must imply that the mayor or chief magistrate must have the usual powers appertaining to the office and that there is no power in either the legislature or the home rule city to change the meaning of the term. The question of the validity of such a form of government has not gone to the courts, but the attorney general's office, still somewhat under the influence

[71]State ex rel. Otis v. District Court of Ramsey County, (1906) 97 Minn. 147, 106 N.W. 306; State ex rel. Zien v. City of Duluth (1916) 134 Minn. 355, 159 N.W. 792.

of the doctrine of the separation of powers in city government, has ruled as follows:

"Of course there may be a city manager as well as a mayor, but the point is that the duties customarily performed by the mayor may not be taken from him and reposed in another officer of the city government...There must be a mayor and he must be the chief executive of the city. There must be a legislative body and the legislative authority which properly belongs to that body may not be delegated to an administrative officer."[72]

As to the first of these propositions it is submitted that there is no such category as "the duties customarily performed by the mayor." There is, of course, a certain position of honor which comes to the person who occupies the office. Historically in England, in the American colonies, and in the early states, the mayor was little more than a figurehead. His duties were such only as the charter conferred upon him and these varied greatly. The council was the real government of the city, although out of deference to the office it was generally required that the mayor should be present at meetings. In the United States today, and even in Minnesota, mayors have the widest range of importance, having almost no power in some cities and very broad powers in others. Furthermore, the student will search the Minnesota supreme court decisions in vain to find any important powers set down as being inherent in the office of mayor, and even the leading authorities upon the subject will add little or nothing to his results. The second proposition in the opinion quoted above, that the mayor "must be the chief executive of the city" is equally open to criticism. The constitution itself does not make this statement. Not even the governor is called a chief executive in our state constitution. Even if the mayor were called "chief executive" it would help little toward an understanding of the office.[73] On the one hand it might imply that there could be other executive officers in addition to the chief, and on the other the use of the term would confer practically no powers upon the officer bearing the title. In conclusion it is an open question whether the words quoted from the attorney general's opinion are not directly contradictory to the supreme court decision in the *Mankato case.*

[72]Opinion by James E. Markham, Assistant Attorney General, Nov. 2, 1921; see 6 Minn. Munic. 163, Dec. 1921, for text of opinion and more extended discussion.

[73]Compare Field v. People, (1840) 3 Ill. 79; State v. Bowden, (1912) 92 S. C. 393, 75 S.E. 866; Chisholm v. Georgia, (1793) 2 Dall. 419, 1 L. Ed. 440; State v. Dawson, (1912) 86 Kan. 180, 119 Pac. 360, 39 L.R.A. (N.S.) 993; 12 R.C.L. 1001-3.

Another point of considerable importance has come up, involving the power not only of home rule cities but of the legislature itself to regulate the conduct of local elections. In its charter of 1912 the city of Duluth introduced the method of election by preferential voting. In a series of contested election cases which arose following the first election, the supreme court not only sustained the power of home rule cities to provide their own systems of election, but even permitted the application of such systems to the election of municipal judges and allowed a sort of compulsion to be used which resulted in the throwing out of ballots which had not been marked for as many candidates for the council as there were places to be filled.[74] In these cases no questions of constitutionality touching the system of preferential voting were raised, but when that point was subsequently considered the court, in a four to one decision, declared the system contrary to the constitution on the ground that it violated the requirement of equality of voting right among all voters.[75] The following provisions of the constitution were involved. Every qualified voter "shall be entitled to vote...for all officers that now are, or hereafter may be, elective by the people," and "all elections shall be by ballot." In the opinion of the majority of the court, these provisions absolutely guaranteed, beyond legislative power to interfere therewith, the principle of one man one vote, and one vote one value. Under the Duluth charter, one voter might vote first, second, and third choices and have all three choices counted, while another voted only first choice and had only that choice counted. In other words, one might vote for three persons for an office and have all counted, while another might vote for only one person. The court did not consider fully that, as a matter of fact, every voter was given the same *right* and that it was only his own negligence which could in any way militate against him, and that it is mathematically demonstrable that one who voted only first choice might actually be voting more effectively for his candidate than the one who voted all three choices. The fact that inequalities were possible was enough, in the court's opinion, to condemn the system.

In order to overcome inequalities in existing voting systems, inequalities which sometimes give the majority of voters less than a majority of the members of the council and sometimes give them

[74]Farrell v. Hicken, (1914) 125 Minn. 407, 147 N.W. 815; McEwen v. Prince, (1914) 125 Minn. 417, 147 N.W. 275.

[75]Brown v. Smallwood, (1915) 130 Minn. 492, 153 N.W. 953.

proportionately more representatives in the council than they have voters in the constituency, various reform organizations have proposed the introduction of the Hare system of proportional representation, otherwise known as the single transferable vote system, into American municipal elections. Under this system, a number of aldermen would be chosen from a district and election would be by the quota system. Roughly speaking, if five were to be elected, each one-fifth of the voters who could agree unanimously upon one candidate would be entitled to that one. Instead of one party carrying off all the representatives from the district, therefore, each party would presumably get about the number of members to which it was entitled. This is supposed to be accomplished by permitting each voter to vote a first, second, third, and so on to an unlimited number of choices among the candidates who offer themselves, and by distributing the surpluses of ballots above the quotas received by the most popular candidates and by distributing all the votes of the weakest or least popular candidates received upon the first choice, to other candidates according to second and other choices until the correct number of candidates have been declared elected by having received their quotas. Under this system every voter's vote is counted just once, and for just one candidate, but if a voter's first choice is a very weak candidate, without prospects of election, by the system of transferring votes that voter's ballot will be counted according to his second choice, or even according to his third or some later choice. The question having come up as to the constitutionality of this method of voting, the attorney general has ruled that it is probably unconstitutional, following the reasoning in the *Brown v. Smallwood* case.[76] As a matter of fact, the system of proportional representation is clearly distinquishable from that of preferential voting. The latter makes possible definite inequalities, whereas the former goes far toward ensuring equality of votes. The decision of the Michigan supreme court in the *Kalamazoo case* suggests another ground, however, upon the basis of which the system of proportional representation may be unconstitutional in this state.[77] Under this system, no matter how many councilmen are elected

[76]Opinion by Clifford L. Hilton, Attorney General, Dec. 1, 1921; see 7 Minn. Munic. 81. June 1922, for more extended discussion.

[77]Wattles ex rel. Johnson v. Upjohn, (1920) 211 Mich. 514, 179 N.W. 335. The Ohio court of appeals for the 8th district has sustained the system in the Cleveland case. Reutener v. City of Cleveland, (May 6, 1922). The California district court of appeal for the 3rd district has declared the system invalid in the Sacramento case, and the state supreme

from a district, each voter's vote may be counted for only one candidate. The Minnesota constitution provides that each voter may vote "for all officers" elective by the people within his voting district. In the Michigan case the court held that if seven councilmen are to be elected from the city at large, it is the right of each voter to vote for seven and to have his votes counted for seven. It is very clear from the history of the Minnesota provision that this was not the intention of the framers of the constitution, but that this meaning can be read into the provision cannot well be denied.

Questions of home rule procedure and other incidental matters have not been touched upon in this brief review. The principal cases upon these points have been digested in another place.[78] We cannot close, however, without remarking how much more satisfactory are the decisions upon home rule than are those upon the prohibition against special legislation. The latter deal with a limitation upon legislative power, and such limitations are always difficult to enforce. The cases on home rule construe a relatively simple grant of powers. In the cases on special legislation there is much confusion. One finds not a few contradictions. On the other hand, although they are not perfectly harmonious, the municipal home rule decisions follow a definite and self-consistent theory, a reasonably straight and not a zig-zag line. This is all the more gratifying in view of the fact that there were relatively few decisions in other states which could in any important sense serve the local court as a guide.

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court has denied the petition for rehearing without vouchsafing any reason for its refusal. People ex rel. Devine v. Elkus, et al., (Cal. 1922) 211 Pac. 34. Hearing denied by supreme court, Dec. 22, 1922.

[78]Anderson, City Charter Making in Minnesota 149-161.

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CORPORATIONS—NATURE AND EFFECT OF ULTRA VIRES ACTS IN MINNESOTA.—The Minnesota supreme court in a recent case[1] has reiterated its view that the term "ultra vires" as applied to the acts of a corporation, has both a primary and a secondary meaning. In its primary sense, it means an act which the corporation is not authorized to do under any circumstances;[2] whereas in its secondary meaning, it refers to acts which the corporation has authority to do, but which authority in this particu-

[1]City of Marshall v. Kalman, (Minn. 1922) 190 N.W. 597, 600.
[2]Minnesota Thresh. Mfg. Co. v. Langdon, (1890) 44 Minn. 37, 41, 46 N.W. 310.

lar instance was abused or irregularly exercised.[3] This twofold use of the term is admittedly "unfortunate in obscuring a subject in itself sufficiently perplexing."

When a corporation acts ultra vires in the primary sense, the corporate charter becomes subject to forfeiture at the suit of the state.[4] With respect to the ultra vires acts of a national bank, however, the federal government alone may raise the objection.[5] Ultra vires acts, being beyond the corporate authority, are said to be void in toto,[6] either because of lack of legal capacity of the corporation,[7] or because of the illegality of the act.[8] Thus, where an ultra vires contract is wholly executory, either party may avoid performance.[9] Where it has been performed by both parties, it is unassailable by either.[10] Where it is executed by one

[3]Bell v. Kirkland, (1907) 102 Minn. 213, 219, 113 N.W. 271, 13 L.R.A. (N.S.) 793, 120 A.S.R. 621.

[4]See International Lbr. Co. v. American Suburbs Co., (1912) 119 Minn. 77, 86, 137 N.W. 395. It has been said that ultra vires is a concern of the state, and not of private persons who are not stockholders, Baker v. Northwestern Guar. L. Co., (1886) 36 Minn. 185, 187, 30 N.W. 464, and in Crolley v. Minneapolis & St. L. R. Co., (1883) 30 Minn. 541, 543, 16 N.W. 422, it is said that no one whose interests are not affected, except the state, can question the right either to convey or receive and hold property. In International Lbr. Co. v. American Sub. Co., cited above, private individuals, whose interests were affected, were granted an injunction restraining a corporation from doing an ultra vires act. But compare it with Newell v. Minneapolis, Lynd., etc., R. Co., (1886) 35 Minn. 112, 123, 27 N.W. 839, 59 Am. Rep. 303. See State of Minn. ex rel. Clapp v. Minnesota Thresh. Mfg. Co., (1889) 40 Minn. 213, 224, 41 N.W. 1020, 3 L.R.A. 510.

[5]See Hennessy v. City of St. Paul, (1893) 54 Minn. 219, 223, 55 N.W. 1123.

[6]Rochester Ins. Co. v. Martin, (1868) 13 Minn. 59 (Gil. 54, 57); Bell v. Kirkland, (1907) 102 Minn. 213, 219, 113 N.W. 271, 13 L.R.A. (N.S.) 793, 120 A.S.R. 621 (dictum). But if the ultra vires act is void in toto, it is difficult to see how any rights can arise thereunder; so it is doubtful if this dictum really represents the Minnesota theory of ultra vires, except in the case of a public corporation. See footnotes 15 and 16, infra. At all events it is significant to note that the question of ultra vires cannot be raised collaterally. North Side State Bank v. Manthey, (Minn. 1922) 190 N.W. 72.

[7]See Bell v. Kirkland, (1907) 102 Minn. 213, 113 N.W. 271, 13 L.R.A. (N.S) 793, 120 A.S.R. 621.

[8]See Stewart v. Erie & West. Tran. Co., (1871) 17 Minn. 372 (Gil. 348, 376). In National Invest. Co. v. Nat. Sav., etc., Ass'n, (1892) 49 Minn. 517, 52 N.W. 138, a distinction is suggested between ultra vires acts which are expressly prohibited by statute and those which are merely in excess of authority, but in Rochester Ins. Co. v. Martin (1868) 13 Minn. 59 (Gil. 54, 57), the court said that all powers not conferred are denied just as much as if the legislature used express negative language for that purpose. See also Seymour v. Chicago Guar. F. L. Soc., (1893) 54 Minn. 147, 55 N. W. 907.

[9]National Invest. Co. v. Nat. Sav., etc., Ass'n, (1892) 49 Minn. 517, 52 N.W. 138.

[10]Bell v. Kirkland, (1907) 102, Minn. 213, 221, 113 N.W. 271, 13 L.R. A. (N.S.) 793, 120 A.S.R. 621.

party but is wholly executory as to the other, the court in certain early cases, allowed the defense of ultra vires either by taking cognizance of the theory of incapacity,[11] or by recognizing the doctrine that all persons who deal with a corporation are presumed to know and are bound to take notice of the limitations of power conferred upon it by its charter or its articles of incorporation,[12] or for the further reason that is is against public policy to permit an indirect extension of corporate authority. But to prevent the obvious injustice of this result, the court, by applying the doctrine of estoppel, now seems thoroughly committed to the holding that when an ultra vires contract, which is not otherwise objectionable, has been performed on one side, the party, who has received and retained the benefits of such performance, will not be permitted to evade performance on his part on the ground that the contract was beyond the purpose for which the corporation was created.[13] This rule applies to religious corporations,[14] but it does not apply to municipal or other public corporations,[15]

[11]Rochester Ins. Co. v. Martin, (1868) 13 Minn. 59 (Gil. 54); Delaware Farmers' M. F. Ins. Co. v. Wagner, (1894) 56 Minn. 240, 57 N.W. 656.

[12]See Senour Mfg. Co. v. Church Paint & Mfg. Co., (1900) 81 Minn. 294, 299, 84 N.W. 109.

[13]Seymour v. Chicago Guar. F. L. Soc., (1893) 54 Minn. 147, 55 N.W. 907; Northland Prod. Co. v. Stephens, (1911) 116 Minn. 23, 133 N.W. 93; Auerbach v. Le Sueur Mill. Co., (1881) 28 Minn. 291, 9 N.W. 799; Davis v. Nat. Casualty Co., (1911) 115 Minn. 125, 131 N.W. 1013; Erb v. Yoerg, (1896) 64 Minn. 463, 67 N.W. 355; Central Bldg. & L. Ass'n v. Lampson, (1895) 60 Minn. 422, 62 N.W. 544. An estoppel also arises where a corporation, which without authority, has purchased stock in another corporation, and the act has been ratified by all the stockholders, attempts to avoid its liability as a stockholder. Hunt v. Hauser Malting Co., (1903) 90 Minn. 282, 96 N.W. 85; Olson v. Warroad Merc. Co., (1917) 136 Minn. 310, 161 N.W. 713. In Kraniger v. People's Building Soc., (1895) 60 Minn. 94, 97, 61 N.W. 904, it is said that an estoppel cannot apply if the corporation does not actually receive the benefit, as where an officer embezzles money borrowed in excess of the limit of indebtedness. See also Bloomingdale v. Cushman, (1916) 134 Minn. 445, 159 N.W. 1078. The statement in City of Marshall v. Kalman, (Minn. 1922) 190 N.W. 597, 600-1, that "whether there may be an estoppel where the contract is ultra vires in the primary meaning is somewhat doubtful," seems inadvertent, unless the court is speaking of ultra vires contracts of public corporations. See footnotes 15 and 16, infra.

[14]See Norwegian Evang. L. B. Cong. v. United States F. & G. Co., (1900) 81 Minn. 32, 37, 83 N.W. 487.

[15]4 MINNESOTA LAW REVIEW 155, 157; City of Chaska v. Hedman, (1893) 53 Minn. 525, 55 N.W. 737; State ex rel. City of St. Paul v. Minnesota Trans. R. Co., (1900) 80 Minn. 108, 83 N.W. 32; see Bell v. Kirkland, (1907) 102 Minn. 213, 222, 113 N.W. 271, 13 L.R.A. (N.S.) 793, 120 A.S.R. 621. But this does not bar an action in quasi-contract, Borough of Henderson v. County of Sibley, (1881) 28 Minn. 515, 11 N.W. 91, but the statute of limitations begins to run when the corporation receives the benefit. Village of Glencoe v. County of McLeod, (1889) 40 Minn. 44, 41 N.W. 239. In this connection, compare Farmer v. City of St. Paul, (1896) 65

or to private corporations for a public purpose;[16] at least, it is applied with much greater rigor and strictness when municipal or other public corporations are involved,[17] the reasons being that such corporations are organized for governmental purposes, and not pecuniary gain, and that public policy requires that the taxpayers be protected. But, while the corporation itself is liable on ultra vires contracts where it has received and retained benefits thereunder; yet, if all the stockholders did not ratify the act, they are not subject to their so-called constitutional double liability, as, for example, where a manufacturing corporation incurs debts while engaging in a line of business not authorized by its articles of incorporation,[18] or, as held in a very recent case,[19] where the officers of the corporation incur corporate debts in excess of the limit of indebtedness prescribed by the articles.

The result attained by applying the doctrine of equitable estoppel, while undoubtedly correct, is a perversion of the doctrine of estoppel, because the essential element thereof, namely, reliance, cannot be made out, in the face of the two doctrines that ultra vires contracts are void in toto, and that everyone who deals with a corporation is constructively charged with knowledge of the contents of the corporate charter or articles of incorporation.

Much the same results, as the foregoing, are attained where ultra vires acts of the secondary nature are concerned. Generally, no question of public policy is involved. The state apparently will not interfere,[20] but either of the parties immediately connected with the transaction may raise the question if the contract is executory on both sides.[21] Executed contracts, however, will not be disturbed. If the contract is fully executed on one

Minn. 176, 67 N.W. 990, 33 L. R. A. 199, with Jackson v. Board of Ed. of City of Minneapolis, (1910) 112 Minn. 167, 174, 127 N.W. 569.

[16]Wolford v. Crystal Lake Cemetery Ass'n, (1893) 54 Minn. 440, 56 N.W. 56.

[17]Newberry v. Fox, (1887) 37 Minn. 141, 143, 33 N.W. 333, 5 A.S.R. 830.

[18]See Ballantine, Stockholders' Liability in Minnesota, 7 MINNESOTA LAW REVIEW 79, 100; and see Senour Mfg. Co. v. Church Paint & Mfg. Co., (1900) 81 Minn. 294, 84 N.W. 109.

[19]State of Minn., ex rel. Hilton v. Mortgage Sec. Co. of Minn., (Minn. 1922) 191 N.W.

[20]See State of Minn., ex rel. Clapp v. Minnesota Thresher Mfg. Co., (1889) 40 Minn. 213, 226, 49 N.W. 1020, 3 L.R.A. 510.

[21]The statement in City of Marshall v. Kalman, (Minn. 1922) 190 N. W. 596, 601, that "it is illogical to assume that a doctrine invented to protect those who are directly interested in a corporation extends equally to those who deal with the corporation," perhaps applies to public corporations only. See Bell v. Kirkland, (1907) 102 Minn. 213, 225, 113 N.W. 271, 13 L.R.A. (N.S.) 793, 120 A.S.R. 621.

side but is executory on the other, the party who has received the benefit of performance is not allowed to evade his obligation by setting up the ultra vires nature of the contract. This rule is based on the principal of estoppel,[22] or, if the act has been assented to by all the stockholders with full knowledge of the facts, on the theory of ratification.[23] As a general rule there would seem to be no theoretical objection to applying either of these theories to this situation, because no question of corporate capacity is involved, and because the doctrine of constructive notice of the limits of the corporate authority refers only to that which is contained in the charter or in the articles of incorporation, and not to extrinsic matters.

To summarize: It seems that the Minnesota court, hesitating to ignore the restraints on corporate authority, has built up the theory of corporate incapacity and illegality of ultra vires acts, with the attendant doctrine of constructive notice, only to tear them down in effect, whenever the interests of justice so demand, by refusing to allow a party who receives a benefit to take advantage of the lack of corporate power. The result attained is undoubtedly in accord with the weight of authority.[24] But it is suggested that on principle there should be no distinction between primary and secondary ultra vires acts, because after all the question of ultra vires really involves no question of corporate capacity at all, but merely a question of the power of the corporate officers.[25] Furthermore, the doctrine of constructive notice seems impracticable, unjust, and out of harmony with business custom, and should be discarded, substituting in its stead the test whether an outsider may reasonably be charged with actual notice of the limitations on the corporate authority. The purpose of the doctrine of ultra vires "is to protect, first, the interest of the public that the corporation shall not transcend the powers granted to it; and, second, the interest of the stock-

[22]Clearwater County State Bank v. Bagley-Ogema Tel. Co., (1911) 116 Minn. 4, 133 N.W. 91.

[23]Fergus Falls Woolen M. Co. v. Boyum, (1917) 136 Minn. 411, 162 N. W. 516; see Willis v. St. Paul Sanitation Co., (1893) 53 Minn. 370, 55 N.W. 550, where the court speaks of the receipt and retention of benefits as ratification of the ultra vires act. As to the question of the board of directors' ratification of the unauthorized act of an officer, see Dickinson v. Citizens Ice & F. Co., (1918) 139 Minn. 201, 165 N.W. 1056; Bacon v. Bankers Trust & Sav. Bank, (1919) 143 Minn. 318, 173 N.W. 719. For a discussion of ratification of municipal and other public contracts, see 4 MINNESOTA LAW REVIEW 160.

[24]See notes, L.R.A. 1917A 749 and L.R.A. 1917B 814.

[25]See 18 Harv. L. Rev. 461 and 23 Harv. L. Rev. 495.

holders that the capital shall not be subjected to the risk of enterprises not contemplated by the articles of incorporation and therefore not authorized by the stockholders in subscribing for the stock."[26] It accordingly has been suggested that, especially as to private corporations, the state alone should take care of the element of public policy, and that the outsider should be prevented from using the defense to get out of his contract, thereby allowing the unauthorized act of the officers to give rise to rights in the corporation, provided, of course, that the stockholders do not object to the assumption of authority. Would not business convenience and justice be best subserved, if all corporate contracts, even though wholly executory, were enforced in every case where a similar contract between individuals would be enforced, except where the officers' lack of authority is reasonably apparent and ought to have been known by the other party?[27] The presumption should be that a contract authorized by the directors is within the scope of the corporate purposes and powers. Nor should the corporation be permitted to deny liability on contracts made by its highest executive officers, who alone exercise its powers, on the theory that the articles contain a public limitation of their authority. The articles should be regarded, like the by-laws, as internal regulations, binding the members and officers, but of no force, per se, as to the outsiders in limiting ostensible power and authority.

PAYMENT—CONTRACTS—DOCTRINES OF DURESS OF PERSON AND PROPERTY.—It is elementary that if a person with full knowledge of the facts, or with the means of knowledge, voluntarily pays money under a claim of right, generally he may not recover it back. And it is well settled that a payment made pursuant to a compromise of a disputed claim may not be assailed later. But it is equally well established that a payment made under compulsion, coercion, or duress may be recovered back. Each of these principles, while separate and distinct by itself, naturally merges into the other; so the question of what is or is not an involuntary payment in a given case must depend largely upon the particular facts and circumstances of that case.[1] It has been said that while

[26]Olson v. Warroad Merc. Co., (1917) 136 Minn. 310, 314, 161 N.W. 713.

[27]See article by George Wharton Pepper, 9 Harv. L. Rev. 225, 269.

[1]Duress, as a ground for the recovery of money paid, is a relative rather than a positive term, depending upon the situation of the parties, their relation to each other, physical and mental strength, and all the surrounding

the nature and effect of duress have been before the courts for a long time, yet the law is now in a transition stage and the decisions conflicting; and that this is due to two causes: First, the old point of view looked to the nature of the threats or violence as the primary test of duress; the modern point of view looks to the effect of the threats or violence on the mind of the person subjected thereto. Second, the union of legal and equitable actions has tended to swallow up the definite but limited common-law notion of duress in the broader but vaguer doctrine of undue influence which finds its operation chiefly in equity.[2]

At the early common law, the doctrine of duress was confined to duress of person,[3] but gradually it was extended to cover cases of duress of property, both personal[4] and real.[5] Duress may consist in the procurement of the payment of money or the procurement of a contract. A contract secured by duress is not void, but is voidable only, and hence may be rendered valid and binding by subsequent ratification.[6] Textwriters are not agreed on the theory underlying the doctrine of duress. Pollock says that the right of recovery is based, not on the involuntary nature of the payment in and of itself, but on failure of consideration.[7] Leake, basing his view on a dictum in an old English case,[8] would explain the

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circumstances, and must be such as to influence so strongly the payor that his payment is not the act of his own will. Coon v. Metzler, (1915) 161 Wis. 328, 332, 154 N.W. 377, L.R.A. 1916B 667. For comprehensive notes on the subject of duress, see 30 Am. L. Reg. (N.S.) 641; 45 Am. Dec. 153; 94 A.S.R. 408, 411.

[2]1 Page, Contracts, 2nd ed., 780-1.

[3]See Skeate v. Beale, (1840) 11 Adol. & El. 98. There was a further distinction, namely, that money actually paid to prevent a seizure could be recovered, whereas an executory contract, entered into to prevent the seizure, could not be avoided. It has been said that there obviously is no merit to this distinction. 3 Williston, Contracts 2846. But see E. D. Clough & Co. v. Boston & Maine R., (1914) 77 N.H. 222, 251, 90 Atl. 863, Ann. Cas. 1915B 1195, where it is said that money paid under duress may be recovered, and the coercion need not amount to the duress necessary to the avoidance of a contract.

[4]Astley v. Reynolds, (1732) 2 Strange 915.

[5]Joannin v. Ogilvie, (1892) 49 Minn. 564, 52 N.W. 217, 16 L.R.A. 376, 32 A.S.R. 581; First Nat. Bank of David City v. Sargeant, (1902) 65 Neb. 594, 91 N.W. 595, 59 L.R.A. 296; see note L.R.A. 1915B 498.

[6]See Campbell v. Chabot, (1916) 115 Me. 247, 98 Atl. 746. Thus, payment of note, which was given under duress, cannot be recovered. Baldwin Co. v. Savage, (1916) 81 Ore. 379, 391, 159 Pac. 80; Brown v. Worthington, (1911) 152 Mo. App. 351, 133 S.W. 93; but see Brown v. Worthington, (1912) 162 Mo. App. 508, 142 S.W. 1082. Contra, Coon v. Metzler, (1915) 161 Wis. 328, 154 N.W. 377, L.R.A. 1916B 667, and note; Nelson v. Leszczynski, (1913) 177 Mich. 517, 143 N.W. 606.

[7]Wald's Pollock, Contracts, 3rd Am. ed., 732. In Galvin v. Stokes, (1920) 68 Colo. 376, 191 Pac. 117, 120, the court said: "The check was obtained by duress and was therefore without consideration and void."

[8]Atlee v. Backhouse, (1838) 3 M. & W. 633, 650.

cases on the ground that the payment was simply involuntary, rather than on any theory of duress.[9] But Williston thinks that the courts are proceeding under the influence of the equitable doctrine of undue influence, and that duress is but the extreme of undue influence.[10] In fact, he thinks it desirable to extend the meaning of the word "duress" to cover every case where a party to a contract or other transaction was deprived of the freedom of his will, and he notes a tendency of the courts in that direction.[11]

Various definitions of duress are given, each depending largely upon the view of the jurisdiction in which the case arises and, as noted above, often upon the circumstances of the case. No definite or exact rule of universal application can be laid down. A definition often accepted is this: To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no immediate relief other than by making the payment.[12] Thus, mere reluctance to pay is not sufficient.[13] Nor will the fact that an actual protest was filed make a voluntary payment involuntary.[14] But failure to protest will not make an involuntary payment voluntary, although it is always advisable to make a protest, because it is valuable evidence of the coercion.[15] If the relative situations of the parties give one of them dominance over the other, that is an important element in determining whether duress was exercised.[16]

There are several general rules as to what particular threats or acts amount to duress.[17] The law does not regard a person as being under duress who enters into a contract to relieve, not him-

[9]Leake, Contracts, 7th ed., 289.

[10]3 Williston, Contracts 2828.

[11]3 Williston, Contracts 2830-1.

[12]Radich v. Hutchins, (1877) 95 U.S. 210, 213, 24 L. Ed. 409. Conversely, a payment can not be recovered if made with full knowledge of the facts rendering the claim illegal, without any immediate necessity therefor, and not to release his person or property from detention. Gaar, Scott & Co. v. Shannon, (1909) 52 Tex. Civ. App. 634, 115 S.W. 361, affirmed in (1912) 223 U.S. 468, 32 S.C.R. 236, 56 L. Ed. 510. For other definitions of duress, see 1 Page, Contracts, 2nd ed., 739.

[13]Cantonwine v. Bosch Bros., (1910) 148 Ia. 496, 127 N.W. 657.

[14]21 R.C.L. 149.

[15]De Graff v. County of Ramsey, (1891) 46 Minn. 319, 321, 48 N.W. 1135; see 30 Am. L. Reg. (N.S.) 641, 688.

[16]See Swift & Co. v. United States, (1884) 111 U.S. 22, 4 S.C.R. 244, 28 L. Ed. 341; American Brewg. Co. v. City of St. Louis, (1905) 187 Mo. 367, 86 S.W. 129, 2 Ann. Cas. 821. and note.

[17]See 3 Williston, Contracts 2846; 1 Page, Contracts, 2nd ed., 786.

self, but another person, unless such other person is a member of his family.[18] And generally, duress exercised by a third person in procuring a mortgage, contract, or the like, does not affect the rights of the obligee thereof, who did not participate therein in any way.[19] A person may threaten to do anything he has a right to do, regardless of the effect upon the other party; therefore, money paid under duress may be recovered back only if it appears that the defendant in justice and good conscience ought not retain it.[20] A mere threat to sue is not sufficient to render involuntary, a payment made to prevent the suit.[21] And threats of criminal prosecution, unaccompanied by any threat of immediate imprisonment, do not amount to duress.[22] Again, the mere threat to withhold from a party a legal right, which he has an adequate remedy to enforce, is not legal duress.[23] Similarly, a payment in excess of the sum actually due, in order to avoid an attachment, is not paid under duress, in the sense that it can be recovered,[24] unless for financial reasons the payor is unable to make the statutory bond necessary to secure the release of the goods.[25] And it has been held that mere refusal to pay a debt will not render voidable a contract procured by such refusal, even though the other party was forced to enter into it by his financial necessities.[26]

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[18]9 R.C.L. 726; Wald's Pollock, Contracts, 3rd Am. ed., 290. In Adams v. Irving Nat. Bank, (1889) 116 N.Y. 606, 23 N.E. 7, 6 L.R.A. 491, 15 A.S.R. 447, the court said: "It is not an accurate use of language to apply the term 'duress' to the facts upon which the plaintiff seeks to recover. The case falls rather within the equitable principle which renders voidable contracts obtained by undue influence. However we may classify the case, the rule is firmly established that, in relation to husband and wife or parent and child, each may avoid a contract induced and obtained by threats of imprisonment of the other, and it is of no consequence whether the threat is of lawful or unlawful imprisonment." See Francis v. Hurd, (1897) 113 Mich. 250, 71 N.W. 582. But see Union Exch. Nat. Bank of New York v. Joseph, (1921) 231 N.Y. 250, 131 N.E. 905, 17 A.L.R. 323, and note.

[19]Smith v. Commercial Bank of Jasper, (1919) 77 Fla. 163, 81 So. 154, 4 A.L.R. 862, and note: see generally on this point, 1 Page, Contracts, 2nd ed., 813.

[20]C. W. Hahl & Co. v. Hutcheson, Campbell & Hutcheson, (Tex. Civ. App. 1917) 196 S.W. 262.

[21]Monroe Nat. Bank v. Catlin, (1902) 82 Conn. 227, 73 Atl. 3; Kamenitsky v. Corcoran, (1917) 177 App. Div. 605, 164 N.Y.S. 297.

[22]Voorhees v. Nelson, (1916) 189 Mich. 684, 155 N.W. 708; Campbell v. Chabot, (1916) 115 Me. 247, 98 Atl. 746.

[23]Cable v. Foley, (1891) 45 Minn. 421, 47 N.W. 1135; Baldwin v. Village of Chesaning, (1915) 188 Mich. 17, 154 N.W. 84, Ann. Cas. 1918B 512, and note.

[24]Remington Arms, etc., Co. v. Feeney Tool Co., (1921) 97 Conn. 129, 115 Atl. 629, 18 A.L.R. 1230, and note; Turner v. Barber, (1901) 66 N.J.L. 496, 49 Atl. 676.

[25]Finch v. J. M. Cox Co., (1917) 19 Ga. App. 256, 91 S.E. 281.

[26]Silliman v. United States, (1879) 101 U.S. 465, 25 L. Ed. 987; Hackley v. Headley, (1881) 45 Mich. 569, 8 N.W. 511; see Cable v. Foley, (1891)

It has been said that a mere breach of contract or threat to break a contract has not yet been held to amount to duress.[27] There are some dicta[28] and decisions to this effect,[29] but in most of them the plaintiff's needs were not pressing or else he had an adequate remedy at law. That is to say, under circumstances of especial hardship and oppression, which are, of course, questions of fact, an actual or threatened breach of contract may amount to duress.[30] Thus, in a recent Tennessee case,[31] the defendants repudiated an option which the plaintiffs had procured in connection with options on adjoining lands pursuant to an immense water-power development project. The defendants' land was the key to the plan, and, if it was not obtained immediately, the project necessarily would fail, and the plaintiffs would lose large sums that they had invested. In other words, a suit for specific performance would be wholly inadequate. Accordingly, the plaintiffs acceded to the defendants' demand for more than double the price named in the option, obtained a deed, and the same day brought an action to recover the excess which they had paid. The court granted the claim on the ground that the payment was procured through duress of property. The case is contrary to many well-considered cases, but it marked a commendable advance of the doctrine of duress.

There are some cases of duress which apparently are not included under duress of person or property. Thus, a candidate for office was allowed to recover a fee, payment of which a statute, later held unconstitutional, made a condition precedent to the

45 Minn. 421, 47 N.W. 1135, where the court stressed the point that the plaintiff had an adequate remedy at law at the time he claims he was compelled to enter into the contract which he now seeks to avoid. Compare the Hackley case with McCabe v. Shaver, (1888) 69 Mich. 25, 36 N.W. 800.

[27]7 Cal. L. Rev. 188, 190.

[28]Joannin v. Ogilvie, (1892) 49 Minn. 564, 568, 52 N.W. 217, 16 L.R.A. 376, 32 A.S.R. 581; Smithwick v. Whitley, (1910) 152 N.C. 369, 67 S.E. 913.

[29]See 1 Page, Contracts, 2nd ed., 803; Goebel v. Linn, (1882) 47 Mich. 489, 11 N.W. 284, 41 Am. Rep. 723; Matthews v. Wm. Frank Brewg. Co., (1899) 26 Misc. 46, 55 N.Y.S. 241. Contra, Independent Belot. Aid Soc. v. Lurie, (1921) 187 N.Y.S. 59, where an undertaker, who had agreed with the plaintiff lodge to bury its deceased members at stipulated prices, demanded a much larger sum when he was asked to prepare a body for burial. Other undertakers were unavailable; so the plaintiff paid the sum demanded. Later it was allowed to recover it. See Horner v. State, (1899) 42 App. Div. 430, 59 N.Y.S. 96. And see Secor v. Ardsley Ice Co., (1909) 133 App. Div. 136, 117 N.Y.S. 414, affirmed without opinion in 201 N.Y. 603, 95 N.E. 1139, where the defendant agreed to sell the plaintiff ice at $2 a ton, but later demanded more. Cheaper ice being unavailable, the plaintiff paid under protest, and was allowed to recover the excess in an action for *breach of contract.*

[30]1 Page, Contracts, 2nd., 805.

[31]Johnson v. Ford, (Tenn. 1922) 245 S.W. 531.

right to file.[32] Again, a plaintiff was allowed to recover money that he paid under the fear that he would be expelled from a union, and therefore be unable to secure work.[33] These cases might be said to involve duress of rights.[34]

Be that as it may, it would seem that a contract or a payment is procured by duress whenever the person really did not have a choice in the matter.[35]

RECENT CASES

ADVERSE POSSESSION UNDER PAROL GIFT—STATUTE OF FRAUDS—STATUTE OF LIMITATIONS—DISSEISEE HOLDING ADVERSELY AS AGENT OF DISSEISOR.—A son entered into possession of certain lands under a parol gift from his father, and made substantial improvements. The son left the land in a year, returning every summer or sending his family there during the summer. The father remained in possession, in subordination to the son's claim of right and possession, making statements on numerous occasions that the property belonged to the son. *Held*, that through the possession of the father as tenant of the son, the oral grant ripened into legal title by adverse possession. *Nevells v. Carter*, (Me. 1922) 119 Atl. 62.

The rule is recognized in most jurisdictions that a parol gift of land is taken out of the statute of frauds when the donee has acquired possession and made permanent improvements on the land in reliance on the gift. See 6 MINNESOTA LAW REVIEW 604. But the court in the instant case rests its decision solely on the ground that title was acquired by adverse possession. It is well-settled law that one claiming as owner under a parol gift and remaining in possession for the statutory period, acquires title by adverse possession. *Schafer v. Hauser*, (1897) 111 Mich. 622, 70 N.W. 136, 35 L.R.A. 835, and note, 66 A.S.R. 403. It is equally well settled that to acquire title by adverse possession, the disseisor may hold possession through an agent or tenant. *Kelley v. Green*, (1919) 142 Minn. 82, 170 N.W. 922; *Omaha & Florence L. T. Co. v. Parker*, (1892) 33 Neb. 775, 51 N.W. 139, 29 A.S.R. 506, and note. Further, possession under a parol gift need not be notorious or hostile to the donor, because entry under a parol gift is evidence to show that the donee entered under a claim of right and adverse to all others, and the donor is presumed to have notice of the adverse claim. *Sumner v. Murphy*, (1834) 2 Hill (S.C.) 488, 27 Am. Dec. 397; *Craig v. Craig*, (Pa. 1887) 11 Atl. 60; Clark v. Gilbert, (1872) 39 Conn. 94, 97; *Thomson v. Thomson*, (1892) 93 Ky. 435, 441, 14 Ky. Law Rep. 513, 20 S. W. 373; see note 35 L.R.A. 835, 838. And the fact that the father continues to live on the premises with his son, admitting ownership of the son, is not suffi-

[32]Johnson v. County of Grand Forks, (1907) 16 N.D. 363, 113 N.W. 1071, 125 A.S.R. 662.

[33]Fuerst v. Musical Mut. P. Union, (1905) 95 N.Y.S. 155. No cases have been found, but it is doubtful if one can recover what he has paid his employer under the fear that his failure to do so would cause his discharge.

[34]7 Cal. L. Rev. 188, 189.

[35]Joannin v. Ogilvie, (1892) 49 Minn. 564, 567-8, 52 N.W. 217, 16 L. R.A. 376, 32 A.S.R. 581.

cient to interrupt the son's adverse possession under a parol gift from his father. *Owsley, Sr. v. Owsley, Jr.,* (1903) 117 Ky. 47, 25 Ky. Law Rep. 1186, 77 S.W. 397; see *Raleigh v. Wells,* (1905) 29 Utah 217, 221, 81 Pac. 908, 110 A.S.R. 689. Even a wife, living with her husband on land to which he has legal title, may acquire title by adverse possession against him, if during the statutory period he admits his wife's title under a subsequent ineffective conveyance from the same grantor. *Hartman v. Nettles,* (1886) 64 Miss. 495, 8 So. 234. See, however, *Potter v. Adams,* (1894) 125 Mo. 118, 28 S.W. 490, 46 A.S.R. 478, where the same conclusion is reached on the theory of estoppel. In *McPherson v. McPherson,* (1906) 75 Neb. 830, 106 N.W. 991, 121 A.S.R. 835, an even stronger decision is found. The husband bought a void tax deed to land adjoining a tract occupied by both the husband and wife. The husband, through a third person, quitclaimed to his wife. Two years later, unknown to the wife, the husband purchased a quitclaim of the patent title, which deed was not recorded for eight years. During the ten year period the husband and wife lived on their original plot, the husband working the tract purchased. The court held that the wife acquired title by adverse possession, because, in order to interrupt adverse possession, the re-entry of the owner must be hostile to the possession of the claimant. See also *Burrows v. Gallup,* (1865) 32 Conn. 493, 498, 87 Am. Dec. 186. Dicta in several decisions are apparently contra to these decisions, but in none of them is there evidence that one occupant disclaims title in himself and admits the claim of title of his joint occupant. For example, in *Gafford v. Strauss,* (1889) 89 Ala. 283, 18 A. S. R. 111 the husband in effect denied his wife's title by mortgaging the premises occupied by the husband and wife, subsequent to a parol gift to his wife; in *Hovorka v. Havlik,* (1903) 68 Neb. 14, 93 N.W. 990, 110 A.S.R. 387 the wife's admission of the husband's claim of title to premises occupied jointly is negatived by the fact that the husband claimed under a deed from his wife, void because of duress. See also *Stiff v. Cobb,* (1899) 126 Ala. 381, 28 So. 402, 85 A.S.R. 38; *Clark v. Gilbert,* (1872) 39 Conn. 94; cases cited in notes, 18 A.S.R. 113; 22 Ann. Cas. 570. It follows from the few decisions on this point, that the actual physical exclusion of the legal owner is not necessary, in order to acquire a title by adverse possession, provided that during the statutory period he disclaims any title in himself and at all times admits the claim of title made by the adverse claimant. From this rule it logically follows that the adverse claimant may under these circumstances acquire title through the possession of an agent in joint occupancy with the owner, or even through the possession of the owner as agent or tenant of the adverse claimant. Provided that the evidence of a submissive holding is clear, definite and conclusive, and inconsistent with the hypothesis of a mere license, *Ogsbury v. Ogsbury,* (1889) 115 N.Y. 290, 295, 22 N.E. 219; *Raleigh v. Wells,* (1905) 29 Utah 217, 81 Pac. 908, 110 A.S.R. 689, it is submitted that the rule of the instant case is reasonable and equitable.

BILLS AND NOTES—WAIVER OF DEMAND, PROTEST, AND NOTICE OF PROTEST—WHETHER TERMS ON THE BACK OF A NOTE ARE "EMBODIED IN THE INSTRUMENT" WITHIN THE MEANING OF THE NEGOTIABLE INSTRUMENTS

LAW.—The defendant was sued as an indorser on a note having a waiver of demand, protest and notice of protest, printed on the back of the note. Several indorsements intervene between the printed waiver and the defendant's signature. *Held,* two justices dissenting, that under sec. 110 of the Negotiable Instruments Law the defendant was a mere indorser, and not bound by the waiver, and therefore not liable where notice of dishonor was not given. *Mooers v. Stalker et al.,* (Iowa 1922) 191 N. W. 175.

Under the common-law decisions printed provisions appearing on the back of a note at the time of the execution thereof by the maker became a part of the note and were therefore embodied therein. 8 C.J. 702; I Daniel, Neg. Inst., 6th ed., 203, 204; *The Portsmouth Savings Bank v. Wilson,* (1894) 5 App. D.C. 8. This view is based upon the theory that the contract of indorsement is a conditional one, implied in law from the acts of the parties and that the conditions thereto may be waived by the person or persons entitled to performance, either by express stipulation to that effect or by action or a course of conduct inconsistent with the right to demand such performance, and that when the waiver enters into the contract at its inception it is as much a part of the contract as anything else that appears therein and is binding upon all parties to the contract. *The Portsmouth Savings Bank v. Wilson,* (1894) 5 App. D.C. 8, 13; 2 Daniel, Neg. Inst., 6th ed., 1244, 1246. It is generally conceded that the Negotiable Instruments Law is but a codification of the common-law decisions on the subject where there was no appreciable conflict in such decisions. 8 C.J. 47; *Central National Bank of Portsmouth v. Sciotoville Milling Co.,* (1917) 79 W.Va. 782, 784, 91 S.E. 808. This fact is disregarded by the court in the instant case and the decision is based on the fact that sec. 110 (see G.S. Minn. 1913, sec. 5922) provides that: "Where the waiver is embodied in the instrument itself, it is binding upon all parties; but where it is written above the signature of an indorser, it binds him only," and, in order to give the second clause of the section effect, it is found necessary to limit the first clause to terms on the face of the instrument. This conclusion was suggested in 8 C.J. 703. The dissenting justices are supported by the only authority on the question, *Central National Bank of Portsmouth v. Sciotoville Milling Co.,* (1917) 79 W.Va. 782, 91 S.E. 808, and as pointed out in the dissenting opinion in the instant case, the division provided for by section 110 is one of time rather than place. The first clause concerns provisions introduced before the instrument left the maker's hands and the second refers to such indorsement or writing as may have been added since the instrument left the hands of the maker.

CARRIERS—LIMITATION OF LIABILITY—AGREED VALUATION—CONVERSION BY CARRIER—CUMMINS AMENDMENT.—The plaintiff shipped goods in interstate commerce at an agreed valuation. The goods were miscarried and later they were sold by the carrier as unclaimed although the owner was making continuous demand therefor. The plaintiff sues for the full value. *Held,* that the full value be recovered notwithstanding the agreed valuation, for this is a case of conversion, and that a construction and application of the Cummins Amendment to these facts is unnecessary. *Sands v. American Railway Express Co.,* (Minn. 1923).

The validity of agreed valuation clauses in interstate commerce is solely a federal question insofar as Congress has acted upon the subject. They are held valid, when based on alternative rates approved by the Interstate Commerce Commission. U.S. Comp. Stat., 1916, sec. 8604a (Cummins Amendment) and note 2, p. 9292; *Adams Express Co. v. Croninger,* (1913) 226 U.S. 491, 33 S.C.R. 148, 57 L. Ed. 314, 44 L.R.A. (N.S.) 257, and note; see *Western Assurance Co. v. Wells Fargo & Co.,* (1919) 143 Minn. 60, 173 N.W. 402. In the instant case the court does not definitely state the grounds of their decision, which may have been, either that there is a conversion after the contract of carriage was completed, or that there was a conversion while in interstate commerce. On the former theory it is obvious that a full recovery might be allowed as the contract of transportation was performed, although imperfectly, and liability for subsequent acts is not affected by any limitation contained in the contract. See *Central of Georgia R. Co. v. Chicago Portrait Co.,* (1904) 122 Ga. 11, 49 S.E. 727. However, if the goods were considered still in interstate commerce a construction of the Cummins Amendment would be necessary. The Cummins Amendment provides that the carrier "shall be liable...for the full actual loss, damage or injury to such property caused by it...Provided, however, the provisions hereof...shall not apply...to property...received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released." U. S. Comp. Stat., 1916, sec. 8604a. The United States Supreme Court has definitely stated that the stipulation of an agreed valuation cannot be escaped by the form of the action, and that to hold that the conduct of a carrier could give the shipper a right to ignore the stipulation, would antagonize the plain policy of the act. The action, however, was in trover for misdelivery, and the Supreme Court has not passed directly upon the situation where there is an affirmative conversion for the carrier's own benefit, as in the instant case. *Georgia, etc., R. Co. v. Blish Milling Co.,* (1916) 241 U.S. 190, 36 S.C.R. 541, 60 L. Ed. 948. The Supreme Court not having directly passed on the point, it has been definitely held, by a state court, prior to the decision in the instant case, that the act does not apply and was not intended to apply in the face of a strong public policy which seeks to prevent such an opportunity for fraud. *St. Louis, etc., R. Co. v. Wallace,* (Tex. Civ. App. 1915) 176 S.W. 764; see *Richter & Sons v. American Express Co.,* (1917) 180 Ia. 1037, 164 N.W. 228. Where an employee acting outside the scope of his employment converts or embezzles goods for his own benefit the act protects the carrier, *D'Utassy v. Barrett,* (1916) 219 N.Y. 420, 114 N.E. 786; *Moore v. Duncan,* (1916) 237 Fed. 780; *Henderson v. Wells Fargo Express Co.,* (Tex. Civ. App. 1919) 217 S.W. 962, but in all these cases it is intimated that the rule would be different if the carrier itself converted the goods for its own benefit. The decisions of the state courts can be traced to the distinction enunciated in *Magnin v. Dinsmore,* (1877) 70 N.Y. 410, that "an *affirmative,* but not necessarily intentional, act of wrongdoing" will deprive the carrier of the contract limiting his liability to an agreed value.

CONFLICT OF LAWS—GARNISHMENT—JURISDICTION—GARNISHMENT OF A NON-RESIDENT WITHOUT PERSONAL SERVICE ON THE PRINCIPAL DEBTOR.—The plaintiff, a resident of North Dakota, sues a resident of Montana in North Dakota, obtaining substituted service, and garnishes a railroad company doing business in both states but not organized under the laws of either. The garnishee makes a return, showing indebtedness owing to the defendant on an obligation incurred in Montana and not payable at any particular place. *Held*, that the courts of North Dakota have jurisdiction to render a valid judgment in garnishment. *Bingenheimer Mercantile Co. v. Weber*, (N.D. 1922) 191 N.W. 620.

This decision is in accord with the weight of authority which holds that a court has jurisdiction in garnishment proceedings whenever it has personal jurisdiction over the sub-debtor (garnishee), provided the garnishee could himself be sued by his creditor in that state. *Harris v. Balk*, (1905) 198 U.S. 215, 25 S.C.R. 625, 49 L. Ed. 1023; *Leech v. Brown*, (1915) 172 Ia. 182, 154 N.W. 440; *Wiener v. American Ins. Co.*, (1909) 224 Pa. 292, 73 Atl. 443, 23 L.R.A. (N.S.) 593; *Biggert v. Straub*, (1906) 193 Mass. 77, 78 N.E. 770; *Wright v. Railroad*, (1906) 141 N.C. 164, 53 S.E. 831. In Minnesota for the purpose of garnishment a debt has a situs wherever the sub-debtor may be found and wherever the sub-debtor may be sued for its recovery, *Starkey v. Cleveland, etc., R. Co.*, (1911) 114 Minn. 27, 130 N.W. 540, L.R.A. 1915F 880, but where the sub-debtor is only temporarily within the state the court will not exercise jurisdiction in a garnishment proceeding, *McKinney v. Mills*, (1900) 80 Minn. 478, 83 N.W. 452, though it undoubtedly has the power to do so under the test accepted as to the situs of the debt. *Harris v. Balk*, (1905) 198 U.S. 215, 221, 25 S.C.R. 625, 49 L. Ed. 1023. And possibly the Minnesota court would not exercise jurisdiction in the situation presented in the instant case, where the transaction out of which the debt arose took place in a state other than that in which the garnishment is issued. *Swedish-American Nat. Bank v. Bleecker*, (1898) 72 Minn. 383, 75 N.W. 740, 42 L.R.A. 283; compare *Starkey v. Cleveland, etc., R. Co.*, (1911) 114 Minn. 27, 32, 130 N.W. 540, L.R.A. 1915F 880. A minority holds that the situs of a debt for the purpose of garnishment is exclusively at the principal debtor's domicile. *Louisville & Nashville R. Co. v. McCarty*, (1915) 195 Ala. 150, 70 So. 91; *Central Trust Co. v. Chattanooga R. & C. Co.*, (1895) 68 Fed. 685; *Atchison, etc., R. Co. v. Maggard*, (1895) 6 Colo. App. 85, 39 Pac. 985. Theoretically the result reached by both the majority and minority is erroneous. Garnishment is a proceeding in rem, the res being the debtor-creditor relation. In order to control this relation the court must have the power to control both parties to it. See Beale, Jurisdiction in Rem to Compel Payment of a Debt, 27 Harv. L. Rev. 107, 116. Compare Carpenter, Jurisdiction over Debts for the purpose of Administration, Garnishment, and Taxation, 31 Harv. Law Rev. 905, 912.

CONSTITUTIONAL LAW—SCHOOLS—STATUTE REQUIRING LICENSE FOR OPERATION OF PRIVATE SCHOOLS.—The New York legislature recently passed an act requiring all private schools, with specified exceptions, to obtain a license before operating. The act further provided that no license should be granted to any school where the instruction offered included the

doctrine that organized government should be overthrown by unlawful means. The defendant refused to apply for a license on the ground that the statute was unconstitutional as it deprived persons of liberty and property without due process of law and did not afford equal protection of the law, and an injunction is sought to prevent the operation of the school. *Held,* that the state can prevent the teaching of rebellious doctrines by requiring of schools a license, the issuance of which is conditioned on the fact that such doctrines shall form no part of the curricula of the schools. *People v. American Socialist Soc.,* (1922) 195 N.Y.S. 801.

There are few cases defining the limits to which the state may go in the regulation of private schools. Inasmuch as private rights are involved, the regulation cannot overstep the bounds of the police power. See note 29 L.R.A. (N.S.) 53. Legislatures have the power to enact syndicalism statutes. See *State v. Workers' Socialist Publishing Co.,* (1921) 150 Minn. 406, 185 N.W. 931, 20 A.L.R. 1544 sustaining Chapter 215, p. 311, Laws of Minnesota 1917 forbidding anyone to teach the duty, necessity, or propriety of unlawful methods of accomplishing industrial or political ends. Having the power to protect the state interests by penal statutes it would seem that the instant case is correct in sustaining an act providing for an injunctional remedy which effectively protects the state's interest. Other attempts have been made to regulate private schools which to some extent show the limits to the state's power in this respect. A state cannot deprive a private school of its property and give it to another institution merely because the former is inefficient and not accomplishing the ends designated in its charter. *Ohio v. Neff,* (1895) 52 Ohio St. 375, 40 N.E. 720, 28 L.R.A. 409. However, it is not a denial of equal protection of the law, nor of due process, to prohibit the maintenance of any school where persons of white and negro races are both received; but to provide that separate schools for white and colored persons shall not be operated less than twenty-five miles apart, is unreasonable and not within the police power. *Berea College v. Commonwealth,* (1906) 123 Ky. 209, 94 S.W. 623, 13 Ann. Cas. 337, 124 A.S.R. 344. The state may require that competent instructors shall be provided in private, denominational, and parochial schools, *State of Kansas v. Will,* (1916) 99 Kan 167, 160 Pac. 1025, and it is intimated that the general course of study might be prescribed.

CORPORATIONS—OFFICERS—COMPENSATION—REASONABLENESS OF AMOUNT ATTACKED BY MINORITY STOCKHOLDERS—EVIDENCE—BURDEN OF PROOF.—The plaintiff, a minority stockholder, sued the defendant corporation and its directors to compel a refund of money alleged to have been wrongfully received as salaries. The salaries were paid for services in management, not merely as directors, and were in part percentage bonuses on the business of the corporation. The findings of the trial court referred to "a purpose to unjustly deprive minority stockholders of a fair part of the earnings," and this purpose was "manifested in the liberal salaries paid." *Held,* that while the salaries seemed large, possibly on account of the large bonus due to an abnormally prosperous year, the plaintiff has the burden of proving that the salaries are so unreasonable and excessive that their retention would be a substantial wrong to him, and that he has not sustained that

burden. *Seitz v. Union Brass & Metal Mfg. Co.*, (Minn. 1922) 189 N.W. 586.

Where salaries are voted to directors, by directors, and the vote is carried by the vote of the directors whose compensation is being fixed, the obligation is prima facie voidable at the election of either the corporation or a stockholder, for the acts of directors, where their own interests oppose those of the corporation, are in general scrutinized with great jealousy by the courts, *Jones v. Morrison*, (1883) 31 Minn. 140, 148, 16 N.W. 854, and the burden is on the director of proving the fairness of the salaries for good faith is not presumed. *Francis v. Brigham Hopkins Co.*, (1908) 108 Md. 233, 70 Atl. 95, but see *Beha v. Martin*, (1914) 161 Ky. 838, 171 S.W. 393. However, if the action of the directors was ratified by the stockholders, even though the directors' vote passed by reason of the vote of the director benefited, the burden of proving the unreasonableness of the salary is on the person seeking the refund. *Lillard v. Oil, Paint and Drug Co.*, (1903) 70 N.J. Eq. 197, 56 Atl. 254; *Booth v. Beattie*, (N.J. Eq. 1922) 118 Atl. 257. Where, as in the instant case, the vote of the director benefited is not a controlling element in the vote, the better view seems to be that the action of the directors will not be set aside by the courts on the suit of a minority stockholder unless the result is an oppression of the minority, *Bounds v. Stephenson*, (Tex. Civ. App. 1916) 187 S.W. 1031; principal case; see *Beha v. Martin*, (1914) 161 Ky. 838, 171 S.W. 393; *MacNaughton v. Osgood*, (1886) 41 Hun (N.Y.) 109. Contra, *Booth v. Land Filling Co.*, (1905) 69 N.J. Eq. 536, 59 Atl. 767. In the *MacNaughton* case, however, it was held that where a corporation sues to force a refund the director should prove the reasonableness of the salary received. Where, independent of the fairness of the salaries, actual fraud on the part of the directors has been established, it was held that the burden of proving that the salaries were reasonable, was thrown on the directors. *Harrison v. Thomas*, (1901) 112 Fed. 22, 50 C.C.A. 98.

CRIMINAL LAW—DOUBLE JEOPARDY—IDENTITY OF OFFENCES ARISING FROM THE SAME ACT—INDICTMENT.—A shot at B and killed B but the same shot also killed C. A was tried and acquitted of the murder of B. In answer to an indictment for the murder of C he pleaded former jeopardy. *Held*, that the former acquittal is a bar to this prosecution. *Ruffin v. State*, (Ga. 1922) 114 S.E. 581.

This decision is supported by authority, 16 C.J. 283; *Clem v. State*, (1873) 42 Ind. 420, 13 Am. Rep. 369; *Ben v. State*, (1853) 22 Ala. 9, 58 Am. Dec. 234; *Spannell v. State*, (1918) 83 Tex. Cr. Rep. 418, 203 S.W. 357; 1 Bishop, New Cr. Law 635, on the theory that since there is only one act there is only one offence. But the general test as to the identity of offences is that the offences are not the same if the same evidence could not be offered to secure a conviction under either indictment. *Ex parte Henkes*, (1919) 267 Fed. 276; *United States v. Farhat*, (1920) 269 Fed. 33; *State v. Hackett*, (1891) 47 Minn. 425, 50 N.W. 472; 1 Bishop, New Cr. Law, sec. 1051. Applying this test to the instant case, since A could not be convicted of the murder of C by evidence showing the murder of B, the offences would not be the same

and there would be no double jeopardy. Some authorities so hold. *People v. Majors,* (1884) 65 Cal. 138, 3 Pac. 597, 52 Am. Rep. 295; *Commonwealth v. Browning,* (1912) 146 Ky. 770, 143 S.W. 407; Wharton, Cr. Pl. & Pr., 8th ed., sec. 468. It is apparent, then, that most jurisdictions make an exception to the general test where there is only one act. It has been suggested that this exception is made because both offences could be charged in one indictment. 1 Bishop, New Cr. Law, sec. 1061. But this is really no reason at all because such an indictment would be void for duplicity if there were two offences. Wharton, Cr. Pl. & Pr., secs. 243, 468 (3). Some authorities hold in larceny cases that there is only one offence because the name of the the thing stolen, or the owner of it, is required in the indictment for descriptive purposes only and is not of the essence of the offence. *State v. Hennessey,* (1872) 23 Ohio St. 339, 13 Am. Rep. 253; *State v. Warren,* (1893) 77 Md. 121, 26 Atl. 500, 39 A.S.R. 401. And the cases first cited in support of the instant case intimate that the same reasoning applies to homicide cases as to the name of the person killed. Whatever the reason may be, the "one act" test as to the identity of offences in this particular class of cases seems to be firmly established. And it seems to conform to the spirit of the rule as to double jeopary. 1 Bishop, New Cr. Law 635. Since both so-called "offences" may be joined in one count of the indictment if this test is applied, no unfair results are reached, and it becomes the duty of the prosecutor to join them. The Minnesota court has adopted this test in certain cases and might therefore apply it in the situation presented in the instant case. *State v. Moore,* (1902) 86 Minn. 422, 90 N.W. 787; *State v. Hoskins,* (1895) 60 Minn. 168, 62 N.W. 270.

CRIMINAL LAW—INCREASE OF SENTENCE—JUDICIAL DISCRETION—REVIEW OF SENTENCE BY APPELLATE COURT.—The defendant, having been convicted of assault and battery, was sentenced by the trial court to twelve months in jail and assigned to work on the county roads. A day later, a motion by the defendant for a new trial having been denied, he appealed. The trial judge then struck out the original sentence and substituted one doubly severe, saying that the original sentence was imposed because he had inferred that the defendant would not push the case further. From this increased sentence the defendant appealed. *Held,* that the severity of the sentence was within the discretion of the trial judge so long as the limits prescribed by law were not exceeded, and would not be reviewed since no manifest and gross abuse of discretion was shown. *State v. Sudderth,* (N.C. 1922) 114 S.E. 828.

It is undoubtedly the general rule that the trial court may amend and even increase a sentence imposed, at any time during the same term of court at which the original judgment was rendered, if nothing has been done in satisfaction of the original sentence, *Regina v. Fitzgerald,* (1795) 1 Salk. 401; *Commonwealth v. Weymouth,* (1861) 2 Allen (Mass.) 144, 79 Am. Dec. 776, and note; *State v. Dougherty,* (1886) 70 Ia. 439, 30 N.W. 685, on the ground that a term of court is regarded as one continuous day, until the end of which, when the judgment roll is signed and the matter becomes of record, a sentence is considered to be within the "breast" of the trial court. It is generally held, however, that a court may not at a sub-

sequent term of court amend or increase a sentence imposed at a prior term. *Pifer v. Commonwealth,* (1858) 14 Gratt. (Va.) 710; *People v. Whitson,* (1874) 74 Ill. 20; *Ex parte Friday,* (1890) 43 Fed. 916, 8 Am. Cr. Rep. 351. Nor can the court alter a sentence after execution or satisfaction of it has been commenced, *Brown v. Rice,* (1869) 57 Me. 55, 2 Am. Rep. 11; *State v. Meyer,* (1912) 86 Kan. 793, 122 Pac. 101, 40 L.R.A. (N.S.) 90, and note, Ann. Cas. 1913C 278, and note; *Smith v. District Court,* (1906) 132 Ia. 603, 109 N.W. 1085, 11 Ann. Cas. 296, and note, for the reason that the defendant would otherwise be forced to suffer two punishments for one offence. It is also a general rule that the trial court has absolute discretion in imposing a sentence, which the appellate court has no jurisdiction to review so long as the sentence is within the limits prescribed by law. *Keeler v. State,* (1905) 73 Neb. 441, 103 N.W. 64; *Tarrant v. State,* (1880) 4 Lea (Tenn.) 483; see *State v. Barrett,* (1889) 40 Minn. 65, 41 N. W. 459; see *State v. Tarlton,* (1908) 22 S.D. 495, 118 N.W. 706. An increase of a defendant's sentence merely because he exercises his inherent right to appeal would seem to be a gross abuse of judicial discretion, but in *Meaders v. State,* (1895) 96 Ga. 299, 22 S.E. 527, although the court disapproved the practice and said the court had no right to increase a sentence for that reason alone, it was not made a ground for reversal. And in *Nichols v. United States,* (1901) 106 Fed. 672, it was held that it must be presumed that the trial court increased the sentence from proper motives and not to inflict a penalty for the exercise of a clear legal right which would call for the severest censure.

HUSBAND AND WIFE—CONVEYANCE FROM HUSBAND TO WIFE—FAILURE OF CONSIDERATION—FRAUD—RESCISSION.—The plaintiff was induced by his wife to convey to her certain real estate that was his separate property. At the time, wholly unknown to the plaintiff, the wife was involved in an affair with a paramour and intended to abandon the plaintiff. The conveyance was made solely as a gift, supported by no monetary consideration. Upon the subsequent abandonment by the wife, the plaintiff commenced this action to set aside the conveyance and quiet title. *Held,* that under the circumstances there was such failure of consideration that the conveyance was left without support, and it is therefore set aside. *Johnson v. Johnson et al.,* (Wash. 1922) 210 Pac. 382.

Insofar as the fraud perpetrated by the wife in securing the conveyance from her husband is concerned, the decision reached in the instant case is in conformity with the great weight of authority. The relation of husband and wife is so highly confidential in nature that in any transaction between them, induced by fraud, equity will interpose, declare it void, and restore the parties to their original rights. *Thomas v. Thomas,* (1910) 27 Okla. 784, 109 Pac. 825, 113 Pac. 1058, 35 L.R.A. (N.S.) 124, 24 Ann. Cas. 713; 2 Pomeroy, Equity Jurisprudence, 4th ed., 2037, 2081. In the instant case, however, the court touches but incidentally upon the presence of fraud, as such, and rests its decision upon the theory that "the anticipation of future amicable marital relations, whether implied or expressed, becomes the consideration that supports a conveyance from one spouse to another where there is no money or other valuable consideration to support

such conveyance even though it be called a gift for want of more exact characterization," and on the cessation of such relations, due to the fault of the spouse receiving the property, there is a failure of consideration. With a single exception the cases cited are decided solely on the basis of the existence of fraudulent intent at the time of the conveyance and research fails to disclose additional authority for this theory. *Evans v. Evans,* (1903) 118 Ga. 890, 45 S.E. 612, 98 A.S.R. 180; see *Thomas v. Thomas,* (1910) 27 Okla. 784, 799, 109 Pac. 825, 113 Pac. 1058, 35 L.R.A. (N.S.) 124 24 Ann. Cas. 713. On this theory it would seem that a rupture of the marriage relation, whether thirty days or thirty years after the conveyance, if due to the fault of the spouse receiving the property, would constitute failure of consideration and warrant rescission despite the fact that at the time of conveyance the spouse acted bona fide. It is generally held, however, that, where the transaction was originally made in good faith, equity will not set it aside on subsequent estrangement of the parties, even though made at the solicitation of the party receiving the property, *Finlayson v. Finlayson,* (1889) 17 Ore. 347, 21 Pac. 57, 3 L.R.A. 801, 11 A.S.R. 836, and even though the party receiving the property is guilty of adultery. *Kinzey v. Kinzey,* (1893) 115 Mo. 496, 22 S.W. 497, 20 L.R.A 222. And further, under the theory proposed how far must the spouse fail in his or her duties as a spouse to constitute a failure of consideration?

INSURANCE—APPLICABILITY OF PRORATING CLAUSE IN ACCIDENT INSURANCE POLICY TO OTHER INSURANCE POLICIES.—The plaintiff, as beneficiary, sues for death benefits under an accident insurance policy issued by the defendant company. The policy contains a prorating clause for reduction of indemnity if the insured should carry with another company, other insurance covering the "same loss," without giving notice to the defendant company. The insured took out a life insurance policy without giving the required notice. *Held,* that the life insurance policy does not cover the "same loss" within the meaning of the clause in the accident policy, and that the plaintiff is entitled to full indemnity. *Arneberg v. Continental Casualty Co.,* (Wis. 1922) 190 N.W. 97. See also, *Fehrer v. Midland Casualty Co.,* (Wis. 1922) 190 N.W. 910.

Prorating clauses are placed in accident policies to avoid the hazard of self-inflicted injury, and they are valid. *Dustin v. Interstate Business Men's Accid. Ass'n,* (1916) 37 S.D. 635, 642, 159 N.W. 395, L.R.A. 1917B 319, and note. The instant case is one of first impression but the question of construction is analogous to that arising where an applicant for accident insurance states that he has not been rejected by any other insurance company, when, in fact, he has been rejected by a life insurance company. The weight of authority holds that such statements do not constitute a breach of warranty. *Wright v. Health and Accid. Ass'n,* (1910) 107 Me. 418, 78 Atl. 475, 32 L.R.A. (N.S.) 461, and note; *Mutual Reserve Life Ins. Co. v. Dobler,* (1905) 137 Fed. 550, 70 C.C.A. 134; *Dineen v. General Accident Ins. Co.,* (1908) 126 App. Div. 167, 110 N.Y.S. 344; *Mays v. New Amsterdam Cas. Co.,* (1913) 40 App. D.C. 249, 46 L.R.A. (N.S.) 1108. As in the principal case, these latter decisions are based on an application of the rule that the equivocal terms, "other

insurance," "same loss" shall be construed most favorably to the insured and in view of the fact that accident insurance is inherently different from life insurance. The death benefit is not the dominant feature of accident insurance. The indemnity for loss of time resulting from accident is the characteristic feature of accident insurance in the mind of the business man. *Montreal Coal and Towing Co. v. Metropolitan Life Ins. Co.*, (1903) 24 Quebec C.S. 399, affirmed in 35 Can. Sup. Ct. 266.

LANDLORD AND TENANT—SUBLESSEE— EVICTION—LIABILITY FOR RENT. —The defendant sublet from the plaintiff, who was a lessee of the premises. The ground landlord evicted the defendant, and in an action for rent brought thereafter by the plaintiff, the defendant interposed this eviction as a defense. *Held*, that the plaintiff should recover. *Jones & Brindisi, Inc. v. Bernstein*, (1922) 197 N.Y.S. 263.

The authorities unanimously hold as does this case, that a sublessee, in an action for rent, cannot set up the defense that he has been evicted by the ground landlord who has only a reversionary interest in the premises. *Luckey v. Frantzkee*, (1850) 1 E. D. Smith, (N.Y.) 47; 2 Tiffany, Landlord and Tenant 1297; 2 McAdam, Landlord and Tenant, 3rd ed., 1294. Cases apparently contra, see *Galland v. Shubert Theatrical Co.*, (1918) 105 Misc. Rep. 185, 172 N. Y. S. 775, can be explained on the ground that there is either an eviction under a paramount title, where the landlord has an immediate right to possession, or that there is an assignment, and not a sublease, so that there is privity of contract between the landlord and the assignee. See *Craig v. Summers*, (1891) 47 Minn. 189, 191, 49 N.W. 742, 15 L.R.A. 236. While the eviction of the sublessee by the landlord amounts to an eviction of the lessee, terminating the lessee's liability to pay rent, but not his term, *Burn v. Phelps*, (1815) 1 Starkie 94, the sublessee must pay his rent to the lessee. *Luckey v. Frantzkee*, (1850) 1 E.D.Smith (N. Y.) 47. The law of the land vindicates the sublessee's rights, and he is bound to resort to his legal remedy against the wrongdoer, as the landlord, without an immediate right to possession, is but a trespasser, see *Geer v. Boston etc., Zinc Co.*, (1907) 126 Mo. App. 173, 188, 103 S.W. 151, and the lessee should not be liable in the absence of an express covenant against interference by strangers, *Andrew's Case of Grays Inn*, (1591) Croke's Eliz. 214, for it would be unreasonable to expect the immediate lessor to indemnify the sublessee against every wanton trespass committed by third persons. 2 McAdam, Landlord and Tenant, 3rd ed., 1295.

LIBEL—DEFAMATION—ATTACK ON REPUTATION—EXPOSING TO HATRED, CONTEMPT OR RIDICULE.—The plaintiff made an attempt to block a state appropriation for a county fair on the ground that the fair management had permitted the use of certain gambling devices on the grounds. The alleged libelous newspaper article stated that the plaintiff "invoked the aid of the law in an underhanded, roundabout way" to "square up a few of his personal grudges,...to satisfy personal selfishness." *Held*, two justices dissenting, that the newspaper article was not defamatory and hence not within the statutory definition of libel because, although it may

have brought the plaintiff into hatred, contempt and ridicule, it did not injure his reputation by attacking his integrity and moral character. *Fey v. King,* (Iowa 1922) 190 N.W. 519.

In the instant case the civil action is based upon a statutory definition of criminal libel, but the statute may be disregarded for the purposes of this discussion because it simply embodies the common law definition of libel. *Farley v. Evening Chronicle Pub. Co.,* (1905) 113 Mo. App. 216, 87 S.W. 565; *Horton v. Binghamton Press Co.,* (1907)122 App. Div. 332, 106 N.Y.S. 875, affirmed in 93 N.E. 1122, 200 N.Y. 550; *Quinn v. Prudential Ins. Co.,* (1902) 116 Iowa 522, 90 N.W. 349. Common-law libel is written defamation which may be any printing, writing, sign, picture or effigy which is false and tends to injure a person's reputation, and thereby expose him to public hatred, contempt or ridicule, or degrade him in society, or lessen him in public esteem, or lower him in the confidence of the community. *McDermott v. Union Credit Co.,* (1899) 76 Minn. 84, 78 N.W. 967, 79 N.W. 673; *Peck v. Tribune Co.,* (1909) 214 U.S. 185, 29 S.C.R. 554, 53 L.Ed. 960. The court in the instant case asserts that the term reputation as used in the definition of defamation refers to integrity and moral character, and unless they are attacked, the written or printed words are not libel although they may bring a person into hatred, contempt or ridicule; and this view us upheld by at least one other court. *Diener v. Star-Chronicle Pub. Co.,* (1911) 232 Mo. 416, 135 S.W. 6. But this view is attacked by the dissenting opinion in the instant case, and the weight of authority holds that written words may be libelous although they make no charge against integrity or moral character, e. g., if they merely expose to public ridicule, *Snyder v. New York Press Co.,* (1910) 137 App. Div. 291, 121 N.Y.S. 944, or contempt, *Stewart v. Swift Specific Co.,* (1885) 76 Ga. 280, 2 A.S.R. 40, or impute illegitimacy, *Shelby v. Sun Printing and Publishing Ass'n,* (1886) 38 Hun 474, affirmed 109 N.Y. 611, 15 N.E. 895, or state that the plaintiff is a negro. *Upton v. Times-Democrat Pub. Co.,* (1900) 104 La. 141, 28 So. 970. And Iowa has applied the majority view, *Morse v. Times-Republican Printing Co.,* (1904) 124 Iowa 707, 100 N.W. 867; *Turner v. Brien,* (1918) 184 Iowa 320, 167 N.W. 584, 3 A.L.R. 1585, and it would seem clear that in the instant case the court placed too narrow an interpretation upon the term "reputation" in its relation to libel.

NEGLIGENCE—HUSBAND AND WIFE—FAMILY AUTOMOBILE DOCTRINE—CONTRIBUTORY NEGLIGENCE OF A BAILEE NOT IMPUTED TO HIS BAILOR.—The plaintiff owned an automobile which was used at will by his wife for her own purposes. While driven by his wife for her own personal purpose, the automobile collided with the defendant's train at a highway crossing, due to the negligence of both parties, In an action by the husband to recover damages to his automobile, it is *held,* that the negligence of the plaintiff's wife does not bar a recovery. *Norton v. Hines, Director General of Railroads, et al.,* (Mo. App. 1922) 245 S.W. 346.

Aside from any complication introduced by the family automobile doctrine the modern tendency and weight of authority holds that the contributory negligence of a bailee is not imputable to the bailor where the subject

of the bailment is damaged by a third person, for, where one has been injured by the wrongful act of another to which he has no way contributed, he should be entitled to compensation from the wrongdoer. *Morgan County v. Payne,* (Ala. 1922) 93 So. 628; *Fischer v. International R. Co.,* (1920) 112 Misc. 212, 182 N.Y.S. 313; *Lloyd v. Northern Pacific R. Co.,* (1919) 107 Wash. 57, 181 Pac. 29, 6 A.L.R. 307; *Currie v. Consolidated R. Co.,* (1908) 81 Conn. 383, 71 Atl. 356; *Sea Ins. Co. v. Vicksburg, S. & P. R. Co.,* (1908) 159 Fed. 676, 86 C.C.A. 544, 17 L.R.A. (N.S.) 925; *New York L. E. & W. R. Co. v. New Jersey Electric R. Co.,* (1897) 60 N.J.L. 338, 38 Atl. 828, 43 L.R.A. 849, affirmed, 61 N.J.L. 287, 41 Atl. 1116, 43 L.R.A. 854; *Gibson v. Bessemer & L. E. R. Co.,* (1910) 226 Pa. 198, 75 Atl. 194, 27 L.R.A. (N.S.) 689, 18 Ann. Cas. 535. In a number of the earlier decisions the contrary view was taken on the theory that where a bailee uses property for the very purpose for which it was bailed, there is the same privity of contract in all essential features as in engagements between principal and agent and between master and servant, and that consequently the bailor can only recover, where on the same facts the bailee might recover. *Illinois Central R. Co. v. Sims,* (1899) 77 Miss. 325, 27 So. 527, 49 L.R.A. 323; *Puterbaugh v. Reasor,* (1859) 9 Ohio St. 484; *Texas & P. R. Co. v. Tankersley,* (1885) 63 Tex. 57; see also *Welty v. Indianapolis & V. R. Co.,* (1885) 105 Ind. 55, 4 N.E. 410. It would seem, however, that the majority rule would be inapplicable, in the situation presented in the instant case, if the question should arise in a jurisdiction that recognizes the family automobile doctrine. Under the facts of the principal case the husband would clearly be liable, under the family automobile doctrine, for damage inflicted by the wife, 4 MINNESOTA LAW REVIEW 73, 5 MINNESOTA LAW REVIEW 321, and to hold him liable for damage caused by the bailee and not subject him to defense raised by the bailee's conduct, where he seeks redress for damage to the car, would seem obviously inconsistent. The decision in the instant case is correct in view of the fact that Missouri has repudiated the family automobile doctrine, enunciated in *Daily v. Maxwell,* (1911) 152 Mo. App. 415, 133 S.W. 351, in subsequent decisions. *Hays v. Hogan,* (1917) 273 Mo. 1, 200 S.W. 286; *Mast v. Hirsh,* (1918) 199 Mo. App. 1, 202 S.W. 275. On facts that would have subjected the owner to liability for damages caused by the bailee under the family automobile doctrine, Virginia has arrived at the same conclusion as the Missouri court, see *Virginia R. & Power Co. v. Gorsuch,* (1917) 120 Va. 655, 91 S.E. 632, but Virginia has not accepted the family automobile doctrine. *Blair v. Broadwater,* (1917) 121 Va. 301, 93 S.E. 632.

PAYMENT—DURESS OF PROPERTY.—Pursuant to a proposed scheme of water-power development, the plaintiffs obtained options on various tracts of land among which was an option from the defendants which recited a purchase price of $10,000. The plaintiffs immediately thereafter expended some $50,000. Somewhat later the defendants, having become dissatisfied with the price, notified the plaintiffs that they would not execute a deed if the option was exercised. Notwithstanding this notice of the defendants, the plaintiffs exercised the other options, which were about to expire, bringing their total expenditures to $100,000. Consequently, they faced a heavy

loss if they failed to get the defendants' land, which really was the key to the whole plan. A suit for specific performance of the option was inadequate to their needs, because of the long delay which would be occasioned. Accordingly, the plaintiffs paid the $25,000 demanded by the defendants, obtained the deed, but on the same day brought this action to recover the additional $15,000. *Held*, that it was recoverable, because it was paid under duress of property. *Johnson et al. v. Ford et al.*, (Tenn. 1922) 245 S.W. 531.

For a discussion of the principles involved, see NOTES, p. 337.

SCHOOLS AND SCHOOL DISTRICTS—POWERS DELEGATED TO BOARD OF EDUCATION—RIGHT TO EXCLUDE FRATERNITIES.—The plaintiffs, taxpayers, having children who were members of high-school fraternities, sought to enjoin the board of education from enforcing its rule barring all members of fraternities from representing the school in extra-curricular activities, such as athletic and literary contests and denying them the privilege of participation in public graduation exercises. *Held*, two justices dissenting, than an injunction should issue, as the board had no power to make such a rule. *Wright v. Board of Education of St. Louis*, (Mo. 1922) 246 S.W. 43.

Considerable hesitation is shown by most courts in interfering with rules fixed by school authorities for the government of pupils; dicta in many cases declare the rules are presumed reasonable, or that they are not subject to review unless there has clearly been an abuse of discretion in the exercise of the power delegated to them. *Wilson v. Board of Education*, (1908) 233 Ill. 464, 84 N.E. 697, 13 Ann. Cas. 330; *Kinzer v. Independent School District*, (1906) 129 Ia. 441, 105 N.W. 686, 3 L.R.A. (N.S) 496, 6 Ann. Cas. 996; *State ex rel. Dresser v. District Board*, (1908) 135 Wis. 619, 116 N.W. 232, 16 L.R.A. (N.S.) 730 The reasonableness of such rules is a question of law for the court. *Thompson v. Beaver*, (1872) 63 Ill. 353. The authority of the school board is supreme in the school precincts, and extends to the home, where parental authority is generally paramount, only to the extent necessary to control such action of the pupil at home as may effect the government and discipline of the school, or which would have a pernicious effect on the moral tone of the school. *Hobbs v. Germany*, (1909) 94 Miss. 469, 479, 49 So. 515, 22 L. R. A. (N.S) 983; *Sherman v. The Inhabitants of Charleston*, (1851) 8 Cush. (Mass.) 160; notes, 3 L.R.A. (N.S.) 496; 15 Ann. Cas. 404. A rule forbidding pupils of a public school to attend moving picture shows except on Friday and Saturday nights was held reasonable. *Mangum v. Keith*, (1918) 147 Ga. 603, 95 S.E. 1. The instant case seems to stand alone in holding a rule against secret societies in the schools unreasonable and beyond the power of school authorities. Contra, *Wayland v. Hughes*, (1906) 43 Wash. 441, 86 Pac. 642, 7 L.R.A. (N.S.) 352; *Wilson v. Board of Education*, (1908) 233 Ill. 464, 84 N.E. 697, 13 Ann. Cas. 330; see *State ex rel. Stallard v. White et al.*, (1882) 82 Ind. 278, 42 Am. Rep. 496. Having stated that the Missouri statute describes the powers of the school board only in the most general terms, the distinction maintained in the principal case, that in the *Wayland* and *Wilson* cases the authorities had been granted very broad powers, would seem of little merit, thus leaving the decision in direct conflict with

the majority view; the instant case holding that the rule unreasonable interference with home affairs and also that the conduct of such members does not injuriously affect the school. In Minnesota, statutes forbid secret fraternities in any high-school, district, primary, or graded school, and give the authorities power to adopt all rules necessary to enforce the prohibition, G.S. Minn. 1913, secs. 2802-2805, and similar statutes have been held constitutional. *Waugh v. University of Mississippi,* (1915) 237 U.S. 589, 35 S.C.R. 720, 59 L. Ed. 1131.

STATUTE OF FRAUDS—PERFORMANCE OF CONTRACTS—COMPUTATION OF TIME—DOCTRINE OF DE MINIMIS.—The plaintiff contracted to render a full year of service for the defendant and could have started the performance the following day. He was later discharged and brought this action for breach of contract. *Held,* that the contract was not within the statute of frauds. *Dykema v. Story & Clark Piano Co.,* (Mich. 1922) 190 N.W. 638.

By the weight of authority, a verbal contract for a year's services to commence in futuro, even though it be the next day after the making of the contract, is within the statute of frauds, 27 C.J. 186; 25 R.C.L. 453; *Chase v. Hinkley,* (1905) 126 Wis. 75, 105 N.W. 230, 2 L.R.A. (N.S.) 738, 5 Ann. Cas. 328, 110 A.S.R. 896, for the reason that in computing the statutory period the day on which the agreement is made denotes the initiation of the contract and not the future date on which performance is to commence. The minority rule, adopted by the instant case, is predicated on two reasons. Under the doctrine de minimis the day on which the contract is made is excluded in computing the statutory period. In the second place, the contract is construed as a contract for one year from the making of the contract and not a contract for a year's services from the time the performance is commenced. *Smith v. Gold Coast and Ishanti Explorers, Limited,* [1903] 1 K.B. 285; *Prokop v. Bedford Waist & Dress Co.,* (1919) 105 Misc. Rep. 573, 173 N.Y.S. 792. In *O'Donnell v. The Daily News Co.,* (1912) 119 Minn. 378, 387, 138 N.W. 677, a contract for a year's services commencing in one week is involved. The court cites the leading case, *Chase v. Hinkley,* with approval, stating that "the doctrine of de minimis cannot be invoked to avoid the operation of the statute of frauds" and "'an hour more than the time specified is in law as fatal to the contract as though it were two, five, or a hundred years.'" The court however did not have under consideration a contract that called for this absolute statement. G.S. Minn. 1913, sec. 9412 (21), in chap. 107 on Construction of Statutes and Express Repeals, provides: "In computing the time within which an act is required or permitted to be done, the first day shall be excluded and the last included, unless the last shall fall on Sunday..." As stated in *Spencer v. Haug,* (1891) 45 Minn. 231, 47 N.W. 794, the section is not applicable alone to matters of procedure but applies to the computation of time under all statutes. This section would apparently exclude from the operation of the statute cases where performance commences in futuro but not later than the day after the contract is formed. See also *Dickson & Co. v. Frisbee,* (1875) 52 Ala. 165, 23 Am. Rep. 565.

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STATE TAXATION OF NATIONAL BANK SHARES

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STATE taxation of national bank shares is essentially a problem in construing section 5219 of the Revised Statutes. That section provides that nothing in the National Bank Act shall prevent the inclusion of such shares in the personal property of their owners for assessing taxes imposed by authority of the state in which the bank is located. It also grants each state permission to determine the manner and place of taxing the shares of all such banks located within it. This permission is, however, subjected to two restrictions: one relating to the manner of taxation; the other, to the place. No state may tax such shares at a greater rate than is assessed upon other moneyed capital in the hands of its individual citizens; and the shares of these banks in one state, owned by non-residents, can be taxed only in the city or town in which the bank is located. It is the former restriction that has been chiefly involved in the long line of decisions defining the limits of a state's power to tax national bank shares. Those decisions constitute the principal subject for the discussion that follows.

Revised Statutes 5219 does not require that national bank shares be taxed on an equality with other moneyed capital owned by citizens of the taxing state; it prohibits their taxation at a greater rate than applicable to such moneyed capital. Equality is therefore the minimum requirement. States have not ordinarily preferred such shares in their taxing systems; they have aimed to comply with the minimum demands only. Hence, the

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legal problem has usually been to determine whether equality had been achieved. Two distinct problems have arisen: first, what is comprehended within the term "other moneyed capital in the hands of individual citizens;" and second, what constitutes equality of rate.

OTHER MONEYED CAPITAL IN HANDS OF INDIVIDUAL CITIZENS

The definition of this phrase has been treated largely as a problem of defining "other moneyed capital." The qualifying language "in the hands of individual citizens" has received no extended discussion; it has seldom been mentioned except incidentally. It seems to have been assumed that the scope of the whole expression could be determined by considering its most important element. No very serious consequences, except an occasional confusion in reasoning, has resulted therefrom. Convenience of treatment will be furthered by adopting the same approach.

Congress limited the states' power to tax national bank shares in order to protect such banks from an unequal and unfriendly competition by institutions or individuals carrying on a similar business.[1] This purpose furnishes the key to the construction of R. S. 5219, including the interpretation of the phrase "other moneyed capital."[2] The effect of tax systems on the distribution of capital among competing uses has always been recognized by both legislators and investors. The former have utilized the principle in protective tariff enactments to divert capital to industries into which it would not normally have gone; the large scale investment in tax exempt securities in these days of high sur-taxes sufficiently proves that the latter have not been unaware of the relation. In a broad sense every use of capital competes with its every other possible use. This is especially true of free capital, that is, capital which has not yet been definitely devoted to any specific use. An investor with a given amount of capital for investment would undoubtedly be governed in making his choice between subscribing to the shares of a national bank and those of a moving picture house by the relative tax burden on these two forms of property. But in the ordinary course of events other motives enter to determine his selection; for instance, ownership

[1]First National Bank of Wellington v. Chapman, (1899) 173 U.S. 205, 213, 43 L. Ed. 669, 19 S.C.R. 407.

[2]Mercantile National Bank of N. Y. v. Mayor, etc., of New York, (1886) 121 U.S. 138, 154, 155, 30 L. Ed. 895, 7 S.C.R. 826.

of the bank shares may carry with it a respectability that was at one time associated with the ownership of New Haven stock in New England. The tax factor becomes infinitely more important when, having decided to invest his capital in the business of banking, the question is whether to employ it through the instrumentality of a state bank, a national bank, or a private banking establishment. In view of these considerations and the judicially expressed purpose of R. S. 5219, the problem of defining "other moneyed capital" is ultimately that of selecting those competing uses for capital which are sufficiently similar so that the relative tax burden constitutes an important factor in a choice between them.

One of the earliest cases in which the court passed on the question was that of *People ex rel. Duer v. Commissioners of Taxes*.[3] The New York law taxed national bank shares at their value determined, as permitted by the *Bank Tax Cases*,[4] without deduction of the value of exempt securities held by the bank. The shares of insurance companies were not taxed to their owners, but the companies themselves were assessed on their capital computed by deducting exempt securities. If capital invested in insurance company stocks were "other moneyed capital" within R. S. 5219, the scheme of taxation would have been invalid.[5] The court, however, held that capital so invested did not constitute such "other moneyed capital." This position was later reaffirmed.[6] Neither of these cases gave any clue to the test to be applied in determining the question. The matter received its first comprehensive discussion in *Mercantile National Bank of New York v. Mayor, etc., of New York*.[7] The court, after reviewing the earlier cases, stated that moneyed capital in the hands of individual citizens did not necessarily embrace shares of stock held by them in all corporations whose capital was employed in business carried on for the pecuniary profit of the shareholders; but that the shares in some corporations, according to the nature of their business, might be such capital.[8] The test of whether shares of a given corporation were moneyed capital, as distinguished from other capital, was said to be, not the character of the investments in

[3](1866) 4 Wall. (U.S.) 244, 18 L. Ed. 344.
[4](1865) 3 Wall. (U.S.) 573, 18 L. Ed. 229.
[5](1865) 3 Wall. (U.S.) 573, 18 L. Ed. 229.
[6]Bank of Redemption v. Boston, (1887) 125 U.S. 60, 31 L. Ed. 689, 8 S.C.R. 772; First National Bank of Aberdeen v. County of Chehalis, (1896) 166 U.S. 440, 41 L. Ed. 1069, 17 S.C.R. 629.
[7](1886) 121 U.S. 138, 30 L. Ed. 895, 7 S.C.R. 826.
[8]Mercantile National Bank v. Mayor, etc., of New York, (1886) 121 U. S. 138, 157, 30 L. Ed. 895, 7 S.C.R. 826.

which, either by law or in fact, the bulk of the capital and surplus of the corporation were from time to time invested, but the nature of the business in which the corporation was engaged.[9] If the enterprise were one in which the capital employed was money with the object of making profits by its use as money, a share or interest in such enterprise would be moneyed capital.[10] The court stated that such moneyed capital would be included within the terms of R. S. 5219. In the course of its opinion, however, it was compelled to limit its definition by applying a further test. The case involved the New York tax system which exempted deposits in savings banks. The argument had been advanced that this effected a prohibited discrimination. The court admitted that "these deposits constitute moneyed capital in the hands of the individuals within the terms of any definition which can be given to that phrase;" but nevertheless held that they were not moneyed capital within R. S. 5219 because savings banks did not compete with national banks, which were commercial banks. The test of such competition has been repeatedly used to determine the content of the phrase "other moneyed capital."[11] The terms of R. S. 5219, therefore, prohibit states from discriminating in their taxing systems against national bank shares in favor of capital employed in the conduct of those operations that constitute the principal activities of national banks. They do not prevent extending tax favors to capital engaged in non-competing businesses, even though its effect may be to retard the flow of free capital into the national banking field, or to increase the motives for withdrawing therefrom capital already invested therein.

The general rule just stated has received some measure of specific content in the course of a long series of judicial decisions. To determine whether a given employment of capital is a competing use requires a comparison of the business operations of national banks with those of the other businesses involved.

"The business of banking, as defined by law and custom, consists in the issue of notes payable on demand, intended to circulate as money where the banks are banks of issue; in receiving deposits payable on demand; in discounting commercial paper;

[9]Mercantile National Bank v. Mayor, etc., of New York, (1886) 121 U.S. 138, 154, 30 L. Ed. 895, 7 S.C.R. 826.

[10]Mercantile National Bank v. Mayor, etc., of New York, (1886) 121 U.S. 138, 157, 30 L. Ed. 895, 7 S.C. R. 826.

[11]First National Bank of Aberdeen v. County of Chehalis, (1896) 166 U.S. 440, 41 L. Ed. 1069, 17 S.C.R. 629; Merchants National Bank v. Richmond, (1920) 265 U.S. 635, 65 L. Ed. 1135, 41 S.C.R. 619; People ex rel. Hanover National Bank v. Goldfogle et al., (N.Y. 1922) 137 N.E. 611.

making loans of money on collateral security; buying and selling bills of exchange; negotiating loans, and dealing in negotiable securities issued by the government, state and national, and municipal and other corporations. These are the operations in which the capital invested in national banks is employed."[12]

Capital invested in mining companies is clearly not embarked upon an enterprise competing with national banks, and hence it is not illegal to exempt their shares from taxation.[13] The same is true of investments in telephone,[14] wharf,[15] or gas[16] campanies. It has also been held that investments in building and loan associations are not such moneyed capital.[17] The shareholders' interest in railroad and manufacturing corporations was held not to constitute "other moneyed capital," even though it might appear that a large part of their assets were invested in "securities payable in money," thus making them "owners of moneyed capital."[18] That same case took a similar view as to shares in insurance companies, although the court admitted that the investments made by such companies might well be termed moneyed capital.[19] It is clear that the court in so characterizing the investments made by such companies meant no more than "securities payable in money." This, however, is an inadequate test with no particular bearing on the meaning of the term as used in R. S. 5219. It is not the particular form of the assets that is decisive of whether they constitute "other moneyed capital," but the character of the business transactions out of which they arise. It is not overlooked that this may, and usually will, affect their form in some respects, but that is merely incidental. In the cases which the court had in mind, the transactions, in connection with which said corporations acquired the "securities payable in money,"

[12]Mercantile National Bank of New York v. Mayor, etc., of New York, (1886) 121 U.S. 138, 156, 30 L. Ed. 895, 7 S.C.R. 826. See, also, First National Bank v. Anderson, (Iowa 1923) 192 N.W. 6.

[13]Talbott v. Silver Bow County Commissioners, (1890) 139 U.S. 438, 35 L. Ed. 210, 11 S.C.R. 594.

[14]Bank of Redemption v. Boston, (1887) 125 U.S. 60, 31 L. Ed. 689, 8 S.C.R. 772.

[15]First National Bank of Aberdeen v. County of Chehalis, (1896) 166 U.S. 440, 41 L. Ed. 1069, 17 S.C.R. 629.

[16]First Nat. Bank of Aberdeen v. County of Chehalis, (1896) 166. U.S. 440, 41 L. Ed. 1069, 17 S.C.R. 629.

[17]Mercantile National Bank of Cleveland v. Hubbard, (1899) 98 Fed. 465.

[18]Mercantile National Bank of New York v. Mayor, etc., of New York, (1886) 121 U.S. 138, 30 L. Ed. 895, 7 S.C.R. 826.

[19]See also Bank of Redemption v. Boston, (1887) 126 U.S. 60, 31 L. Ed. 689, 8 S.C.R. 772; People v. Commissioners, (1866) 4 Wall. (U.S.) 244, 18 L. Ed. 344: First Nat. Bank of Aberdeen v. County of Chehalis, (1896) 166 U.S. 440, 41 L. Ed. 1069, 17 S.C.R. 629.

were not such as constituted operations of commercial banking. That alone would justify the exclusion of investments in such companies from the category of "other moneyed capital" within R. S. 5219. The court, after needless confusion, did in that very case ultimately reach the conception that the "other moneyed" capital" referred to was that competing with national bank capital in "carrying on the exchanges of commerce." It was because the business of savings banks differed from, and did not compete with, that of commercial banking institutions, that savings bank deposits were not considered "other moneyed capital" within R. S. 5219.[20] Such deposits are in substance capital borrowed by the bank from the depositors, and reinvested by it in making loans. From the point of view of the depositor they constitute investments payable in, and readily convertible into, money. The deposits are as much employed in the business of the savings bank as any other form of capital contribution. But, as said in another case, savings banks are not "banking institutions in the commercial sense of that phrase."[21] The case of these deposits, therefore, shows that the decisive factor is the kind of transactions in which the capital is employed, not the accidental characteristic that the investor's interest is in the form of a security or credit payable in money. This is equally apparent from the fact that the exemption of investments in state and municipal bonds is not violative of R. S. 5219.[22] These are certainly "securities payable in money." Furthermore, the definition of banking heretofore given included dealings in such securities among banking operations. The seeming inconsistency of permitting their exemption in the light of that definition is readily explained on the theory that the crucial test is competition with the more distinctively commercial operations of national banks, that is, those intimately connected with facilitating "the exchanges of commerce."

The case of trust companies has caused the court considerable difficulty. The New York tax system that was involved in *Mercantile National Bank of New York v. Mayor, etc., of New York*[23] taxed national bank shares on an ad valorem basis, while

[20]Mercantile National Bank of Cleveland v. Hubbard, (1899) 98 Fed. 465.

[21]Bank of Redemption v. Boston, (1887) 125 U.S. 60, 31 L. Ed. 689, 8 S.C.R. 772.

[22]Mercantile National Bank of New York v. Mayor, etc., of New York, (1886) 121 U.S. 138, 30 L. Ed. 895, 7 S.C.R. 826.

[23]Mercantile Nat. Bank of New York v. Mayor, etc., of New York, (1886) 121 U.S. 138, 30 L. Ed. 895, 7 S.C.R. 826.

trust companies were taxed on their capital and also required to pay a franchise tax based on income. This difference in method was alleged to constitute a discrimination against national bank shares. This contention was not sustained. The court's reasoning, however, leaves a doubt as to whether the basis for the decision was that capital invested in trust companies was not moneyed capital within R. S. 5219, or that the difference in method of taxation did not discriminate against national bank shares. After describing the usual and distinctive functions of trust companies, it said that:

"It is evident from this enumeration of powers, that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce."[24]

Later on in the same paragraph it stated that such companies do "receive money on deposit . . . and invest it in loans, and so deal, therefore, in money and securities for money in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals, as used in the act of Congress." This was followed by the statement that the taxation of trust companies was at least equal to that upon national bank shares. In a case, decided the year after that last referred to, it was held that the interest of individuals in trust companies was not moneyed capital for the reason that "the investments made by the institutions themselves . . . are not moneyed capital in the hands of the individual citizens of the state."[25] The New York tax system passed on in the *Mercantile National Bank Case* was again before the court in *Jenkins v. Neff*.[26] There had been no change in the taxation of national bank shares and trust companies, but the charge of discrimination was based on the contention that the latter were in fact doing a banking business. The essence of that claim was that investments in trust companies constituted "other moneyed capital" within R. S. 5219. A state's tax system can be proved consonant with that section by showing that the capital alleged to be favored either is not "other moneyed capital" or that it is taxed at least as heavily as national bank shares. Had the court construed its own decision in the *Mercantile National Bank Case* as based on the

[24]Mercantile Nat. Bank of New York v. Mayor, etc., of New York, (1886) 121 U.S. 138, 159, 30 L. Ed. 895, 7 S.C.R. 826.

[25]Bank of Redemption v. Boston, (1887) 125 U.S. 60, 31 L. Ed. 689, 8 S.C.R. 772.

[26](1902) 186 U.S. 230, 46 L. Ed. 1140, 22 S.C.R. 905.

theory that investments in trust companies did constitute "other moneyed capital" which was taxed at least as heavily as national bank shares, the claim advanced in *Jenkins v. Neff* could have been disposed of as utterly irrelevant. In that event the fact that such companies were operating as banks would only make more positive the assumption on which the earlier decision had been based. The court would only have had to refer to the *Mercantile National Bank Case* as a judicial ruling that the New York system did not discriminate against national bank shares in favor of "moneyed capital" in the form of investments in trust companies. It, however, adopted no such short cut solution. It rejected the contention because, even admitting that trust companies were in fact doing a banking business, it would not presume that the state would show bad faith by permitting them to continue such operations. The decision was based on the theory that investments in trust companies were not competitive with national banking capital within R. S. 5219, even though such companies did temporarily compete because of their illegal acts. This is evidenced by the quotation, with approval, of that part of the opinion of the New York court of appeals in the same case,[27] in which Judge Woodward relied largely on that part of the decision in the *Mercantile National Bank Case* relating to savings bank deposits. As heretofore shown, these were held not to be "other moneyed capital" within R. S. 5219, because savings banks did not compete with national banks. Furthermore, the *Mercantile National Bank Case* was stated to have held that trust companies "were not in any proper sense of the term banking institutions." In a later case, however, trust companies were referred to as "other moneyed capital" and "competitive institutions;"[28] but as expressly stated by the court, no question of discrimination between national bank shares and investments in trust companies was involved. This dictum, coupled with the uncertainty as to the real grounds for the decision in the *Mercantile National Bank Case,* leaves the status of investments in trust companies somewhat in doubt. It is probable that investments in trust companies with the powers exercised by those involved in *Jenkins v. Neff,* would today be considered as not within "other moneyed capital." In any given case, however, the varying powers conferred upon such companies under the laws of the different states would be an im-

[27](1900) 163 N.Y. 320, 57 N.E. 408.

[28]New York ex rel. Amoskeag Savings Bank v. Purdy, (1913) 231 U.S. 373, 58 L. Ed. 274, 34 S.C.R. 114.

portant factor. That national banks are today permitted to engage in the business of trust companies under the conditions prescribed in the Federal Reserve Act,[29] should not affect this conclusion. That amendment has merely authorized national banks to assume functions beyond those of ordinary commercial banking, in order to put them on a competitive equality, not with trust companies, but with state banks where the latter are permitted to combine trust company operations with the conduct of commercial banking. It has in no sense expanded the strictly banking powers of national banks.

The discussion thus far has been largely as to what is not "other moneyed capital." It remains to point out what has been held to be included therein. It has always been considered that credits and notes, held by individuals, would be included if competitive with national banking capital.[30] The question was squarely raised and definitely decided in the case of *Merchants National Bank v. Richmond*.[31] That case defined "other moneyed capital" as including "not only moneys invested in private banking, properly so-called, but investments of individuals in securities that represent money at interest and other evidences of indebtedness such as normally enter into the business of banking."[32] Not all credits owned by individuals constitute "other moneyed capital," for in several cases the court has refused relief where the tax systems favored some credits.[33] The term includes only credits, notes and securities that arise in connection with transactions similar to those carried on by national banks. That capital invested in private banking institutions is "other moneyed capital" scarcely requires citation of authority.[34]

Revised Statutes 5219 prohibits the taxation of national bank shares at a higher rate than that assessed on "other moneyed capi-

[29]38 Stat. L. 251, 262. See First National Bank of Bay City v. Fellows, (1917) 244 U.S. 416, 61 L. Ed. 1233, 27 S.C.R. 734.

[30]First National Bank of Wellington v. Chapman, (1898) 173 U.S. 205, 43 L. Ed. 669, 19 S.C.R. 407; First National Bank of Aberdeen v. County of Chehalis, (1896) 166 U.S. 440, 41 L. Ed. 1069, 17 S.C.R. 629; Boyer v. Boyer, (1884) 113 U.S. 689, 28 L. Ed. 1089, 5 S.C.R. 696; Evansville National Bank v. Britton, (1881) 105 U.S. 322, 26 L. Ed. 1053. Compare with Boyer v. Boyer the case of Hepburn v. School Directors, (1874) 23 Wall. (U.S.) 480, 23 L. Ed. 112.

[31](1920) 256 U.S. 635, 65 L. Ed. 1135, 41 S.C.R. 619.

[32]Merchants Nat. Bank v. Richmond, (1920) 256 U.S. 635, 639, 65 L. Ed. 1135, 41 S.C.R. 619.

[33]First National Bank of Wellington v. Chapman, (1899) 173 U.S. 205, 213, 43 L. Ed. 669, 19 S.C.R. 407; First National Bank of Aberdeen v. County of Chehalis, (1896) 166 U.S. 440, 41 L. Ed. 1069, 17 S.C.R. 629.

[34]See People ex rel. Hanover National Bank v. Goldfogle, (N.Y. 1922) 137 N.E. 611.

tal in the hands of individual citizens" of the taxing state. As has been stated, the last part of this expression has been practically neglected in the decisions. This has resulted in one complication that might have been avoided. Contrary to what would seem to be the natural meaning of this section, it is not necessary to compare the tax burden on national bank shares with that on the individual citizen's legal interest in competing moneyed capital. It is clear from the language of the section that Congress considered the shareholder's interest in the capital and surplus of national banks as moneyed capital. It is equally certain from the cases that the shareholder's interest in the capital and surplus of competitive institutions constitutes moneyed capital. In both these cases it is moneyed capital in the hands of individuals. The shareholder's interest in corporate assets is legally distinct from that of the corporation in such property. The states can levy no tax on national banks except on their real property.[35] In the *Owensboro National Bank Case* the state sought to uphold a tax on the franchise and property of national banks on the theory that such a tax was in effect one on the shareholder's interest. The court, however, held that, even if such tax were in fact equivalent to one on the shareholders, the two were not equivalent in law because the shareholder's and the corporation's interest in the latter's assets were in law distinct things. The same reasoning would lead to the conclusion that a tax on the franchise or property of state banks and other institutions competing with national banks was not the legal equivalent of a tax on the shareholder's interest in such companies. From this point of view, the language of R. S. 5219 would require a comparison between the rates on national bank shares and the shares of stock in competing financial institutions, as far as "other moneyed capital in the hands of individual citizens" consists of such shares. If then a state did not tax such shares as property to their owners, although it might be taxing the corporations themselves, the system would violate the section, if national banks shares were taxed, since the rate on the other individual moneyed capital, consisting of the shares first referred to, would be nil. The court has, however, not carried its own reasoning in the *Owensboro Case* to its logical conclusion. It has held that a tax on national bank shares is not illegal merely because shares in state banks are not taxed to their owners when

[35]Owensboro National Bank v. Owensboro, (1898) 173 U.S. 664, 43 L. Ed. 850, 19 S.C.R. 537; First National Bank of Gulfport v. Adams, (1922) 42 S.C.R. 323.

these banks themselves are taxed on their property.[36] The tax on national bank shares may, therefore, be compared either with that on shares owned by citizens in competing institutions, or with that assessed against those institutions themselves. It frequently happens that national bank shares are taxed as property while competing institutions are taxed on some other basis, such as a franchise tax measured by income. There is generally little, if any, relation between the ad valorem rate and such franchise rate. To determine whether the application of these different methods gives substantial equality as between national bank shares and the shareholder's interest in such other institutions, may frequently require highly complex computations. The same necessity would, of course, exist if national bank shares were taxed as property on an ad valorem basis while the shares of competing institutions were taxed on income. But in the former situation there is the added complication of translating a tax burden on the corporation into one on its shareholders. In practice the court seldom, if ever, performs such mathematical computations. Resting itself on the principle that substantial equality only is required, it makes a more or less accurate judgment as to the relative tax burden imposed on national bank shares and competing individual moneyed capital, without considering how the tax on competing institutions bears on their shareholders. The result is an additional complication in the sufficiently complex problem; one, too, which might have been avoided by declining to consider a tax on the companies as the legal equivalent of a tax on their shareholders, even though in its ultimate incidence the tax might be wholly borne by them through an equivalent diminution of the book value of their shares.

A state's tax system may provide a scheme of taxation in terms discriminating against national bank shares in favor of other moneyed capital, and yet not violate R. S. 5219. Such potential favoritism is not decisive. If there is in fact no such other moneyed capital, there would be no actual taxation of national bank shares discriminating in favor of competing capital. The very idea of discrimination involves a comparison of two things; if one be absent, there can be no discrimination in fact. The failure to prove the existence of a substantial amount of competing moneyed capital in the form of individual credits was held a sufficient reason for the refusal to invalidate a state statute that allow-

[36]San Francisco National Bank v. Dodge, (1904) 197 U. S. 70, 49 L. Ed. 669, 25 S.C.R. 384.

ed debts to be set off against credits but not against the value of national bank shares.[37] Had such fact been shown, the law would have been repugnant to R. S. 5219.[38] This whole matter has been adequately expressed in *First National Bank of Garnet v. Ayers*[39] in the following language:

"In order to come to a decision in favor of the plaintiff in error it would be necessary for this court to take what counsel for plaintiff call judicial notice of what is claimed to be a fact, viz., that the amount of moneyed capital in the state of Kansas from which debts may be deducted, as compared with the moneyed capital invested in shares of national banks, was so large and substantial as to amount to an illegal discrimination against national bank shareholders. This we cannot do. There is no proof whatever upon the subject... When proof shall be made regarding that matter, it may then be determined intelligently whether, within the case of *Mercantile National Bank v. New York*,...there has been a real discrimination against the holders of national bank shares, and hence a violation of the above-cited Act of Congress.[40]

In both *Merchants National Bank v. Richmond*[41] and *Hanover National Bank v. Goldfogle*[42] the existence of material amounts of competing money capital is emphasized. The mere existence of a few state banks with statutory limitations to a rate below that assessed on national bank shares does not constitute a substantial amount of competing capital;[43] but where there were fifty-three such banks, there was held to be a discrimination in favor of a material amount of competing capital.[44] Revised Statutes section 5219, therefore, is aimed at discrimination in favor of actually existent competing moneyed capital, and this must be proved by those who allege the invalidity of state tax laws.

What Constitutes Equality of Rate.[45]

Revised Statutes section 5219 permits the inclusion of national bank shares in the valuation of their owner's property, and their

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[37]First National Bank of Wellington v. Chapman, (1898) 173 U.S. 205, 43 L. Ed. 669, 19 S.C.R. 407.

[38]People ex rel. Williams v. Weaver, (1879) 100 U.S. 539, 25 L. Ed. 705.

[39](1895) 160 U.S. 660, 40 L. Ed. 573, 16 S.C.R. 412.

[40](1895) 160 U.S. 660, 667, 668, 40 L. Ed. 573, 16 S.C.R. 412.

[41](1921) 256 U.S. 635, 641, 65 L. Ed. 1135, 41 S.C.R. 619.

[42](N.Y. 1922) 137 N.E. 611.

[43]Lionberger v. Rowse, (1869) 9 Wall. (U.S.) 468, 19 L. Ed. 721. See First Nat. Bank v. Anderson, (Iowa 1923) 192 N.W. 6.

[44]City National Bank v. Paducah, (1887) 5 Fed. Cas. No. 2743.

[45]The discussion that follows will be principally concerned with the question of equality, not that of discrimination. This is done for purposes of convenience. It must not, however, be forgotten that the statute in

taxation at rates not greater than assessed on competing moneyed capital. It has never yet been decided that these provisions limit a state to taxing such shares on an ad valorem basis, although in the *Hanover National Bank Case* that argument was advanced by counsel for respondent. The governing principle in testing a state's tax system for consonance with the federal statute is that taxation, not merely the rate, shall be equal. This was definitely announced in *People v. Weaver,*[46] although that decision was in fact based on an inequality of rate prejudicial to national bank shares. Equality, however, does not require similarity of treatment in every respect. A state can require national banks to collect at the source the tax due on its shares even where state banks are given an option in that respect.[47] Such provisions have little, if any, effect on the tax burden. Nor is it a violation of the section to retroactively assess a penalty upon national banks for failing to report shares owned by residents, which were during such periods taxable to their owners, although state banks were not required to make any such returns.[48] But penalties cannot be so assessed for failure to report shares owned by non-residents of the state whose interest during the period was not taxable under the state law.[49] The equality demanded by R. S. 5219 does not require national bank shares and competing moneyed capital to be treated exactly alike in matters connected with the administration of taxes.

The actual tax burden depends upon at least two factors, the basis on which the tax is assessed, and the rate. If both national bank shares and competing moneyed capital are directly assessed on an ad valorem basis, the problem of equality of taxation is reduced to the single one of comparing rates. Such was the situation in *Merchants National Bank v. Richmond.*[50] A state may, however, be taxing national bank shares on value while competing moneyed

terms prohibits discrimination, rather than requires equality. Equality as hereinafter used must be construed as equivalent to absence of discrimination.

[46]People ex rel. Williams v. Weaver, (1879) 100 U.S. 539, 25 L. Ed. 705.

[47]First National Bank of Aberdeen v. County of Chehalis, (1896) 166 U.S. 440, 41 L. Ed. 1069, 17 S.C.R. 629; Merchants & Mfrs. National Bank v. Pennsylvania, (1896) 167 U.S. 461, 42 L. Ed. 236, 17 S.C.R. 829; First National Bank v. Kentucky, (1870) 9 Wall. (U.S.) 353, 19 L. Ed. 701.

[48]Citizens National Bank v. Kentucky, (1910) 217 U.S. 443, 54 L. Ed. 832, 30 S.C.R. 532.

[49]Covington v. First National Bank of Covington, (1904) 198 U.S. 100, 49 L. Ed. 963, 25 S.C.R. 562.

[50](1920) 256 U.S. 635, 65 L. Ed. 1135, 41 S.C.R. 619. For a discussion of the bearings of the decision in this case, and that in Eddy v. First National Bank, (1921) 275 Fed. 550, upon the Minnesota method of taxing national bank shares, see 6 MINNESOTA LAW REVIEW 56, 239.

capital is taxed on income. The existence of equality can then be determined only by reducing the income rate to an equivalent rate on the value of the capital which produced the income, or by converting the ad valorem rate to an equivalent rate on the income received on the national bank shares. The difficulties of such a difference in method will be considered when discussing the *Hanover National Bank Case*. Another combination of methods is the direct taxation of national bank shares on their value, and an indirect taxation of the shares of competing institutions through a tax assessed against those institutions themselves. The court has passed on such situations in several cases. In *Davenport National Bank v. Board of Equalization*[51] national bank shares were taxed in the usual manner while state savings banks were taxed on their capital, the shares of the latter not being taxed. This was sustained because discrimination was neither "a necessary nor a probable inference from anything in this system of taxation," nor shown "by any actual facts in the record." A similar contention was made in *Covington v. First National Bank of Covington*,[52] where state banks were taxed on franchise, their shares not being taxed. As to this the court said that there was "nothing in the bill to show that this difference in method operates to discriminate against national bank shareholders." It follows, therefore, that R. S. 5219 permits direct taxation of national bank shares while the shares of competing institutions are taxed only indirectly, unless the "usual or probable effect" of such difference in method, or its actual results, is a discrimination against the former. This can be illustrated by comparing *Bank Tax Cases*[53] with *San Francisco National Bank v. Dodge*.[54] In both, national bank shares were directly taxed to their owners, state bank shares indirectly through a tax on the capital of the banks. States cannot tax those portions of corporate capital invested in federal bonds,[55] but their value need not be deducted in valuing national bank shares.[56] If the nominal rate of assessment on national bank shares and state bank capital is the same, the effective rate of the direct tax on the former will be greater than the effective rate of the indirect tax on shares of

[51](1887) 123 U.S. 83, 31 L. Ed. 94, 8 S.C.R. 73.
[52](1904) 198 U.S. 100, 49 L. Ed. 963, 25 S.C.R. 562.
[53](1865) 3 Wall. (U.S.) 573, 18 L. Ed. 229.
[54](1904) 197 U.S. 70, 49 L. Ed. 669, 25 S.C.R. 384.
[55]Home Savings Bank v. Des Moines, (1907) 205 U.S. 503, 51 L. Ed. 901, 27 S.C.R. 571.
[56]Bank Tax Cases, (1865) 3 Wall. (U.S.) 573, 18 L. Ed. 229.

state banks in every case in which any part of the latter's capital is invested in exempt securities. The only way of maintaining equality of effective rates in that situation is by allowing the deduction of exempt securities owned by national banks in computing the value of their shares. This was not permitted in the *Bank Tax Cases,* but was allowed by the California laws in the *San Francisco National Bank Case.* The court accordingly held the taxes involved in the former invalid, solely for that reason, but decided that the mere difference in method did not vitiate the California law. In none of the cases referred to in this paragraph did it appear that there were any state bank shares actually favored. Apparently it is sufficient if the necessary, usual or probable effect is discriminatory; individual instances of actual favoritism to competing capital need not be shown.

The two cases last discussed involved comparisons of direct tax burdens on national bank shares with indirect burdens on shares of competing institutions, both kind of taxes being based on value. The problem would have been more complex had the competing institutions been taxed on some other basis. In that case it would have been necessary to translate an indirect tax burden on one basis into an equivalent direct one on another base. The federal Supreme Court has never yet had to face that situation squarely. The New York court, however, passed on a tax system in which national bank shares were taxed on value, and private banking capital on income, in the *Hanover National Bank Case.*[57] New York taxed shares in national and state banking associations at one percent on their book value. The state income tax law was construed as applying to dividends on national bank shares, as well as the income from private banking and other individual moneyed capital. Such private banking and other competing moneyed capital was not subject to any ad valorem taxes, neither for state nor local purposes. As thus construed the law was clearly discriminatory against national bank shares since it taxed them on both income and value, while competing capital was assessed on income only. The argument had been made, however, that dividends on national bank shares were not subject to the income tax. The tax on national bank shares was held invalid even on this assumption. In discussing this part of its decision the court said:

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[57]People ex rel. Hanover National Bank v. Goldfogle, (N.Y. 1922) 137 N.E. 611.

"We are forced to compare two methods which are wholly unlike. How can equality be established or presumed as the necessary result of taxing statutes? In a very considerable number of cases the valuation tax must inevitably be the heavier burden. It is fixed and certain. The income tax is variable and dependent on income and the amount of income. It is conceivable that when returns on such capital are low, the bank stock would be taxed and the competing capital would be exempt. In no event would equality exist unless the income on competing capital were large beyond the dreams of avarice and the usual returns on investments."

The court's reasoning is in general sound; there is, however, one qualifying factor which it overlooked, that is, the ad valorem rate at which national bank shares are taxed as compared with the rates levied on income. This factor would not have affected the conclusion in the instant case, for the income tax rates were relatively low. The court does not state whether the proof showed actual cases of substantial inequality in sufficient number to make the discrimination really existent. In view of the existence of material amounts of competing private banking capital, it is a practical certainty that favoritism did in fact exist. But, as in the cases heretofore discussed, the tax was held invalid because inequality was "the necessary result of the taxing statutes."

The feature of state tax systems that has been assailed as violating R. S. 5219 more frequently than any other is permitting personal debts to be deducted from personal property in general, or from credits, but not from the value of national bank shares. One of the earliest cases on this point involved the New York tax laws which allowed debts to be set off against all forms of personal property except bank shares, state and national.[58] All personal property, including such shares, was taxed on its value at a nominally uniform rate. The deduction of such debts from those credits which were in fact competing moneyed capital was held to result in taxing such moneyed capital at a net value less than its real value, while national bank shares were assessed at full value. The same nominal rate would, under such circumstances, produce unequal effective rates discriminatory against national bank shares. The tax in question was held invalid for that very reason. The court again passed on the same features of the identical tax laws in *Board of Supervisors v. Stanley*,[59] in which there were two classes of complainants, those who proved individual debts, and those who did

[58]People ex rel. Williams v. Weaver, (1879) 100 U.S. 539, 25 L. Ed. 705.
[59](1881) 105 U.S. 305, 26 L. Ed. 1044.

not. The earlier case was construed as a decision that the tax was invalid as to the complainant, not void under all circumstances. The court therefore held the tax invalid as to those who had proved just debts, valid as to the other complainants. The opinion contains the following language:

"It is very difficult to conceive why the Act of the Legislature should be held void any further than when it affects some right conferred by the Act of Congress...When a shareholder has no debts to deduct, the law provides a mode of assessment for him, which is not in conflict with the Act of Congress, and the law in that case can be held valid."[60]

This, on its face, seems to require the existence of actual discrimination as a condition to declaring a tax invalid. It would be incorrect, however, to deny that the "necessary results of the taxing statutes" is still the usual test. Permitting individual debts to be deducted from credits and not from the value of national bank shares violates R. S. 5219,[61] but allowing unincorporated banks to deduct business debts is valid since the debts of national banks have inevitably been considered in determining the value of their shares.[62]

The case of *New York ex rel. Amoskeag Savings Bank v. Purdy*[63] should be compared with *Board of Supervisors v. Stanley*. The New York statute taxed national bank shares at a flat one percent rate on book value, but in no case was the rate to exceed that contemporaneously assessed on general property,[64] which rate applied to private banking capital. The rate on such shares might, therefore, be less than that on private banking capital; it could never be greater. Personal debts were not deductible from the value of national bank shares, but could be set off against private banking capital. This was the gravamen of the relator's charge of discrimination. It had debts at least equal to the value of the shares owned. It seemed to be in exactly the position of those complainants in the *Stanley Case* as to whom the tax there involved had been held invalid. Nevertheless, relief was denied. The tax system involved in the *Amoskeag Savings Bank Case* taxed both national bank shares and private banking capital on

[60]Supervisors v. Stanley, (1881) 105 U.S. 305, 312, 315, 26 L. Ed. 1044.

[61]Evansville National Bank v. Britton, (1881) 105 U.S. 322, 26 L. Ed. 1053.

[62]First National Bank of Wellington v. Chapman, (1898) 173 U.S. 205, 43 L. Ed. 669, 19 S.C.R. 407.

[63](1913) 231 U.S. 373, 58 L. Ed. 274, 34 S.C.R. 114.

[64]This qualification was made a part of the New York statute by the decision of the New York court of appeals in People ex rel. Bridgeport Savings Bank v. Feitner, (1908) 191 N.Y. 88, 83 N.E. 592.

value. The nominal rate was not, however, necessarily the same. Hence, permitting personal debts to be deducted from the latter but not the former would not necessarily, or even probably, result in a higher effective rate on national bank shares. Whether or not it did would depend upon the actual relation of the general property rate to that on such shares, and the extent to which private banking capital was in fact offset by the personal debts of its owners. The difference in rate might equalize or more than offset the advantage accruing to private banking capital from the deduction of such debts. The court held that the relator had the burden of proving discrimination, and that this had not been met by merely showing that it had debts which it was not permitted to deduct while private banking capital could deduct similar debts. It was because the manner of taxing the two classes of capital was different that the court refused to apply the decisions in *People v. Weaver* and the *Stanley Case*. The difference is important for the reasons just stated. Where, therefore, the necessary result of the preference to other moneyed capital in the matter of deducting debts is prejudicial to national banking capital, the burden is sustained by a mere showing that the owner of national bank shares has debts; where the necessary result is not such, that showing is insufficient. The comparison of these cases shows that, under taxing statutes like those now being discussed, the existence of debts owed by national bank shareholders is not a test to determine whether the tax system is discriminatory; that fact merely furnishes a test for limiting the class of those who can complain of a discrimination that exists. It should be noted that, just as in the case of other forms of alleged inequality, no question was raised in any of these cases as to whether there were in fact any personal debts set off against private banking capital so that the legal advantage was more than formal.

The simplest method of producing inequality, except an actual discrimination in rates, is by a systematic overvaluation of national bank shares, or undervaluation of competing moneyed capital. This might be practiced where both kinds were directly taxed, or where national bank shares were taxed directly and the shares of competing institutions taxed indirectly. It is illegal discrimination to assess national bank shares at a higher percentage of their actual value than other banking capital, even though the statute requires all property to be assessed at its real value.[65] But such

[65]Pelton v. Commercial National Bank of Cleveland, (1879) 101 U.S. 143, 25 L. Ed. 901; Whitbeck v. Mercantile National Bank, (1887) 127 U.S. 193, 32 L. Ed. 118, 8 S.C.R. 1121.

discrimination must be intentional and systematic, not accidental.[66] In one case national bank shares were to be assessed at their full cash value, which the federal Supreme Court construed as requiring a consideration of all the bank's intangibles. It interpreted the state law as assessing state banks on their property exclusive of such intangibles. The statute made no such exclusion, but the absence of a state decision requiring their inclusion was held equivalent to their legal exclusion. The tax on national bank shares was, therefore, held invalid.[67] The decision may have been correct as applied to its facts; even that is doubtful. Its method of reasoning is clearly unwarranted. An even more curious and doubtful result was achieved in *Bank of California, National Association v. Henderson.*[68] California taxed the shares of both state and national banks on their value, at the same uniform rate. Value was fixed at the book figure after deducting the value of the real property owned. The Bank of California owned shares in another national bank located within the state. The state tax on those shares was upheld. Its own shares were assessed at book value, as above defined, without deduction of the value of the shares owned in said other national bank. This was held to violate R. S. 5219. The court's reasoning is most turgid. It seems to base its decision on the theory that, "from the point of view of ultimate beneficial interest," the stockholder and the bank are one. This factor would be important only in so far as it supported a conclusion that the taxation to the bank of the shares owned by it, and the assessment of its own shares at a value that included those same shares, constituted a double tax burden on its shareholders. The court, however, explicitly stated that it would not "stop to point out the double burden resulting from the taxation of the same value twice which the assessment manifested, as to do so could add no cogency to the violation of the one power to tax by the one prescribed method conferred by the statute, and which was the sole measure of the state authority." Under this decision shares in state banks would be taxable at their book figure less the value of the real estate owned, while in determining the value of national bank shares a further deduction would have to be made. This creates a preference in favor of national bank shares. It is

[66]First National Bank v. Albright, (1907) 208 U.S. 548, 52 L. Ed. 614, 28 S.C.R. 349.

[67]San Francisco National Bank v. Dodge, (1904) 197 U.S. 70, 49 L. Ed. 669, 25 S.C.R. 384.

[68]Bank of California National Association v. Henderson, (1918) 248 U.S. 476, 63 L. Ed. 372, 39 S.C.R. 165.

the only case in which R. S. 5219 has been construed as requiring more than equality of position as between national bank shares and competing moneyed capital. The decision is unsupportable, and in some respects directly contrary to earlier cases, as the dissenting opinion of Justice Pitney clearly shows.

The foregoing discussion has aimed to derive from judicial decisions the tests to be applied in determining the validity of state taxation on national bank shares. No state can impose on them a heavier tax burden than on competing moneyed capital. There is no illegal discrimination unless there exists in fact a substantial amount of such competing capital. In this respect the test is one of fact. Whether the state statutes discriminate against national bank shares in favor of existing competing capital depends on whether their necessary, usual, or probable result is to produce prejudicial inequality. It is not necessary to show that some existing competing money capital is in fact favored. This is clearly shown in the cases involving the deduction of personal debts from private banking capital. Such deduction would clearly not in fact produce prejudicial inequality unless (a) some private banking capital was actually offset by such debts, and (b) some national bank owners were prevented from making similar deductions from the value of their shares. If the statute is one that permits debts to be deducted from personal property in general, the above tests could be satisfied only by showing (a) that the personal property of the owner of private banking capital, other than such capital, was less than his debts (for otherwise it could be argued that the deduction had been made from such other property), and (b) that the debts of the owner of national bank shares exceeded his other personal property (for otherwise it could be argued that he had deducted all his debts from such other property and, therefore, had none left to be set off against his bank shares). The only reasonable alternative to such refinements of proof would be a legal rule that debts should be considered deductible ratably over all the property against which the law permits them to be set off. Requiring such strict proof might operate to defeat the purpose of R. S. 5219, or at least make its realization difficult. The test actually used, therefore, is adequate, and, in most cases, would be found in accord with the facts. While, therefore, discrimination can be proved by showing that the necessary result of the tax system is to produce prejudicial inequality, only they can raise the point who are actually injured.

Constitutional Aspects

Recent decisions holding state tax laws invalid because in conflict with R. S. 5219, have created a demand both for a revision of that section, and a re-examination of the entire question of Congressional authority to limit the states' power to tax national bank shares.[69] It has been suggested that, apart from that section, the states would have power to tax national bank shares owned by residents or with a situs therein.[70] The language of R. S. 5219 is practically the same as that found in the act of June 3, 1864,[71] creating the national banking system. Congressional permission to tax has, therefore, existed as long as there have been any national bank shares to tax. It follows that there can have been no decision on the point in respect of shares of national banks organized under our present National Bank Act. Nor has any decision been found affirming or denying this power in the states as to shares in earlier banks created under the federal law. Analogical reasoning from recognized principles, and dicta, constitute our only ground. *McCulloch v. Maryland* contains dicta that the principle on which it was decided would not prevent state taxation of the citizens' interest in the Bank of the United States;[72] but several of the cases that have arisen under R. S. 5219 explicitly declare that the states could not tax national bank shares without Congressional permission.[73] These later dicta clearly view the taxation of such shares as prohibited by the principles of *McCulloch v. Maryland* and *Osborne v. Bank*,[74] denying the states power to tax federal agencies performing federal functions. National banks are federal agencies, but the bank's and the shareholder's interest therein are separate legal things. Extending the principle exempting federal agencies from state taxation to the shareholder's interest in such bank must assume either that that interest is itself a federal instrumentality, or that the realization of the federal purposes the banks were incorporated to subserve requires such extension. Neither of these assumptions is so free from doubt as to give to these dicta the quality of a logical application of con-

[69] State Taxation of National Bank Stocks, Uncertainty of its Constitutional Basis, by Alfred J. Schweppe, 6 Minnesota Law Review 219.

[70] State Taxation of National Banks, Uncertainty of its Constitutional Basis, by Alfred J. Schweppe, 6 Minnesota Law Review 219.

[71] 13 Stat. L. 111, ch. 166.

[72] (1819) 4 Wheat (U.S.) 316, 436, 4 L. Ed. 579.

[73] Owensboro National Bank v. Owensboro, (1898) 173 U.S. 664, 43 L. Ed. 850, 19 S.C.R. 537; People ex rel. Williams v. Weaver, (1879) 100 U.S. 539, 25 L. Ed. 705.

[74] (1824) 9 Wheat (U.S.) 738, 6 L. Ed. 204.

stitutional principles to the situation. However, the probabilities are that, were the court called upon to decide the question, the dicta of the later cases would become the rule of decision.

If the conclusion of the preceding paragraph be correct, the question arises whence Congress derives its authority to consent to such taxation. The principle of *McCulloch v. Maryland* does not rest on any express constitutional limitation on the taxing power of the states, but on implications derived from the nature of the federal system established by the constitution. The situation is not one in which the states delegated a part of their taxing power to the federal government, which Congress by R. S. 5219 re-delegated to the states. The power of Congress to do that would be more than doubtful.[75] Nor is it a case of a concurrent power to tax such shares, the states being permitted so to do in so far as their tax laws did not conflict with Congressional action on the same subject.[76] It is rather that, in adopting a constitution establishing a federal system, the states consented not to use their reserved powers, including the general power of taxation, so as to impair the efficient exercise of federal powers. If Congress by a valid law determines that a given federal power shall be exercised in a certain manner, the states cannot prevent it by exercising any of their reserved powers.[77] But this implied limitation on the states exists only for the benefit of the federal government. In the first instance Congress can determine what state action shall not be deemed an impairment of efficient federal action. The decisions under R. S. 5219 frequently state that it prescribes the full measure of a state's power to tax national bank shares;[78] the power of Congress to permit their taxation at all is assumed without argument. Since, however, the restriction is a matter of constitutional law, its exact scope is ultimately a problem in interpreting that document, that is, a judicial question. Hence it would probably be held that there is a limit to the power of Congress to grant the states permission to tax these shares. That limit will have to be determined in the light of the purposes of that constitutional restriction. As heretofore stated, its aim is to insure the realization by the federal government, or its agencies, of the purposes

[75]See on the "delegation theory," People ex rel. Williams v. Weaver, (1879) 100 U.S. 539, 543, 25 L. Ed. 705.

[76]See on the "concurrent power theory," Bank Tax Cases, (1865) 3 Wall. (U.S.) 573, 585, 18 L. Ed. 229.

[77]First National Bank v. Fellows, (1917) 244 U.S. 416, 61 L. Ed. 1233, 37 S.C.R. 734.

[78]First National Bank of Gulfport v. Adams, (1922) 42 S.C.R. 323.

for which federal powers were granted, by prohibiting state action preventing absolutely, or impairing, the exercise of those powers. State action aimed at federal powers would normally consist in either absolute prohibition or discriminatory enactments. As long as investors in national bank shares are not discriminated against on that account, the efficient functioning of the national banks will not usually be defeated or impaired by permitting such shares to be taxed. Revised Statutes, section 5219 is framed on that very theory, and in practise operates as an adequate safeguard. Every proposal to relieve the situation of some of its complications will have to consider this factor; else they may turn out to be a wasted effort.[79]

[79]Since this article was written, Congress has amended R. S. 5219 in several important respects. It has substituted for the expression "other moneyed capital" the phrase "other moneyed capital employed in the business of banking."

"ARISING OUT OF BUSINESS DONE IN THE STATE"

By George E. Osborne*

If a foreign corporation doing business in a state authorizes some person in the state to receive service of a process, jurisdiction over it is not confined to obligations arising out of the business there done.[1] If such a corporation gives no actual authorization to anyone to receive service, but a responsible agent[2] of the corporation is served in the state, it is an unsettled question whether it can be held subject to the state's jurisdiction on obligations which did not arise out of business done in the state.[3] If there is no consent to anyone receiving service and service is made on a state official designated by statute but having no connection with the corporation it is clear that jurisdiction is restricted to cases in which the obligation arose out of the business[4] done in the state.[5] The scope

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[1]Bagdon v. Philadelphia and Reading Coal Co., (1916) 217 N. Y. 432, 111 N. E. 1075, L.R.A. 1916F 407, Ann. Cas. 1918A 389; Smolik v. Philadelphia and Reading Coal Co., (1915) 222 Fed. 148; Gold Issue Mining Co. v. Penn. Fire Ins. Co., (1917) 243 U. S. 93, 61 L. Ed. 610, 37 S.C.R. 344. In this last case the defendant had filed consent to service upon a public official; contra, Sawyer v. No. Am. Life Ins. Co., (1874) 46 Vt. 697. For a collection of cases see L.R.A. 1916F 410 note.

[2]"Whether process served on a member of the corporate group can be the foundation of a judgment...turns on...whether the particular person on whom the writ was served was a sufficiently responsible member of the intelligent portion of the group to make it moderately certain that guiding officers will be apprised of the suit." Henderson, The Position of Foreign Corporations in American Constitutional Law 171. See also Henderson op. cit. pp. 91-92 and cases cited, particularly Connecticut Life Ins. Co. v. Spratley, (1898) 172 U.S. 602, 610, 43 L. Ed. 569, 19 S.C.R. 308.

[3]Fry v. Denver, etc., R. Co., (1915) 226 Fed. 893 and Takacs v. Philadelphia and Reading Ry. Co., (1915) 228 Fed. 728 hold there can be no jurisdiction. There are contrary decisions: Atchison, etc., Ry. Co. v. Weeks, (1918) 248 Fed. 970; Reynolds v. Missouri, etc., Ry., (1917) 228 Mass. 584, 117 N.E. 913; Lagergren v. Penn. R. Co., (1915) 130 Minn. 35, 152 N.W. 1102; Rishmiller v. Denver, etc., R. Co., (1916) 134 Minn. 261, 159 N.W. 272; Merchants Elevator Co. v. Chesapeake & Ohio R. Co., (1920) 147 Minn. 188, 179 N.W. 734; Callaghan v. Union Pacific R. Co., (1921) 148 Minn. 482, 182 N.W. 1004; Farmers' Co-operative Equity Co. v. Payne, (1921) 150 Minn. 534, 186 N.W. 130; Tauza v. Susquehanna Coal Co., (1917) 220 N.Y. 259, 115 N.E. 915; El Paso and Southwestern Co., v. Chisholm, (Tex. Civ. App. 1915) 180 S.W. 156. No case has yet been carried to the United States Supreme Court, the ultimate arbiter of the question.

[4]The term "business" may be used in two senses. It may mean a business transaction or agreement. It may also mean an establishment with a fixed location, stock in trade, staff of workers and managers, etc. It is not clear which meaning the courts give it. See quotations in note 5, post.

of the limitation in this last case has never been thoroughly analysed.

Starting with the assumption that the foreign corporation is doing business in the state within the meaning of these service statutes,[6] that business may be conducted in at least two different

[5]Old Wayne Mut. Life Assn. v. McDonough, (1907) 204 U.S. 8, 51 L. Ed. 345, 27 S.C.R. 236; Simon v. Southern R. Co., (1914) 236 U.S. 115, 59 L. Ed. 492, 35 S.C.R. 255.

The courts have stated this restriction in varying language. Pertinent extracts from the decisions on this point follow:

"Conceding...the defendant association may be held to have assented to the service upon the insurance commissioner of process in a suit brought against it there in respect of business transacted by it in that commonwealth, such assent cannot properly be implied where it affirmatively appears, as it does here, that the business was not transacted in Pennsylvania... While the highest considerations of public policy demand that an insurance corporation, entering a state in defiance of a statute which lawfully prescribes the terms upon which it may exert its powers there, should be held to have assented to such terms as to business there transacted by it,...we do not imply such assent as to business transacted in another state, although citizens of the former state may be interested in such business.

As the suit in the Pennsylvania court was upon a contract executed in Indiana,...we hold that the judgment in Pennsylvania was not entitled 'to full faith and credit in another state.'" Old Wayne Mut. Life Ass'n v. McDonough, (1907) 204 U.S. 8, 51 L. Ed. 345, 27 S.C.R. 236.

"But this power to designate by statute the officer upon whom service in suits against foreign corporations may be made relates to business and transactions within the jurisdiction of the state enacting the law. Otherwise, claims on contracts wherever made, and suits for torts wherever committed might be drawn to the jurisdiction of any state in which the foreign corporation might at any time be doing business,...the statutory consent of a foreign corporation to be sued does not extend to causes of action arising in other states." Simon v. Southern R. Co., (1914) 236 U.S. 115, 59 L. Ed. 492, 35 S.C.R. 255.

"This power is limited to instances where the action is based upon transactions had or business done within the jurisdiction of the state wherein the service is had...such assent [to service] may be only implied ...in actions founded on contracts originating within the state of service...it must appear that the cause arose from the business there done." Fry v. Denver, etc., R. Co., (1915) 226 Fed. 893.

"...it [i. e., service on the designated state official] could be good only in causes of action arising out of the business of the corporation in the state..." Atchison, etc., Ry. Co. v. Weeks, (1918) 248 Fed. 970. Almost identical language is used in Smolik v. Philadelphia and Reading Coal & Iron Co., (1915) 222 Fed. 148.

"Causes of action arising out of business and transactions transpiring within the state." El Paso and Southwestern Co. v. Chisholm, (Tex. Civ. App. 1915) 180 S.W. 156. In Reynolds v. Missouri, etc., Ry. Co., (1917) 228 Mass. 584, 117 N.E. 913, practically the same phraseology was employed.

"Causes of action arising in the state where the action is brought." Rishmiller v. Denver, etc., R. Co., (1916) 134 Minn. 261, 159 N.W. 272.

"The cause of action sued upon has no relation in its origin to the business here transacted." Tauza v. Susquehanna Coal Co., (1917) 220 N.Y. 259, 115 N.E. 915.

[6]"Business may be sufficient to subject the foreign corporation that does it to the service of process, and yet insufficient to require it to take out a license." International Text Book Co. v. Tone, (1917) 220 N.Y. 313, 318, 115 N.E. 914. See Tauza v. Susquehanna Coal Co., (1917) 220 N.Y. 259, 268, 115 N.E. 915.

ways. A local business plant or organization, having a fixed habitation with activities radiating out from it as a center, may have been established. A branch store of any kind would be an example. On the other hand, the headquarters of all the business done by the corporation and the corporation itself may be located in the foreign state, but it is possible that, by regularly entering into a great many separate business transactions within the state it would be held to be doing business there.[7] A foreign manufacturing corporation making sales and deliveries within the state through travelling agents will serve as an illustration.[8]

Where the business is conducted in the first described manner several cases may be imagined.[9] First, the contract may be entered into and the breach of it occur in state A where the business is carried on.[10] In such a case both the primary and second-

[7]"Here was a continuous course of business in the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Company were delivered within the state of Kentucky. This was a course of business, not a single transaction...This...constituted a doing of business there." International Harvester Co. v. Kentucky, (1913) 234 U.S. 579, 584, 58 L. Ed. 1479, 34 S.C.R. 944. Duluth Log Co. v. Pulpwood Co., (1917) 137 Minn. 312, 163 N.W. 520; Fleischman Const. Co. v. Blauners, (1919) 190 App. Div. 95, 179 N.Y.S. 193, accord. The recent case of Massey v. Norske Lloyd Ins. Co., (Minn. 1922) 189 N.W. 714, apparently falls within this class.

[8]International Harvester Co. v. Kentucky, (1913) 234 U.S. 579, 58 L. Ed. 1479, 34 S.C.R. 944.

[9]"A method of service is insufficient when, although it may have a tendency to give notice to the defendant, yet there is another way obviously better calculated to give notice. [Thus] service by publication is insufficient when personal service is possible (Bardwell v. Collins, (1890) 44 Minn. 97, 46 N.W. 315) or where the defendant had left the state but his family remained at his last place of abode. McDonald v. Mabee, (1917) 243 U.S. 90, 61 L. Ed. 608, 37 S.C.R." Scott, Business Jurisdiction over Non-residents, 32 Harv. L. Rev. 871, 875 note 25. Under this principle it would seem that service on a state official designated by statute would not be good if there could be service upon a real agent of the corporation in the state. This would always be possible so long as it continued to do business in the state in this way. The problem under discussion could arise, therefore, only when, after the corporation has ceased to do business in the state, suit is brought on a cause of action arising prior to the withdrawal. Where a foreign corporation doing business in the state had consented to service on a state official it was held that the state might validly provide for such service after the corporation had ceased to do business, at least as to "controversies growing out of that business." Mutual Reserve Life, etc., Ass'n v. Phelps, (1903) 190 U.S. 147, 47 L. Ed. 987, 23 S.C.R. 707. Tucker v. Ins. Co., (1919) 232 Mass. 224, 122 N.E. 285, accord. Semble, McCord Lumber Co. v. Doyle, (1899) 97 Fed. 22. Cf. Hunter v. Mutual Reserve Life Ins. Co., (1910) 218 U.S. 573, 54 L. Ed. 1155, 31 S.C.R. 127.

[10]E.g., a contract made in the state to deliver goods in the state and a failure to deliver the goods.

For the sake of simplicity it will be assumed throughout this paper that the law of the state where the contractual agreement is consummated governs the creation of the contractual obligations; and that the law where the contract is to be performed governs the creation of the obligations growing out of the breach. On the general question of what law governs

ary[11] obligations arise in that state. Second, the contract may be made in state B where the corporation is not doing business and is not incorporated but the breach may occur in state A.[12] Third, the contract may be made in state A but the breach occur in state B.[13] Fourth, both the primary contractual obligation may be created and the remedial obligation arise in state B.[14] A fifth problem can be raised by supposing in situations two to four that the foreign corporation also does business in state B through another branch plant. The question then would be whether, by serving the state official named by statute, the corporation can be sued in state B on an obligation incurred through dealings with the branch business organization in state A though the legal obligation, either primary or secondary, or both, was created by the law of state B. In all of these situations the obligations arose out of activities emanating from the business located in state A.

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the creation and performance of contracts see Beale, What Law Governs the Validity of a Contract, 23 Harv. L. Rev. 1, 79, 194, 260; Lorenzen, Validity and Effects of Contracts in the Conflict of Laws, 30 Yale L. Jour. 565, 655, 31 Yale L. Jour. 53; 3 Beale, Cases on Conflict of Laws 540-544. Most of the same problems could be raised under other theories as to what law controlled by varying the facts of the hypothetical cases.

[11]"The first division, primary rights, includes all the rights created by law and existent in the ordinary proper course of events, unaffected by illegal interference. The second division, secondary rights, includes rights which arise upon the violation of primary rights by the wrong of some responsible human actor; they are created by law in order that reparation may be made for the wrongful destruction of each primary right." Beale, A Treatise on the Conflict of Laws, Vol. I, Part I, p. 165.

"The entire legal relation—the vinculum juris—resulting from that [contractual] agreement may be called a primary, contractual obligation."

"Let it be assumed, however, that X, without excuse fails to perform... In such a case a new legal relation—a secondary, or remedial, obligation arises between A and X. The latter, as a consequence of the breach of his primary duty, is now under a remedial duty to make...reparation...," Hohfeld, Nature of Stockholder's Individual Liability for Corporation Debts, 9 Col. L. Rev. 285, 293.

[12]E.g., the "business" in A sends an agent with full power to contract into B where an agreement is made to ship goods in A. There is a failure to ship.

Some of the language in the quotations in note 5, supra, from Old Wayne Ins. Co. v. McDonough, Simon v. Southern R. Co., and Fry v. D. & R. G. R. Co. would exclude this case. None of the actual decisions are on the point, however, and other language in the same cases and in other decisions would indicate that the only obligation which need arise in the state is the secondary obligation, e.g., see the quotation from Rishmiller v. Denver, etc., R. Co., supra, note 5. "Cause of action" as there used apparently means the obligation arising from the breach of the primary obligation. Look also at last sentence in the quotation from Simon v. Southern R. Co.

[13]E.g. the agreement is entered into in A to deliver goods in B and there is a failure to deliver. See the quotation from Fry v. Denver, etc., R. Co., supra, note 5. See also, Fletcher v. Southern Colonization Co., (1921) 148 Minn. 143, 146, 181 N.W. 205.

[14]E.g. the same facts as in note 12, supra, except the agreement is to deliver goods in state B.

In the case of torts the secondary obligation always must be created by the same law which fixes the primary in rem right which is violated.[15] Consequently only the secondary obligation need be taken into account and the second and third problems above could not arise.[16] However, a tort occurring in state B as the result of activities having their directing source in a business in state A could be regarded, in a natural sense, at least, as arising out of that business.[17]

If the "doing business" in the state were of the second kind described, the fourth problem need not be considered. If the agreement were both made and fulfilled outside of state A, even though the corporation be considered to be "doing business" in that state, there is nothing in either the ordinary business sense or in legal contemplation which could be regarded as connected with any business organization of any business transaction there.[18]

The same is true in the case of torts. Further, assuming that the business transaction took place partly in state A where the corporation was "doing business" and partly in state B, and that, in the course of carrying out that part of the transaction which occurred in state B, the corporation committed a tort, it is difficult to conceive of a situation in which the tort could have had any connection with that part of the transaction occurring in state A.[19] Hence it would seem that the tort always must be committed in the state where the corporation is "doing business" in this manner in order to say it arose out of the business done there.

Having narrowed the field of inquiry to enumerated situations in which, in one sense or another, the obligation can be said to be connected with the business carried on in the state, the further

[15]LeForest v. Tolman, (1875) 117 Mass. 109, 19 Am. Rep. 400. See Fry v. Denver, etc., R. Co., (1915) 226 Fed. 893, 894.

[16]Probably the same is true of quasi-contractual obligations. As to the nature of quasi-contractual obligations see Woodward, Quasi-Contracts, sec. 3, 1. See also, Corbin, Quasi Contractual Obligations, 21 Yale L. J. 533.

[17]E.g. the business in state A agrees to deliver a truck in state B. While the truck is being driven from state A to its destination in state B, it injures a person in state B as a result of the driver's negligence.

A quasi-contractual obligation arising in some similar manner could be regarded as connected up with the business in state A, e.g., overpayment by mutual mistake in state B.

[18]Apparently this was the situation in Old Wayne Ins. Co. v. McDonough, (1907) 204 U.S. 8, 51 L. Ed. 345, 27 S.C.R. 236.

[19]It is arguable that an exception exists in the case of deceit. It may be possible to say that an act which results in injury, induced in state B by reason of an agreement fraudulently obtained in state A, is linked up with the part of the whole transaction which took place in state A.

question remains whether all of them fall within the terms of the legal limitation on jurisdiction. Clearly the first case put does so under any interpretation of its purpose. Whether the others do so depends upon the rationale of the restriction. The fundamental reason for some kind of limitation is the obvious fact that this kind of process is necessarily unsatisfactory and ordinarily insufficient.[20] It ought to be restricted in its operation so far as possible and yet not allow the corporation to elude those who should be able to hold it accountable within the state. The test of jurisdiction, that the obligation must arise out of some business done in the state, would appear to be a groping for some rule to designate who these persons should be.[21] It is submitted, a reasonable

[20]"The method of service on a statutory officer is open to serious abuse, and it may be justified only as a necessary protection to residents of the state." Henderson, Position of Foreign Corporations in American Constitutional Law 99. Should the United States Supreme Court hold that service in the state upon an agent of the corporation is valid only as to obligations arising out of business done in the state (see note 3, supra) it would be difficult to sustain this reasoning.

Another reason suggested is the hardship upon the corporation in being compelled to defend a suit in a state far from the place where the transaction out of which it grew took place. See Rishmiller v. Denver, etc., R. Co., (1916) 134 Minn. 261, 265, 159 N.W. 272; Simon v. Southern Ry. Co., (1914) 236 U.S. 115, 130, 59 L. Ed. 492, 35 S.C.R. 255. This is a factor which has some weight; but if it were the basic reason for the limitation it would apply equally where service was on an actual agent of the corporation. That it would apply in such a case however, seems improbable. See note 3, supra. Further, as the Massachusetts court has expressed it, "the argument ab inconvenienti urged on behalf of the defendant is met by one of equal force on the side of the plaintiff" if he has to go to the home of the foreign corporation to sue. Reynolds v. Missouri, etc., Ry. Co., (1917) 228 Mass. 584, 588, 117 N. E. 913.

[21]See Hunter v. Mutual Reserve Life Ins. Co., (1906) 184 N.Y. 136, 144, 76 N.E. 1072, 30 L.R.A. (N.S.) 677, 6 Ann. Cas. 291, affd. 218 U. S. 573, 54 L. Ed. 1155, 31 S.C.R. 127, 30 L.R.A. (N.S.) 686, where the court says statutes like these were "primarily designed for the protection of the citizens of the state." For similar statements see Mutual Reserve, etc., Ass'n v. Phelps, (1902) 190 U.S. 147, 158, 47 L. Ed. 987, 23 S.C.R. 797; Sawyer v. North American Life Ins. Co., (1874) 46 Vt. 695, 706. Cf. last line of the first paragraph quoted from the Old Wayne Case, supra note 5.

A possible explanation of the reason for the usual terms of the restriction is the doubtful constitutionality of a state statute saying that only citizens of that state might sue the foreign corporation there. Barrell v. Benjamin, (1819) 15 Mass. 354; State v. North American Land & Timber Co., (1902) 106 La. 621, 31 So. 172; Reeves v. Southern Ry. Co., (1905) 121 Ga. 513, 49 S.E. 594, Cf. So. Carl & Ga. R. Co. v. Eietzen, (1897) 101 Ga. 730, 732, 29 S.E. 292. Of course, no doubt would exist if the plaintiff were a foreign corporation. See 70 L.R.A. 514 for a collection of cases. But even if such a rule were constitutional, the general policy, certainly, is to allow citizens of another state to sue on the same terms as citizens of the state where the action is brought. That is true, even though the statute allowing the action was primarily for the benefit of citizens of the state. Johnston v. Trade Ins. Co., (1882) 132 Mass. 432. It would violate no constitutional provision, however, to say that only obligations arising out of business done in the state could be sued upon. In most cases such obli-

interpretation of the test is that anyone who has dealings within the state[22] with the corporation should be able to hold the corporation there. The word "dealing" is meant to include, not merely the entering into a transaction but also its performance and the consequences thereof. Hence, if either the primary or secondary obligation arose within the state where the corporation was doing business, the corporation should be held accountable there. Further, if the business dealing out of which a contractual obligation grew was with a business organization, then, even though both the primary and secondary rights arose in another state, the corporation should be liable to suit where its business branch, the actual entity dealt with, was located. In such a case reasonable expectations[23] were raised that the corporation could be reached and held accountable where the "business" with which the transactions were entered into was located. Those expectations ought to be realized in spite of the unsatisfactory character of the service. There seems to be, however, no such reason in the case of torts.[24] The business carried on in one state can scarcely be said to have created reasonable expectation in a tortfeasee in another state, that, if he were injured he could sue the corporation in the first state.

In a recent Minnesota case[25] this whole problem was ignored. In that case a foreign insurance corporation was carrying on busi-

gations would run to residents of the state and thus the desired result would be achieved without violating either the constitution or good policy.

[22]See Hunter v. Mutual Reserve Life Ins. Co., (1910) 218 U.S. 573, 590, 54 L. Ed. 1155, 31 S.C.R. 127, 30 L.R.A. (N.S.) 686. This rule would operate to protect residents of the state, the ones for whom the state has primary concern, since they will be the ones in all ordinary cases who will have dealings within the state with the foreign corporation. Further, it does not impose on the corporation the duty of defending at a place away from where the transaction occurred.

[23]"Jural Postulate III. In civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith, and hence (a) will make good reasonable expectations which their promises or other conduct reasonably create." Pound, Outline of a Course on the History and System of the Common Law 44. Dean Pound framed this postulate with reference to the enforceability of obligations. It seems, however, equally applicable to a situation like this.

[24]Again, an exception may exist in the case of deceit. If the "business" in state A fraudulently induces a person in B to enter into a transaction whereby he is damaged it is arguable that, on entering into the agreement he may have anticipated, not merely a breach of contract, but that the whole transaction was a fraud upon him. In such a case he may be said to have relied upon being able to reach the corporation in state A if the deal did turn out to be a deceit upon him. See Pound, op. cit., note 23.

The same reasoning would apply to most quasi-contractual obligations. e.g., by mutual mistake in settling acounts there is an overpayment in state B to the "business" operating in state A.

[25]Massey S. S Co. v. Norske Lloyd Ins. Co., (Minn. 1922) 189 N.W. 714.

ness in the second described manner. A Minnesota corporation took out an insurance policy on a ship having its situs in Minnesota.[26] The insurance contract was entered into in Wisconsin, or, at any rate, not in Minnesota.[27] The loss occurred in Michigan territorial waters.[28] It did not appear where the policy was payable. The court held that the insurance corporation was doing business in the state and therefore was subject to the jurisdiction of Minnesota courts through service on the state insurance commissioner although no consent to his receiving service had been given. The court did not even consider the question whether the obligation sought to be enforced arose out of the business done in Minnesota. If the contract were to be performed in Minnesota the result on this point seems correct, for the secondary obligation at least would have arisen in Minnesota.[29] If the policy was payable in Wisconsin, the decision is open to doubt.

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[26]The case in this respect appears indistinguishable from Old Wayne Life Ins. Co. v. McDonough, (1907) 204 U.S. 8, 51 L. Ed. 345, 27 S.C.R. 236. There, an insured person was within the state; here, insured property was within the state.

The law of the situs of insured property generally is held to have, as such, no effect upon the insurance contract. See 63 L.R.A. 833, 855 for a collection of cases.

[27]The insured corporation sent its order for the policies from its office in Superior, Wisconsin, to a Chicago insurance broker. The broker obtained the policies from the insurance corporation. The policies were signed outside the state of Minnesota. On receiving them, the brokers forwarded them to the insured at Superior.

There are different theories as to when a contract of insurance is completed, but under any of them it is clear that on these facts it was not entered into in Minnesota. See Patterson, The Delivery of a Life Insurance Policy, 33 Harv. L. Rev. 198. See also, 63 L.R.A. 833; 23 L.R.A. (N.S.) 968; 52 L.R.A. (N.S.) 275. Indeed, the Minnesota court went on the assumption that the contract had not been executed in Minnesota.

[28]The court correctly decided that this did not have any bearing upon the question at issue. See 63 L.R.A. 833, 855.

[29]This would distinguish the case from Old Wayne Ins. Co. v. McDonough, (1907) 204 U.S. 8, 51 L. Ed. 345, 27 S.C.R. 236. There the contract of insurance was not only made outside the state but was payable where made.

On the question whether the law of the place of performance should govern the secondary obligation arising upon failure to perform see Lorenzen. Validity and Effects of Contracts in the Conflict of Laws, 31 Yale L. Jour. 53, 66-72.

THE EFFECT OF ALTERATION OR ABOLITION OF A MUNICIPAL CORPORATION UPON ITS DEBTS

By John Donald Robb*

In a number of cases which have been decided by the Supreme Court of the United States the question which was raised was —what happens to debts owed by a muncipal corporation to a private person, when the state abolishes or alters the municipal corporation without making provision for the payment of its debt? In *Laramie County v. Albany County*,[1] the state legislature had carved the defendant county out of the plaintiff county without making any provision for the apportionment of the debt. Suit was brought to compel contribution by Albany County, but the court held that the entire burden must fall upon the parent county. In the case of *Mount Pleasant v. Beckwith*,[2] however, where the legislature abolished a municipal corporation and divided its territory among three others without providing for any apportionment of the debt, the court apportioned the debt, and allowed a bondholder of the extinct municipality to bring suit against one of its successors, on the ground that, unless the legislature intended the debt to be apportioned, the obligation of the plaintiff's contract would be impaired, and the court would so construe the legislative act as to uphold its constitutionality.

There is a respectable amount of opinion to the effect that the two cases are irreconcilable and that the former is the correct view. It is argued that in the *Laramie Case* the value of the bonds was lessened by cutting down the size of the county which was responsible for payment of the debt, and hence if there were no impairment of the obligation of contracts in that case, there would be none in the *Mount Pleasant Case*. But, it is said, the parties must have contracted with a view to the law, and therefore one of the terms of the contract was that if the state exercised its sovereign power of altering or abolishing the debtor corporation without apportioning the debt among its successors, the debt

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[1](1875) 92 U.S. 307, 23 L. Ed. 552.
[2](1879) 100 U.S. 514, 25 L. Ed. 699.

should as to that successor be invalid. Therefore, there is no impairment of contract in either case and the court is free to construe the statute without a slant. Construing the statute thus we should reach in both cases the result of the *Laramie Case*.

The argument thus advanced, however, is open to the criticism that it assumes a term of the contract which is purely fictitious, and the interpretation of a contract is a process in which we should stick to facts. There is a great danger in adjusting the facts so that we may reason from the premise thus derived to a preconceived result. The data of a judicial decision should be determined accurately before it is attempted to reason therefrom. There can be little doubt that the contracts in question were upon their faces unconditional contracts by the city to pay back to the plaintiff the money borrowed. There is no express qualification to the effect that the contract should be subject to the right of the state to destroy the debtor. And it is rather difficult to conceive of parties entering into a contract with such an understanding.

The analogy which is drawn between the *Laramie Case* and the *Mount Pleasant Case* seems to be unsound. It is submitted that there is no real antagonism between the two cases, for in the former the parent municipal corporation was well able to pay the entire debt, while in the latter the debtor municipal corporation was entirely destroyed. In the former the obligation of the contract persists unimpaired, only the security being weakened. In the latter the contract itself is impaired, is in fact destroyed when the obligor is destroyed without provision for a successor. This distinction may perhaps be better brought out by a consideration of the case of *Brewis v. City of Duluth*.[3] In that case the debtor municipal corporation was not destroyed, but the larger part of its assets was transferred by legislative act to another municipal corporation, and it was left for the time without the ability to pay its debt. This is then a middle case, a substantial impairment of the obligation of the contract, whereas the *Laramie Case* involves only an immaterial impairment of the security (the debt being left intact) and the *Mount Pleasant Case* involves the total impairment of the obligation of the contract.

If then these two premises are sound, namely, that there is a contract absolute in its terms and an impairment of the obligation of such contract, the legislative act is within the literal wording of the prohibition in article I, sec. 10, par. 1, of the constitution of the United States.

[3](1881) 3 McCrary (U.S.C.C.) 219, 9 Fed. 747.

At this point we are met by a very pertinent consideration. In order to recover on such an evidence of indebtedness, the bondholder would have to recover a judgment against the city, and then mandamus the collection of necessary taxes, if the municipality proved refractory and refused to levy the taxes.[4] If the tax commissioners then resigned one could only go into equity and have a receiver appointed to collect the taxes. But, in *Meriwether v. Garrett*,[5] the Supreme Court has held that the collection of taxes by such a receiver was unconstitutional, as a usurpation by the courts of legislative power.

It is quite evident then that, if the above line of argument is to be followed, the contract clause must be read as referring only to a certain class of contracts, namely, those which can be enforced by the courts without usurping legislative powers. This seems to be the correct approach, logically, and the further question now arises whether in its practical results the latter approach is preferable to the former, that is, whether it is not better to say that there is a contract and that its obligation is impaired, and then to consider whether such a contract comes within the protection of the contract clause, than to say that one of the terms of the contract envisages its destruction by the act of one of the parties and that therefore its obligation is not impaired.

By the former view the contract includes an implied agreement that the state may destroy the municipal corporation at any time and thus repudiate its debt. Consequently, if the legislature destroys the municipal corporation there is no remedy for the creditor. By the latter view there is a contract enforceable in spite of the destruction of the municipal corporation, by means of a judgment, an apportionment by the court, and a writ of mandamus directed to municipal officials of the succeeding municipal corporation ordering the collection of such taxes as had already been provided for the payment of these obligations. The remedy of the creditor is only limited by the constitutional inability of the courts to exercise legislative power. That this is the line along which the problem is being worked out by the Supreme Court there is evidence in the decision of *Mobile v. Watson*.[6] In that case the city of Mobile was authorized to issue bonds, and did so, providing at the same time for a special tax

[4]Heine v. Levee Commissioners, (1873) 19 Wall. (U.S.) 655, 22 L. Ed. 223.

[5](1880) 102 U.S. 472, 26 L. Ed. 197.

[6](1886) 116 U.S. 289, 29 L. Ed. 620, 6, S.C.R. 398.

to be levied annually to take care of the payments of principal and interest as they became due. The city of Mobile was later dissolved by the state legislature and the port of Mobile was incorporated to take over most of its assets. Upon suit by one of the bondholders the court decreed that the officers of the port of Mobile should assess, levy and collect the special tax provided for by the legislature. The legislative power had already been exercised so that the court had merely to order certain executive acts.

It seems, therefore, that the ends of justice, as well as logical coherence, can better be attained by applying to these cases the view that there is a contract, valid insofar as it can be enforced by the courts without usurping legislative power, than by applying the theory that one of the terms of the contract is that it shall cease to be of binding force if the state legislature sees fit to destroy or partially destroy a municipal corporation.

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WILLS—DEVOLUTION OF LAPSED AND VOID DEVISES—EFFECT OF RESIDUARY CLAUSE.—At the common law a void or lapsed devise of realty descended to the heirs-at-law even though there was a residuary clause in the will. A void or lapsed legacy of personalty, however, went to the residuary legatees.[1] With the apparent intention of securing uniformity and also possibly of removing any ambiguity created by other provisions of the act, the Victorian Wills Act of 1837[2] specifically provided that lapsed and void devises of realty should be included in a residuary devise,

[1]Wright v. Hall, (1748) Fortescue 182; see notes Ann. Cas. 1914D 719; 44 L.R.A. (N.S.) 793; 40 Cyc. 1949.
[2]I Vict. c. 26.

if the will contained such.[3] Only eleven states in the Union have enacted similar statutes.[4] A recent Kansas case, *Kirkpatrick v. Kirkpatrick*,[5] depicts the painful and possibly questionable process of judicial legislation which is essential to arrive at a similar conclusion without the aid of this specific statute, the court holding that a void devise of realty passed under the residuary clause to the residuary devisees.

The fact that at the common law the void or lapsed devise did not fall into the residuary clause whereas the void or lapsed legacy did, is accounted for by the fact that a devise was held to speak from the date of the execution[6] of the will while a bequest of personalty spoke as of the time of the testator's death.[7] This difference served as an opening for the working out of two rules of intention. The law courts controlling the devise, and prejudiced by rules of primogeniture into a favoritism of the heirs-at-law, held that in both the case of the void and the lapsed devise the intention of the testator was to dispose of certain property to specific devisees, that he did not intend that his property so specifically devised should go to the residuary devisee since he anticipated an effectual disposal and not a failure of the devise and consequently it goes to the heir-at-law under the general principle that an heir can only be disinherited by express words or necessary implication.[8] A distinction was urged between lapsed and void devises by the residuary devisees in cases involving a void devise.

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[3]1 Vict. c. 26, sec. 25.

[4]District of Columbia, California, North Carolina, Pennsylvania, Rhode Island, Virginia, North Dakota, South Dakota, Oklahoma, Utah, West Virginia.

[5](Kansas 1922) 211 Pac. 146.

[6]Wright v. Hall, (1748) Fortescue 182; Green v. Dennis, (1826) 6 Conn. 293, 16 Am. Dec. 58. "And to go a step further the reason for that rule was this. The power to dispose of land by will was lost after the conquest. When it was regained it came under the form of a right to dispose of uses. The appointment of uses was a present act and therefore a will of land was held to speak as of its date. When the right to devise was given by the statute of 32 Henry VIII chap. 2, the doctrine still remained that a will of land dealt with the legal interest held by the testator at the time of making the will." Learned P. J. in Hilles v. Hilles, (1878) 16 Hun 76. See Holt C. J., in Brunker v. Cook, (1708) 11 Mod. 121, 123.

[7]Durour v. Motteux, (1749) 1 Ves. Sen. 321; Sorrey v. Bright, (1835) 21 N. C. (1 Dev. & B. Eq.) 113, 28 Am. Dec. 584. "Because the last will was usually made in articulo mortis, because a decedent should make some provision for his soul by bequests to the poor and to the church, the jurisdiction over wills was naturally assumed by the clergy, and by the thirteenth century they had established that monopoly in ecclesiastical courts over wills of chattels which existed until the abolition of their jurisdiction in civil matters in 1856." Wigmore, Celebration Legal Essays 544, 549.

[8]Doe v. Underdown, (1741) Willes 293; see Davis v. Davis, (1900) 62 Ohio St. 411, 417, 57 N.E. 317, 78 A.S.R. 725.

It was contended that the void devise was ineffectual for all purposes and that as it would not pass by the specific devise if the testator died immediately he therefore intended it to go to the residuary devisee, but in the case of a lapsed devise "if he (the testator) were to die immediately, nothing remains undisposed of, he cannot intend to give anything in these lands to his residuary devisee."[9] While the distinction found some support[10] it was quite generally repudiated[11] as the court refused to make a distinction between void and lapsed devises saying that the testator undoubtedly intended the same in both cases. The ecclesiastical courts had jurisdiction over wills or that portion of a will which concerned personalty.[12] At that time, if any personal property was left undisposed of, it went, not to the next of kin, but to the executor[13] who might not be a relative at all, and this reason[14] probably induced[15] the ecclesiastical court to find that the testator intended at the time he made the will that all property which was not covered by an effective legacy at the time of his death should be included in the residuary clause.

The English law was materially changed by the Wills Act of 1837 which provided that after-acquired realty might be passed

[9]Doe v. Underdown, (1741) Willes 293. It should be noted that the Kansas Court in Kirkpatrick v. Kirkpatrick, (Kan. 1922) 211 Pac. 146, 154 construes this argument as to intention as an argument that inherently the testator could not provide for the succession of lapsed devises in his will. Their theory is that as the property in effect leaves the testator when he makes the will, (see footnote 6), and comes back to him when the devise lapses, that it constitutes after-acquired property and therefore that the residuary devise in the will could not pass such property. The fiction that the property left the testator, however, was merely resorted to as a basis for an argument that the testator *did not intend* to pass the lapsed devise in the residuary clause and there is no reason to suppose that if it was provided that a given devise if lapsed shall go to certain person it would not have been given effect.

[10]Doe v. Sheffield, (1811) 13 East 526, 534; see Hayden v. Inhabitants of Stoughton, (1827) 5 Pick. (Mass.) 528; Ferguson v. Hedges, (1832) 1 Harr. (Del.) 524.

[11]Gravenor v. Hallum, (1767) Ambl. 643; Tregonwell v. Sydenham, (1815) 3 Dow 194; Van Kleeck v. Reformed Dutch Church of N. Y. (1837) 6 Paige (N.Y.) 600, aff'd, 20 Wend. (N.Y.) 457; see 4 Kent Comm. 4th ed., 542.

[12]See footnote 7.

[13]Attorney-General v. Hooker, (1725) 2 P. Wms. 338.

[14]In Kirkpatrick v. Kirkpatrick, (Kan. 1922) 211 Pac. 146, 152, it is stated that to die intestate was probably to die unconfessed and therefore the ecclesiastical courts gave property covered by void and lapsed legacies to the residuary legatee, but it is more probably merely one of the reasons why the ecclesiastical court first came to have jurisdiction of wills concerning personalty. See footnote 7. It is improbable that if a man made a specific legacy of property, and it failed for some reason that he could not foresee, that he could have been considered as unconfessed.

[15]Davis v. Davis, (1900) 62 Ohio St. 411, 417, 57 N.E. 317, 78 A.S.R. 725.

by a will executed at a time before death;[16] that every will shall be construed to speak as of the time of death;[17] that unless otherwise shown by the will, any void or lapsed devise of realty shall be included in the residuary clause if there be such.[18] Obviously the latter provision produced uniformity, all void and lapsed devises or legacies falling into the residuary clause.

A number of jurisdictions[19] in the United States have enacted statutes similar to section xxv of the English Wills Act but in other than these the decisions are not uniform, and these decisions alone will be considered. A majority of these jurisdictions hold that the void or lapsed devise goes to the residuary devisee the same as in the case of a legacy. This conclusion is reached without the aid of an act similar to section xxv of the English Wills Act by the adoption of a rule of intention directly opposed to the rule of the law courts at the common law. While it is admitted that the testator did not intend to include ineffectual devises in the residue, for the inference is not warranted that he thought the devises invalid, the general intention not to die intestate and the idea that the residuary devisee was intended to take everything except that which passed to specific devisees prevails, and, as this is found to be the intention of the testator it is given affect.[20] If this rule of intention is adopted no statute whatsoever is essential.[21] The objection to its adoption, however, is that the common-law rule was directly opposed and it is in effect judicial legislation. A number of jurisdictions retain

[16]Chap. 26, sec. III. "It shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in the manner hereinafter required all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death."

[17]Chap. 26, sec. XXIV. "And be it further enacted, that every will shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

[18]Chap. 26, sec. XXV. "And be it further enacted, that unless a contrary intention shall appear by the will, such real estate or interest therein, as shall be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will."

[19]District of Columbia, California, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia, West Virginia.

[20]Kirkpatrick v. Kirkpatrick, (Kan. 1922) 211 Pac. 146; Thayer v. Wellington, (1864) 9 Allen (Mass.) 283, 295; Dunn v. Kearney, (1919) 288 Ill. 49, 123 N.E. 105.

[21]Galloway v. Darby, (1912) 105 Ark. 558, 151 S.W. 1014, 44 L.R.A. (N.S.) 782, and note, Ann. Cas. 1914D 712, and note.

the common-law rule of intention and consequently hold that void and lapsed devises go to the heir-at-law whereas void and lapsed legacies go to the residuary legatee.[22] At least two American jurisdictions would seem to support the distinction suggested between void and lapsed devises.[23] In none of the decisions supporting the majority view is the fact frankly recognized that the common-law rule of intention is discarded and the courts apparently arrive at the conclusion that existing statutes require an abandonment of the common-law distinction.

The decision in *Kirkpatrick v. Kirkpatrick*,[24] is the best example afforded. In Kansas, as in Minnesota and many other states, the only statute enacted is merely the equivalent of the first section mentioned of the English Wills Act, section III. The Kansas act provides:

"Any estate or interest in lands or personal estate or other property acquired by the testator after the making of his will shall pass thereby in like manner as if held or possessed at the time of making the will if such shall clearly and manifestly appear by the will to have been the intention of the testator."[25]

The Kansas court says that section XXIV of the English Wills Act deals only with the offending rule of interpretation that the will of realty speaks as of the time of its execution; that section XXV of the English Act merely deals with the consequence of that rule which consequence is said to be that after acquired property would not pass and that a lapsed devise would not pass as it was after-acquired property. The court said the Kansas act deals with this consequence, making it possible to pass after-acquired property, and that hence the incompatible rule of interpretation fails.[26] As the English Wills Act in section III empowered the devisor to pass after-acquired property the same as the Kansas statute, the conclusion must follow that the Kansas court considers sections XXIV and XXV in the English Wills Act entirely superfluous, and this without having commented on that fact. But further, is it true that the consequence of the rule that the will of realty spoke as of the time of execution was that after-acquired property would not pass? Rather the rule of interpretation resulted from the inherent limitations on the power to devise and from the desire of the court to favor the heir-at-law. Nor did the mere granting of

[22]Bridgeport Trust Co. v. Parker, (1922) 97 Conn. 245, 116 Atl. 182; Rizer et al. v. Perry, (1881) 58 Md. 112.

[23]See the American cases in footnote 10.

[24](Kan. 1922) 211 Pac. 146.

[25]Kansas, G. S. 1915, sec. 11809; Minn., G. S. 1913, sec. 7264.

[26]Kirkpatrick v. Kirkpatrick, (Kan. 1922) 211 Pac. 146, 153.

the power to devise after-acquired realty necessitate changing the rule of intention that had been adopted, unless expressly provided the intention could still be found not to pass after-acquired property. So section XXIV of the English Act was essential to make the rule that all the property owned at death, was *intended* to be covered by the will. Then to consider the last assumption of the Kansas court that a lapsed devise is after-acquired property. Apparently the argument of fiction once proposed to justify a distinction between lapsed and void devises, that in the case of a void devise the property never left the testator whereas in the case of the lapsed devise the property left and returned, is adopted.[27] Having adopted this fiction for the purpose of fitting a lapsed devise in their statute concerning "after-acquired" property the court proceeds to say that in the interests of uniformity[28] they will treat a void devise in the same manner, entirely overlooking the fact that the only function of the fiction which they adopted was to warrant a distinction between lapsed and void devises. How could sections III and XXIV of the English Wills Act affect the rule of intention that as the testator has specifically attempted to dispose of this property in one manner he does not intend that it shall be covered by another provision in the will?[29] Certainly the Kansas statute can have no more effect than to change the offending rule that the will is not intended to cover property actually acquired after the execution of the will.[30] Obviously a

[27]See footnote 9.

[28]Note that as stated before, the common-law courts rejected the fiction not with a view of obtaining uniformity but for the reason that they concluded the testator's intention was the same in both the case of the void and lapsed devise.

[29]Section III of the English Wills Act merely extends the *power* to will *actually* after-acquired property and if it were not specifically provided that after-acquired property should pass in the residuary clause the rule of intention then applied by the court would not pass such property. Section XXIV of the English Wills Act would cover actually after-acquired property even though not specifically so provided for they must look at the will as executed and speaking as of a time immediately before death. See 1 Williams, Executors, 9th ed., 174.

[30]While it is assumed that the Kansas act is the equivalent of section XXIV of the English Wills Act, this assumption is questionable and more possibly it is only the equivalent of section III of that act. Whereas under section XXIV of the English Act the will "speaks" as of the time of death and therefore includes all the property he then owns "unless a contrary intention is shown," under the Kansas act such after-acquired property will pass as if held at the date of execution of the will only "if such shall clearly and manifestly appear by the will to have been the intention of the testator," and as the act does not make the will "speak" as of a time after he acquired the property, as does the English section, the intention is manifestly *not clear* unless the judiciary, the legislature not having acted, changes the rule that the will speaks from the date of execution.

statute similar to section XXV of the English Wills Act disposes of any question.[31]

While a number of courts have arrived at the same conclusion[32] as the *Kirkpatrick case,* having only a statute similar to the Kansas act or statutes construed to be equivalent of only section XXIV of the English Wills Act, some courts[33] in the same circumstances have felt compelled to make a distinction between lapsed and void devises and between void or lapsed devises and void or lapsed legacies. In view of this fact is it not desirable that the insufficient legislation on this subject in Minnesota be supplemented by statutes similar to sections XXIV and XXV of the English Wills Act before the question is raised in the Minnesota courts?

BROKERS—NATURE AND EFFECT OF RELATIONSHIP BETWEEN STOCKBROKERS AND MARGIN CUSTOMERS.—It is the generally recognized rule in the United States that a stockbroker is not the owner of the securities he purchases for a customer pursuant to a marginal transaction,[1] but is essentially, though not strictly, a

[31]Nothing but section XXV of the English Act prevents the application of the rule that an heir-at-law can only be disinherited by express words or necessary implication which was held applicable because the testator designated that certain property shall go to specific persons who were not residuary devisees.

[32]Thayer v. Wellington, (1894) 9 Allen (Mass.) 293, 296, 85 Am. Dec. 753; Gallavan v. Gallavan, (1901) 57 App. Div. 320, 68 N.Y.S. 30; Cruikshank v. Home for the Friendless, (1889) 113 N.Y. 337, 21 N.E. 64, 4 L. R.A. 140; Holbrook v. McCleary, (1881) 79 Ind. 167.

[33]See footnote 22 and the American cases in footnotes 10 and 11.

[1]When securities are purchased pursuant to the so-called marginal transaction, they are, as it is termed, "carried" for the customer until the transaction is closed by a sale or otherwise, and meanwhile the customer's account is said to be "long" of such stocks. The broker supplies a part, often most, of the necessary funds, and he protects himself from loss by keeping the securities and requiring the customer to make a proportionate payment in money or a deposit of other securities as collateral. This payment or deposit is the customer's equity or "margin" in the assets to his credit in the hands of the broker. See Campbell, The Law of Stockbrokers, 2nd ed., 26. On his books, the broker credits the customer with the value of the securities bought, changing this daily as the market fluctuates, and debits him with the advances made to complete the purchase. There also may be sales on margin, where the customer sells securities which he does not own. This is called a "short sale," and until the sale is, as it is termed, "covered" by a corresponding purchase, the customer's account is said to be "short" of such securities. In this transaction, the broker generally borrows the securities and makes the sale, retaining the proceeds to secure him in providing the securities for delivery, and requiring in addition the payment or deposit by the customer of a margin just as in the case of a purchase on margin. See Campbell, op. cit., 20, 73.

pledgee thereof to secure the payment of his advances.[2] But the Massachusetts court regards the broker as the owner of the securities, carrying them upon a conditional contract of sale to deliver them to the customer on demand and proper tender of the purchase price. An intensive and able survey of the Massachusetts cases on the subject has led a writer to declare recently that though this is the doctrine commonly ascribed to the Massachusetts court, yet the true view of that court is that the broker holds the legal title to the securities in trust for the customer.[3] But, the federal district court for the district of Massachusetts in a recent case,[4] applying the rule of the state where the transactions occurred, repudiated this trust theory and re-affirmed the old debtor-creditor doctrine,[5] holding that upon the broker's bankruptcy, a marginal customer occupies the position of a general creditor.

Irrespective of which theory is followed, there are certain universally accepted rights and privileges growing out of marginal transactions. A broker buying securities on margin for a customer or holding securities deposited as collateral for the margin account, need not keep the identical securities for the customer, but he must have on hand or under his control, free from the just claims of other customers and available for delivery to him the securities to which he will be entitled upon payment of the amount due from him thereon.[6] It is clear that under this rule, the broker may lawfully pledge the customer's securities bought on margin,[7] and also those deposited as collateral on the trading account, providing the broker is entitled to a lien thereon for money advanced,[8] and providing he pledges them separately for an amount not greater than that due him from the customer. If he pledges them for more than that sum, and does not keep on hand other securities of like

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[2]Richardson v. Shaw, (1907) 209 U.S. 365, 28 S.C.R. 512, 52 L.Ed. 835, 14 Ann. Cas. 981; Skiff v. Stoddard, (1893) 63 Conn. 198, 26 Atl. 874, 28 Atl. 104, 21 L.R.A. 102; Markham v. Jaudon, (1869) 41 N.Y. 235.

[3]Smith, Margin Stocks, 35 Harv. L. Rev. 485, 506.

[4]In re Codman, (1922) 284 Fed. 273.

[5]For a discussion and comparison of the debtor-creditor and the pledgor-pledgee theories, see 8 Col. L. Rev. 488.

[6]Horton v. Morgan, (1859) 19 N.Y. 170, 75 Am. Dec. 311, and note; Strickland v. Magoun, (1907) 119 App. Div. 113, 104 N.Y.S. 425.

[7]Campbell, The Law of Stockbrokers, 2nd ed., 46.

[8]In re T. A. McIntyre & Co., (1910) 181 Fed. 955, 958, 104 C.C.A. 419. It has been held that even though a customer's account showed more credits than debits, he was none the less indebted to the broker to the extent of his debit total. In re Toole, (C.C.A. 1921) 274 Fed. 337, Manton, J., dissenting. See 22 Col. L. Rev. 155. See also, In re Ennis, (1911) 187 Fed. 720, 724, 109 C.C.A. 468. Compare, Campbell, op. cit., 50-1.

kind and amount, he is guilty of conversion.[9] However, the general practice of brokers in making their so-called general loans, is to mingle the securities of their various customers and pledge the whole bulk to a third person for a loan ordinarily larger than the indebtedness of any one customer. Where this was done without retaining on hand securities available for delivery to a customer, it was held to be ipso facto a conversion.[10] But the same court later said:

"If the broker has the stock under his control (even if it is pledged), and can resume possession by paying the amount borrowed thereon, not exceeding the amount which the customer owes on account of the purchase, there has been no conversion."[11]

If, upon the insolvency of the broker, the customer, to redeem from the pledgee, would be required to pay a pro rata share of the pledge loan in excess of his indebtedness to the broker, there clearly would be a conversion by the broker.[12] The question of when the conversion takes place is important, because, assuming that the hypothecation was a conversion, then, if the securities later decline in value, the customer's measure of recovery is the value of the stock at the time of the hypothecation. Of course, if the stock advances after the hypothecation, the customer may waive the tort and take the profit. Generally, however, the broker, for his own protection, enters into a special agreement with the customer, whereby the broker is entitled to pledge the securities for more than the amount of the customer's indebtedness, but this merely gives the broker the right to pledge the customer's securities in his general loans, and does not authorize him to pledge them for more than his lien would justify.[13]

The exact theory of the relationship between the broker and his marginal customer is of primary importance when the broker becomes insolvent. If the customer has only a contractual claim against the broker, then, as held in the federal case mentioned above, he must prove his claim as a general creditor. But, if the

[9]In re Pierson's Est., (1897) 19 App. Div. 478, 46 N.Y.S. 557. A broker's unauthorized pledge of securities indorsed in blank to an innocent pledgee is, of course, binding on the customer. Johnson v. Bixby, (1918) 252 Fed. 103, 164 C.C.A. 215, 1 A.L.R. 660. Consequently, a customer, in order to get his stock, must settle according to the pledgee's lien. McNeil v. The Tenth Nat. Bank, (1871) 46 N.Y. 325, 339, 7 Am. Rep. 341.

[10]Douglas v. Carpenter, (1897) 17 App. Div. 329, 45 N.Y.S. 219.

[11]Mayer v. Monzo, (1912) 151 App. Div. 866, 137 N.Y.S. 616. The question seems not to have been passed upon by the New York court of appeals.

[12]Campbell, op. cit., 51.

[13]Campbell, op. cit., 124, 125.

legal title to the securities is in the customer, he may redeem them upon payment of his debt to the broker, for he has an equity superior to that of a general creditor.[14] Under this rule, interesting and difficult questions arise when the various customers are claiming priority over one another.

Upon the failure of the broker, the marginal customer's right to redeem his securities depends, first, upon whether he can identify them, and, second, upon their situation with respect to the securities of other customers at the time of the failure.[15]

If he cannot trace his stock or its identifiable proceeds,[16] he becomes a general creditor no matter how grievously he has been

[14]This same result would be reached under the theory that the broker holds title to the securities in trust for the customer. For a discussion of the adjustment of the conflicting interests of marginal customers and general creditors in case of loss, see Smith, Margin Stocks, 35 Harv. L. Rev. 485, 512.

[15]" . . . however strong the equity of a particular customer may be, it will only avail him in regard to securities which he can identify as his. If there were 300 shares of stock in a broker's loan and three customers, classified according to their equities as A, B, and C, established ownership of one-third of the stock by showing that the broker was carrying 300 shares of that kind of stock for each of them. A would get all of the stock that survived the satisfaction of the loan up to 100 shares, B would get the remaining surplus, if any, up to 100 shares, and C would get the rest, each having identified in the same manner 100 of the 300 shares as his and being entitled to require that the shares identified by the ones having the inferior equity be first sold to satisfy the loan. But, if B could show by certificate number or otherwise that the 300 shares in the loan were identical ones bought for him, his identification would defeat the title of A to any part of the shares, and B would get the entire surplus despite A's superior equity. [Compare cases cited in footnotes 37-39.] Or, if B could thus identify 100 of the shares and then could show that the broker had in other loans a sufficient quantity of the same kind of stock to reduce A's pro rata share of the stock in the instant loan to say 10 shares. A would get 10 shares, and B would get the balance of the surplus up to 100 shares, assuming that the other 190 shares in the loan were not identified by customers having equities equal or superior to that of B." Campbell, op. cit., 100, note.

[16]If the broker converted securities of his customers, deposited the proceeds in his general bank account, and then drew out all the funds, redeposits subsequently made constitute a general restoration, in which all the defrauded cestuis share ratably. In re T. A. McIntyre & Co., (1910) 181 Fed. 960, 104 C.C.A. 204. Money in the hands of a broker to the credit of the customer above the amount of the latter's indebtedness is held ordinarily by the broker as a quasi-trustee. Hence, in case of insolvency of the broker, the customer would have a prior claim upon any general funds into which it could be traced, subject to the proportionate rights of other customers whose money could be traced into the same account. But to trace the trust funds properly, the claimant must show that they are contained somewhere in the estate at the time of the insolvency. Merely showing that prior to the insolvency the broker was in possession of the funds is not sufficient. Campbell, op. cit., 103-5. But, in some jurisdictions the customer must do more than show that the trust fund has gone to swell the broker's estate. He must show the specific property into which it has been changed, or the specific fund in which it is included. In re J. C. Wilson & Co., (1917) 252 Fed. 631, 640.

wronged.[17] There are several rules governing identification.[18] Where the claimant identifies his securities by certificate number,[19] or where it can be shown that certain securities were being held for the customer,[20] he is entitled to them. This is a "precise" or "specific identification" and takes preference over "general identification."[21] The latter arises in the situation where it is shown that the broker was carrying a block of securities of a particular kind, but not held for any particular customer, sufficient in amount to satisfy the demands of all the customers, including the broker himself, claiming that kind. This identification entitles each to the number of shares that were being carried for him.[22] Where general identification only is possible, and the block of securities will satisfy the claims of all the customers, but not the broker himself, it will be presumed that the securities on hand are being held for the customers. But this is merely a presumption of fact.[23] But where the securities capable of general indentification are not sufficient to satisfy the claims of all the customers, exclusive of the broker himself, each is entitled to his pro rata share,[24] and it is immaterial whether or not he is a credit or debit customer.[25]

[17]In re J. F. Pierson, Jr., & Co., (1915) 225 Fed. 889, 891; In re J. C. Wilson & Co., (1917) 252 Fed. 631, 652, 653-4. One who can not trace his securities is entitled to a set-off against his indebtedness equal to the value of the stock when converted; and where he, having the burden to show the date of the conversion, did not show it as of any given date before the date of bankruptcy, the value of the securities may be fixed as of the latter time. In re J. F. Pierson, Jr., & Co., (1915) 225 Fed. 889, 892. See In re Pierson, (1916) 233 Fed. 519, 147 C.C.A. 405, certiorari dismissed in 243 U.S. 641, 37 S.C.R. 404, 61 L.Ed. 943.

[18]Having made proper identification, the claimant may file his claim as a general creditor, thereby waiving any claim to specific securities. But participation in the bankruptcy proceedings does not preclude him from reclaiming his securities if, when he filed as a general creditor, he expressly reserved what rights he might have in the securities in question. Thomas v. Taggart, (1908) 209 U.S. 385, 28 S.C.R. 519, 52 L.Ed. 845. See In re James Carothers & Co., (1910) 182 Fed. 501. If the customer has surrendered, lost, or failed to trace his claim to follow his securities, the general creditors succeed to his claim. In re Pierson, (1916) 238 Fed. 142, 151 C.C.A. 225; In re J. C. Wilson & Co., (1917) 252 Fed. 631, 653.

[19]In re J. C. Wilson & Co., (1917) 252 Fed. 631, 654.

[20]They need not be the identical ones originally purchased for him. See Skiff v. Stoddard, (1893) 63 Conn. 198, 225-6, 26 Atl. 874, 28 Atl. 104, 21 L.R.A. 102; In re B. Solomon & Co., (C.C.A. 1920) 268 Fed. 108, 110. Similarly, if he is the only one claiming a particular kind of security. Gorman v. Littlefield, (1913) 229 U.S. 19, 33 S.C.R. 690, 57 L.Ed. 1047.

[21]See footnote 15, supra.

[22]Skiff v. Stoddard, (1893) 63 Conn. 198, 226.

[23]Skiff v. Stoddard, (1893) 63 Conn. 198, 227.

[24]Duel v. Hollins, (1916) 241 U.S. 523, 36 S.C.R. 615, 60 L.Ed. 1143; In re Pierson, (1916) 238 Fed. 142, 151 C.C.A. 225. As to the balance of their claims they are general creditors. In re J. C. Wilson & Co., (1917) 252 Fed. 631, 653.

[25]Skiff v. Stoddard, (1893) 63 Conn. 198, 228-30.

These rules are the same even though the securities are at the time of the bankruptcy in the hands of a pledgee.

Assuming that the securities are traceable, the next step is to determine the priorities of the various claimants. The rule applicable is the familiar equitable doctrine that equity will treat alike those similarly situated. In applying this test, it is a cardinal principle that as between securities hypothecated with authority and those hypothecated without authority, the latter have the superior equity.[26] There are several general rules as to whether a particular hypothecation is rightful or wrongful. Securities left with the broker for safekeeping,[27] and securities of so-called "cash customers," that is, those who pay outright for their purchase,[28] may not be hypothecated without express authorization. If the broker before bankruptcy converted a part of the customers' securities, leaving unconverted a certain amount of similar securities, there is no presumption that he selected the securities of the margin customer for conversion, leaving untouched the stock of the cash customer.[29] However, if the pledge were rightful, and there remain insufficient securities to satisfy all claims, it will be presumed that the broker utilized only those securities which he had a right to use, thus leaving unaffected those of a cash customer.[30]

While collateral deposited as margin may be pledged, it has been held that securities purchased on margin, included in the pledge, should be applied first to satisfy the pledgee's lien.[31] But the better view would seem to be that there is no difference between the two classes in this respect.[32] It is clear, however, that

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[26]Willard v. White, (1890) 56 Hun (N.Y.) 581, 10 N.Y.S. 170. See In re Ennis, (1911) 187 Fed. 720, 109 C.C.A. 468, where it is shown that the mere fact that a customer is a marginal trader is not conclusive on the repledge of his securities.

[27]In re Mills, (1908) 125 App. Div. 730, 110 N.Y.S. 314, aff'd without opinion in 193 N.Y. 626, 86 N.E. 1128.

[28]In re J. C. Wilson & Co., (1917) 252 Fed. 631, 651. If a marginal customer is "long" on some security, and his collateral gives him a credit balance over his "short" securities, he is in the same position as to his "long" stock as a cash customer who had no marginal transactions. In re J. C. Wilson & Co., (1917) 252 Fed. 631, 655. See In re Mason. (C.C.A. 1922) 282 Fed. 202, 205, where it is said that marginal traders may pay the amount due on their purchase, demand their stock, and thus put themselves on an equality with those who had paid for their securities in full before bankruptcy.

[29]In re J. C. Wilson & Co., (1917) 252 Fed. 631, 652.

[30]In re J. C. Wilson & Co., (1917) 252 Fed. 631, 654.

[31]Willard v. White, (1890) 56 Hun (N.Y.) 581, 10 N.Y.S. 170; Sillcocks v. Gallaudet, (1892) 66 Hun (N.Y.) 522, 21 N.Y.S. 552.

[32]Campbell, The Law of Stockbrokers, 2nd ed., 98.

such collateral may not be pledged if the broker has no lien on it. And securities carried on margin, though they may be hypothecated, may not be used for the broker's own purposes.[33]

Where the broker, with authority to pledge the securities, converts part of them and pledges the remainder along with other stocks pledged without authority, the first customer, if after and as a result of the conversion there is a net credit balance in his favor on the whole account, is similarly situated to claimants whose stocks were pledged without authority.[34] But where the broker converts a portion of "long" stock, and the customer later, with notice of conversion, allows the broker to remain in possession of his unconverted stock, which is pledged and upon bankruptcy sold by the pledgee, the customer's claim, no matter how much the unconverted securities exceeded his debit balance, is inferior to those of customers whose stock was pledged without authority, and who can trace the stock or its proceeds.[35]

In the case of securities hypothecated without authority and belonging to different customers, the equities are originally equal, and that equality is not disturbed by the fact that the stock of one is sold by the pledgee, while that of the other survives the liquidation.[36] And it has been held that the same is true as to securities deposited as collateral which have been rightfully pledged along with others.[37] But an earlier federal case reached a contrary result,[38] and a United States Supreme Court holding seems contra.[39] The rule was based on the fear that otherwise the door would be flung wide open to fraudulent practices, because a customer, whose collateral had been hypothecated with that of others, easily could arrange with the pledgee to save his collateral from liquidation. Speaking of this rule, it has been said:

"However, the decision has not gone far enough. While closing the door to connivance between customer and lending bank...

[33]In re J. C. Wilson, (1917) 252 Fed. 631, 649, 652; In re Ennis, (1911) 187 Fed. 720, 109 C.C.A. 468.

[34]In re J. C. Wilson & Co., (1917) 252 Fed. 631, 649.

[35]In re J. C. Wilson & Co., (1917) 252 Fed. 631, 644.

[36]In re J. C. Wilson & Co., (1917) 252 Fed. 631, 636, explaining In re T. A. McIntyre & Co., (1910) 181 Fed. 955, 957, 104 C.C.A. 419. But, if the pledgee rightfully sold the securities prior to the bankruptcy, this rule, in the absence of fraud or collusion, apparently would not apply. It is to be noted that the contribution required of a claimant, whose securities have survived liquidation, is ordinarily the amount which they were worth at the date of the bankruptcy. In re T. A. McIntyre & Co., (1910) 181 Fed. 955, 959, 104 C.C.A. 419.

[37]In re Toole, (C.C.A. 1921) 274 Fed. 337.

[38]Johnson v. Bixby, (1917) 252 Fed. 103, 164 C.C.A. 215, 1 A.L.R. 660.

[39]Thomas v. Taggart, (1908) 209 U.S. 385, 28 S.C.R. 519, 52 L.Ed. 845.

it leaves open a door for connivance between customer and broker. The customer may persuade his broker to withdraw the former's collateral from a loan and to substitute another's. Therefore the collateral of the various customers of the broker should be treated as a common adventure... Then the unpledged collateral and marginal securities should be marshaled with the securities surviving liquidation of the various loans effected to carry the accounts, and distributed pari passu among the customers having claims to the various securities. If this view were adopted, a customer's rights would not depend upon the haphazard pledging or non-pledging of his securities; nor upon the chance that his securities might be wilfully substituted to protect someone else."[40]

RECENT CASES

BANKS AND BANKING—TAXATION OF NATIONAL BANK STOCK—COMPETITION WITH NATIONAL BANKS.—The plaintiff, a national bank, sues to enjoin the collection of a tax assessed to its shareholders at the rate of 143.5 mills on the dollar. It is alleged in the complaint that within the taxing district there is $5,000,000 loaned or invested by individuals on real estate security which is taxed at a flat rate of 5 mills on the dollar. The petition does not charge that the plaintiff bank is engaged in loaning its funds on real estate security. The total value of the capital, surplus, and undivided earnings of the state and national banks in the district does not exceed $316,852. *Held*, that the complaint does not show that any moneyed capital is in competition with the moneyed capital of national banks, as it does not appear that any amount of the plaintiff's money is loaned on real estate security, and therefore the demurrer to the complaint is sustained. *First Nat. Bank of Guthrie Center v. Anderson*, (Ia. 1923) 192 N.W. 6.

For a discussion of the principles involved, see, article by Henry Rottschaefer, State Taxation of National Bank Shares, 7 MINNESOTA LAW REVIEW 357.

CARRIERS—PASSENGERS—DUTY TO INQUIRE AS TO TRANSFER POINTS—ANNOUNCING STATIONS—AWAKENING PASSENGERS IN CHAIR CAR.—The plaintiff, boarding the defendant's train at 10:30 P. M., asked for Pullman accommodations. Unable to get them, and to the knowledge of the conductor, he went to sleep in a chair car. The plaintiff did not know that a change of cars was necessary but the conductor, having collected his ticket, knew that a transfer was necessary. The conductor failed to awaken him at his transfer point until it was too late to catch his connecting train. *Held*, that there was no duty on the conductor, in the absence of inquiry, to inform the plaintiff of the necessity of a transfer, and no duty to

[40] 22 Col. L. Rev. 155, 158.

awaken him when the transfer point or his destination was reached. *Hill v. New,* (Okla. 1923) 212 Pac. 422.

The instant case is clearly in accord with the great weight of authority. As stated in *Ohio, etc., R. Co. v. Applewhite,* (1876) 52 Ind. 540: "It is the duty of a person about to take passage on a railroad train to inform himself when, where, and how he can go or stop . . .; and if he makes a mistake not induced by the company, against which ordinary care . . . would have protected him, he has no remedy against the company for the consequences." Refusal to give such information on request, however, renders the company liable. *Lilly v. St. Louis & S. F. R. Co.,* (1912) 31 Okla. 521, 122 Pac. 502, 39 L.R.A. (N.S.) 663, and note.

As a general rule there is no duty to awaken a passenger and inform him that his destination has been reached so that he may get off. *Seaboard Air Line R. Co. v. Rainey,* (1905) 122 Ga. 307, 50 S.E. 88, 2 Ann. Cas. 675, and note, 106 A.S.R. 134; *Southern R. Co. v. Kendrick,* (1886) 40 Miss. 374, 90 Am. Dec. 332, and note. The duty of the carrier is discharged when its servant has announced in each car the name of the station as it is approached. *Seaboard Air-Line R. Co. v. Rainey,* (1905) 122 Ga. 307, 50 S.E. 88, 2 Ann. Cas. 675, and note, 106 A.S.R. 134. This announcement must be made in such a manner that persons having ordinary hearing and paying ordinary attention will hear it, but the company does not insure that the passenger shall hear it. *Chesapeake & Ohio R. Co. v. Robinson,* (1909) 135 Ky. 850, 123 S.W. 308. A promise by the conductor to awaken a passenger is without the scope of his authority and imposes no liability on the company. *Sevier v. Vicksburg, etc., R. Co.,* (1883) 61 Miss. 8, 48 Am. Rep. 74; *Missouri, K. & T. R. Co. v. Kendrick,* (Tex. Civ. App. 1895) 32 S.W. 42. Even though the station is not announced at all, if it is proved that the passenger was asleep, the passenger cannot recover because of his contributory negligence, and the possibility that he might have heard or been awakened is entirely too conjectural to be considered. *Seaboard Air-line R. Co. v. Rainey,* (1905) 122 Ga. 307, 50 S.E. 88, 2 Ann. Cas. 675, and note, 106 A.S.R. 134. Though there is generally no duty to give passengers personal notice, exceptional circumstances may impose this duty, as where considerations of age, sex, or physical infirmity may bring that within the scope of the conductor's duty; but it must appear the conductor knew such exceptional facts in order to bind the company, and possibly that he knew such facts when the person boards the train, 2 Hutchinson, Carriers, 3rd ed., 1316; *Weightman v. Louisville, etc., R. Co.,* (1893) 70 Miss. 563, 12 So. 586, 19 L. R. A. 671, 35 A.S.R. 660; *Southern R. Co. v. Herron,* (1915) 12 Ala. App. 415, 68 So. 551, for where the conductor was informed of a passenger's condition, which existed before he boarded the train, only after the train has started, it was held that the company was not charged with awakening him. *Sevier v. Vicksburg, etc., R. Co.,* (1883) 61 Miss. 8, 48 Am. Rep. 74. But see *Gilkerson v. Atlantic, etc., R. Co.,* (1914) 99 S.C. 426, 83 S.E. 592, L.R.A. 1915C 664, Ann. Cas. 1916B 248 where the duty to give personal notice was imposed where the passenger merely notified the conductor that he was "tired out" and apt to go to sleep. Different rules, of course, are applied to passengers in sleeping cars. 4 Elliott, Railroads, 2nd ed., 478.

CONFLICT OF LAWS—JURISDICTION IN PERSONAM—SERVICE OF PROCESS ON INSURANCE COMMISSIONER—REQUISITE THAT THE OBLIGATION SUED ON ARISE OUT OF BUSINESS DONE IN THE STATE.—The plaintiff, a Minnesota corporation, obtained insurance on one of its vessels from the defendant, a foreign corporation. The defendant has no office in Minnesota, nor does it employ an agent here, and the contract of insurance was signed outside the state of Minnesota. It is averred in an affidavit that the defendant has in the last few years issued other policies on vessels owned by Minnesota corporations. The defendant has not expressly consented to service of process on the insurance commissioner. The defendant appears specially and moves to set aside the service made on the insurance commissioner. *Held,* that the service is sufficient. *Massey S. S. Co. v. Norske Lloyd Ins. Co.,* (Minn. 1922) 189 N.W. 714.

The Minnesota court did not refer to the question whether the obligation here sued on arose out of the business done in the state. See, article by George E. Osborne, Arising Out of Business Done in the State, 7 MINNESOTA LAW REVIEW 380.

CONSTITUTIONAL LAW—DIVORCE—ALIMONY AS A "DEBT"—IMPRISONMENT FOR NON-PAYMENT.—The defendant, incarcerated in the county jail under a commitment for failure to pay temporary alimony, sued out a writ of habeas corpus to be discharged from custody, maintaining that a decree for alimony is a "debt" within the constitutional provision against imprisonment for debt. The court, expressly overruling its former decisions, *held,* that a decree for alimony is not a "debt" within the meaning of the constitutional provision against imprisonment for debt and that the decree may be enforced by imprisonment for contempt where no reasonable cause for non-payment is shown. *Cain v. Miller,* (Neb. 1922) 191 N.W. 704.

By abandoning its former ruling the Nebraska court leaves Missouri the sole advocate of the doctrine that there can be no imprisonment for non-payment of alimony, holding, that as the decree for alimony creates but a debt, imprisonment for which is prohibited by the constitution, there can be no imprisonment for contempt since the only act of the defendant is a refusal to pay a debt. *In re Kinsolving,* (1909) 135 Mo. App. 631, 116 S.W. 1068; *Francis v. Francis,* (1915) 192 Mo. App. 710, 179 S.W. 975; note Ann. Cas. 1913E 1088. In support of the principal case see notes 34 L.R.A. 665; 17 L.R.A. (N.S.) 1140, L.R.A. 1915B 651; Ann. Cas. 1913E 1087. The imprisonment is a punishment for contempt in disobeying an order of the court, and not for the mere failure to pay money, for the decree was really to enforce, by the payment of money, a duty owed by the defendant to the wife and the public, to give the former that portion of the husband's property to which she was equitably entitled. *Hurd v. Hurd,* (1896) 63 Minn. 443, 65 N.W. 728; *State v. Cook,* (1902) 66 Ohio St. 566, 64 N.E. 567, 58 L.R.A. 625; *Ex parte Murray,* (1888) 35 Fed. 496; see 12 Col. Law Rev. 638. Where the defendant's non-compliance with the decree is due to honest inability to pay and is not a fraudulent or willful refusal, the element of contempt is lacking, and imprisonment, which could then only be for failure to pay the money, would be a violation of the con-

stitutional provision against imprisonment for a debt. *Hurd v. Hurd,* (1896) 63 Minn. 443, 65 N.W. 728; *Messervy v. Messervy,* (1909) 85 S.C. 189, 67 S.E. 130; notes 30 L.R.A. (N.S.) 1001; Ann. Cas. 1913E 1088. And the burden is upon the defendant to show his inability. But in *In re Cowden,* (1903) 139 Cal. 244, 73 Pac. 156, it was held that ability to pay must be alleged in the complaint.

For some purposes a decree of alimony is regarded as a debt. An action at law for debt will lie for the amount of the decree, *Wagner v. Wagner,* (1904) 26 R.I. 27, 57 Atl. 1058, 65 L.R.A. 816, 3 Ann. Cas. 578. It has been held to be a debt within the meaning of the exemption laws, *Schooley v. Schooley,* (1918) 184 Ia. 835, 169 N.W. 56, 11 A.L.R. 110, and note, and see the excellent dissenting opinion; but not a debt provable in or barred by bankruptcy proceedings. *Audubon v. Shufeldt,* (1901) 181 U.S. 575, 21 S.C.R. 735, 45 L. Ed. 1009; *Wetmore v. Markoe,* (1904) 196 U.S. 68, 49 L. Ed. 390, 25 S.C.R. 172.

CORPORATIONS—GRATUITIES—IMPLIED POWERS — ULTRA VIRES — SUBSCRIPTIONS TO EDUCATIONAL INSTITUTIONS.—The directors of a business corporation subscribed to the endowment funds of two colleges, for the purpose of securing the establishment therein of courses in business administration, which the directors thought would benefit the corporation by furnishing a supply of scientifically trained employees. The corporation is likely to receive local advertising as a result and also the good will of influential citizens. In reliance on the subscriptions the colleges hired teachers, and offered courses as contemplated. The receiver of the corporation now requests instructions as to whether the subscriptions were ultra vires or should be paid. Neither creditors nor stockholders object to the expenditure. *Held,* that the subscription was not ultra vires. *Armstrong Cork Co. v. H. A. Meldrum Co.,* (Dist. Ct. N.Y. 1922) 285 Fed. 58.

There is no implied authority in a corporation to give away any portion of the corporate property, or to create a corporate obligation gratuitously, 1 Morawetz, Private Corp., 2nd ed., 399, but there is a clear distinction between a mere gift and a subscription made with a view of receiving a pecuniary benefit therefrom. 2 Fletcher, Corp., 2148. The test seems to be whether or not the corporation will receive a direct and proximate benefit, "but it is impossible to lay down an inflexible rule to govern such cases, and each case must be determined on its own circumstances." *Vandall v. South San Francisco Dock Co.,* (1870) 40 Cal. 83, 91. See 1 Boston Univ. Law Rev. 99, 110. Bank charters are construed strictly and subscriptions by banks to funds for bringing new industries to the locality and so increasing business are ultra vires, *Holt v. Winfield Bank,* (1885) 25 Fed. 812; *McCrory v. Chambers,* (1892) 48 Ill. App. 445; *Robertson v. Buffalo, etc., Bank,* (1894) 40 Neb. 235, 58 N.W. 715, whereas under the same circumstances a subscription by a business corporation would be held valid. *Huntington Brewing Co. v. McGrew,* (1916) 64 Ind. App. 273, 112 N.E. 534. Donations by railroads to projects which would tend indirectly to increase the traffic are held ultra vires in most cases. *Tomkinson v. Southeastern R. Co.,* (1887) L.R. 35 Chan. Div. 675; *Davis v. Old Colony R. Co.,* (1881) 131 Mass. 258, 41 Am. Rep. 221; See *Military Ass'n v.*

Savannah, etc., R. Co., (1898) 105 Ga. 420, 31 S.E. 200. On the other hand, corporations whose purpose is the improvement and sale of realty are treated as having very extensive implied powers in such matters. *Whetstone v. Ottawa University,* (1874) 13 Kan. 240; *Sherman Center Town Co. v. Russell,* (1891) 46 Kan. 382, 26 Pac. 715; *Vandall v. South San Francisco Dock Co.,* (1870) 40 Cal. 83. Subscriptions to the Red Cross and similar civilian instrumentalities for the successful prosecution of the late war were considered valid as supporting law and order upon the continuance of which corporate existence depends. 46 Wash. Law Rep. 693. Though subscriptions to enterprises for the benefit of and to gain the goodwill of present employees have been recognized as valid, *Steinway v. Steinway & Sons,* (1896) 17 Misc. Rep. 43, 40 N.Y.S. 718, the instant case is clearly extreme in extending the rule to include persons under no contractual obligation to ever serve the corporation and who will be presumably paid all that their services are worth if they do serve the corporation. The court, however, gave weight to the value of the advertising, as did the court in *B. S. Green Co. v. Blodgett,* (1895) 159 Ill. 169, 42 N.E. 176, 50 A.S.R. 146. Further, the fact that this was a small so-called "family corporation" was noted by the court, and while this fact, as well as the fact that neither the stockholders nor the creditors object to the payment, does not logically affect the test as first stated, the presence of such elements is noticeable in many of the liberal decisions.

Had the instant case arisen in a state court the subscription might well have been sustained on the ground that the reliance and performance of the other party deprived the corporation of the right to set up the ultra vires character of the promise, *State Board of Agriculture v. Citizens St. R. Co.,* (1874) 47 Ind. 407, 17 Am. Rep. 702; see, *Sherman Center Town Co. v. Russell,* (1891) 46 Kan. 382, 26 Pac. 715; *Richelieu Hotel Co. v. International, etc., Co.,* (1892) 140 Ill. 248, 29 N.E. 1044, 33 A.S.R. 234; and *Huntington Brewing Co. v. McGrew,* (1916) 64 Ind. App. 273, 112 N.E. 534, a doctrine not accepted in the federal courts, 3 Fletcher, Corp., 2600.

CRIMINAL LAW—HOMICIDE TO AVOID ILLEGAL ARREST—PROVOCATION.—The deceased, an officer of the law, went to the defendant's home without a warrant to arrest him for a misdemeanor. The defendant, to avoid the arrest, shot and killed the officer. The evidence as to the circumstances of the shooting was conflicting. The jury returned a verdict of murder. On appeal, *held,* that it is manslaughter only, to kill an officer to prevent an illegal arrest, unless the evidence shows previous or express malice. *Giddens v. State,* (Ga. 1922) 113 S.E. 386.

Liberty of citizens is regarded so highly in the law that an unlawful attempt to arrest is esteemed a great enough provocation to arouse a man's passions. See in general, note, 66 L.R.A. 353, 374. And it is a question for the jury whether one, who kills an officer to prevent his illegal arrest, acted solely from the excitement of the moment, in which case the crime will be only manslaughter, *Roberson v. State,* (1901) 43 Fla. 156, 23 So. 535, 52 L.R.A. 751; see *Galvin v. State,* (1869) 6 Coldwell (Tenn.) 283; *Terri-*

tory v. Lynch, (1913) 18 N.M. 15, 133 Pac. 405, or whether the slaying was with malice, i. e., in cold blood, in which case it is murder notwithstanding the provocation. See *Galvin v. State,* (1869) 6 Coldwell (Tenn.) 283, apparently overruling *Tackett v. State,* (1832) 3 Yerger (Tenn.) 392, 24 Am. Dec. 582, which said that regardless of previous malice, the slaying referred only to the illegal arrest and is only manslaughter. *State v. Spaulding,* (1885) 34 Minn. 361, 25 N.W. 793; Wharton, Homicide, 3rd ed., 386, 407. Malice may be inferred from the facts and circumstances of the case. If there is malice, it is murder even though the deceased attempted to enter the defendant's house illegally to arrest him. *State v. Scheele,* (1889) 57 Conn. 307, 18 Atl. 256, 14 A.S.R. 106; *People v. Randall,* (1820) 1 Wheeler (N.Y.) C.C. 258. In a few instances, it has been held that the provocation of illegal arrest supports a rebuttable presumption that the accused's mind was beclouded with passion, and that the crime will be only manslaughter until actual malice is proved. *Briggs v. Commonwealth,* (1886) 82 Va. 554; 1 Bishop, Criminal Law 699. A few courts, however, practically fashion this doctrine into a rule of law, asserting unqualifiedly that homicide committed with the sole purpose of preventing an illegal arrest is manslaughter only, unless previous or express malice toward the deceased is shown. *Cryer v. State,* (1893) 71 Miss. 467, 14 So. 261, 42 A.S.R. 473; 2 Bishop, Criminal Law 652, 698. Under this latter view, followed in the instant case, it is manifest that the true basis of the rule, namely, that the provocation of illegal arrest *might* support a legitimate passion, is not observed, and the result is that even though the defendant is perfectly cool and acts with the greatest deliberation in killing to resist the illegal arrest, he is not guilty of murder. It should be noted that a different rule applies where an arrest is made under a warrant which, though technically defective, is fair and clear on its face, and which is issued by the proper officer having jurisdiction. *Alsop v. Commonwealth,* (1882) 4 Ky. L. Rep. 547; *Boyd v. State,* (1854) 17 Ga. 191; Wharton, Homicide, 3rd ed., 392.

CRIMINAL LAW—PUNISHMENT—PROSTITUTION—COMMITMENT TO INDUSTRIAL HOME FOR WOMEN NOT PUNISHMENT.—The petitioner was found guilty of soliciting for prostitution under a city ordinance providing for a fine of $100 or imprisonment of fifty days for the offense. As provided by statute, in lieu of the punishment provided for by the ordinance she was sentenced by the police court to an indeterminate sentence in the State Industrial Home for Women, where she might be detained up to six years. The petitioner claims such detention is cruel and inhuman punishment, as she could only be confined fifty days under the ordinance. *Held,* that commitment to the Industrial Home was not, within the meaning of the state constitution, punishment at all. It is not a penalty, but is wholly for the purpose of assistance and reformation. *Ex parte Carey,* (Cal. 1922) 207 Pac. 271.

The court in the instant case applies the rules and principles governing the commitment of minors to reformatories and houses of refuge and of correction. In such cases it is held that commitment for care and guardianship where no criminal conduct is involved is not punishment

within the general meaning of that term. *Farnham v. Pierce,* (1886) 141 Mass. 203, 6 N.E. 830, 55 Am. Rep. 452, and note; *State v. Brown,* (1892) 50 Minn. 353, 52 N.W. 935, 16 L.R.A. 691, 36 A.S.R. 651, and notes; *Reynolds v. Howe,* (1883) 51 Conn. 472. Nor is the reformatory or house of correction a prison, it is a school, the restraint of liberty imposed on the inmate being parental and protective in its nature and not punitory. *In re Ferrier,* (1882) 103 Ill. 367, 42 Am. Rep. 10; *State v. Kilvington,* (1898) 100 Tenn. 227, 45 S.W. 433, 41 L.R.A. 284. Where commitment is based on a charge of crime, as a substitute for punishment, the same rule has been applied. *State v. Phillips,* (1898) 73 Minn. 77, 75 N.W. 1029. But where crime is charged the tendency of the more modern statutes is to require regular trial and conviction before commitment. *In re Sanders,* (1894) 53 Kan. 191, 36 Pac. 348, 23 L.R.A. 603, and note; *People v. Illinois State Reformatory,* (1894) 148 Ill. 413, 36 N.E. 76, 23 L.R.A. 139; 13 R.C.L. 960. And though predicated largely upon the tone of the statute involved the commitment is regarded as a penalty and punishment for the crime which the party has committed. *People v. Illinois State Reformatory,* (1894) 148 Ill. 13, 36 N.E. 76, 23 L.R.A. 139; see note 120 A.S.R. 957; 30 Cent. Law Jour. 53. It is to this class of cases that the principal case is closely analogous. Conceding that the modern view of penology is reformatory rather than compensatory as set forth in *State v. Wolfer,* (1912) 119 Minn. 368, 138 N.W. 315, 42 L.R.A. (N.S.) 978, 31 Ann. Cas. 1249, it is submitted that the view taken by the Illinois court is sound and that the commitment in the principal case should be regarded as both penal and reformatory. At least it cannot seriously be contended that such commitment is not such a punishment as will bar a future prosecution for the same offense.

ELECTION OF REMEDIES—WHAT ARE AVAILABLE REMEDIES—WHEN ARE REMEDIES INCONSISTENT—SUIT ON A WRITTEN CONTRACT NOT A BAR TO SUBSEQUENT SUIT FOR ITS REFORMATION—RES ADJUDICATA.—The plaintiff contracted to sell a trademark to the defendant and in consideration therefor he was to receive the dividends on certain stock in the defendant company, which stock was to be placed in escrow. The plaintiff sued on the written contract to recover the dividends due and payable and it was held that by the terms of the written instrument the dividends were not payable to the plaintiff but were payable back into the treasury in payment for the stock. The decision was appealed to the supreme court, *Segerstrom v. Holland Piano Mf'g Co.,* (1919) 142 Minn. 104, 170 N.W. 930, and there affirmed. The plaintiff now brings this action to reform the written instrument and it is *held* that the plaintiff is entitled to reformation as the actions are not inconsistent and the futile attempt to assert a right which the plaintiff in fact never had does not bar the enforcement of remedies actually available. *Segerstrom v. Holland Piano Mf'g Co.,* (Minn. 1923) 192 N.W. 191.

It would seem clear that the court is correct in refusing to apply the doctrine of election of remedies. The actions are certainly not inconsistent, for the action for reformation is but ancillary to an enforcement of the same right which the plaintiff attempted to assert in the first action. Both

affirm the contract. See 6 MINNESOTA LAW REVIEW 341, 480, 487-488. And the doctrine contemplates the actual existence of two remedies. But see *United States v. Oregon Lumber Co.*, (1922) 43 S.C.R. 100 (Taft, C. J., Brandeis and Holmes, JJ., dissenting) annotated in 7 MINNESOTA LAW REVIEW 244, and severely criticised in 36 Harv. Law Rev. 593.

The decision also removes considerable doubt that surrounds a number of Minnesota decisions, often relied on as applications of the doctrine of election of remedies, which involve merely an application of the doctrine of res adjudicata. 6 MINNESOTA LAW REVIEW 487, 488. In *Spurr v. Home Insurance Co.*, (1889) 40 Minn. 424, 42 N.W. 206 where the plaintiff, bringing an action for the reformation of an insurance policy, had prior to that time instituted an action on the policy which was dismissed on his motion before trial, the court did not mention the doctrine of res adjudicata and in the language used relied upon the fact that the prior suit had not been prosecuted to judgment. The case of *Thomas v. Joslin*, (1886) 36 Minn. 1, 29 N.W. 344, 1 A.S.R. 624 was distinguished merely because there the prior suit "had proceeded to judgment." As pointed out in 6 MINNESOTA LAW REVIEW 487 the reason for the decision in the *Joslin case* was the fact that issues vital in the second suit had been determined in the first suit and hence the former suit was res adjudicata. In the *Home Insurance Case* there is no suggestion that any issue in the suit for reformation was presented in the prior suit and would have been passed on had the case gone to judgment. And so in the principal case, no issue in the present action was determined in the previous suit. The first suit not only went to trial but was appealed to the supreme court. The *Home Insurance Case* is relied on by the court. The conclusion apparently must be as stated in effect in 6 MINNESOTA LAW REVIEW 487, 488, that if the remedies are not inconsistent the sole consideration then is whether the doctrine of res adjudicata bars the present action.

EVIDENCE—CONTRACTS—SALES—ADMISSIBILITY OF REPORT OF MERCANTILE AGENCY AS BASIS FOR DETERMINING COMMERCIAL CREDIT.—The defendant company agreed to deliver a quantity of coal to the plaintiff in lots as ordered. The contract provided for a credit period of thirty days but reserved to the defendant the right to stop shipment when, in its judgment, the plaintiff's credit should become impaired. Upon the defendant's refusal to ship except for cash on delivery, the plaintiff brought this action for breach of contract. The trial court refused to admit in evidence a report from a mercantile agency offered by the defendant as a basis for its judgment that the plaintiff's credit had become impaired. *Held*, that the credit report was competent evidence to show good faith on the part of the defendant in arriving at a judgment as to the plaintiff's credit. *Trainor Fuel & Transfer Co. v. Buchanan Coal Co. and Old Ben Coal Corp.*, (*Minn.* 1923) 191 N.W. 431.

This decision appears to be one of first impression on the precise issue presented. Where commercial ratings are the mere estimate of credit agencies, made without the participation or knowledge of the one whose credit is in question, they are inadmissible in evidence under the hearsay rule to show the state of solvency of such person. See, 22 C.J. 902, 27

Cyc. 476. They are not competent to show a debtor has failed to assign all his property to trustees, *Richardson Bros. & Co. v. Stringfellow,* (1893) 100 Ala. 416, 14 So. 283; nor are they admissible to charge a person with liability as a member of a partnership. *Cook v. Penrhyn Slate Co.,* (1880) 36 Ohio St. 135, 38 Am. Rep. 568; *Marks & Stix v. Hardy's Admr.,* (1904) 117 Ky. 663, 25 Ky. L. Rep. 1770, 1909, 78 S. W. 864, 1105. But where the defendant has himself given the credit agency information concerning his capital and assets, the mercantile report is admissible to show that the plaintiff dealt with the defendant in reliance upon such information. *National Bank of Merrill v. Ill. & Wis. Lbr. Co.,* (1898) 101 Wis. 247, 77 N.W. 185; see *Blake v. Meadows,* (1909) 225 Mo. 1, 33, 123 S. W. 868. The court, in the instant case, states that the report was admissible solely to establish whether the defendant had just ground in concluding that the plaintiff's credit was impaired. By way of dictum the opinion intimates that the reports would not be admissible to show the plaintiff's actual financial status. It is submitted that credit reports should be admitted as an exception to the hearsay rule, even where the purpose is to prove actual solvency or insolvency in other than bankruptcy proceedings, provided of course that the compiler, like every other witness, be shown beforehand to be properly qualified to make statements upon the subject in hand, 3 Wigmore, Evidence, sec. 1694. In view of the reliance commonly placed upon such reports by the business world, it would seem that the same circumstantial guarantee of trustworthiness is present in these commercial ratings as is found in certain other commercial and professional lists which are generally held admissible. See, 3 Wigmore, Evidence, sec. 1702-1706. Furthermore, if reputation is admissible to show solvency or insolvency, 2 Wigmore, Evidence, sec. 1623; *Nininger v. Knox,* (1863) 8 Minn. 140, it is difficult to understand why reports of credit agencies should be excluded.

EVIDENCE—DIVORCE—ADULTERY—EVIDENCE OF GOOD REPUTATION—ADMISSIBILITY THEREOF.—The defendant was sued for divorce on the ground of adultery. Her offer of evidence as to her good character and reputation for chastity was refused. *Held,* that such evidence did not prove or tend to prove she was not guilty of the act charged and was properly excluded. *Blasi v. Blasi,* (1922) 197 N.Y.S. 871.

The general rule is that in ordinary civil actions the general reputation of the parties is not involved in the issue and evidence concerning it is not admissible, because such evidence has no probative value in disproving a specific act and would obscure the real issues and increase the expense and delay of trials. 10 R.C.L. 947. But in criminal actions it is well settled the previous good reputation of the defendant is competent and revelant as original testimony, on the ground that if it be shown that the defendant has a good reputation it is improbable that he would have committed the crime. 8 R.C.L. 207. The test of admissibility, generally, is whether the general good character of the defendant is in issue. 1 Greenleaf, Evidence, 15th ed., sec. 54. The authorities are not agreed as to whether general good character is involved when, in a civil action, a specific immoral act is charged. Probably a majority of the courts exclude such evidence on be-

half of the defendant in a suit for divorce on the ground of adultery. *Humphrey v. Humphrey,* (1828) 7 Conn. 116; *Van Horn v. Van Horn,* (1907) 5 Cal. App. 719; *Talley v. Talley,* (1906) 215 Pa. 281, 64 Atl. 523. See *McKane v. Howard,* (1911) 202 N.Y. 181, 95 N.E. 642, 25 Ann. Cas. 960, and note, which was an action for breach of promise and the defense was fornication. There is an increasing tendency to the contrary, however, on the theory that a charge of adultery does directly involve one's general character. 9 R.C.L. 327; 19 C.J. 127; *O'Bryan v. O'Bryan,* (1850) 13 Mo. 16, 53 Am. Dec. 128; *Warner v. Warner,* (1897) 69 N.H. 137, 44 Atl. 908; 1 Wigmore, Evidence, sec. 64. Evidence of general good character is admitted in actions for seduction, *Hein v. Holdridge,* (1900) 78 Minn. 468, 81 N.W. 522, for indecent assault, *Schuck v. Hagar,* (1877) 24 Minn. 339, and generally for breach of promise where the defense is specific immoral conduct. Note 25 Ann. Cas. 963. As urged by the Minnesota court, it would seem that, since the rule of exclusion in civil actions is largely one of convenience, it should not apply where there is as much reason for admitting such evidence as in criminal cases. Evidence of general reputation has as much probative value in showing the improbability of an alleged immoral act, as it has in disproving a crime. From the very nature of the charge it often happens that an innocent person can only meet the issue by a denial and proof of good reputation. One should not be deprived of this privilege because of some rule of convenience, or because it "tends to confuse the issues," in such civil cases, when, in a simple criminal case involving no more serious consequences than perhaps the payment of a small fine he is accorded the absolute right to give such evidence. *Hein v. Holdridge,* (1900) 78 Minn. 468, 81 N.W. 522.

EVIDENCE—WITNESSES—WILLS—PROBATE PROCEEDINGS NOT A CIVIL ACTION—STATUTES EXCLUDING TESTIMONY BY AN INTERESTED PARTY OF CONVERSATIONS WITH A DECEASED PERSON NOT APPLICABLE IN PROBATE PROCEEDINGS.—In a probate proceeding to establish a will, the plaintiff, a legatee under the will, was permitted to testify as to conversations with the deceased for the purpose of establishing mental capacity and the absence of fraud and duress. *Held,* two justices dissenting, that a statute, N.D. G. L. 1913, sec. 7871, prohibiting interested parties from testifying as to conversations with a deceased person in a civil action or proceeding by or against executors, administrators, heirs at law or next of kin, in which judgment might be rendered for or against them, is not applicable. *Keller v. Reichert et al.,* (N.D. 1922) 189 N.W. 690.

Statutes, in general evincing the purpose apparent in the one under consideration but varying in form and detail, have been adopted by practically all jurisdictions. 1 Wigmore, Evidence 707. The justification for their existence is pointedly questioned, 1 Wigmore, Evidence 708, and the exception made in the principal case to the application of such statutes is said to be a recognition of that fact. This exception is recognized by the weight of authority. 28 R.C.L. 511; *McHugh v. Fitzgerald,* (1894) 103 Mich. 21, 61 N.W. 354: *In re Veazey,* (1912) 80 N.J. Eq. 466, 85 Atl. 176, 31 Ann. Cas. 980, and note; note 51 L.R.A. (N.S.) 187. The proceeding is but a judicial inquiry as to whether or not the will propounded

shall control the succession to estates, the purpose of the testimony of interested witnesses is not to reduce or destroy the estate but merely to determine the manner of distribution. The proceeding is one in rem in which the estate as an entity is not interested, and since the effect of these proceedings is neither to increase nor diminish the estate, it cannot be said to be a party thereto. *Henry v. Hall,* (1894) 106 Ala. 84, 101, 17 So. 187, 54 A.S.R. 22. The minority view, asserted by the dissenting judges in the principal case, is based on the idea that the interested party should not be permitted to prove by his own oath the communications of the deceased to him, which perhaps might have been disproved had the deceased been living, and, that the admission of the communications of the deceased would give the interested party an advantage which his adversaries could not overcome, as the communications may have been colored by the interest of the witness as no other person was living to testify concerning them. *Rich v. Bowker,* (1881) 25 Kan. 7, 9; *In re Shapter,* (1906) 35 Colo. 578, 85 Pac. 688, 6 L.R.A. (N.S.) 575, 117 A.S.R. 216; *Goldthorp's Estate,* (1895) 94 Ia. 336, 62 N.W. 854, 58 A.S.R. 400. In Minnesota a legatee may testify as to statements of the testator for the purpose of laying a foundation for an opinion as to the testamentary capacity of the testator, *Chapel v. Chapel,* (1917) 137 Minn. 420, 163 N.W. 771. If, however, as in the instant case, the conversation is relative to the will it is not even admissible for that purpose. *In re Brown,* (1888) 38 Minn. 112, 35 N.W. 726; see also *Cady v. Cady,* (1903) 91 Minn. 137, 97 N.W. 580. As stated in *In re Brown* the reason they are admitted is because they constitute "verbal acts" and it would seem clear that in Minnesota the nature of the proceeding has nothing to do with their admission for similar statements will be received as a basis for an opinion in an equitable action to set aside a contract on the ground of incapacity. *Wheeler v. McKeon,* (1917) 137 Minn. 92, 162 N.W. 1070. The statement in 31 Ann. Cas. 982, that Minnesota adopts the majority rule is incorrect and the only question that will be considered is whether the witness offered is an interested party or not.

FEDERAL EMPLOYERS' LIABILITY ACT—APPORTIONMENT OF DAMAGES—DISTRIBUTION UNDER WRONGFUL DEATH STATUTES OF JUDGMENT OBTAINED UNDER THE FEDERAL EMPLOYERS' ACT.—The plaintiff, as administratrix of the estate of her husband, sued the director general of railroads for damages under the Federal Employers' Liability Act for the death of her husband. The jury found a verdict for the plaintiff and assessed the damages of the widow and each of the three minor children. *Held,* that the apportionment of the damages constituted reversible error. *Strunks v. Payne et al.,* (N.C. 1922) 114 S.E. 840.

A reference to the authorities cited in the opinion seems to show that the court holds as above stated though the opinion is somewhat ambiguous. While the terms of the federal act, U. S. Comp. St. sec. 8657-8665, do not provide expressly for an apportionment a majority of the decisions hold that on request an apportionment should be made by the jury. *Gulf, etc., R. Co. v. McGinnis,* (1913) 228 U.S. 173, 33 S.C.R. 426, 57 L.Ed. 785; *Collins v. Pennsylvania R. Co.,* (1914) 163 App. Div. 452, 148 N.Y.S. 777; *Chafin v. Norfolk & Western R. Co.,* (1917) 80 W. Va. 703, 93 S.E. 822;

Pittsburgh, etc., R. Co. v. Collard's Adm'r, (1916) 170 Ky. 239, 185 S.W. 1108; *Horton v. Seaboard Airline R. Co.,* (1918) 175 N.C. 472, 95 S.E. 883. It has been held reversible error to direct the jury to assess the damages in a single sum, *Fogarty v. Northern Pacific R. Co.,* (1913) 74 Wash. 397, 133 Pac. 609, L.R.A. 1916C 800, for each beneficiary is only to get his actual damage. As was said in the *McGinnis case*: "Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her pecuniary loss. That apportionment is for the jury to return. This will of course exclude any recovery in behalf of such as show no pecuniary loss." And in *Horton v. Seaboard Airline R. Co.,* (1918) 175 N.C. 472, 95 S.E. 883, which is apparently overruled in the instant case though it is not even cited by the writer of the opinion who also wrote a dissenting opinion in the *Seaboard Case,* the court expressly recognized the fact that the object of the federal act is not merely to confine recovery to pecuniary loss but also to distribute it according to the actual loss. The confusion centers around the language used in *Central Vermont R. v. White,* (1914) 238 U.S. 507, 35 S.C.R. 865, 59 L. Ed. 1433, Ann. Cas. 1916B 252. After the court there noted the fact that in the original Lord Campbell's Act, 9 & 10 Vict. c. 93, sec. 2, there was a provision for apportionment and that this provision was omitted from the federal act, it was said: "The omission clearly indicates an intention on the part of Congress to change what was the federal practice so as to make the federal statute conform to what was the rule in most states in which it was to operate. These statutes when silent on the subject have generally been construed not to require juries to make an apportionment." The case, however, was one wherein the defendant is attacking a judgment that was not apportioned, *and the defendant had never requested an instruction that it be apportioned by the jury.* See also, *Hadley v. Union Pacific R. Co.,* (1916) 99 Neb. 349, 156 N.W. 765; *Jones v. Kansas City Southern R. Co.,* (1918) 143 LA. 307, 78 So. 568. It is usually the defendant who requests an apportionment of the judgment and for the obvious purpose of more readily ascertaining an error in their assessment by the jury. His grievance, therefore, is not apparent. To adopt the rule of the instant case is merely to ingraft on the federal act one of the numerous inconsistencies peculiar to state wrongful death statutes, for in the absence of an apportionment the sum recovered under the federal act will be divided as personal property under the state statutes among all persons in the class of beneficiaries entitled to sue irrespective of the actual damage incurred. *In re Stone,* (1917) 173 N.C. 208, 91 S.E. 852. As a general rule under wrongful death statutes actual damage must be proved but distribution is made to all members of the class. Tiffany, Death by Wrongful Act, 2nd ed., 216; Minn. G.S., 1913, sec. 8175, and Laws 1915, c. 187, sec. 1. This form of distribution has worked hardship under such statutes, *St. Louis, etc., R. Co. v. Needham,* (1892) 52 Fed. 371, 3 C.C.A. 129; *Snedeker v. Snedeker,* (1900) 164 N.Y. 58, 58 N.E. 4; *Griffin v. Bailey,* (1911) 89 Neb. 733, 131 N.W. 1033, and the courts while realizing the injustice look to the legislature for the remedy. This difficulty is avoided under the federal act by requiring an apportionment by the jury *on request* for such instruction.

HABEAS CORPUS—CUSTODY OF CHILDREN—RIGHT OF ADOPTIVE PARENTS AS AGAINST NATURAL PARENTS—BEST INTERESTS OF CHILD.—The mother of an illegitimate child insisted that the doctor give the child away, and in compliance with her wish the doctor gave the child to the defendants, who legally adopted it and are now rearing it under ideal conditions. Three years later, the father of the child having returned from the war, the parents of the child married and filed this petition for a writ of habeas corpus to obtain custody of the child. *Held,* that on the sole ground that the best interest of the child would be better subserved hereby, the custody should be awarded to the defendants. *Kurtz et ux. v. Christenson et ux.,* (Utah, 1922) 209 Pac. 340.

The authorities are uniform in holding that in habeas corpus proceedings the court is not limited to the question of legal custody, but may decide solely on equitable grounds of what will best subserve the interests of the child, so that the child's welfare prevails against the interest of one in whom the custody of the child has been vested by appointment by a court, as guardian, *In re Standish,* (1921) 197 App. Div. 176, 188 N.Y.S. 900, or as custodian for the purpose of finding a home for the child. *State ex rel. Evangelical etc., Soc. of Minn. v. White,* (1913) 123 Minn. 508, 144 N.W. 157. Where the relationship in consideration is of a more permanent nature, legal adoption, the courts assert practically the same rule. *United States v. Sauvage,* (1899) 91 Fed. 490; see the instant case; or it is stated that the best interests of the child are the controlling consideration if not the sole element to be considered. *In re Sidle,* (1915) 31 N.D. 405, 154 N.W. 277; *State ex rel. Larson v. Halverson,* (1914) 127 Minn. 387, 149 N.W. 664. The wording of the rule can be of little practical value but the fact is evident in the cases that the courts have given no weight whatsoever to any *right* on the part of the adopting parents, as such, to keep the child. As to the elements considered in determining the best interests of the child, see, I Bailey, Habeas Corpus, 592; note Ann. Cas. 1914A 740. In some cases it would seem that a *right* on the part of the adoptive parents to the custody of the child has been considered by the court and given weight in the form of a presumption that it is for the best interest of the child to stay with the parent. See *Wilson v. Mitchell,* (1910) 48 Colo. 454, 111 Pac. 21, 30 L.R.A. (N.S.) 507; *Denton v. James,* (1920) 107 Kan. 729, 193 Pac. 307, 12 A.L.R. 1146. As regards the modern rule it is definitely settled that a natural parent shall only be deprived of the custody of a child when the parent is unfit to keep the child. 20 R.C.L. 601, 602; *In re Crocheron,* (1909) 16 Idaho 441, 101 Pac. 741, 33 L.R.A. (N.S) 868 and note. The two questions, what will best subserve the interests of the child, and, when is a parent unfit to keep a child, obviously involve different considerations. An adoption carries with it every right except natural birth and the adopting parent is entitled to the custody of a child as if a natural parent. *Denton v. James,* (1920) 107 Kan. 729, 193 Pac. 307, 12 A.L.R. 1146; *Miller v. Miller,* (1904) 123 Ia. 165, 98 N.W. 631. It would seem that sound public policy would require a definite recognition of a right in the adopting parent similar to that recognized in the natural parent in order to encourage adoption, for as stated in *Whalen v. Olmstead* (1891) 61 Conn. 263, 23 Atl. 964, 15 L.R.A. 593: "The better the character of the well-selected family home, the more essentially in spirit and truth it is such, the more likely

they who compose it would be to require assurance of a degree of perpetuity to the relations about to be assumed. She who would become a nursing mother of a deserted, neglected, cruelly treated, or dependent child. might wish to feel and demand to know, that even a natural parent could not have...a right superior to her own." And in *Sandine v. Johnson,* (1920) 188 Ia. 620, 625, 176 N.W. 638, on an application for a writ of habeas corpus by the natural parents, there being no showing that the adoptive parents were unfit to keep the child, the court states that the validity of the adoption was decisive of the suit.

HIGHWAYS—ESTABLISHMENT BY PRESCRIPTION—INTERRUPTION SUFFICIENT TO PREVENT.—The plaintiff sought an injunction ordering the removal of the eaves on the defendant's building, which overhung the sidewalk and caused water to drip thereon. The plaintiff claimed that the sidewalk had become a public way by prescription. *Held,* that the overhanging eaves and dripping water were sufficient interference with the public user of the walk to prevent the development of a public highway by prescription. *Woodsville Fire District v. Stahl,* (N.H. 1922) 119 Atl. 123.

Use of a way by the public, with the knowledge and acquiescence of the landowner, under a claim of right which is adverse, continuous, and uninterrupted, gives rise to a public highway by prescription. 29 C. J. 373; *Township of Madison v. Gallagher,* (1895) 159 Ill. 105, 42 N.E. 316. But any unambiguous act of the owner which evidences his intention to exclude the public from such uninterrupted use destroys the immature prescriptive right. 29 C.J. 376; *City of Seattle v. Moeller,* (1913) 72 Wash. 99, 129 Pac. 884. Ordinarily, such an act must be a substantial obstruction of the way, an interference inconsistent with public user. Thus, the erection of gates and fences, which do not prevent public travel have been held not to be an obstruction which, as a matter of law, would prevent the growth of a prescriptive highway. *Weld v. Brooks,* (1890) 152 Mass. 297, 25 N.E. 719; *Bolger v. Foss,* (1884) 65 Cal. 250, 3 Pac. 871; *Lange v. Busse,* (1917) 207 Ill. App. 136; *Wilkins v. Barnes,* (1880) 1 Ky. L.R. 328. On the other hand, the erection of gates and fences, accompanied by locking, *Shellhouse v. State,* (1886) 110 Ind. 509, 11 N.E. 484, or by the posting of notices, *City of Seattle v. Moeller,* (1913) 72 Wash. 99, 129 Pac. 884, is such an obstruction. It would seem that the court in the instant case has gone far in holding that over-hanging eaves and dripping water prevents the growth of a public prescriptive right. Since a public highway is generally said to be an easement for travel purposes imposed on the land, 4 Words and Phrases 3297, the court might well have held that the public did acquire an easement for travel purposes which was subject to the use continuously exercised by the defendant. However, in New Hampshire, a "legal highway" includes not only the soil but all the space above it, so that, although an overhanging structure may not interfere in the slightest with travel, it nevertheless is an obstruction which, if the highway is already established, is a nuisance, since it lessens its breadth, *State v. Kean,* (1897) 69 N.H. 122, 45 Atl. 256, 48 L.R.A. 102 (projecting bay windows), or which will prevent the development of a

highway by prescription. *Town of Exeter v. Meras,* (1921) 80 N.H. 132, 114 Atl. 24 (projecting bay windows). In the last case the court intimated that although a legal highway could not be acquired, the public might acquire a right of way for travel purposes only. This however, is overruled by the instant case. In Minnesota, the possibility of creating public highways by prescription was declared doubtful by an early dictum, on the ground that prescription presumes a grant and therefore a grantee capable of taking, while the public is not such a grantee. *Klenk v. Town of Walnut Lake,* (1892) 51 Minn. 381, 384, 53 N.W. 703. See 29 C.J. 371, and Elliott, Roads and Streets, 2nd ed., 183-5 on this question. The doctrine of dedication of highways is recognized by statutes in which six years' user and maintainance by the public is deemed a dedication. Minn. G.S. 1913, sec. 2563.

INSURANCE—LIFE INSURANCE—CONSUMMATION OF THE CONTRACT—CONDITIONAL DELIVERY—WHEN THE DUTY TO DISCLOSE CEASES.—After an application for life insurance was accepted at the home office and sent to the branch office, but before it was turned over to an agent of the applicant and before the first premium was paid, the insured became seriously ill. By the terms of the application the policy was not to take effect unless the first premium was paid and the policy delivered during the life time of the insured. In ignorance of the insured's illness the policy was sent to the agent of the applicant and the first premium was accepted. On suit by the beneficiary it is contended that the failure to disclose the change in physical condition between the date of the application and the date of the delivery of the policy voids the policy. *Held,* that the beneficiary is entitled to recover. *Ames v. New York Life Ins. Co.,* (Minn. 1922) 191 N.W. 274.

It is undoubtedly the rule that the insured must disclose all material facts increasing the risk which arise after the application has been made and before the contract has been consummated. *Whitley v. Piedmont & Arlington Life Ins. Co.,* (1874) 71 N.C. 480; *Gordon v. Prudential Ins. Co.,* (1911) 231 Pa. 404, 80 Atl. 882; *Harris v. Security Mut. Life Ins. Co.,* (1914) 130 Tenn. 325, 170 S.W. 474, L.R.A. 1915C 153, and note; *Equitable Life Ins. Soc. v. Mc Elroy,* (1897) 83 Fed. 631, 28 C.C.A. 365. In the instant case, though the language is confusing, the general rule, very probably, is not discarded, and the decision is merely that a contract was consummated before the insured became ill. Eliminating from consideration the effect of conditions, such as payment of the premium or delivery during the life-time of the insured, there are various holdings as to when the contract is consummated. The strictest rule requires an actual physical delivery of the policy to the insured. *Busher v. New York Life Ins. Co.,* (1904) 72 N.H. 551, 58 Atl. 41. Possibly the weight of authority favors the time the policy is received by the local agent. *Gallagher v. Metropolitan Life Ins. Co.,* (1910) 67 Misc. 115, 121 N.Y.S. 638; *Unterharnscheidt v. Missouri State Life Ins. Co.,* (1913) 160 Ia. 223, 138 N.W. 459. Minnesota designates the time the policy is mailed from the home office. *Kilborn v. Prudential Ins. Co.,* (1906) 99 Minn. 176, 108 N.W. 861; *Mutual Reserve Fund Life Ass'n v. Farmer,* (1898) 65 Ark. 581, 47 S.W. 850; *Rose v.*

Mutual Life Ins. Co., (1909) 240 Ill. 45, 88 N.E. 204. The most extreme view is that the contract has been consummated when the policy has been executed by the officials at the home office, see *Van Arsdale-Osborne Brokerage Co. v. Robertson*, (1912) 36 Okla. 123, 128 Pac. 107; *Robinson v. U. S. Ben. Soc.*, (1903) 132 Mich. 695, 94 N.W. 211, and *Kentucky Mutual Life Ins. Co. v. Jenks*, (1854) 5 Ind. 96, 99, or even when the home office official marks the application, "approved." *Kohen v. Mutual Reserve Life Ass'n*, (1866) 28 Fed. 705. The stipulation in the application and policy, however, that the policy was not to take effect unless the premium was paid and the policy delivered during the life time of the insured, introduces a complication. It has been held that such conditions are conditions precedent to the consummation of any contract whatsoever. *Yount v. Prudential Life Ins. Co.*, (Mo. App. 1915) 179 S.W. 749: *Goldstein v. New York Life Ins. Co.*, (1917) 176 App. Div. 813. 162 N.Y.S. 1088. There is ample authority, however, to the effect that these conditions are precedent only to the attaching of the risk, *Kohen v. Mutual Reserve Life Ass'n*, (1866) 28 Fed. 705; that a preliminary contract to insure is consummated when the application is accepted or the policy mailed, depending on the view taken when the conditions are not present, and that a final contract of insurance, upon the same terms, is made binding on the company when the conditions are satisfied. *McCleave v. Mutual Reserve Fund Life Ass'n*, (1893) 55 N.J.L. 187, 26 Atl. 78; 33 Harv. Law Rev. 198, 220. The fact that the insurance company may waive these conditions is an indication that they are conditions precedent to the attaching of the risk and not precedent to the formation of the contract, for if they are the latter the insurance company could not waive them. *Rhodus v. Kansas City Life Ins. Co.*, (1911) 156 Mo. App. 281, 137 S.W. 907. The same result might be reached on the theory that the delivery of the policy is a delivery in escrow conditioned on the payment of the premium. The doctrine of delivery in escrow is not confined to deeds alone. *Riggs v. Trees*, (1889) 120 Ind. 402, 22 N. E. 254, 5 L.R.A. 696. Under either of the two views last mentioned the decision in the principal case is correct, for the duty to disclose terminated at the time the contract to insure was consummated, which was at the time the policy was mailed from the home office, and the insured did not become sick until after that date.

JUDGMENTS—LIENS—EQUITABLE ESTATES OF JUDGMENT DEBTOR—EXECUTION.—The judgment debtor had an equitable interest in the real estate in question at the time the judgment was docketed. By virtue of a statute making a judgment, when docketed, a lien on "all the real estate" of the judgment debtor, the plaintiff judgment creditor seeks to maintain an action to determine adverse claims of the present legal title holder. *Held*, that a judgment does not become a lien on an equitable interest without execution, and that therefore the action could not be maintained. *Fridley v. Munson*, (S.D. 1922) 191 N.W. 453.

Statutes similar to the one involved in the instant case are in effect in many states. See Minn., G.S. 1913, sec. 7904. And, since the judgment lien exists only by virtue of the statute it has been held in many jurisdictions, following the policy of many courts in construing statutes strictly,

that a judgment does not become a lien on an equitable interest. *Smith v. Ingles,* (1862) 2 Or. 43; *Flint v. Chaloupka,* (1904) 72 Neb. 34, 99 N.W. 825, 117 A.S.R. 771, and note 780; *Cummings v. Duncan,* (1912) 22 N.D. 534, 134 N.W. 712, 32 Ann. Cas. 976, and note. There are a number of authorities contra. *Atwater v. Manchester Savings Bank,* (1891) 45 Minn. 341, 48 N.W. 187, 12 L.R.A. 741; *Hook v. Northwest Thresher Co.,* (1904) 91 Minn. 482, 98 N.W. 463; *Lathrop v. Brown,* (1867) 23 Ia. 40; *Julian v. Beal,* (1866) 26 Ind. 220, 89 Am. Dec. 460. At the early common law, except for debts due the king, the lands of a judgment debtor were not liable to the satisfaction of a judgment against him because of the policy of the feudal law. 15 R.C.L. 793; 2 Freeman, Judgments, 4th ed., 620. By the statute of Westminster 2, 13 Edw. 1., c. 18, the writ of elegit was given, subjecting the land of the judgment debtor to execution. The judgment lien is regarded as a direct consequence of the right to levy execution. *Coombs v. Jordan,* (1831) 3 Bland. (Md.) 284, 22 Am. Dec. 236; *Atwater v. Manchester Savings Bank,* (1891) 45 Minn. 241, 48 N.W. 187, 12 L.R.A. 741; 2 Freeman, Judgments, 4th ed., 622. Consequently, in those jurisdictions which hold that a judgment is a lien on an equitable interest it is found, as the authorities cited above indicate, that an equitable interest is subject to execution. And it is also true that in the great majority of jurisdictions supporting the contrary holding, an equitable interest is not subject to execution. *Holmes v. Wolford,* (1905) 47 Or. 93, 81 Pac. 819; *Shoemaker v. Harvey,* (1894) 43 Neb. 75, 61 N.W. 109; see *Smith v. Collins,* (1913) 81 N.J. Eq. 348, 86 Atl. 957. Thus in admitting that such an equitable interest would be subject to execution, the court in the instant case is clearly out of line with the authorities cited in support of the decision that there is no lien. But aside from this reasoning, it seems improbable that the legislature, in framing the statute, intended to exclude equitable interests, especially since the distinction between the law court and court of equity is largely abolished. The creditor always could have relief in Chancery, for there equitable estates were as much bound by a judgment lien as were legal estates. *Unknown Heirs of Whitney v. Kimball,* (1853) 4 Ind. 546, 58 Am. Dec. 638; *Freedman's Sav. etc., Co. v. Earle,* (1884) 110 U.S. 710, 4 S.C.R. 226, 28 L. Ed. 301. To send a plaintiff to the "other side of Westminster Hall" in a jurisdiction where the question is arising for the first time, and where the statute would easily bear a different interpretation, is clearly contrary to present tendencies in cases of this kind. 15 R.C.L. 806; 2 Freeman, Judgments, 4th ed., 636.

LANDLORD AND TENANT—IMPLIED COVENANTS—DUTY OF LESSOR TO PUT LESSEE IN POSSESSION—DAMAGES.—A lessor sued his former tenant, who wrongfully held over his term, to recover damages caused by the tenant in refusing to surrender possession of the premises to the lessee whose term commenced at the expiration of the defendant's term. The plaintiff includes in his bill the amount expended in providing quarters for the present lessee until possession of the demised premises could be recovered. *Held,* that the lessor could recover only nominal damages, since he had no duty to deliver the premises to the lessee. *Rice v. Biltmore Apartments Co.,* (Md. 1922) 119 Atl. 364.

There are two groups of irreconcilable holdings on the question presented in this case. Some courts follow the rule as it was laid down in *Gardner v. Ketellas,* (1842) 3 Hill (N.Y.) 330, 38 Am. Dec. 637, commonly called the New York, or American rule. The theory on which these cases are decided is that if the lessee is prevented from taking possession by a tenant wrongfully holding over, now a mere stranger, it is not the duty of the landlord to oust the wrongdoer and put the lessee in possession, because the right to possession at the end of the outstanding term is in the lessee by virtue of the lease and not in the lessor, and that, therefore, when the landlord has given the tenant the legal right to possession he has done all that the law requires of him against third persons not claiming under prior rights derived from him. *Sigmund v. Howard Bank,* (1868) 29 Md. 324; see *Barrells v. Brown,* (1923) 198 N.Y.S. 236; see *United Merchants, etc., Co. v. Roth,* (1908) 193 N.Y. 570, 576, 86 N.E. 544. Others follow what is known as the English rule, established by the case of *Coe v. Clay,* (1829) 5 Bing. 440, 3 M. & P. 57, where it was said that he who lets agrees to give possession, and not merely a chance of a law suit. This rule was first followed in this country by *King v. Reynolds,* (1880) 67 Ala. 229, 233, 42 Am. Rep. 107, which proceeds on the theory that when a lease is made, to begin at a future time, it is a part of the understanding of the parties, without which the lease would not have been made, that there is an implied covenant that the lessor shall have the premises open to the entry of the lessee when the time comes for the lessee to take possession according to the lease and the latter is under no obligation to maintain an action against the tenant holding over in order to gain possession. *Sloan v. Hart,* (1909) 150 N. C. 269, 273, 63 S.E. 1037, 21 L.R.A. (N.S.) 239, 134 A.S.R. 911, and note; *Thomas v. Croom,* (1912) 102 Ark. 108, 113, 143 S.W. 88; *Cleveland, etc., R. Co. v. Joyce,* (1913) 54 Ind. App. 658, 103 N.E. 354; *Herpolsheimer v. Christopher,* (1907) 76 Neb. 352, 111 N.W. 359, 9 L.R.A. (N.S.) 1127, and note, 14 Ann. Cas. 399, and note. This implied covenant, however, does not extend beyond the time when possession is to be delivered. *Sloan v. Hart,* (1909) 150 N. C. 269, 63 S.E. 1037, 21 L.R.A. (N.S.) 239, 134 A.S.R. 911; *Hertzberg v. Beisenbach,* (1885) 64 Tex. 262. It is argued in favor of the New York rule, that in no ordinary contract is it customary impliedly to warrant against law suits, and that an implication that the lessee will not have to oust a wongdoer in possession changes the contract of the parties for they had a right to presume that the former tenant would not hold over. Further, that the remedy of the tenant, who now has the right to possession, is as perfect and effectual to dispossess the wrongdoer and recover damages as that of the lessor before the execution of the lease and that the delay caused by his suit is no greater than if the lessor brought the action. Note, 134 A.S.R. 916; see also 1 McAdam, Landlord & Tenant, 3rd ed., 338; 1 Tiffany, Landlord & Tenant 545. At the common law, entry was necessary to vest the estate in the lessee and until entry he had only an executory interest, 4 Kent, Comm. 106, from which it would seem to follow he could not sue on the lease. This may have been the cause of the English rule. For a development of the lessee's right before possession, see, 2 MINNESOTA LAW REVIEW 367, 370. Entry is unnecessary to complete the tenant's estate since the Statute of Uses. 1 Tiffany, Real Property, 2nd ed., 116. But the decisions supporting the English rule distinguish be-

tween a lease, which is a contract for a chattel interest, the primary element of which is delivery of possession as in any executed contract for personalty, and an agreement concerning realty, where a deed takes the place of livery of seisin. It is further argued that a lease would not be made if the lessee thought he was taking a chance on a law suit and that even so, the lessor should bear the burden of such a suit, since the facts are most apt to be within his own knowledge. *King v. Reynolds,* (1880) 67 Ala. 229, 42 Am. Rep. 107. This rule appears to be the most equitable, in practice at least, and the tendency of the recent cases seems to be in its favor.

NEW TRIAL—WHAT CONSTITUTES—POWER TO GRANT ON COURT'S OWN MOTION.—An action was tried and submitted to the court for decision. While holding the case under advisement, the trial judge concluded that he had committed error in denying a jury trial, and, of his own motion and without a decision of the issues, made an order granting a *new trial.* The plaintiff secured a writ of mandamus commanding the trial court to proceed and decide the issues or show cause to the contrary. *Held,* that the order granting a new trial was invalid since the court could not of its own motion grant a new trial for errors of law. *State ex rel. Mingo v. District Court of LeSueur County,* (Minn. 1922) 191 N.W. 416.

A new trial has been defined by statute and adjudications to be a reexamination, in the same court, of the issues of fact, after trial, and decision by the jury, the court, or by referee. Iowa, Code, 1897, sec. 3755; *Hooker v. Chittenden,* (1898) 106 Ia. 321, 76 N.W. 706; *Crossland v. Admire,* (1893) 118 Mo. 87, 24 S.W. 154; Cal. Code, Civ. Proc. 1903, sec. 656; *San Diego Land & Town Co. v. Neale,* (1888) 78 Cal. 63, 20 Pac. 372, 3 L.R.A. 83; S. D., Code of Civ. Proc. 1903, sec. 300; N. Y., Cr. Code 1903, sec. 462; 2 Bates' Ann. St. Ohio, 6th ed., sec. 5305. It would seem that in Minnesota, a new trial could come only after a "verdict, decision, or report." See Minn., G. S. 1913, sec. 7828; see *Dodge v. Bell,* (1887) 37 Minn. 382, 34 N.W. 739. From the language of the chief justice in the instant case it appears that he considers a trial completed only by a verdict or decision, yet the order of the trial court made before a decision was considered as granting a new trial throughout the opinion. The trial judge does not lose control over the case when the evidence is all in and the issues submitted. It is only when a decision has been made that the trial judge ceases to have control. Thus, after submitting issues to a jury, the court may dismiss the jury and decide the case itself, as it might have done in the first place, there being no right to a jury trial. *Farmer v. Stillwater Co.,* (1909) 108 Minn. 41, 121 N.W. 418. It would seem that the position of the dissenting justice in the principal case, that this was but an intermediate order and not in fact an order amounting to the grant of a new trial, is sound. As decided it stands as a material limitation on the power of the trial court to correct a mistake made during the progress of the trial.

But even considered as an order granting a new trial for errors at law, the rule of the decision is very strict. Where not restricted by statute, it is well settled that the district court has the inherent power to grant a new trial of its own motion. 20 R.C.L. 300; 29 Cyc. 921; *DeVall v. DeVall,* (1911) 60 Or. 493, 118 Pac. 843, 40 L.R.A. (N.S.) 291, and note. This in-

herent power has been taken away or limited in some states by statute. *Townley v. Adams,* (1897) 118 Cal. 382, 50 Pac. 550; *Flugel v. Henschel,* (1896) 6 N.D. 205, 69 N.W. 195; *Traxinger v. Minneapolis St. P. & S.M.R. Co.,* (1909) 23 S.D. 90, 120 N. W. 770. It has not been cut off by statute in Minnesota, nor is it affected by the statute limiting a new trial on motion of the aggrieved party to specific causes. *Bank of Willmar v. Lawler,* (1899) 78 Minn. 135, 80 N.W. 868. But Minnesota limits this inherent common law by adjudications. It was limited to aggravated cases by *Bank of Willmar v. Lawler,* (1899) 78 Minn. 135, 80 N.W. 868. In aggravated cases it was further limited to the grounds of insufficiency of the evidence where the verdict is so palpably against the evidence that it would be an abuse of discretion to deny a new trial had the party aggrieved made a motion therefor. *Farris v. Koplau,* (1911) 113 Minn. 397, 129 N.W. 770. And this applies even where the court erroneously directed the verdict and then granted a new trial of its own motion for this error, *Stebbins v. Martin,* (1913) 121 Minn. 154, 140 N.W. 1029, which would seem to be an error of law although it was necessary to consider it as a verdict based on insufficient evidence to have it line up with the other decisions. The limitation imposed by the instant case would seem to prevent the granting of a new trial on the court's own motion even though the error of law may make the case as aggravated as any deficiency of evidence. Courts of general jurisdiction claim the inherent power to correct prejudicial errors committed by them, not only on account of their solicitude for the rights of the litigants, but also in justice to themselves, and this power will not be interfered with except where there is an abuse of discretion. *DeVall v. DeVall,* (1911) 60 Or. 493, 118 Pac. 843, 40 L.R.A. (N.S.) 291, and note, (where the trial court gave erroneous instructions); *McKinley v. Warren,* (1914) 218 Mass. 310, 105 N.E. 990, (error of law by court in equity case); *Hunt v. Des Moines City R. Co.,* (1920) 188 Ia. 1068, 177 N.W. 48, (erroneous instructions by trial court); *New York Life Ins. Co. v. Goodrich,* (1898) 74 Mo. App. 355, (error in the admission of evidence); *Weber v. Kirkendall,* (1895) 44 Neb. 766, 63 N.W. 35; *Eggen v. Fox,* (1905) 124 Wis. 534, 102 N.W. 1054. But see, *Shields v. Colonial Trust Co.,* (Okla. 1916) 160 Pac. 719.

PARDONS—EQUITY—CANCELLATION OF WRITTEN INSTRUMENTS FOR FRAUD—HABEAS CORPUS WILL NOT LIE ON A VOID PARDON.—The defendant's application for a pardon had never been referred to the board of parole, as required by statute, but nevertheless a pardon, valid on its face, was issued by the governor and delivered to the defendant. A proceeding in equity was instituted by the attorney general of the state to cancel the pardon for the fraud of the defendant in its procurement. Later the defendant sued out a writ of habeas corpus in the same county. The actions were tried together and the pardon was adjudged void and cancelled and the defendant was retained in custody. The defendant then sued out a second writ in a different county. *Held,* by a four to three decision, that an equity court has jurisdiction to cancel a pardon for fraud practiced on the governor in its procurement. *Rathbun v. Baumel,* (Ia. 1922) 191 N.W. 297.

In England, by virtue of the statute, 27 Ed. III (1353), st. I, c 2, every pardon shall contain the representations made to procure it; and if a judge before whom the pardon is pleaded or relied upon finds the representations to be untrue, he is required to disallow the pardon. On a writ of scire facias the fraud would be adjudged and the pardon cancelled. *Mr. Howard's Case,* (1661) T. Raym. Rep. 13. In *Knapp v. Thomas,* (1883) 39 Ohio St. 377, 48 Am. Rep. 462, however, it was definitely held that this statute comprised no part of the common law of Ohio because of the fact that the form of our government and the nature of the pardoning power is different from that of England, and in other cases the English statute is not mentioned. See the principal case and *Commonwealth v. Halloway,* (1863) 44 Pa. 210, 84 Am. Dec. 431. The decision in the instant case, which is supported by the better authority, is based on the broad principle that equity has jurisdiction "to hold for naught any written instrument that has its inception in fraud," *Dominick v. Bowdoin,* (1871) 44 Ga. 357; 1 Bishop, New Criminal Law, 8th ed., 548. A number of decisions, in context supporting this decision, are weakened by the fact that the question presented was want of delivery or fraud apparent on the face of the instrument. *State v. McIntire,* (1853) 46 N.C. 1, 59 Am. Dec. 566; *Rosson v. State,* (1887) 23 Tex. Crim. App. 287, 4 S. W. 897; *Commonwealth v. Halloway.* (1863) 44 Pa. 210, 84 Am. Dec. 431. In opposition to this view, however, as contended by the dissenting justices in the instant case, there is authority to the effect that in our form of government, where the legislative, executive, and judicial departments within their respective spheres are equally independent and exclusive, the pardoning power is exclusively in the executive and if he permits himself to be imposed upon it is a question between himself and his constituents. *Knapp v. Thomas,* (1883) 39 Ohio St. 377, 48 Am. Rep. 462; *Whitcomb v. State,* (1846) 14 Ohio Rep. 282. While it is true to a certain extent, as maintained by the court in the principal case, that this judicial investigation does not constitute a review of the conduct of the governor but rather of the conduct of the prisoner, yet, in effect it is a review of the proceedings in that the court does determine what the existing facts are that should have been stated and were fraudulently concealed. But, as stated in the instant case, if the courts have not this power they are "impotent to protect their judgments from annulment by fraud perpetrated upon the pardoning power."

PROCEDURE—EXTRAORDINARY LEGAL REMEDIES—WRIT OF PROHIBITION—WHEN IT WILL ISSUE.—One Taylor was convicted in police court of a violation of the prohibition laws, and fined and ordered imprisoned. That court under statutory authority also ordered Taylor to execute a bond conditioned on proper observation of prohibition laws in the future, and, on his failure to furnish the bond he was ordered imprisoned as provided by statute. An appeal to the state circuit court from the conviction suspends the attendant penalty for that offense, but the jailor retains Taylor in custody under the order of imprisonment for failure to execute the bond. The defendant, a judge of the state circuit court, granted Taylor's petition for a writ of habeas corpus and is proceeding to hear

the return and is about to discharge Taylor from custody. On the petition of the state attorney-general it is, *held*, that a writ of prohibition shall issue to stop the habeas corpus proceeding as Taylor was legally imprisoned under the alternative order to furnish a bond or go to jail, which order is not suspended by the appeal from the offense, and, no appeal lying from the decision in habeas corpus proceedings, there is no other adequate remedy for the state. *Rodes v. Gilliam*, (Ky. 1922) 245 S.W. 897.

The well-recognized element entitling the petitioner to a writ of prohibition is the threatened action of a court without jurisdiction or in excess of its jurisdiction; and this standard, with varying emphasis on the necessity of a lack of other adequate remedy, is still supported by the weight of authority. High, Extraordinary Legal Remedies, 3rd ed., 708; *State ex rel. v. Morse*, (1904) 27 Utah 336, 75 Pac. 739, 1 Ann. Cas. 711, and note; *Silver Peck Mines v. District Court*, (1910) 33 Nev. 97, 110 Pac. 503, 29 Ann. Cas. 587, and note; *Pope Mfg. Co. v. Arnold Schwinn & Co.*, (1913) 208 Fed. 406; *State ex rel. Roberts v. Hense*, (1916) 135 Minn. 99, 160 N.W. 198. And especially where the question of jurisdiction depends on a controverted fact, the upper court will not interfere. *Bracey v. Robinson*, (1918) 83 W. Va. 9, 97 S.E. 295; *State ex rel. Barbee v. Allen*, (1917) 96 Ohio S. 10, 117 N.E. 13. But, generally, the writ will issue even where the court has jurisdiction to prevent the hearing of a case by a judge who is an interested party and refuses to turn the case over to another judge. *Forest Coal Co. v. Doolittle*, (1903) 54 W.Va. 210, 46 S.E. 238. Some disposition to modify the old strict rule is discernible in recent decisions. The appointment of a receiver on an insufficient complaint, alleging merely dissatisfaction with the corporate management, and the granting of relief not asked for in the petition, was held to be such excess of jurisdiction as to justify the prohibition of further proceedings. *State ex rel. Mills v. Calhoun*, (Mo. App. 1921) 234 S.W. 855. The writ was granted to stop criminal proceedings against a defendant whose dismissal was asked by the prosecuting attorney, who had statutory power to exercise discretion in the termination of a prosecution, the upper court holding that while the trial court had not been deprived of all jurisdiction, yet it had no legal right to proceed. *Foley v. Ham*, (1917) 102 Kan. 66, 169 Pac. 183. Several courts have, at least in terms, forsaken the old test, and declare that not jurisdiction of the lower court, but adequacy of ordinary legal remedy is the proper standard. If ordinary legal process will give relief why grant an extraordinary remedy? Is it just to deny the writ, even if the lower court is acting within its jurisdiction, if no other adequate remedy is at hand? *State ex rel. Miller v. Superior Court*, (1905) 40 Wash. 555, 82 Pac. 877, 2 L.R.A. (N.S.) 395, 111 A.S.R. 925, reversed in part by *State ex rel. Martin v. Superior Court*, (1917) 97 Wash. 358, 166 Pac. 630; *McLaughlin v. McLaughlin*, (R.I. 1922) 117 Atl. 649. Where a complaint did not state an offense and the lower court is about to proceed to trial, the upper court states that the writ is granted as the trial would be futile as it would have to be reversed on appeal but it is also said that the writ would not lie against the action of the justice of the peace as there was immediate relief from such action by an appeal to a superior court. *Farraher v. Superior Court of Kern County*, (Cal. Ct. of App. 1919) 187 Pac. 72. In connection with the principal case see *Commonwealth v.*

Minor, (1922) 195 Ky. 103, 241 S.W. 856 and compare with *Cohen v. Webb*, (1917) 175 Ky. 1, 192 S.W. 828 which suggested no qualification to the old test of jurisdiction.

RES ADJUDICATA—INDEMNITOR AND INDEMNITEE—CONCLUSIVENESS OF FINDING IN PROCEEDING BY EMPLOYEE AGAINST EMPLOYER IN SUBSEQUENT CONTROVERSY BETWEEN INSURER AND EMPLOYER.—The defendant employer, operating under the Workmen's Compensation Law, was insured in the plaintiff company. An employee was injured and in a proceeding before the Industrial Accident Board, at which both the plaintiff and the defendant were represented, it was held that the employer had had notice of the employee's injury within the statutory period of three months and was therefore liable. The Industrial Accident Board refused to decide as to the rights of this plaintiff and defendant inter se as they had no jurisdiction over the question. In accordance with the statute, the plaintiff company thereupon paid the employee the amount of the award, and, as the defendant had failed to give the plaintiff notice of the accident until four months after the accident, whereas the terms of the policy required immediate notice, brings this action to recover the amount so paid. As a defense it is alleged that the defendant received no notice from the employee within three months as required by statute and that for this reason the award was illegal. *Held*, two justices dissenting, that the finding of the Industrial Accident Board was res adjudicata. *Lumbermen's Mut. Casualty Co. v. Bissell*, (Mich. 1922) 190 N.W. 283.

As a general rule parties to an action are not bound, under the doctrine of res adjudicata, by a judgment rendered in a prior suit to which they were parties but not adverse parties. 2 Black, Judgments, 2nd ed., 906; *Pioneer Savings and Loan Co. v. Bartsch*, (1892) 51 Minn. 474, 53 N.W. 764, 38 A.S.R. 511; see the dissenting opinion in the principal case. It is, however, a well recognized exception to the general rule, that where parties to a prior suit, though not adverse, stand in the relation of indemnitor and indemnitee, such parties, in a subsequent action, are bound by the facts as found in the prior adjudication. *Mason-Henry Press v. Aetna Life Ins. Co.*, (1911) 146 App. Div. 181, 130 N.Y.S. 961. It is not essential that a person standing in this relationship shall be a party of record to make the prior adjudication binding upon him, and it is sufficient that notice and opportunity to defend is given. *Strong v. Phoenix Ins. Co.*, (1876) 62 Mo. 289, 21 Am. Rep. 417. In *Fleckten v. Spicer*, (1896) 63 Minn. 454, 65 N.W. 926, the finding against a vendee of land in an action by a third party, the vendee being defended by the vendor under his covenant of title was held to be res adjudicata in a subsequent action by the vendee against the vendor. Since the estoppel created by the application of the doctrine res adjudicata is mutual, 2 Black, Judgments, 2nd ed., 828; *Nowak v. Knight*, (1890) 44 Minn. 241, 46 N.W. 348, that which would be res adjudicata when pleaded by the indemnitee is likewise res adjudicata when so pleaded by the indemnitor, as in the instant case. *Edinger & Co. v. Southwestern Surety Ins. Co.*, (1918) 182 Ky. 340, 206 S.W. 465; *American Candy Co. v. Aetna Life Ins. Co.*, (1916) 164 Wis. 266, 159 N.W. 917. Where the employer has paid the award and sues his indemnitor, the suit

is predicated on the existence of a valid award and the employer cannot base his claim on the award and deny the existence or truth of facts, found, at the trial of the award, as the grounds for the award. In the principal case, however, the indemnitor is forced by statute to pay a claim for which he is not liable under the terms of his contract with the indemnitee, and as the indemnitor is suing, the indemnitee is not forced to take the inconsistent positions of relying on the award and denying the facts on which it is based, he does not rely on the award at all. This situation brings out the fact that the primary reason for the decisions in all of these cases involving indemnitor and indemnitee is the application of the doctrine of res adjudicata.

TORTS—HUSBAND AND WIFE—RIGHT OF WIFE TO SUE FOR CRIMINAL CONVERSATION.—The plaintiff, in an action for criminal conversation, sued to recover damages suffered because of an act of adultery committed by her husband and the defendant. *Held,* one justice dissenting, that the Married Women's Act gave the plaintiff no right to recover in an action for criminal conversation. *Oppenheim v. Kridel,* (1923) 198 N.Y.S. 157.

This case follows the rule of *Kroessin v. Keller,* (1895) 60 Minn. 372, 375, 62 N.W. 438, 27 L.R.A. 685, 51 A.S.R. 533, commented on in 9 Harv. Law Rev. 156, see also 32 Harv. Law Rev. 576, which asserted that a wife has no right of action in criminal conversation. *Doe v. Roe,* (1890) 82 Me. 503, 20 Atl. 83, 8 L.R.A. 832, 17 A.S.R. 499. At the common law the wife had no such action, 13 R.C.L. 1487, because only the husband was regarded as having a property right in the marital relationship the invasion of which would give an action in the nature of trespass vi et armis, 3 Black. Comm. 138, 139, and also because the wife could sue only in her husband's name at the common law, and the benefit of the suit, if any, was his, so that to permit her to sue would be allowing the husband to recover for his own wrong. See *Turner v. Heavrin,* (1918) 182 Ky. 65, 206 S.W. 23, 4 A.L.R. 562, and note. If these were the sole reasons for disallowing the right of action to the wife, it is evident that they are no longer applicable, and consistency would demand that the wife be permitted to sue equally as well as the husband, since the practical wrong is the same to each. The Minnesota decision, however, urges that at least one constituent of the right invaded is the husband's right to an unimpeachable succession, pointing out that no act of the husband can stigmatize the wife's succession. *Kroessin v. Keller,* (1895) 60 Minn. 372, 62 N.W. 438, 27 L.R.A. 685, 51 A.S.R. 533. But in cases allowing a recovery for an alienation of affections it is affirmed that the rights flowing from the marriage contract are co-extensive, and the weight of authority allows the wife to recover for a wilful interference, on the ground that, since the adoption of the Married Women's Acts, all the common-law disabilities are removed. *Bennett v. Bennett,* (1889) 116 N.Y. 584, 590, 23 N.E. 17, 6 L.R.A. 553, and note. See also 6 MINNESOTA LAW REVIEW 76. The English courts have intimated that the wife's rights are equal to the husband's, see *Lynch v. Knight,* (1861) 9 H.L.C. 577, 589, but the action for criminal conversation was abolished in England by statute. 20 & 21 Vict. c. 85, sec. 59. If it is admitted that moral standards have changed from

sex inferiority at common-law times to sex equality, it would seem that the reasons, upon which the right of a wife to recover for a wilful alienation of her husband's affections rests, are fundamentally and logically applicable to an action for criminal conversation. *Rott v. Goehring,* (1916) 33 N.D. 413, 157 N.W. 294, L.R.A. 1916E 1086, Ann. Cas. 1918A 643; Tiffany, Domestic Relations 87. At least the tendency of recent cases construing acts similar to the act existing in New York has been to allow the wife a recovery in an action for criminal conversation. *Turner v. Heavrin,* (1918) 182 Ky. 65, 206 S.W. 23, 4 A.L.R. 562, and note; *Dodge v. Rush,* (1906) 28 App. D.C. 149, 8 Ann. Cas. 671, and note; see *Parker v. Newman,* (1917) 200 Ala. 103, 75 So. 479. In answer to the position of the Minnesota court, it would seem that the fact that the husband may as an item of damage recover because the line of succession is endangered whereas no such damage can be incurred where the husband errs, in no way necessitates the holding that there is no common right in the wife. In recognizing the fact that the disgrace to the innocent spouse is also an item of damage to be considered, the Minnesota court has recognized an element which might well be considered the basis of a common right.

WILLS—DEVOLUTION OF LAPSED AND VOID DEVISES—EFFECT OF RESIDUARY CLAUSE.—A testator in his will made a specific devise, which was preceded by a general devise of "all other property of every kind and character not hereinafter disposed of." The specific devise was void under the rule against perpetuities. In an action to have the will construed, it was *held,* that the void devise passed under the residuary clause to the residuary devisees. *Kirkpatrick v. Kirkpatrick,* (Kansas 1922) 211 Pac. 146.

For a discussion of the principles involved, see NOTES, p. 392.

BOOK REVIEWS

INTERNATIONAL RELATIONS, by James Bryce. The MacMillan Company, New York. 1922. 275pp.

This small volume consists of a series of lectures delivered at the Institute of International Relations in 1921. In these addresses, the distinguished jurist has set himself the task of attempting to explain why the political relations of nations have not grown more friendly with the increasing intimacy of their economic and social relations.

The lectures, which are essentially popular in character, are marked by the breadth of scholarship, liberality of outlook, and sanity of judgment which have characterized all of Viscount Bryce's utterances. They afford a happy relief from the vague doctrinaire idealism of many of the war-time declarations, as also to the harsh materialistic cynicism of most of the postwar literature on international relations. Lord Bryce is an optimist but he is no visionary. He is a practical reformer, not a political theorist or the exponent of popular shibboleths. He always insists upon

keeping close to the facts and is careful to base his judgments upon the findings of history and his practical knowledge of human nature.

In the first two chapters, the author fills in the historical background for his analysis of present day international conditions. He is severely critical at times of the nationalist spirit of the Paris Conference and does not hesitate to condemn some of the provisions of the treaty of Versailles, especially those relating to reparations and the re-drafting of the map of Europe. He admits, however, that the diplomatic difficulties were so great as to preclude the possibility of effecting a settlement which would be satisfactory or even fair in some cases to all parties concerned. The choice which the Conference was called on to make was often a choice between evils.

Lord Bryce's analysis of the factors making for war and peace covers familiar grounl. As a staunch free-trader, he is naturally suspicious of protectionist tariff policies and the commingling of politics and commerce in international relations. His comments upon the doctrine of nationality, the influence of the press upon public opinion and the merits and defects of open diplomacy are particularly valuable in the light of present-day controversies. On all these subjects he speaks with the dual authority of the jurist and the man of affairs.

Even more important is his discussion of the best means of promoting peace and avoiding war. He is hopeful of the ultimate success of the League of Nations. "Imperfect it may be, but it is the only plan which has yet been launched with any prospect of success." The usefulness of the League might be greatly increased, in his opinion, if the Council were made up of independent non-official members instead of instructed governmental representatives as at present. The United States, he is convinced, cannot afford to be indifferent to the chaotic conditions of Europe, but this country, he realizes, must be the judge of the way and means by which its duty to humanity can best be discharged. The chief hope for the future, in his opinion, must depend upon a possibility of improving human nature itself. "What the nations now need is a public opinion which shall in every nation give more constant thought and keener attention to international policy and lift it to a higher plane."

This volume, we may then conclude, is a simple but illuminating exposition of the political faith of one of the greatest of recent political philosophers. It is a splendid expression of the political principles of late Victorian liberalism and as such will well repay the careful perusal of all students of international affairs.

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A REVIEW OF THE CASES ON "BLUE SKY" LEGISLATION

BY MONTREVILLE J. BROWN[1]

PRIOR to 1910 there were no "Blue Sky Laws." Since then nearly all of the states have enacted them. They are in essential respects the same; and are not now open to constitutional objections. In 1917 cases involving the acts of Michigan, South Dakota and Ohio attacked as violative of the fundamental law went to the Supreme Court of the United States; and that court upheld them upon the broad ground that they were expressive of a legitimate exercise of the police power.[2] Since the decisions in these cases litigation has been largely conducted in the state courts and most of the questions raised have called for construction and interpretation; some cases have dealt with matters of criminal pleading and procedure. It is the purpose of this article to take up the more important of these questions and matters and consider them in the light of the holdings of the appellate courts of the various states. In so far as possible consideration of cases will be confined to those of substantially general application.

The purpose of "Blue Sky Laws" has been oft expressed.[3] It is deemed sufficient to state that they are designed to prevent

[1]Assistant Attorney General of Minnesota.

[2]Hall v. Geiger-Jones Co., (1917) 242 U.S. 539, 61 L.Ed. 480, 37 S.C.R. 217; Caldwell v. Sioux Falls Stockyards Co., (1917) 242 U.S. 559, 61 L.Ed. 493, 37 S.C.R. 224; Merrick v. Halsey & Co., (1917) 242 U.S. 568, 61 L.Ed. 498, 37 S.C.R. 227.

[3]Hall v. Geiger-Jones Co., (1917) 242 U.S. 539, 61 L.Ed. 480, 37 S.C.R. 217; Caldwell v. Sioux Falls Stockyards Co., (1917) 242 U.S. 559, 61 L.Ed. 493, 37 S.C.R. 224; Merrick v. Halsey & Co., (1917) 242 U.S. 568, 61 L.Ed. 498, 37 S.C.R. 227; State v. Gopher Tire & Rubber Co., (1920) 146 Minn. 52, 177 N.W. 937; State v. Agey, (1916) 171 N.C. 813, 88 S.E. 726; Goodyear v. Meux, (1920) 143 Tenn. 287, 228 S.W. 57.

fraud in the sale of specified contracts usually designated as stocks, bonds, investment contracts, or other securities. In administering and enforcing the law so as to effectuate the intent, one or the other of the two questions frequently arises. Is the corporation, association, concern or person proposing to sell subject to the law? Is the law regulatory of the sale of the particular contract proposed to be sold? These are the questions; and answers given thereto by those charged with carrying out the legislation have not always met with the approval of applicants, with the result that the courts have from time to time been resorted to. The decisions deal more with these questions than with any others.

Persons and Concerns Subject to the Law

The typical law excludes from its purview certain securities and single or isolated transactions; then defines investment company and dealer and prohibits sales by either unless licensed. Exceptions in the various laws differ; but the provisions defining investment company and dealer and requiring license are, for all practical purposes, the same. The exceptions speak for themselves and only incidental consideration will be given thereto. The difficulty arises when commissioners are called upon to determine whether a given seller is an investment company or dealer within the meaning of the law. This question under various states of fact has been before the courts of several of the states; and it is to the decisions of these courts on this question that attention will first be directed.

For a number of years some doubt was entertained as to whether trustees are subject to the law in the sale of certificates of interest in the property and assets held by them under a common law declaration of trust. The question has been passed on by the courts of California, Iowa, Kansas, Michigan and Missouri. These courts hold them subject to the law in making such sale. They are viewed in some of the cases as constituting an investment company, and in others as the agents of an investment company, such investment company operating as an unincorporated association.[4] The rule of amenability is recognized as settled law; and commissioners are now without exception, so

[4]In re Girard, (1921) 186 Cal. 718, 200 Pac. 593; Home Lumber Co. v. Hopkins, (1920) 107 Kan. 153, 190 Pac. 601, 10 A.L.R. 879; People v. Clum, (1921) 312 Mich. 651, 182 N.W. 136, 15 A.L.R. 253; Schmidt v. Startz, (1922) 208 Mo. App. 439, 236 S.W. 694; Wagner v. Kelso, (Ia. 1923) 193 N.W. 1.

far as the writer is advised, applying it within their respective jurisdictions.

Aside from the standing of so-called common law trusts, no difficulty general to the administration of the law has been encountered in determining whether or not a given applicant is an investment company. If a concern is the issuer of a security and is selling the security, it is an investment company and subject to the law.

When it comes to the question whether one selling a security issued by another is a dealer, the answer is not always free from doubt. A recent case in which this question was passed upon is that of *State ex rel. Gutterson v. Pearson, et al.*[5] It is of such far-reaching consequences that a somewhat detailed consideration thereof is deemed appropriate.

The case arose in this way: Plaintiff was about to sell fifteen thousand shares of the common and fifteen thousand shares of the preferred stock of the New England Cereal Company, when he was informed by the commission that he could not lawfully sell the stock without its approval, and that if he sold or attempted to sell the same without such approval, it would take steps to put a stop thereto and bring about the criminal prosecution of all offending parties. Under the belief that the securities law had no application to the sale by him of these securities, he brought an action to restrain the commission from in any way interfering with him in the sale thereof. A demurrer to the complaint was sustained in the lower court. An appeal was taken to the supreme court where there was a reversal.

The material facts were few. Plaintiff's business was buying and selling stocks and bonds. He maintained an office in the city of Minneapolis. He was the absolute owner of the stock he proposed to sell in the course of his business. The New England Cereal Company, the issuer of the stock, was a Connecticut corporation; and had never been, and was not at the time, engaged in the business of selling its stock in Minnesota.

Plaintiff's position was based on the wording of sections 3 and 4, chapter 429, Laws of Minnesota 1917, as amended by sections 4 and 5, chapter 105, Laws of Minnesota 1919, and the use in various provisions of the law of the expression "such securities." These sections at the time the case was decided read as follows:

[5] (Minn. 1922) 189 N.W. 458.

"Sec. 3. Every person, firm, co-partnership, corporation, company or association, whether unincorporated or incorporated, under the laws of this or any other state, territory or government, which shall either himself, themselves or itself, or by or through others engage in the business within the state of Minnesota of selling, offering or negotiating for the sale of any stocks, bonds, investment contracts or other securities, herein called securities (except those exempt under the provisions of this act), issued by him, them or it, except to a bank or a trust company, shall be known, for the purpose of this act, as an investment company.

"Every person, firm, co-partnership, company, corporation or association, whether unincorporated or incorporated under the laws of this or any other state, territory or government, not the issuer, who shall within the state of Minnesota sell or offer for sale any of the stocks, bonds, investment contracts, or other securities herein called securities, issued by an investment company, except the securities specifically exempt under the provisions of this act, or who shall by advertisement or otherwise profess to engage in the business of selling or offering for sale such securities within the state of Minnesota, shall be known for the purpose of this act as a dealer. The term dealer shall not include an owner, not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created by law lawfully sells any securities embraced within such trust."

Section 4 provides that:

"No such investment company and no such dealer shall sell or offer for sale any such securities or profess the business of selling or offering for sale such securities, unless and until he or it shall have been licensed by the commission as herein provided. . . ."

In view of the wording of section 3, plaintiff urged that an investment company was one engaged in the business within the state of selling securities issued by it; that a dealer was one selling within the state securities of an investment company or companies; that, as the New England Cereal Company was not engaged in the business of selling its stock in this state, it was not an investment company; and that in selling the stock of that company owned by him, he was not selling the stock of an investment company; and as a consequence, in so far as the selling of such stock was concerned, was not a dealer and therefore not subject to section 4. He further urged that the expression "such securities" made use of in the act referred to and meant the stocks, bonds, investment contracts and other securities of an

investment company; and that, in view of the fact that the New England Cereal Company was not an investment company, none of these provisions, including all of the regulatory features of the law, had any application to a sale of the stock of that company owned by him.

Plaintiff's contention boiled down amounted to this: The securities law is only regulatory of the sales of securities of issuers themselves engaged in the business within the state of selling such securities.

In answer to this contention it was insisted that the purpose of the act rendered it necessary to place on section 3 a meaning contrary to that contended for by plaintiff. The purpose being to prevent fraud, it was argued that all sales of securities made within the state, subject to exceptions specified in section 2, fell within the regulatory features of the law. Where securities were being sold to the general public, the seller, it was contended, no matter whether as the owner or the agent of another, was subject to the law; it was immaterial whether the issuer was or was not engaged in the sale thereof within the state. This was urged upon the court as the law applicable to the situation:

"With the purpose and intent of the law in mind, we again refer to section 3. It is obvious that a literal interpretation of the language of this section would result in a defeat of the object sought to be attained by the legislature. In such a situation there must be a departure from literal interpretation; we must so construe the section as to bring it in harmony with the purpose and intent of the act. Words may be eliminated or particular terms given an extended or qualified meaning; this, that the act may be potent to eradicate the mischief aimed at, and to avoid a construction which would result in absurdities. A statute is to be construed according to the intention of the legislature and not according to the letter of any section or subdivision thereof; the part must give way to the purpose as disclosed by the whole.

"The rules of statutory construction here applicable are elementary and a discussion thereof is unnecessary. We content ourselves with calling attention to some of the decisions of this court where they have been stated and applied."[6]

[6]Eberd v. Johnson, (1921) 149 Minn. 395, 184 N.W. 12; Thomas v. Stevenson, (1920) 146 Minn. 272, 276, 178 N.W. 1021; State ex rel. Chase v. Minn. Tax Comm., (1916) 135 Minn. 205, 207, 160 N.W. 498; State ex rel. Maryland Casualty Co. v. District Court, (1916) 134 Minn. 131, 158 N.W. 798; Street v. Chicago, etc., Ry. Co., (1914) 124 Minn. 517, 521, 145 N.W. 746; State ex rel. v. Bates, (1905) 96 Minn. 110, 112, 104 N.W. 709; Mariston v. McIntosh, (1894) 58 Minn. 252, 528, 60 N.W. 672, 28 L.R.A. 605; Clementson v. Minnesota Tribune Co., (1891) 45 Minn. 303, 304, 47 N.W. 781. See also 25 R.C.L. 967, 970, 973, 1006, 1007, 1008, 1009; Dunnell's Minnesota Digest, secs. 8939, 8940, 8947, 8951, 8985.

The court declined to adopt the view advanced in behalf of the commission. It held the law did not prohibit a person, the absolute owner of stock issued by a company not itself engaged in the business of selling within the state, from selling such stock without a license. The law, it was ruled, had no application to such a case.

During the course of the court's opinion it was said:

"An 'investment company' as defined in section 3, is one which either itself or through others engages in the business within this state of selling or offering for sale securities issued by itself. A 'dealer' as defined in that section, is one, not an issuer, who within this state sells or offers for sale securities issued by an 'investment company.' Section 4 prohibits any 'such investment company' and any 'such dealer' from selling or offering for sale 'any such securities' until licensed by the commission as therein provided. These prohibitory provisions do not purport to apply to an issuer of securities unless such issuer be an 'investment company' as defined in section three, nor to one, not an issuer, who buys and sells securities unless he be a 'dealer' as defined in that section. It stands admitted that the New England Cereal Company has never, in any manner, sold securities or offered them for sale within the state of Minnesota, and consequently that company is not an 'investment company' within the purview of the statute. As the company which issued the securities offered for sale by plaintiff is not an 'investment company' within the meaning of the statute, selling such securities or offering them for sale did not make plaintiff a 'dealer' within the meaning of the statute, nor bring him within the prohibitory provisions of section four. Defendants do not contend that the statute, taken as it reads, applies to plaintiff, but urge that unless it be construed or extended so as to bring within its provisions those dealers who handle securities issued by companies which do not themselves operate within this state the act can be easily evaded and will fail to accomplish the legislative purpose. . . .

"In order to extend the scope of the statute so as to include within its operation those who sell securities issued by a company which does not itself sell its securities within this state, they urge that the words, 'within the state of Minnesota,' in the paragraph of section 3 which defines investment companies should be either eliminated or transposed from that section to section 4. If the Legislature had done this we might be able to give the statute the broad scope contended for. But this is a highly penal statute, and the courts cannot extend a penal statute to take in those whom the Legislature has left out, nor so as to make acts criminal which the Legislature has not declared to be criminal. Statutes creating crimes must speak for themselves, and cannot be extended by construction to include cases which are clearly outside the statute as enacted by the Legislature."[7]

This decision resulted in curbing the activities of the Minnesota commission to a very appreciable extent; that body had assumed jurisdiction prior to its rendition of all sales of the character of the one under consideration. Its effect was to open the door to the unscrupulous and visionary. The legislature took cognizance of the situation and at its recent session remedied the defect in the law by enacting chapter 4, Laws 1923. This law amends the sections above quoted so as to make them read as follows:

"Sec. 3. Every person, firm, co-partnership, corporation, company or association, whether unincorporated or incorporated, under the laws of this or any other state, territory, or government, which shall either himself, themselves or itself, or by or through others engage in the business within the state of Minnesota of selling, offering or negotiating for the sale of any stocks, bonds, investment contracts or other securities, issued by him, them or it, except to a bank or trust company, shall be known, for the purpose of this act, as an investment company.

"Every person, firm, co-partnership, company, corporation or association, whether unincorporated or incorporated under the laws of this or any other state, territory or government, not the issuer, who shall within the state of Minnesota sell or offer for sale any stocks, bonds, investment contracts or other securities or who shall by advertisement or otherwise profess to engage in the business of selling or offering for sale any stocks, bonds, investment contracts or other securities within the state of Minnesota, shall be known for the purpose of this act as a dealer. The term dealer shall not include an owner, not issuer, of any stocks, bonds, investment contracts, or other securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature, nor one who in a trust capacity created by law lawfully sells any stocks, bonds, investment contracts, or other securities, embraced within such trust.

"Sec. 4. No such investment company and no such dealer shall sell or offer for sale any stocks, bonds, investment contracts, or other securities, or profess the business of selling or offering for sale any stocks, bonds, investment contracts, or other securities, (all of which are in this act referred to under the general term of and called securities) unless and until he or it shall have been licensed by the commission as herein provided. . . ."

There are other cases in which courts have been called upon to decide whether the seller involved was a dealer; but these have

[7]The following cases were cited in support of the court's position: State v. Finch, (1887) 37 Minn. 433, 34 N.W. 904; State v. Walsh, (1890) 43 Minn. 444, 45 N.W. 721; Berg v. Baldwin, (1884) 31 Minn. 541, 18 N.W. 821; Mahoney v. Maxfield, (1907) 102 Minn. 377, 113 N.W. 904, 14 L. R. A. (N.S.) 251, 12 Ann. Cas. 289.

to do with the interpretation of the following language made a part of the definition of dealer:

"The term dealer shall not include an owner, not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature."

The purpose and effect of this provision is stated in the case of *Edward v. Ioor*,[8] in this way:

"The record discloses that defendant Ioor was the owner of 100 shares of stock of the Illinois Piano Company. He sold 27 of these shares to the plaintiff. He sold no other shares of stock of this company. Section 10 of the Commission Act (Section 11954, Comp. Laws 1915) defines the term 'dealer,' and so far as important here provides:

" 'The term 'dealer' shall not include an owner, not issuer, of such securities so owned by him when such sale is not made in the course of continued and successive transactions of a similar nature.'

"This provision was thought important by the framers of this act to remove the question of unconstitutional taint, and preserve the constitutional right of the individual to sell his own stock, but by prohibiting 'continued and successive transactions of a similar nature' prevented the abuse of that right and its exercise in a manner contrary to the spirit of the act. Mr. Ioor had the right to sell this stock to plaintiff. He did not by continued and successive transactions of a similar nature become a dealer. He was acting within his constitutional rights, and by this sale to plaintiff did not violate the act. No liability can be predicated on this transaction."[9]

Securities Covered by Law

The other question which has been most frequently before the courts is whether the contract sold or proposed to be sold is a stock, a bond, an investment contract or other security within the meaning of the law. This question is often difficult of answer. A review of the cases in which it has been disposed of is next in order.

The pioneer in this field is the case of *State v. Gopher Tire & Rubber Company*.[10] Defendant, a Minnesota concern, was indicted charged with selling an investment contract without a license. A demurrer was interposed to the indictment and overruled by the court. Certain questions were certified to the

[8](1919) 205 Mich. 617, 172 N.W. 620, 16 A.L.R. 256.

[9]See also Dows v. Schuh, (1919) 206 Mich. 133, 172 N.W. 418; Dorsun v. Benedict, (1920) 209 Mich. 115, 176 N.W. 459; State v. Summerland, (1921) 150 Minn. 266, 185 N.W. 255.

[10](1920) 146 Minn. 52, 177 N.W. 937.

supreme court for answer. Among them was the question whether the contract was an investment contract or other security. The court answered the question in the affirmative.

The company was engaged in the business of manufacturing automobile tires and inner tubes. The indictment set out the contract alleged to have been sold. This recited that defendant had appointed the holder as one of its agents to assist by word of mouth and in other ways in selling the tires and tubes manufactured by the issuer. It provided that in consideration of the certificate holder's promise to render such assistance and in further consideration of $50.00 paid by him, the issuing company, defendent, would divide pro rata among all the holders of like certificates residing in a specified place 10 per cent of the net price of such tires and tubes as might be sold by defendant's representatives at such place, such division to be made quarterly for a period of twenty years; that the holder would be entitled to a discount of 10 per cent. on all of the defendant's goods which he might purchase for his personal use; and that defendant would annually set aside as a bonus to certificate holders all of its excess earnings after paying operating expenses, fixed charges and dividends to stockholders. The contract was designated by the issuer as a certificate; was transferable upon notice; and contained a clause stating that it was not to be construed to be a certificate of stock or security or investment contract.

On the question whether this was an investment contract the court had this to say:

"No case has been called to our attention defining the term 'investment contract.' The placing of capital or laying out of money in a way intended to secure income or profit from its employment is an investment as that word is commonly used and understood. If defendant issued and sold its certificates to purchasers who paid their money, justly expecting to receive an income or profit from the investment, it would seem that the statute should apply. The statute makes specific mention of stock which, properly speaking, is not a security, and follows the enumeration of investments which fall within its scope with the words, 'herein called securities,' indicating that the legislature has not used the term 'securities' in a literal but in a broad sense. In that sense, these certificates may properly be regarded as investment contracts or securities. The mere fact that defendant has studiously declared that they are not, does not require a court to hold that they are something else.

"We cannot sustain defendant's contention that the certificates are contracts for the performance of services by its agents. The

purchaser pays $50 for a certificate in addition to agreeing to become a 'booster agent' for the sale of defendant's goods. As an inducement to invest, he is promised a share in defendant's profits. This promise extends, first to the profits realized on sales made by the local dealer, and, next, to defendant's total profits. It appears to have been the purpose of defendant to obtain capital by the sale of its certificates, without issuing stock, and, at the same time, to build up a market for its goods, without spending money in advertising. The certificates are like stock in that they give their holders the right to share in the profits of the corporation, but their value is purely speculative, for their holders get no interest in the tangible assets of the corporation."

The Minnesota court has had occasion to apply the doctrine of this case on several occasions.[11]

In the *Summerland Case* the defendants were charged with selling certain securities issued by the Alexandria Minnesota Oil Syndicate, an unincorporated association. The securities were described in the indictment as "three units of the par value of $100 each, each of which said units entitled the owner thereof to an individual beneficial interest in and to the property and assets of said association and in and to the profits resulting from the operation thereof (such unit being registered in the books of said association in the name of the owner thereof) to participate in the management and control of the business and affairs of said association by casting one vote at any meeting of the unit holders of said association upon any question coming before such meeting." The court was called upon to say whether these were investment contracts or other securities; and on this point said:

"It fairly appears from the whole indictment that the 'oil syndicate' was an investment company issuing the same sort of investment contracts within the meaning of the first paragraph of section 3. The so-called 'units' are fairly within the definition of investment contracts as defined in *State v. Gopher Tire & Rubber Company*, 146 Minn. 52, 177 N. W. 937."

In the *Evans and Reynolds Case* the defendants were charged with violating the law in selling a contract entitled by the issuer "3 Per Cent. Contract for Deed." They demurred to the indictment. This was overruled by the lower court. The question whether the instrument set out in the indictment was an invest-

[11]State v. Summerland, (1921) 150 Minn. 266, 185 N.W. 255; State v. Evans and Reynolds, (Minn. 1922) 191 N.W. 425; State v. Ogden, (Minn. 1923) 191 N.W. 916.

ment contract was certified to the supreme court for answer. The court held that it was such a contract.

The contract before the court was in form a contract for deed. Attached to it and made a part thereof were various options open to the purchaser. One of these gave to the purchaser under certain conditions a right to surrender his contract and receive back the money he had paid with a bonus. Another gave the purchaser, after fifty regular monthly payments had been made, if other options had not been exercised, the absolute right to apply the amount paid with interest to build a home, to buy or improve a farm, or to buy or improve business property, and if the amount accumulated should not be sufficient therefor, the company agreed to advance the balance on real estate security. Other options were given.

The court held this contract to fall within the rule of the *Gopher Tire & Rubber Company Case,* saying:

"It is plain that the exercise of some of these options converts the contract into one for the laying out or investment of money in a way intended to secure income or profit from its employment. . . . We are of opinion that this contract is an investment contract within the statute."

In the *Ogden Case* the defendant was convicted of a violation of the law. He appealed to the supreme court and made the point that the contract he was charged with selling was not an investment contract or other security. The court sustained the conviction.

The contract is this case was styled "Statement and Purchase." It recited that defendant had subdivided a leasehold of an eighty acre tract of land in Bighorn County, Wyoming, into 4,800 equal undivided units or fractional interests and was offering 3,000 thereof for sale at $120,000, and that each purchaser purchased separately the number of units set opposite his name. The instrument was signed and acknowledged by the defendant. Following his acknowledgment was a statement with indicated places for signatures of the purchasers, and other data. A purchase of units was made subject under the terms of the instrument to the condition that all money paid was to go to the defendant as treasurer, to be disbursed for obligations incurred, or to be incurred, in connection with the leasehold. This included the obligation on defendant's part to clean out and connect with a pipe line three oil wells on the premises and to drill six additional oil wells and connect with the pipe line. Defend-

ant was required to render an account to the purchasers of moneys received and paid out by him. He was to incorporate a company under the Arizona statutes to hold the lease. Provision was made for a board of directors and an executive committee. The company was to have power to operate all of the wells and from the net amounts derived therefrom, the owners of the units were to be paid their respective portions. Defendant agreed to assign his leasehold to this corporation.

The court held this instrument to be an investment contract or other security, saying:

"It differs, of course, from other contracts which we have had before us, but it is an investment contract within *State v. Gopher Tire & Rubber Co.,* 146 Minn. 53, 177 N. W. 937; *State v. Summerland,* 150 Minn. 266, 185 N. W. 255; and *State v. Evans,* 191 N. W. 425. The purpose was not to convey undivided interests in the land. The purchasers did not intend to become freeholders or land owners. The intent was that the five-eighths interest in the leasehold was to go to a corporation thereafter to be organized. The defendant agreed to do certain things proper to be done to effect this result. Finally, the unit holders were to participate in profits in proportion to their holdings and were to be interested in the same proportion in the corporation holding the title and operating. The arrangement was legitimate, so far as appears, and convenient enough. The paternalistic purpose of the statute is to prevent offering to the public, not land contracts, but investment contracts, evidencing a right to participate in the proceeds of a venture, without the commission first ascertaining whether there is behind the venture something so tangible that a sound policy of regulation permits the exposing the investing public to them. This is an investment contract within the statute. It is one to which the requirement of a license applies."

Other courts have been called upon to determine the standing of instruments being offered for sale.[12] The decisions in these cases deal with provisions peculiar to the law involved. The *Welch* and *Agey Cases,* however, define terms and expressions found in many laws and will, as a consequence, be specially considered.

In the *Welch Case* defendant was charged with selling speculative securities without a license. The North Dakota law expressly prohibited the sale of such securities without approval.

[12]State ex rel. Rossen v. Welch, (1919) 42 N.D. 44, 172 N.W. 234; State v. Agey, (1916) 171 N.C. 831, 88 S.E. 726; Kirk v. Farmers Union Grain Agency, (1921) 103 Ore. 43, 202 Pac. 731; State v. Lee, (1921) 288 Mo. 41, 233 S.W. 20; Standard Home Co. v. Davies, State Bank Commissioner, (1914) 217 Fed. 904.

Defendant contended that the contract sold by him did not come within the definition of speculative securities as set out in the law. The court disagreed with him and denied his application for a writ of habeas corpus.

The criminal complaint charged petitioner, without first complying with the act, with selling "an agreement or buyers' certificate of the Lignite Consumers' Mining Company of North Dakota." It was alleged that this was a speculative security. The certificate was set out in the complaint. It provided in substance:

"that in consideration of the sum of $100, to be paid in cash or note to the Lignite Consumers' Mining Company, a corporation to be formed under the laws of this state not later than October 1, 1919, the said mining company agrees to utilize 90 per cent. of all the moneys secured to establish a mine at or near Havelock, North Dakota, until the sum of $200,000 shall be so applied; and that all surplus subscribed over said sum may be used either to maintain a mine or other mines within this state, or to carry on educational work or experiments with the lignite coal, or its by-products; that the Lignite Consumers' Mining Company agrees to establish its mine at or near Havelock, North Dakota, not later than October 1, 1919, or as soon thereafter as is possible; and that it will immediately thereafter issue to each member or signer of the agreement, a certificate granting him or it the right to purchase coal at said mine or any other mine or mines said company may establish at a price not to exceed $1.50 per ton, or as much lower as the board of directors may deem advisable to sell coal per ton."

The act made the sale of speculative securities unlawful in the absence of a compliance by the seller of certain requirements, the term "speculative securities" being defined as follows:

"The term 'speculative securities' as used in this act shall be taken to mean and include: (1) All securities into the specified par value of which the element of chance, speculative profit, or possible loss equal or predominate over the elements of reasonable certainty, safety, and investment; (2) all securities the value of which materially depends on proposed or promised future promotion or development rather than on present tangible assets and conditions; (3) any securities based in whole or material part on assets consisting of patents, formulae, good will, promotion, or intangible assets; (4) securities made or issued in furtherance of promotion of any enterprise or scheme for the sale of unimproved or undeveloped land on any deferred payments or instalment plan when the principal value of such securities depends on the future performance of any stipulation by the promoters of such enterprise to furnish irrigation or transportation facilities, or other value enhancing utility or improvement."

On the question whether the certificate came within this definition the court said:

"It is contended that the contract or agreement which the defendant sold is not a 'speculative security,' within the terms of the act. In our opinion the contention is wholly untenable. The statute expressly declares that the term 'speculative securities' as used therein shall be taken to mean all stock certificates, shares, bonds, debentures, certificates of participation, contracts, contracts or bonds for the sale and conveyance of land on deferred payments or instalment plan, or other instruments in this nature by whatsoever name known or called, into the par value of which the element of chance, speculative profit, or possible loss equal or predominate over the elements of reasonable certainty, safety, and investment; or the value of which materially depends on proposed or promised future promotion or development rather than on present tangible assets and conditions.

The certificate which the realtor sold for $100 is to be issued in the future. It is to be issued by a corporation to be organized in the future. The mines from which coal is to be sold are to be developed in the future. It seems too clear for argument that the transaction falls squarely within the terms of the statute. The value of the certificate which the relator sold is manifestly dependent upon the future promotion and development of the mines. It also seems entirely clear that reasonable men would be entirely justified in finding that the element of chance, speculative profit, or possible loss, equal or predominate over the elements of certainty, safety, and investment."

In the *Agey Case* the defendant was the agent of a Tennessee corporation authorized under the laws of that state to buy and sell real estate. It bought large tracts of land in Georgia which it divided into lots. Through defendant it sold these lots on contract in South Carolina. No license was obtained under the "Blue Sky Law" and defendant was tried and found guilty of a violation thereof. On appeal to the supreme court the question was presented whether the company was an investment company and whether the sale of the contract in question came within the law.

The contract contained these guarantees on the part of the company:

"'The company guarantees to scientifically develop, cultivate, prune, and take care of said orchard plot or plots for five years, and, upon completion of the payments as above set forth, to make, execute, and deliver to the purchaser hereof a general warranty deed for the number of plots mentioned above, which shall have at that time 200 living trees thereon.' And 'The company guarantees the purchaser hereof 3 cents per pound for all fruit grown on said trees delivered at the preserving plant in good condition.'"

The South Carolina law at the time provided as follows:

"Before any bond, investment, dividend, guarantee, registry, title guarantee, debenture, or such other like company (not strictly an insurance company as defined in this chapter), or any individual, corporation or copartnership who shall be agents, offer for sale or sell the stocks, bonds, or obligations of any foreign corporation, whether organized or to be organized or being promoted, shall be authorized to do business in this state, it must be licensed by the insurance commissioner, which the commissioner is authorized to do when he is satisfied that such company or corporation is safe and solvent and has complied with the laws of this state applicable to fidelity companies and governing their admission and supervision by the insurance department. If such company is chartered and organized in this state and has its home office within the state it may, if a stock company, commence business with a capital stock of twenty-five thousand dollars, provided it is solvent to the extent of not less than fifteen thousand dollars. The license issued to such companies and their agents shall be issued and paid for as provided for those of insurance companies.

Gregory's Supplement, sec. 4805a, subsec. 1 (ch. 156, Laws 1913), provides:

"Every corporation, company, copartnership or association, all of which are in this act termed company, organized, proposed to be organized, or which shall hereafter be organized without this State, whether incorporated or unincorporated, which shall in this State sell or negotiate for sale any stocks, bonds, or other evidences of property, or interest in itself or any other company, all of which are in this act termed securities, upon which sale or proposed sale the whole or any part of the proceeds are used, or to be used, directly or indirectly, for the payment of any commission or other expenses incidental to the organization or promotion of any such company shall be subject to this act."

Applying these provisions of the act to the company and the contract being sold by it, the court held the company to be an investment company offering to the public an investment in lands and fig orchards in Georgia. It also held that the company was offering the "obligations of said corporation" to cultivate said land and was giving its contract to make title upon compliance with certain terms; and lastly, that it was offering for sale within the terms of Laws 1913, Chapter 156, "evidences of property."

In the very recent Iowa case of *Wagner v. Kelso*,[12a] decided on April 6, 1923, the court was called upon to determine whether certificates of interest in common law trust constitute "stock"

[12a] (Ia. 1923) 193 N.W. 1.

within the meaning of the Iowa act providing that every person, firm, association, company or corporation that shall, either directly or through representatives or agents, sell, offer or negotiate for sale within the state any stocks, bonds or other securities, shall, before doing or offering to do any such business within the state, be required to secure a permit of the secretary of state. The contention was made that "stock," as used in the law means only corporation stock or shares. The court discussed the point made quite extensively. We take the liberty of quoting from the opinion at some length:

"To say, as do counsel for appellee, that 'stock,' as that word is here used, means only corporation stock or shares, is to add to the statute what is not there expressed and to neutralize to a great extent the evident legislative purpose in enacting it. It may be admitted that more often than otherwise the word 'stock' is used with reference to the shares issued by private corporations, but it is equally true that in common parlance it is often used in a broader and more general sense of shares in voluntary associations and other enterprises in which many contribute shares for the promotion of some common purpose. The point made by appellee is perhaps new in this jurisdiction, but it has been considered and the same or equivalent language construed by other courts, and, so far as we are able to discover, the authorities are uniformly opposed to the restricted construction which counsel would have us approve. See *People v. Clum,* 213 Mich. 651, 182 N.W. 136, 15 A.L.R. 253; *Home Lbr. Co. v. Hopkins,* 107 Kan. 153, 190 Pac. 601, 10 A.L.R. 879; *Malley v. Bowditch,* 259 Fed. 809, 170 C.C.A. 609, 7 A.L.R. 608. It is true that these precedents were decided under statutes varying in some degree from our own, but in each the court has considered the question whether a 'certificate of interest' may fairly be included with the general term 'stock.' The *Malley Case,* supra, involved the question whether a statute imposing a stamp tax upon the issuance of certificates of stock applied to the issuance of certificates of interest in a common law trust. There, as here, counsel contended that certificates of interest were clearly distinguishable from certificates of stock, and therefore were not subject to the requirement. Overruling the point, the court says:

" 'We are of the opinion that, on the original issue of the certificates of shares of the Pepperell Manufacturing Company, a manufacturing company organized in the form of a trust under the common law, and deriving none of its rights, qualities, or benefits from any statute, there was required . . . a stamp tax of five cents each $100 of face value or fraction thereof.'

"After stating the general character of the trust, the court adds that:

" 'There was thus provided a share capital as a basis for the issue of transferable certificates evidencing a proportional interest

therein and carrying with them certain rights while the company is a going concern and in its winding up.'

"Taking up the contention of counsel that such certificates are not certificates of stock, the court then proceeds to say:

" 'The word 'stock' . . . is to be interpreted in connection with the accompanying words of the statute, association, company, or corporation.' It is a term not peculiar to corporations, but a term equally applicable to the share capital or fund created by or in accordance with an agreement for the formation of an unincorporated association or company . . . . It seems to us clear that the words 'certificates of stock' contain no implication of an intent to exclude common law associations or companies.

"A certificate evidencing a transferable share or shares in the share capital of a manufacturing company, whether incorporated, quasi incorporated, or wholly unincorporated, is properly described as a 'certificate of stock.'

"In *Kennedy v. Hodges,* 215 Mass. 112, 102 N.E. 432, the court, in considering the question of local jurisdiction of the ancillary administration of an estate in the assets of which were included certificates of shares in a trust, says:

" 'There is on principle in this respect no distinction between such certificate and a certificate for shares of stock in a domestic corporation.'

"In *Home Lbr. Co. v. Hopkins,* supra, the company was organized as a so-called trust, much after the manner of the company in this case, and question arose whether such company had complied with the conditions which a statute imposed upon the right to dispose of securities and stock in that state, and it was there held that, as the agreement or declaration of trust provided, as does the agreement in this case, giving the company powers and privileges not possessed by individuals and partnerships, it must conform to the regulations imposed on corporations. The state of Michigan has a 'blue sky law' in all essential respects quite similar to our own and made applicable with certain exceptions to 'every person, corporation, copartnership, company or association,' and forbidding the sale or negotiation of any stocks, bonds, or other securities until compliance with the conditions named, and making a violation of such statute a punishable misdemeanor.

"In the case of *People v. Clum,* supra, the defendant, having been convicted of such violation, appealed, and, among other things, urged as does appellee in this case that, as the association which he represented was not incorporated, but was organized under the common law as a trust, the so-called 'stock' was therefore not stock within the meaning of the act, but the court held that—

" 'The shares into which the capital of this association was divided and for which certificates were issued as stated were stock within the meaning of the act, the selling and offering for sale of which were forbidden except as provided by the act.'

"In the instant case the so-called agreement of trust is so framed that, if valid, it vests the trustees with all and more than all the powers usually conferred upon corporations. They have absolute control of all the company's property and assets. The shareholders are expressly excluded from any voice whatever in its management or business and the only enforceable obligation laid upon the trustees is to distribute the remnant, if any there be, of such assets as shall remain when the trust is finally dissolved and all its debts and obligations discharged. Its capital is a share capital, evidenced by certificates which may pass from hand to hand by sale or gift. They expressly provide that the holder has no authority, power, or right whatsoever to do or transact any business for or on behalf of or binding on the company, and the so-called agreement expressly provides that the shareholders shall have no legal right to the property of the trust and no right to call for a partition of the property or dissolution of the trust. That such shareholders in the nebulous and shadowy substance of the so-called trust are stockholders we cannot doubt. The so-called agreement of trust is evidently drawn with meticulous care to avoid the use of the words 'stock' and 'stockholder,' and thereby, if possible, to avoid the bringing the sale of the shares within the scope of the statute; yet even then the pen of its author at times slipped and betrayed him into the use of the natural and approved word, as, for example, where it makes the parties 'covenant and agree to and with each other . . . for the use and benefit of the present and all future subscribers and stockholders,' and again, in enumerating the multitudinous powers of the trustees, it provides authority to hold and reissue the interest of its capitalization 'its stock and other securities.' It follows, without need of further discussion at this point as to this objection, that the shares of capital in the so-called trust are stock within the meaning of the law."

Criminal Pleading

Four Minnesota cases have to do with the sufficiency of indictments. They are *State v. Gopher Tire & Rubber Company*,[13] *State v. Summerland*,[14] *State v. Ogden*,[15] and *State v. Summerland*.[15a] In the first of these cases the indictment charged several sales and was attacked as duplicitous. The court sustained the indictment, holding that the charge was that of offering and selling securities without a license. In the first *Summerland Case* the indictment charged but one sale. It was demurred to on the ground that it failed to charge a violation of the law. The court sustained the demurrer, holding that where

[13] (1920) 146 Minn. 52, 177 N.W. 937.
[14] (1921) 150 Minn. 266, 185 N.W. 255.
[15] (Minn. 1923) 191 N.W. 916.
[15a] (Minn. May 18, 1923.)

an indictment alleges but one sale it thereby brings the charge within the exception made by section 2 of the act, namely, that the act shall not apply to single or isolated transactions. In view of these decisions, the only safe course to pursue in drawing indictments under a law such as the Minnesota law is to allege several sales. In this way the exception with respect to single or isolated transactions is negatived and without rendering the pleading double. In the *Ogden Case* the court held an allegation that defendant sold to a named person followed by the words, "and others," a sufficient negation of the exception.

In the second *Summerland Case* the court held that an indictment, charging a sale of securities to A, made in the course of like transactions wherein like securities were sold to B and C, states but one offense, namely, a sale to A, upon which the state must rely for a conviction.

Miscellaneous Questions Passed on by the Courts

What Constitutes a Sale Within the Meaning of the Law?

In *Edward v. Ioor*,[16] the question whether exchange of stock constitutes a sale within the meaning of the law was before the court. On the point the court said:

"The plan contemplated by these defendants provided for the organization of a corporation under the laws of Arizona to take over and hold the stock in the other companies, giving its own stock in varying proportions in exchange therefor. It was to be largely a holding company. Did the exchange of its stock for that of the other companies constitute a sale within the meaning of the Commission Act? This court has defined a sale as follows: 'A sale is a parting with one's interest in a thing for a valuable consideration.' *Western Massachusetts Ins. Co. v. Riker,* 10 Mich. 279. 'But every transfer of property for an equivalent is practically and essentially a sale, and the deed of bargain and sale is almost universally used to convey land so transferred. Money's worth is a valuable consideration, as much as money itself.' *Huff v. Hall,* 56 Mich. 456, 23 N. W. 88. Bouvier defines a sale as: "An agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." 3 Bouvier's Law Dict. 2983.

"This definition has been adopted by the legislature of this state in the Uniform Sales Act (Act 100, Public Acts 1913, Comp. Laws 1915, 11,832 et Seq.)

"We must assume that the legislature had in mind this well-understood meaning of the word "sale" when the Commission

[16](1919) 205 Mich. 617, 172 N.W. 620, 16 A.L.R. 256.

Act was passed. If the act is not so construed, as was suggested upon the argument, one may exchange worthless stock for government bonds and escape with impunity. We are impressed that when the Arizona Piano Company exchanged its stock for that of other companies it was a sale of its stock within the meaning of the Commission Act."

In *Rex v. Malcolm*,[17] it was held that a "sale" of shares included an agreement to sell.

WHAT CONSTITUTES FRAUD IN THE SALE OF SECURITIES?

Whether a sale of a given security will work a fraud on investors is a question for determination by those charged with carrying out the law. The courts are loath to disturb a finding on this point; and do not unless the finding is based upon an erroneous theory of the law, or unqualifiedly against the evidence, or arbitrary, unreasonable, unjust or against the best interest of the public.[18]

In *In re Investors' Syndicate*,[19] the commission suspended the license of the syndicate to sell a certain instalment savings certificate, on the ground that the sale thereof worked a fraud on investors. The basis for the charge of fraud was that the history of the sale of the certificate, extending over a period of six years, disclosed that over half of the purchasers forfeited after making a few payments and lost all they paid in. The court overruled the commission, saying:

"The instalment certificate promises that, upon the making of specified payments in advance for ten years, the syndicate will pay the purchaser $1,000. This is the amount of the payments made, with interest at 6 per cent. compounded annually. There is a surrender value after two annual payments. The surrender value for each of the first five years is less than the instalments paid. From the sixth year on it exceeds the principal amounts paid. Experience shows that a large number of the certificate purchasers allow their certificates to lapse within a few years. This means a loss to them. It means a gain, measured by book values, to the syndicate. The objection of the commission is based upon the constant lapsing of the certificates. . . . The real objection to the instalment certificates comes from the fact that the purchaser may not carry out his contract, and therefore loses when he takes the surrender value, in short to many of the investors the investment is an improvident one. This is not because of the fault of the syndicate. . . . The commission does not view

[17](1918) 13 Alberta L.R. 511, 42 D.L.R. 90, 2 West. Week. Rep. 1081.

[18]State v. Securities Commission, (1920) 145 Minn. 221, 176 N.W. 759; State ex rel. Saari v. State Securities Commission, (1921) 149 Minn. 101, 182 N.W. 910.

[19](1920) 147 Minn. 217, 179 N.W. 1001.

the savings contracts as of such a nature that the syndicate will be unable to perform them. If it performs them the purchaser will get what is promised. The investment contract is often an unprofitable one to the purchaser. It is so when he fails to make his payments. We do not inquire as to the limits of the right of the statute to supervise investment contracts of the general nature of the one before us. It is enough to say that the investment certificate does not work a fraud upon purchasers within the meaning of the statute."

WHAT ARE THE RIGHTS OF A PURCHASER OF A SECURITY SOLD WITHOUT A LICENSE?

In *Goodyear v. Meux*,[20] suit was brought to recover a balance alleged to be due on a stock subscription contract. One of the defenses interposed was that the issuer and seller of the stock and its agents had failed to comply with the "Blue Sky Law." It was insisted that the contract was as a consequence illegal and unenforcible. This defense was held good by the court.

The court said:

"The statute referred to, which is carried into Thompson's Shannon's Code, at section 3608a 139 et seq., provides that all local and foreign corporations, with certain designated exceptions, shall be known as investment companies. It provides that before offering to sell any stock, bonds, or other securities of any kind or character, except government, state, or municipal bonds, or any lands or town lots, such corporations shall file statements containing information particularized in the act and shall pay a fee of $25. The act further provides such companies shall file additional statements at the close of business on December 31 and June 30 of each year, and it provides that no agent of such companies shall do any business for them until such agents register their names with the secretary of state and pay certain fees. It is further enacted that any person or agent who undertakes to sell the securities of companies which have not complied with the statute, and that any such companies which undertake to do business in the state without compliance therewith, shall be guilty of a misdemeanor punishable by penalties set out. It is provided that the statute shall be complied with before any attempt to sell stock or do any other business in the state is made.

"We think there can be no doubt but that the bankrupt corporation was one of the kind whose business and the sale of whose securities this statute was designed to regulate. It appears from the record that, when the subscription of defendant for this stock was taken, this company was in default with reference to the statements exacted of it by the statute, and it further appears that the agents who sold the stock were not duly registered.

[20] (1920) 143 Tenn. 287, 228 S.W. 57.

"The contract which was entered into with the defendant was accordingly a contract prohibited by law, and the activities of the corporation and its agents in this respect constituted a misdemeanor punishable by law.

"It is well settled that a contract entered into under these circumstances cannot be enforced."[21]

In *Edward v. Ioor et al.*,[22] the Arizona Piano Company sold some of its stock to plaintiff. The consideration passing from plaintiff to the company consisted of stocks in two other corporations. The Arizona Piano Company had not secured a permit from the Michigan Securities Commission to sell its stock in the state. Plaintiff brought suit to recover the value of the stocks assigned to the Arizona Piano Company. In the court below there was judgment for defendants. On appeal a new trial was granted.

On the question as to the right of plaintiff to rescind and recover the value of the stocks parted with the court said:

"This sale to plaintiff of the stock of the Arizona Piano Company was in conflict with the terms of a penal statute, malum prohibitum, and void, although not expressly declared so to be by the statute."[23]

"Some of these cases are so recent and they so fully consider the authorities and the principles involved that we forego further discussion of the subject. When plaintiff's stock in the Arizona Piano Company, received on this void contract, was tendered back, he was entitled to the stocks he had assigned in payment therefor. The transaction had been rescinded, and upon its rescission he was entitled to be restored to what he had parted with. Failure to restore to him what he had parted with entitled him to its value."

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[21]The court cited: Stevenson v. Ewing, (1888) 87 Tenn. 46, 9 S.W. 230; Cary-Lomberd Lumber Co. v. Thomas, (1893) 92 Tenn. 587, 22 S.W. 743; Haworth v. Montgomery, (1891) 91 Tenn. 16, 18 S.W. 399.

[22](1919) 205 Mich. 617, 172 N.W. 620, 16 A.L.R. 256.

[23]The court cited: Loranger v. Jardine, (1885) 56 Mich. 518, 23 N.W. 203; Niagara Falls Brewing Co. v. Wall, (1893) 98 Mich. 158, 57 N.W. 99; Re Reidy, (1893) 164 Mich. 167, 129 N.W. 196; Ferle v. Lansing, (1915) 189 Mich. 501, 155 N.W. 591, L.R.A. 1907C 1096; Cashin v. Pliter, (1912) 168 Mich. 386, 134 N.W. 482, Ann. Cas. 1913C 697; Mawer v. Greening Nursery Co., (1917) 199 Mich. 522, 526, 165 N.W. 861, 168 N.W. 448.

UNIFORM FRAUDULENT CONVEYANCE ACT IN MINNESOTA

By Donald E. Bridgman*

Origin and Purpose of the Act

The Uniform Fraudulent Conveyance Act was passed in Minnesota in 1921, Laws of 1921, Chapter 415, to take effect January 1st, 1922. It was drafted by the National Conference of Commissioners on Uniform State Laws, and approved and recommended by it for passage in all the states at its annual conference in 1918. This is the same conference which prepared the Uniform Negotiable Instruments Act, and other Uniform Acts.[1] The Fraudulent Conveyance Act has already been enacted in eleven states[2] which, with the year of enactment, are as follows: Arizona, 1919, Delaware, 1919, Maryland, 1920, Michigan, 1919, Minnesota, 1921, New Hampshire, 1919, New Jersey, 1919, Pennsylvania, 1921, South Dakota, 1919, Tennessee, 1919, Wisconsin, 1919. Considering the short time the act has been out of the conference, this is a very good showing.

The purpose of the act is to give greater certainty and also uniformity to the law of fraudulent conveyances, rather than to change the law; and in general the existing common law is followed. The explanatory note prefixed to the official edition of the act[3] gives the reason for drafting the act, as follows:

"Existing confusions in the law relating to conveyances in fraud of creditors make the adoption by the several states of an act which shall put an end to the confusions by concise and clear statements of legal principles pertaining to the subject a matter of practical importance.

"The confusions and uncertainties of the existing law are due primarily to three things:

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[1]The Uniform Commercial Acts in force in Minnesota are as follows:—

Uniform Negotiable Instruments Act, G.S. 1913, Secs. 5813-6009; Uniform Warehouse Receipts Act, G.S. 1913, Secs. 4514-4575; Uniform Sales Act, Laws 1917, Ch. 465; Uniform Bills of Lading Act, Laws 1917, Ch. 399; Uniform Partnership Act, Laws 1921, Ch. 487; Uniform Limited Partnership Act, Laws 1919, Ch. 498; Uniform Fraudulent Conveyance Act, Laws 1921, Ch. 415.

[2]This does not include whatever states may pass the act at the 1923 session.

[3]A reprint of the official text of the act with notes is to be found in 44 Am. Bar Ass'n Rep. 341 and in 5 Am. Bar Ass'n Journal 491.

"First, the absence of any well recognized, definite conception of insolvency.[4]

"Second, failure to make clear the persons legally injured by a given fraudulent conveyance.

"Third, the attempt to make the Statute of Elizabeth cover all conveyances which wrong creditors, even though the actual intent to defraud does not exist.

"The Statute of Elizabeth condemns conveyances as fraudulent only when made with the 'intent' to 'hinder, delay or defraud.' There are many conveyances which wrong creditors where an intent to defraud on the part of the debtor does not in fact exist. In order to avoid these conveyances, the courts have called to their assistance presumptions of law as to intent, and in equity have pushed presumption of fraud as a fact to an unwarranted extent; with the result that, while in the main the decisions under the facts do justice, the reasoning supporting them leaves much to be desired.

"In the act as drafted all possibility of a presumption of law as to intent is avoided. Certain conveyances which the courts have in practice condemned, such as a gift by an insolvent, are declared fraudulent irrespective of intent.[5] On the other hand, while all conveyances with intent to defraud creditors[6] are declared fraudulent, it is expressly stated that the intent must be 'actual intent, as distinguished from intent presumed as a matter of law.'

"The act as drafted makes few changes in the law of any state. In this subject, as in many others in our law, need for definite statutory statement does not arise so much from actual conflict between the law of different jurisdictions arising out of clear cut differences in judicial opinion, as from the confusion of thought manifested in judicial opinion, which renders the law in a great degree uncertain in all jurisdictions.

"The chief benefit to be derived from the adoption of a uniform act on conveyances in fraud of creditors is that, if properly enforced, it will give a known certainty to the law which it does not now possess."

The advantages of this act are also found in the fact that the law is brought into uniformity with other states. Business is conducted to a large extent between different states; and in granting and obtaining credit the law governing fraudulent conveyances is an important feature. A certain and uniform law aids in extending credit. Further, the law of fraudulent conveyances is closely related to bankruptcy; and with a federal Bankruptcy Act the same in all states, it is desirable to have fraudulent conveyances also governed by a uniform law.

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[4]Covered by sections 1 and 2 of Uniform Act.
[5]Sec. 4, also sec. 5, 6 and 8.
[6]See sec. 7.

The Fraudulent Conveyance Act was prepared by the Committee on Commercial Law of the National Conference of which Sampson R. Child of Minneapolis was a member, also Prof. Samuel Williston of Harvard Law School. Prof. William Draper Lewis, of University of Pennsylvania Law School, was draftsman of the act. Tentative drafts of the act were before the National Conference for three years for consideration, before final adoption in 1918.

Scope of the Act

The scope of the act is to put into statutory form the Statute of Elizabeth[7] relating to conveyances fraudulent as to creditors and the rules of construction which have developed around it. This statute, in one form or another, is the law in every state; and is found in Minnesota in section 7013,[8] General Statutes 1913, and also in sections 7014, 7015, 7016 and 7019[9] in so far as the last four sections apply to section 7013. Section 7013 is therefore expressly repealed in section 14 of the Uniform Act, because superseded; but the other four sections are not expressly repealed, since by their terms they are general in nature and apply to the entire subdivision or chapter, and therefore remain to govern the interpretation of sections 7011, 7018, etc. The topics covered by these four sections, in so far as they applied to section 7013, are largely provided for expressly in the Uniform Act, but in a somewhat different way.[10]

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[7]13 Eliz. C. 5, (1570).

[8]This section is as follows:—

"Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or of any rents or profits issuing therefrom, and every charge upon lands, or upon the rents or profits thereof, made with intent to hinder, delay, or defraud creditors or other persons of their lawful actions, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, action commenced, and order or judgment suffered, with like intent, as against the persons so hindered, delayed or defrauded, shall be void."

[9]These sections provide that the conveyances fraudulent against creditors are fraudulent against their successors and assigns, etc., that fraudulent intent is a question of fact, that the title of a bona fide purchaser shall not be impaired, and that "conveyance" covers every creation, assignment, etc., of any estate or interest in lands.

[10]The source of section 7013, and of the four subsequent sections relating to it, is as follows: statute 13 Eliz., chap. 5, (1570) provided that all conveyances, etc., of lands, and goods, and all bonds or judgments, etc., made with intent to delay, hinder or defraud creditors and others of their debts, etc., shall as against such persons, their representatives and assigns be void, but this was not to extend to conveyances, etc., on good consideration, bona fide to a person without notice of the fraud.

The courts gradually built around this statute rules that certain facts constituted constructive fraudulent intent, regardless of the actual

Many states do not have a statute corresponding to section 7010 relating to transfers of goods and things in action in trust for the grantor; and since the law under this section is usually regarded as practically in the same field with the Uniform Act, the repeal of section 7010 by section 14 of the Uniform Act is in aid of statutory uniformity.[11] It is to be noted that section

intent, until in 1818, in Reade v. Livingston, (1818) 3 John. Ch. 481, Chancellor Kent in New York held that a voluntary conveyance was constructively fraudulent as to creditors, if the grantor had any debts, although sufficient assets remained to care for the debts. There was a legislative reaction against this rule; and in 1829 an act was passed in New York, following the provisions of the Statute of Elizabeth, but adding a section to the effect that fraudulent intent was a question of fact, and that no conveyance should be adjudged fraudulent solely because it was without consideration. New York, Revised Statutes 1829, part ii, Ch. vii, title iii, vol. ii, p. 137. This New York statute was copied directly or indirectly in a number of states; and the Minnesota statute, sections 7013 to 7016, and 7019, G.S. 1913, was originally taken from it in 1851 (Ch. 64 R.S. 1851) almost verbatim. For some reason, in the 1866 revision, "goods or things in action" were omitted, leaving the statute applying in terms only to land; but the Minnesota court has held that the Statute of Elizabeth is merely declaratory of the common law, and that by common law transfers of chattels and things in action with intent to defraud creditors are void as to creditors, although not expressly mentioned in the statute. Byrnes v. Volz, (1893) 53 Minn. 110, 54 N.W. 942. Thus the Minnesota Statute of 1913 was derived from the Statute of Elizabeth with some slight modifications, and a revised terminology; and as construed by our courts it represented in a general way the law, statutory or common, in most of the states. This is the situation the Uniform Act was drafted to meet. It, also, is based on the Statute of Elizabeth, as construed by the courts; and there should not be great difficulty in using the Uniform Act in Minnesota. Many of the decisions of the court under the former statute should still be effective under the new act.

It may be of interest to note that chapters 62, 63, and 64, R.S. 1851, relating to Fraudulent Conveyances and Statute of Frauds, are almost verbatim the same as chapter vii, part ii, R.S. 1829, of New York, omitting some sections on retention of possession by a vendor of goods. The New York chapter had three titles. The division was (1) Fraudulent Conveyances and Contracts Relative to Lands, (2) Relative to Chattels and Things in Action, and (3) General Provisions. The last included the Statute of Elizabeth. In General Statutes, Minnesota, 1866, the arrangement was changed to the present one; and chapter 41 of Minn., G.S. 1866 has the three titles: Conveyances Fraudulent as to Purchasers, Statute of Frauds, and Conveyances Fraudulent as to Creditors. This was a return to the original English statutory arrangement; and is the same as chapter 68, Minn., G.S. 1913, except that the Statute of Frauds now comes first. Section 7010 dated from 1851, being originally in the chapter relating to chattels. Sections 7011 and 7012 on retention of possession appear in 1866. Section 7018, Bulk Sales law, was passed in 1899. Section 6707, regarding a resulting trust for creditors, dates from 1851, as does section 6719. The requirement for filing a chattel mortgage appears in 1866.

[11]The comment of Prof. Williston on the effect of the Uniform Act on section 7010 is:

"I should suppose that section 7010 would also be superseded, leading to the consequence which would, I suppose, have represented the common law in many states, that a conveyance by a solvent grantor

7010 relates only to personal property, and that the Minnesota supreme court has held that at least in some of its aspects it merely states the common law which applies also to reality.[12] Now section 11 of the Uniform Act provides that in any case not provided for in the act, the rules of law and equity shall govern, which means that in such case the common law is in force. The common law rule, therefore, which corresponds to section 7010, but which governs land as well as chattels and choses in action, would appear to remain in force under the Uniform Act.

It would seem that the provisions of the Uniform Act might also apply, as well as section 6707, General Statutes 1913, to the rights of creditors where the debtor furnishes the consideration for a conveyance to another party. If an insolvent debtor instead of making a direct gift of his property to C, uses it as consideration to B for B conveying to C, should not this be regarded as a conveyance void as to creditors under section 4 of the Uniform Act, and not merely presumptively fraudulent under section 6707? The Uniform Act in its protection of subsequent creditors and in other particulars is broader than section 6707. There is division of opinion among the states as to whether or not such a purchase of property in the name of a third person by the debtor, comes within the Statute of Elizabeth;[13] but there is an indication in several Minnesota cases[14] that the statute on resulting trusts for creditors[15] and on fraudulent conveyances[16] are closely related, and that the securing of a conveyance to another when the debtor furnishes the consideration, may be treated as a conveyance fraudulent as to creditors. The word "conveyance" in section 1 of the Uniform Act, which is defined as including certain transfers, etc., but not to the exculsion of others, is easily open to the interpretation that it includes a conveyance by an outside person, where the debtor pays for it, in view of the fact

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to another person in trust for the grantor is not fraudulent in the absence of fraudulent intent, and the creditors of the grantor could not treat the conveyance as void, but would be obliged to proceed in an appropriate manner to secure the benefit of the grantor's equitable interest in the same way as if the trust had been created by a third person."

[12]Wetherill v. Canney, (1895) 62 Minn. 341, 64 N.W. 818; Anderson v. Lindberg, (1896) 64 Minn. 476, 67 N.W. 538; Stephon v. Topic, (1920) 147 Minn. 263, 266, 180 N.W. 221.

[13]27 C.J. 452, 453; Bigelow, Fraudulent Conveyances, 127-132.

[14]Blake v. Boisjoli, (1892) 51 Minn. 296, 53 N.W. 637; Leonard v. Green, (1885) 34 Minn. 137, 24 N.W. 915; Stone v. Myers, (1864) 9 Minn. 303.

[15]Sec. 6707.

[16]Sec. 7013.

that the Statute of Elizabeth has been held to apply to such conveyances.

It would seem that payment of premiums on life insurance policies would come within the terms of the Uniform Act, as well as being governed by section 3465, General Statutes 1913, which provides that:

"All premiums paid for insurance in fraud of creditors, with interest thereon, shall inure to their benefit from the proceeds of the policy, if the company be specifically notified thereof in writing."

The section quoted does not attempt to define when the payments are in fraud of creditors. This is for the Uniform Act to do. Although there is difference among the states[17] it appears that in Minnesota, in view of the above statute, payments of life insurance premiums in connection with the payment of the policy are regarded as a "conveyance" to the beneficiary and fall within the terms of the Uniform Act. A discussion of payment of life insurance premiums, showing them to be in substance payments to the beneficiary, is found in *Merchants' and Miners' Transportation Co. v. Borland.*[18]

There is also the question whether the Uniform Act does not also apply to chattel mortgages as well as the chattel mortgage act, section 6966. For instance, if a chattel mortgage is given for a disproportionately small sum by an insolvent debtor, is it not absolutely fraudulent as to creditors under sections 3 and 4 of the Uniform Act, although duly filed and given in good faith? A chattel mortgage falls clearly within the meaning of the word "conveyance" in section 1 of the act. Are the words "purpose of hindering, delaying or defrauding any creditor" in section 6966 to be construed as referring to what the provisions in the Uniform Act say is fraudulent as to creditors? Or are they to retain the meaning which they have been given heretofore in the decided cases,[19] and is a chattel mortgage also fraudulent if it is given in a manner described as fraudulent in the Uniform Act? A chattel mortgage seems to be regarded as falling within the Statute of Elizabeth, and therefore the Uniform Act, in matters not provided for in the chattel mortgage statute.[20]

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[17]27 C.J., 427, et seq.

[18](1895) 53 N.J. Eq. 282. 31 Atl. 272.

[19]Dunnell's Digest, sec. 3884, et seq.

[20]Bigelow, Fraudulent Conveyances 400; 27 C.J. 451.

Prior to the passage of the chattel mortgage statute, the court held such mortgages were governed by the chapter on fraudulent conveyances, Chophard v. Bayard, (1860) 4 Minn. 533 (418); and after the

The Uniform Act contains provisions relating to the remedies of creditors,[21] not found in our statutes, outside of the attachment statute.

There are matters which the act does not cover, that should be referred to in discussing its scope. Sections 7011, and 7012, relating to retention of possession by a seller of goods as presumptively fraudulent, and section 7018, General Statutes 1913, the Bulk Sales law, though included in the same subdivision with section 7013, yet are supplemental provisions relating to additional matters in fraud of creditors. Section 7017, requiring an assignment of debt to be filed, is in the same category. These sections are not superseded by the Uniform Act, and it is expressly provided in Section 14 of the act that they are not repealed. Nor does the Uniform Act cover the effect of omitting a trust in a conveyance, section 6719. The rights of personal representatives and assignees for creditors, under sections 7313, 7314 and 8332, to recover back property fraudulently conveyed, remain unaffected.

Outline of Act

What is the effect of the Uniform Act within the field which it covers? After a brief resumé of its provisions, we will take up the separate sections.

The first three sections constitute a definition of important terms. "Conveyance" is made broad in section 1 to cover any form of transfer of property; also "creditor" is broadly defined, so the one word can cover persons having the various kinds of claims. The definition of "insolvent" in section 2, uses the words "assets" and "debts" defined in section 1, and is important in relation to section 4, which declares certain conveyances by an insolvent, fraudulent. "Fair consideration" defined in section 3 to exclude inadequate consideration, is used in sections 4, 5, 6 and 8, where certain conveyances, if made without fair consideration, are declared fraudulent.

Sections 4 to 8 state what conveyances are fraudulent as to creditors, and whether fraudulent as to present or both present and future creditors. Sections 4, 5 and 6 declare that certain conveyances without fair consideration are fraudulent as to creditors without actual intent to defraud; that is, they are con-

passage of that statute, the court indicated that the law in that respect had not been changed. Horton v. Williams, (1875) 21 Minn. 187, 189, 191.

[21]Secs. 9 and 10.

structively fraudulent because of the circumstances under which made,—thus conveyances by an insolvent,[22] conveyances by persons in business leaving them with unreasonably small capital,[23] and conveyances by a person about to incur debts.[24] Section 7 deals with conveyances where there is actual intent to defraud. Section 8 states when conveyances by a partnership are fraudulent.

Sections 9 and 10 provide for the rights of creditors,—against whom and how they can proceed to reach the property fraudulently conveyed. One section treats of creditors whose claims have matured, the other of creditors whose claims have not matured.

Sections 11 to 15 are provisions common to all uniform acts. Section 11 provides expressly for the existing law to govern in cases not provided for in the act, while section 12 provides that the act shall be construed to promote uniformity, that is, the decisions of other states under the act shall have special weight. A short name, "Uniform Fraudulent Conveyance Act,"[25] a repealing clause,[26] and a provision that the act shall take effect Jan. 1, 1922,[27] complete the act.

Separate Sections of the Act

"Section 1. [Definition of Terms.] In this act 'assets' of a debtor means property not exempt from liability for his debts. To the extent that any property is liable for any debts of the debtor, such property shall be included in his assets.

" 'Conveyance' includes every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or incumbrance.

" 'Creditor' is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

" 'Debt' includes any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent."

The term "assets," defined in this section, is used only in section 2 in defining insolvency. It is apparent that "assets" should not include exempt property which cannot be reached by creditors, when being compared with "debts" to ascertain whether there is a condition of insolvency such as produces a fraud on creditors. In Minnesota with its liberal exemption laws, fixing no value limit on the homestead exemption, this definition is of special importance. A gift of his property by a person leaving him without unexempt assets to cover his debts, should be fraudu-

[22]Sec. 4. [23]Sec. 5. [24]Sec. 6. [25]Sec. 13. [26]Sec. 14. [27]Sec. 15.

lent under section 4, regardless of how great the value of his exempt property may be.

This definition probably states the former law as to fraudulent conveyances, since it delays and defrauds creditors if the debtor gives away his property leaving only exempt property, that cannot be reached, as well as if he leaves himself with no property.[28] The rule under the Bankruptcy Act, sec. 1a(15), that exempt property of the debtor shall be counted in ascertaining insolvency, is adopted because the statute clearly requires it.[29]

"Conveyance" is given a very broad meaning to cover any possible form of transfer of property of any kind, or giving it as security. It would cover the release of a debt. While this is a larger meaning than the word usually has, yet when conveyances fraudulent as to creditors are spoken of, the broadest use of the word is understood. Certainly it is a convenience in the other sections of the act to be able to use one word and avoid the repetition of a long clause.

This full definition doubtless states the former law existing prior to the passage of the Uniform Act. It covers all that section 7013 was intended to cover; and one word is used instead of thirty-five words. It is true that the former statute, section 7013, only referred in terms to land; but the court has held that transfers of goods and choses in action in fraud of creditors are void as to creditors at common law.[30]

Reference has already been made to the fact that "conveyance" may well be construed to include conveyances to a third person where the debtor furnishes the consideration, and payment of life insurance premiums in connection with payment of the policies.[31]

The definition does not expressly exclude conveyance of exempt property; but since fraudulent conveyance statutes have all been construed not to apply to conveyances of exempt property, to which the creditor has no right,[32] this act will without doubt be construed the same way. Section 11 expressly provides

[28]Bigelow, Fraudulent Conveyances 225; Underleak v. Scott, (1912) 117 Minn. 136, 142, 134 N.W. 731.

[29]In re Baumann, (1899) 96 Fed. 946; In re Crenshaw (1907) 156 Fed. 638.

[30]Dunnell's Digest, sec. 3853.

[31]See secs. 6707 and 3465, Minn., G.S. 1913.

[32]Blake v. Boisjoli, (1892) 51 Minn. 296, 53 N.W. 637; Dunnell's Digest, sec. 3850; Bigelow, Fraudulent Conveyances 52 et seq.; Glenn, Creditor's Rights and Remedies, sec. 97.

for existing rules of law to govern in cases not provided for in the act.

The definition of "conveyance" does not exclude property supposedly mortgaged to its full value. It has been held in Minnesota[33] that the conveyance of such an equity is not fraudulent because of no value. There is much to be said for the dissenting opinion in the case, that it is for the creditor, not the jury, to determine whether there is a value in the equity, and that the creditor should have the equity if he wishes it. The dissent appears to represent the better rule, as well as the weight of authority,[34] and since section 12 calls for uniform construction of the act, the act may well change the law of Minnesota on this point. Of course, the rule of *Aretz v. Kloos*,[35] is not affected, that conveyance of property mortgaged to its full value, in satisfaction of the mortgage debt, is not fraudulent, since the release of the debt is consideration.

In the definition of "creditor," also, the word is given the broadest meaning, to include a person having any kind of a legal claim. The word "creditor" thus includes all that was signified by "creditors or other persons" in the former statute. There would be included under the term "unmatured," any claim on a debt not yet due, under the term "unliquidated," a claim for damages in tort though no suit had been brought,[36] and under the term "contingent," the right against a guarantor, or indorser of a note, although the principal has given no indication of defaulting. All of these are protected as claims of a "creditor" against fraudulent conveyances.

This broad definition apparently represents the weight of authority,[37] although there is some conflict on several points. Although a person having an unliquidated or contingent claim, cannot have it satisfied out of the property fraudulently conveyed, until it is liquidated, or the contingency has happened, yet the definition is of significance in relation to section 4, since such person is protected as a creditor against conveyances by an insolvent without fair consideration, and is regarded as a present

[33]Aultman v. Pikop, (1894) 56 Minn. 531, 58 N.W. 551.

[34]Bigelow, Fraudulent Conveyances, 38. Glenn, Creditors' Rights and Remedies, sec. 27.

[35](1903) 89 Minn. 432, 95 N.W. 216, 769.

[36]An example of protection of one having a tort claim for damages as existing creditor from the time the cause of action arose in Eschmann v. Lords, (1920) 92 N.J. Eq. 382, 112 Atl. 488.

[37]Bigelow, Fraudulent Conveyances 163, et seq.; 27 C. J. 472, 473, 476, 477.

existing creditor, and not a future or subsequent creditor. The definition apparently makes no change in the law of Minnesota, except to make a clear and definite rule and remove any doubt. Existing cases attach a broad significance to the words "creditors or other persons" of the former statute.[38]

The term "debt" is defined to include any legal liability, corresponding to the definition of "creditor" to include a person having any legal claim. It includes in one word all that section 7013 meant by "lawful actions, damages, forfeitures, debts or demands;" and is a more modern and simpler mode of expression. The significance of the words "unmatured," "unliquidated" and "contingent" has been referred to under the definition of "creditor." The same remarks, that this is a clarification of the law, rather than a change, also apply to this definition.

"Section 2. [Insolvency.] (1) A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

"(2) In determining whether a partnership is insolvent there shall be added to the partnership property the present fair salable value of the separate assets of each general partner in excess of the amount probably sufficient to meet the claims of his separate creditors. and also the amount of any unpaid subscription to the partnership of each limited partner, provided the present fair salable value of the assets of such limited partner is probably sufficient to pay his debts, including such unpaid subscription."

The importance of this section is that a conveyance by an "insolvent" as here defined is declared fraudulent as to creditors in section 4, if without fair consideration. A person cannot give away his property as against creditors if he is or thereby becomes "insolvent," regardless of intent.

This section clears up a doubtful point. It is true that under the Minnesota state insolvency law, "insolvent" means unable to pay debts as they come due in the ordinary course of business,[39] and that this is the common-law definition of insolvency for the purpose of insolvency acts.[40] However, "insolvency" is also used to denote the fact that the value of a person's property is not equal to his obligations,[41] and this comparing of assets with debts

[38]Stone v. Myers, (1864) 9 Minn. 303 (287); Byrnes v. Volz, (1893) 53 Minn. 110, 54 N.W. 942; Dougan v. Dougan, (1903) 90 Minn. 471, 97 N.W. 122; Murphy v. Casey (1922) 151 Minn. 480, 187 N.W. 416.

[39]Daniels v. Palmer, (1886) 35 Minn. 347, 29 N.W. 162; Dunnell's Digest, sec. 4533.

[40]Glenn, Creditors' Rights and Remedies, sec. 370.

[41]Daniels v. Palmer, (1886) 35 Minn. 347, 29 N.W. 162.

is a more fundamental test, than whether or not at a particular moment, a person has the ready money to pay accruing debts. This comparison of property with obligations is the test of insolvency adopted in the Bankruptcy Act,[42] and in this Uniform Act. There are indications that for the purpose of determining whether a conveyance was fraudulent, the Minnesota court, prior to the passage of the Uniform Act would have used the same broad test.[43] There are cases holding that if a debtor is embarrassed, and cannot readily turn his assets to pay his debts, a voluntary conveyance is void as to creditors, though the value of the assets may exceed his debts.[44] The Uniform Act is more favorable to the debtor on this point, requiring insolvency to make the conveyance constructively fraudulent under section 4. However, the use of the words "present fair salable value" of the assets in the definition and especially the provisions of section 5 and 6 are to be noted. The fact that the debtor was embarrassed, although not insolvent, would, of course, be evidence of actual intent to defraud under section 7 of the act, if he made a gift of part of his property, not sufficient to render him insolvent.

In determining insolvency "probable liability on his existing debts as they become absolute and matured" raises some interesting questions of fact. What is the probable liability on contingent, and unliquidated debts? The likelihood of the contingency happening is an important factor. It would seem that in cases of serious doubt the debtor should take the risk rather than the creditor, and should not give away his property, when subject to contingent liability that is likely to become absolute.

The second part of section 2 prescribes rules for determining the solvency or insolvency of a partnership, providing that the surplus assets of the individual partners above their debts, shall be added to the partnership property in making the comparison with partnership debts. This clears up a point on which there is considerable doubt and an absence of decisions in Minnesota.

"Section 3. Fair Consideration. Fair consideration is given for property, or obligation,

(a) When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

(b) When such property, or obligation, is received in good faith to secure a present advance or antecedent debt in amount

[42]Sec. 1 a (15).
[43]Filley v. Register, (1860) 4 Minn. 391 (296).
[44]Bigelow, Fraudulent Conveyances 226.

not disproportionately small as compared with the value of the property, or obligation obtained."

"Fair consideration" as here defined, is used in sections 4, 5, 6 and 8, to declare certain conveyances fraudulent regardless of intent if made without "fair consideration." It is to be noted that there must be a fair equivalent and good faith of the grantee. A conveyance for an inadequate consideration, or where a gift is primarily intended, but some incidental consideration is involved, is constructively fraudulent under the four sections mentioned, as well as a gift with no consideration. The presence of consideration sufficient for a binding contract is not enough. There must be "fair consideration" as here defined.[45] However, if a purchaser gives less than a fair consideration in good faith, he is entitled to hold the property as security for repayment under section 9 (2).

Prior to the passage of the act, the decisions regarded inadequate consideration as evidence of a fraudulent intent,[46] and the section may involve some change of the law in treating an inadequate consideration like no consideration, as regards hindering and defrauding creditors. Of course, if the debtor sells his property for an inadequate price, not a fair equivalent, he has decreased his property which the creditor can reach, and hindered the collection of the debt. It is chiefly a matter of extent of the wrong to the creditor, whether the debtor gives away his property, or gets some inadequate price in return.

In cases where there is no constructive fraud, lack of fair consideration would, of course, be evidence of actual intent to defraud under section 7 of the act.

Satisfaction of an antecedent debt is "fair consideration" under the definition. The rule is thus continued that a preference of one creditor is not a fraudulent conveyance,[47] and that the remedy

[45]An example of lack of fair consideration would be where the debtor conveys his property to a relative, who in return pays some debts of the debtor not at all equal to the value of the property, the motive back of the conveyance being the debtor's desire to provide for the relative or give the property to him. While the payment of the debts would be consideration for a binding contract, it would not be "fair consideration;" and the conveyance would be fraudulent under section 4, if made by an insolvent.

[46]Carson v. Hawley, (1901) 82 Minn. 204, 84 N.W. 746; Bond v. Stryker, (1898) 73 Minn. 265, 76 N.W. 26. In some instances the court has treated a conveyance where a fair equivalent in property was not obtained, the same as a gift, for instance, conveyance on an agreement to support. Tupper v. Thompson, (1880) 26 Minn. 385, 4 N.W. 621; McCord v. Knowlton, (1900) 79 Minn. 299, 82 N.W. 589. See Bigelow, Fraudulent Conveyances 608 et seq.; 27 C.J. 544.

[47]Dunnell's Digest, sec. 3852.

is under the Bankruptcy Act which provides for the recovery back of certain preferences. The section requires good faith of the grantee; but it is hardly to be supposed that it is intended to change the rule that even though the debtor prefers a friendly creditor with intent to spite a hostile creditor, and prevent him from recovering his debt, as the friendly creditor knows, it is not a fraudulent conveyance.

The intent of the section is obviously to require the debtor to use his property either in paying his debts or in securing property in return which may be available for creditors unless exempt.[48] There is no provision that moral obligations, relationship, "meritorious consideration" or executory agreements constitute "fair consideration." There must be actual property. This raises many interesting questions. How under this section can there be "fair considerations" to sustain, if made by an insolvent, or otherwise constructively fraudulent, the following conveyances: settlements either before or after marriage, conveyance on promise to support, conveyance on any moral obligation or duty, conveyance on agreement to render services in the future, on agreement to pay money or convey property in the future, or conveyance on any other executory consideration? Of course, if the promise to pay money or convey property is subsequently carried out, "fair consideration" has been received. But can services ever constitute "fair consideration" except as the basis of an antecedent debt? In construing the words "antecedent debt," however, it is not unlikely that the court would hold to the present rule, that a debt outlawed by the Statute of Limitations furnishes consideration.[49] While the right to sue is barred by statute, the outlawed debt still exists as a debt.

This section, while in general stating the former law, apparently makes some changes; and it is to be hoped that the courts in construing it may bear in mind section 11 of the act, and strive for uniform interpretation in the different states.

(To be concluded.)

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[48]There is nothing in the section to the effect that a debtor may not receive property in exchange which is exempt under statute. Jacoby v. Parkland, etc., Co., (1889) 41 Minn. 227, 43 N.W. 52. But see Kangas v. Roby, (1920) 264 Fed. 93, 45 A.B.R. 209, and discussion of case in 5 MINNESOTA LAW REVIEW 383.

[49]Frost v. Steele, (1891) 46 Minn. 1, 48 N.W. 413; 27 C.J. 539.

The broad definition of "debt" in section 1 is to be borne in mind. It would apparently include an agreement for alimony and settlement of property rights, such as was sustained in McNally v. Emmetsburg Nat'l Bank, (Ia. 1922) 192 N.W. 925. In such a case the question is one of fraudulent intent under section 7 of the act.

FEDERAL INTERVENTION IN LABOR DISPUTES

By Marjorie Jean Bonney*

In the fall of 1916 the people of the United States were confronted for the first time with the prospect of a nation-wide strike which threatened to tie up the transportation system of the country. Following a period of national anxiety, during which plan after plan for the peaceful settlement of the dispute was seen to fail, Congress passed the Adamson act which granted the demands of the threatening unions and averted the strike. The fall and winter of 1919 witnessed one of the most disastrous coal strikes that has ever occurred in the mine fields. In October, 1921, a nation-wide strike was again threatened by the transportation brotherhoods and averted only narrowly. A second disastrous mine strike of national import, which involved both the anthracite and the bituminous fields, closed the chief coal mines of the country from April of last year until September. And following close on the heels of the mine strike came the shopmen's strike which is still unsettled on 135 railroads. The increasing frequency of threats of national railroad strikes; the general discomfort and inconvenience caused the public by the strikes of individual railroad crafts, and the realization of the national suffering which results from a nation-wide coal strike, make the question of the power of the federal government to intervene and prevent strikes of such a disastrous nature, one of vital importance.

It is therefore, the purpose of this paper, first to present the extent to which the federal government has already developed its powers of intervention, and second, to investigate what further measures it can adopt to insure the nation against the strike danger.

I

The Arbitration Act of 1888, the Erdman Act, and the Newlands Act

The survey of the development of federal intervention in railway labor disputes will entail a study of the policy of the government toward this type of dispute from 1877 when it first took cognizance of the strike danger, through 1888, 1898 and 1913

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when the corporation was more feared than the labor union, up to 1916 and 1920 after it was realized that a definite shift of power from capital to labor had taken place. The policy of the government in these years is exemplified, with the exception of 1877, in federal acts dealing with the railroad strike problem.

At the outset of such a study it is important to note that there was no national labor problem calling for federal intervention before 1877. The question arises, why did this not become earlier a national problem? And the answer is found, first, in the lack of a permanent, self-conscious laboring class, and secondly in the lack of stable national organizations giving to members of this class unity of aim and action.[1] Not until there is a self-conscious, wage-earning class definitely united into national organizations can there be a permanent national labor problem; a problem which calls not for intermittent federal cognizance, but for a permanent constructive policy.

We find that the labor problem does not become national with the railroad strikes of 1877. The approach of the national status of the problem is merely foreshadowed by the disturbances of this year. The rail strikes of 1877[2] may be said to mark an intermediary stage in the development of the labor question from a local to a national problem. For the first time in the history of the country the effects of a labor strike were seriously felt over more than one state; for the first time agencies of the federal government had been interfered with, and for the first time federal troops were called out to suppress a labor strike. The strike, however, did not have back of it a national organization, nor was it yet recognized as presenting a permanent national problem. The president intervened, not because he saw in the labor uprisings a national problem with which the federal government was obliged to deal,[3] but because he was requested by the states as

[1]For an analysis of the growth and history of the labor movement see Commons, History of Labor in the United States, Vols. I and II. Vol. I traces the development of the labor movement from the colonial period up to the period of nationalization in 1860. Vol. II carries on the history from 1860 to 1918. These volumes deal with "the background which explains structure, policies, results and problems."

[2]These strikes started on the Baltimore & Ohio road at Martinsburg, W. Va., and spread rapidly over fourteen states. A description of these strikes is given in McNeill's The Labor Movement of Today. Good accounts are also given in the magazines of this period. An article by Thomas A. Scott in the North American, September, 1877, The Recent Strikes, contains a good description of the 1877 disturbances.

[3]Contrast the action of President Hayes in dealing with the rail strikes of 1877 with the action taken by President Cleveland in the Pullman strike of 1894. Infra, p. 472.

provided in the constitution, to suppress domestic violence. Nor were the people aware that a permanent labor problem had arisen. They did not regard the organized strike as a menace; they feared, rather, unorganized rioting which involved widespread destruction of property. It was the duty of the government to protect property against violence that was here stressed rather than its duty to aid in the amicable settlement of disputes. The Nation, editorially, expressed this attitude when it said, "Society does not owe any particular rate of wages to anybody. It owes protection of life and property and personal rights to its members and nothing more."[4] The proposals of the time urged, therefore, better means of protecting property from violence and better organization of federal and state military forces. It was the cities that listened to these proposals, and the chief effect of the rail strikes of 1877 was a strengthening of the local militia.[5]

If the railroad strikes of 1877 foreshadowed the approach of a permanent labor problem, the great southwestern strike of 1886[6] announced its arrival. For in this strike, which was the first organized railroad dispute of serious import, was clearly demonstrated the dangerous possibilities of repeated clashes of interest between organized railroad labor and arrogant railroad companies. Congress at last recognized the problem as one which could not be settled by federal troops and state militias, and therefore began to consider what action it could take to avert similar disturbances. The result was that in 1888 Congress passed a voluntary arbitration act[7] and thus inaugurated the federal policy of dealing with the railroad labor problem through voluntary boards.

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[4] 25 Nation 85.

[5] 25 Nation, 85, "The inefficiency of the militia showed the need of a reliable basis of operation for the troops, and the construction of numerous and strong armories in the large cities dates from 1877." 2 Commons, op. cit. 191.

[6] This strike was on the Jay Gould lines, and was spoken of as "The greatest and most memorable railroad strike in the United States." It was called by the Knights of Labor March 1, became general on March 8 and dragged on until May 4, when it was officially called off. A detailed account of the strike is contained in the report, "The Great Strike of 1886," which was made by the Bureau of Labor Statistics and Inspection of Missouri in 1887.

[7] Three bills were presented to the house and one to the senate between March 22 and March 31, 1886, and one providing for voluntary arbitration was passed by both houses of the 49th Congress, but failed to receive President Cleveland's signature because it lacked a provision giving initiatory powers to the government. Cleveland outlined the type of arbitration he favored in his message of April 22, 1886. Cong. Rec., 40th Congress, first session, April 22.

The arbitration act of 1888[8] was broad in its scope, applying to all controversies between interstate transportation companies and their employees.[9] It invested the arbitrators[10] with the power to subpoena witnesses and require the production of papers,[11] but it gave them no power to enforce the awards which they were authorized to make. The act provided, merely, that the decision of the arbitrators be publicly announced and then filed with the United States commissioner of labor.[12] The fear of contravening public opinion would be, the legislators thought, sufficiently strong to induce both sides to abide by the award.[13]

Ostensibly this act was highly favorable to labor; for labor, whose bargaining power was, in 1888, materially weaker than that of capital, was then strongly in favor of arbitration while capital, on the other hand, as strongly opposed it. These two attitudes were demonstrated in the southwestern strike, for in this dispute the unions had made repeated appeals for arbitration, and the companies had as repeatedly refused it.[14] It would seem, therefore, that any act providing for arbitration would be to labor's advantage. Actually, however, labor gained very little. For the settlement of labor disputes by arbitration under the act was practically foredoomed to failure, by the condition included in the act, that boards could be established only after both sides had agreed to the proposal to arbitrate.[15] The attitude taken by the roads in 1886 was proof of the unlikelihood that this dual acceptance would ever be secured. The congressmen were aware

[8]25 Stat. at L. 501-04.

[9]25 Stat. at L. 501, sec. 1.

[10]The arbitrators provided for by the act were three in number. One was to be chosen by the employees, one by the railroads, and the third by these two. No provision was made for the choice of the third arbitrator in case the other two failed to agree. See Erdman act footnote 33.

[11]25 Stat. at L. 502, sec. 2.

[12]25 Stat. at L. 502, sec. 3.

[13]Note statement of Representative Osborne: "There is one tribunal before which the highest in the land will bow in humble submission, and that is the tribunal of public sentiment. No man, no body of men can any more withstand the breath of public sentiment than they can blow away with a breath the mist that comes up from the Ocean." Debate on Act of 1888, 49th Congress, first session. Cong. Rec. p. 3021.

[14]Report, "The Great Strike of 1886." It is also interesting to note here that labor was at this time petitioning federal and state legislatures to pass arbitration measures. Note resolution from a local assembly of Knights of Labor read by Rep. Glover in Congress in 1886: "We call upon our legislatures . . . to enact such measures as will compel the recognition of labor organizations and compel corporations to arbitrate differences between themselves and their employees." Cong. Rec. 49th Congress, first session, p. 2973.

[15]Arbitration boards could be established only by the joint, voluntary action of the two parties. See footnote 10.

of this inherent weakness in the bill, but were not yet prepared to bring any form of compulsion to bear on the railroad companies.[16]

"If this measure fails," said Representative O'Neill, however, "with the strong arm of the government we must take these giant corporations by the throat and tell them they must yield to arbitration; they must submit to some peaceful means of settlement."[17]

At first glance, therefore, the arbitration act of 1888 appears to be an entirely futile measure. The act contained one clause, however, which might have redeemed it from ineffectiveness had the government not been hesitant in employing it. This was the clause providing for the creation of a temporary body of three commissioners[18] authorized to investigate labor disputes upon the motion of the president, or upon the application either of the parties to the controversy or of the executive of the state in which the dispute occurred.[19] Interest attaches to this provision for it marks the only appearance of compulsory investigation[20] in federal arbitration acts until 1920.

For six years this act remained inactive on the statute books. And in 1894 when the first attempt to utilize it was made, it entirely collapsed. In this year the Pullman strike occurred.[21] Arbitration proved impossible under the act of 1888 since George Pullman against whom the strike was called, insisted that he had nothing to arbitrate; and the compulsory investigation clause accomplished nothing because it was not called into operation until a month after the strike began, and the commission did not report until after it was ended.[22] The report of the commission and its

[16]"I know," said Representative O'Neill, in presenting the arbitration bill in the 49th Congress, "that the workmen are willing to arbitrate, (in the strike of 1886) and I know that the president of that vast corporation, (the Gould line), has not yet consented to do it. . . . We feel, however," he continued, "that all we can do at this time is to invoke the public opinion of the country in the existing dispute . . . to compel the parties on both sides to appeal to reason." Cong. Rec., 49th Congress, first session, p. 2960.

[17]Cong. Rec., 49th Congress, first session, p. 2959.

[18]The president was authorized to appoint two of the commissioners, one of whom was to be a resident of the state in which the controversy occurred. The commissioner of labor was designated to serve as the third commissioner. 25 Stat. at L. 503, sec. 6.

[19]25 Stat. at L. 503, sec. 6.

[20]Compulsory investigation is not here used in the technical sense. There was no provision in the act of 1888 requiring the maintenance of the status quo pending the investigation.

[21]The best account of the action taken by the government in the Pullman strike is contained in Ex-President Cleveland's Presidential Problems, Chapt. II, The Government and the Chicago Strike.

[22]The report of the commission is contained in Senate Document, 53rd Congress, third session, Serial 3276.

recommendations were, however, of aid in drawing up the next arbitration act.

The federal government, deprived of the assistance of the arbitration act, was obliged to look about for other means of bringing to an end the strike, which was seriously obstructing the mails. Its first action was to issue warrants under the criminal statutes[23] against persons who had participated in the obstruction. Finding this action ineffective, Attorney-General Olney authorized the district attorney of the northern district of Illinois to secure the issuance of a sweeping injunction against Eugene Debs, president of the American Railway Union, other officers of the Union, and those persons participating in the obstructions.[24] The injunction, issued July 3, was read to a mob of between two and three thousand strikers and was met by jeers, howls and further obstruction. President Cleveland immediately ordered troops to Chicago, and the federal government followed up this action July 10 by arresting Debs and the other officers on criminal indictments. These officers of the American Railway Union were arrested a second time July 17 for disobeying the injunction of July 3, and the strike was practically broken. The federal troops were recalled July 20.

The federal action taken in 1894 differs from that taken in 1877.[25] President Cleveland sent the federal troops to the strike scene, not to quell domestic violence, as did President Hayes, but to protect the United States mails and interstate commerce and to enforce the orders of the federal courts. He sent troops not only without the request of Governor Altgelt, but actually over his protest. The president based his right to do this on sections 5298 and 5299 of the revised statutes. The former provided that it should be lawful for the president, when the laws of the United States, because of illegal obstructions, became unenforceable by ordinary judicial proceedings, to employ land or naval forces to execute laws; and the latter provided that it was the duty of the president "when obstructions . . . existed in a state and state authorities were unable, or failed or refused to protect the rights of the people," to employ the land or naval forces, or to use

[23]Revised statutes, sec. 3995, provides a fine not to exceed $100 for persons who knowingly or willfully obstruct the mails.

[24]Attorney-General Olney "suggested" to special counsel that it might be well to apply to the courts for an injunction instead of relying wholly on the criminal statutes. He relied on the commerce clause and the Sherman Anti-Trust act for this action. Cleveland Presidential Problems.

[25]See supra, p 468.

"any other means necessary" for the suppression of domestic violence. Such obstructions clearly occurred, and hence, under the provisions of these statutes, it was not only legal for President Cleveland to call out the troops, but his duty as well.

The use made of the injunction in the Chicago strike calls for special comment since the case of *In re Debs,*[26] which arose out of the arrest of the president of the American Railway Union on a charge of contempt, established conclusively the right of the federal government to intervene with the injunction to prevent conspiracies[27] which interfered with interstate commerce or the mails. The lower federal court[28] based the power to issue the injunction solely on the Sherman Anti-Trust Act, but the Supreme Court, in reviewing the case, rested it on the broader ground that the federal government had full power over interstate commerce and the mails, and in the exercise of this power could "remove everything put upon the highways, natural or artificial, to obstruct the passage of interstate commerce or the mails."[29]

By 1894, therefore, the federal government had established its right to intervene unsolicited in labor disturbances interfering with interstate commerce or the mails by one of three methods. It could institute investigations; it could call out the federal troops, or it could issue injunctions. None of these methods were, however, wholly satisfactory. Investigations had proved useless in the recent strikes; federal troops could not be called out before the dispute was actually in progress, and the injunction did not prove effective when directed against large numbers of strikers.[30] It is not surprising, therefore, that at the conclusion of the strike of 1894 Congress turned its attention to strengthening the provisions of the Arbitration Act of 1888.

The result was the Erdman Act, which became law June 1, 1898.[31] This act, not exceptionally strong itself, is superior to the act of 1888 which it repealed. It took a long step forward by providing for mediation and conciliation which was to precede

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[26](1895) 158 U.S. 564, 39 L.Ed. 1092, 15 S.C.R. 900.

[27]The Pullman strike, it should be noted, was a sympathetic strike.

[28]United States v. Debs, (1894) 64 Fed. 724.

[29]For full discussion of the injunction see infra, Chapter II.

[30]Another weakness in the power of the injunction over strikes was that the injunction could not restrain strikes the purpose of which was the betterment of conditions of employment. This phase did not enter into the case of In re Debs, however, because the Pullman strike was a sympathetic strike. This phase of the equity power is discussed in Chapter II, infra.

[31]30 Stat. at L. 424-28.

arbitration wherever possible. The chairman of the Interstate Commerce Commission and the commissioner of labor were named by the act as mediators and were authorized, on the application of either party, to get in touch with the other party and to attempt an amicable settlement of the dispute.[32] This provision, which was destined to become the most important provision of the act, was considered very lightly by the legislators, who devoted the burden of their discussions to the arbitration proceedings.

Arbitration proceedings under the Erdman Act, like proceedings under the earlier act, could not be instituted until both sides had agreed to arbitrate.[33] After arbitration had been agreed to, however, the provisions of the 1898 act were more stringent. Under this act the parties in agreeing to arbitrate were obliged also to agree not to strike or lock out pending the award and to abide by the terms of the award for one year.[34] It was made unlawful, for three months after the award, for an employer to discharge a workman, or for a workman to quit his employment without giving thirty days' written notice.[35] And finally, the award was made enforceable in equity.[36] An important proviso prohibited the issuance of the injunction to compel the performance of personal service.[37] This proviso makes it evident that the teeth in the act were intended for the corporations.

The Erdman Act, however, possessed weak points. In the first place its scope was limited to disputes affecting employees who were engaged in train operation.[38] In the second place neither mediation nor arbitration proceedings could be instituted without the coöperation of both sides; the mediators were given no power to intervene on their own initiative nor could either party be compelled to request mediation; and in no case could an arbitration board be established without the coöperation of employers

[32]30 Stat. at L. 425, sec. 2.

[33]Arbitrators were named under this act in the same manner as they were under the act of 1888. See supra, footnote 10. It was provided, however, that in case the two arbitrators chosen by the two parties failed to agree on a third arbitrator after five days, the commissioner of labor should then name the third arbitrator.

[34]David A. McCabe, Federal Intervention in Labor Disputes under the Erdman, Newlands and Adamson Acts, 7 Pro. Acad. Pol. Sci. 94.

[35]30 Stat. at L. 427, sec. 7.

[36]Appeals were permitted under the act, first to the U. S. circuit court, then to the circuit court of appeals, where the decision was final. 30 Stat. at L. 426, sec. 4.

[37]30 Stat. at L. 425, sec. 3.

[38]This left outside of the jurisdiction of the act shop-men, car-workers, freight handlers, clerks, etc. 30 Stat. at L. 424, sec. 1.

as well as of the employees. "The employer," said Commissioner of Labor Neill in 1912, "is as free to resort to a lockout and the employees to inaugurate a strike as if the Erdman Act had never been passed."[39] It is important to note also that the compulsory investigation clause of the act of 1888 was left out of the Erdman Act.[40]

The Erdman Act was not immediately successful. The first attempt to utilize its provisions, made a year after its passage, resulted in a complete failure.[41] The railroads in repudiating arbitration in this year, refused to "abdicate" their "vital prerogative" of determining wages "to a special and transient committee of three arbitrators," and while expressing "highest respect" for the commissioners, and confidence in their "ability" and "impartiality," felt that they "ought not, and cannot rightfully, relinquish their duty to determine that question, (of wages)."[42] For seven and a half years following this failure no attempt was made to call into action the clauses of the bill.[43]

The year 1906 marked the beginning of a period of great activity under the act. During the ensuing seven years the mediation and arbitration provisions were invoked in sixty-one controversies;[44] and during this entire period "there was no case of a serious strike, or danger of a serious strike on the part of those employees to whom the law was made applicable, in which the provisions were not invoked."[45] And, surprising as it may have been to the authors of the act, it was the mediation clause which functioned in the majority of these cases. Twenty-eight cases were settled by mediation, eight by mediation and arbitration, and only four by arbitration alone.[46]

The success of the Erdman Act, however, it is important to note, was not due in the first instance, to its superiority over the act of 1888, but to a change in the attitude of the railroad managements toward arbitration. For in 1906 it was not the

[39]1912 Bulletins, Department of Labor, Mediation and Arbitration of Railroad Disputes in the United States.

[40]This clause had functioned just once under the act of 1888. See supra, p. 471.

[41]1912 Bulletins of Department of Labor section on History of the First Attempt to Utilize the Erdman Act.

[42]Ibid.

[43]1912 Bulletins. The antagonistic attitude of the road toward arbitration in this period explains the disuse of the act in this period.

[44]Ibid.

[45]William Chambers, American Experience in Settling Labor Disputes, 7 Acad. Pol. Sci., Pro. 1.

[46]Ibid.

employees, disgusted at the failure of arbitration in 1899, but the company that sought mediation, and it was not until February 27, 1908, after seven other cases had been settled, that labor requested the intervention of the federal board.

The sudden change in the attitude of the railroads toward arbitration was a direct result of the extension of the scope of the labor controversies which followed the adoption, in 1907, by the brotherhoods, of the policy of concerted movement in presenting their demands. In this year the first concerted movement of railroad employees was inaugurated by the conductors and trainmen in the western territory,[48] and in 1910-11 similar movements were engaged in by the firemen in the western territory, by the conductors and trainmen in the eastern territory, and by the Brotherhood of Railroad Engineers.[49] Coincident with the increased strength which labor gained from unified action came less zeal on the part of the employee, and more zeal on the part of the employer to submit to arbitration.

As labor controversies extended over wider areas, the feeling grew that the Erdman Act, enacted in a period when disputes were restricted to individual roads, was inadequate to meet the new conditions. The roads, particularly, expressed a dislike for submitting demands affecting a vast mileage to boards of three men, and because of this aversion, refused, in the engineers' strike of 1911 to seek the intervention of the federal mediators.[50] It was only through the extra-legal action of the federal mediators who intervened unsolicited and induced the parties to submit their dispute to a non-governmental board of seven that a serious strike was averted.[51]

Instead, however, of taking this narrowly averted strike as a warning that the act of 1898 needed revision, Congress waited until a concerted movement by conductors and trainmen, involving

[47]Report of the Commissioner of Mediation and Conciliation for the years 1913-1919. Joint requests were made 18 times and in one case the mediators without legal authority, intervened on their own motion.

[48]This controversy involved 38 roads and 42,000 men. The mileage involved was 101,500. Prior to this time the greatest mileage involved had been 5,800. Ibid., Appendix, Table 3.

[49]An account of these early concerted movements is given in an excellent article, Locomotive Engineers' Arbitration: Its antecedents and its Outcome, by William J. Cunningham, 27 Q. J. of Econ. 12.

[50]For a brief discussion of the Engineers' Strike of 1911 see article by Cunningham cited, footnote 49.

[51]The results of this arbitration were unsatisfactory to labor. The fact that this board advocated compulsory arbitration turned labor definitely against arbitrations under non-governmental boards.

practically all of the railroads in the eastern territory, threatened a disastrous strike, and then, at the urgent request of the president, hurriedly passed the Newlands Act[52] which had been drafted by the railroad men, employees and members of the National Civic Association.[53] It should be noted that in this controversy the employees favored arbitration. They refused to arbitrate, however, under a non-governmental board, and the railroads refused to arbitrate under the Erdman Act unamended. It should also be noted that the Erdman Act failed in the 1912 emergency, not because of any defect in its mediation provisions, but because of dissatisfaction with the arbitration machinery.

The Newlands Act, passed as an emergency measure to provide a mode of arbitration acceptable to the roads and the men and thus avert a strike, has the distinction of being the first federal act which had the sanction of both labor and capital. It amended the Erdman Act in two important respects.[54] It provided for the arbitration board of six contended for by the roads,[55] and created a permanent board of mediation and conciliation of three members[56] which was given the right to intervene on its own motion "in any case in which an interruption in traffic is imminent and fraught with serious detriment to the public interest."[57] The creation of this permanent board of mediation, endowed with the power to offer its services unasked, was a distinct step in the right direction. Mediation which had been provided for more or less incidentally by the Erdman Act, had risen to a place of prominence by 1913, while arbitration, with which the Erdman

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[52]38 Stat. at L., 103-10.

[53]Report of the Commissioner of Mediation and Conciliation for 1913-1919.

[54]Several minor amendments were made. The arbitration machinery was improved by section 4 which provided that the parties to the arbitration, in their agreement to arbitrate, themselves fix the duration of the award, and also specify the period, after the beginning of the hearings, within which the board should file its award. If this period were not fixed, the act provided that that award should be filed thirty days after the beginning of the hearings. The Erdman Act had arbitrarily fixed the duration of the awards at one year, and had made no provision for preventing long drawn out arbitration proceedings. Another amendment of the Newlands Act provided that arbitration boards could be reconvened to construe awards.

[55]Despite the fact that the railroads insisted on six-member arbitration boards, it is interesting to note that the boards of six members have been used only in one-third of the cases under the Newlands Act, and the greatest difficulties over awards have arisen over awards of six-member boards. Report of Commissioner of Mediation and Conciliation, 1913-1919.

[56]38 Stat. at L. 105, sec. 11.

[57]38 Stat. at L. 104, sec. 2.

Act had been chiefly concerned, had been little used. When Congress, then, in the Newlands Act placed the greater emphasis upon mediation, it was applying the lesson it had learned from seven years' experience in dealing with labor disputes. Of the total number of cases settled under the Newlands Act, 70 were successfully adjusted by mediation. In only 21 cases was it found necessary to resort to arbitration.[58]

When the Newlands Act failed in 1916 it failed, as did the Erdman Act, because one of the parties was dissatisfied with the arbitration machinery. In this year it was the employees who looked with disfavor on arbitration and refused to submit their dispute to a government board. When Congress in 1920 drew up a new act for the settlement of labor disputes it ignored the lessons taught by the Erdman and Newlands Acts. Instead of strengthening mediation[59] which had functioned successfully in 98 cases, it turned toward arbitration which had twice been responsible for the breakdown in emergencies of federal labor acts. This later phase of the problem will be discussed in Chapter III.

II

Executive and Judicial Intervention in Labor Disputes

Under the arbitration acts discussed in the foregoing chapter, the federal government can intervene only in railroad disputes which involve employees engaged in interstate transportation. What of its power to intervene in disputes, such as those involved in mine disputes, which fall outside of this category? We have already seen that in two contingencies the federal troops may be used. They may be used, first, if the president is requested to quell domestic violence,[60] and secondly if agencies of the federal government are interfered with.[61] This mode of intervention, however, cannot be called into action until the violence or the interference has become an actuality. Three other methods are at the command of the federal government. These are the in-

[58]Report of the Commissioner of Mediation and Conciliation for 1913-1919.

[59]Mediation needed the assistance of compulsory investigation to give it increased effectiveness. William McCabe said of the Newlands Act, "The law failed to provide the logical initial supplement to voluntary mediation and arbitration . . . the appointment of a commission of investigation and recommendation when mediation and arbitration have failed." Federal Intervention in Labor Disputes Under the Erdman, Newlands and Adamson Act, 7 Pro. Acad. Pol Sci. 94.

[60]See strikes of 1877, p. 468. This method was used by President Harding in the West Virginia mine strikes of 1921.

[61]See Pullman strike of 1894, p. 472.

junction, personal intervention by the president, and intervention by the division of conciliation of the Department of Labor. The federal government can employ, within limited fields, any one, or all three of these modes of intervention in dealing with either railroad or mine disputes. We will consider briefly the respective effectiveness of these three methods.

The Use of the Injunction in Labor Disputes: The right of the federal government to issue injunctions in labor disputes is based, first on the control which Congress enjoys over interstate commerce and the mails. This control was held in *In Re Debs*[62] to grant to Congress the right to "remove everything put upon the highways, natural or artificial, to obstruct the passage of interstate commerce or the carrying of the mails." This case held further that the courts could invoke the injunction to restrain such obstruction, asserting that "the right of the courts to interfere in such matters is recognized from ancient times and indubitable authority." The right to issue injunctions is based, secondly, on a group of statutes which either actually or impliedly give the federal courts equity jurisdiction. These are the Interstate Commerce Act which makes illegal combinations which deny equal facilities in the transfer of interstate commerce between connecting lines;[63] the Sherman Anti-Trust Act which condemns "every contract, combination . . . or conspiracy in restraint of interstate trade or commerce" and provides for the use of the injunction as a preventive remedy, and the Clayton Act which defines the limits within which the injunction may be used in labor disputes.[64]

The equity jurisdiction bestowed upon the courts by these acts has been subject to the limitation that injunctions will not issue in strikes which have as their sole object the improvement of working conditions. This rule which has been laid down by a long line of decisions,[65] is based on the theory that equity will not compel the performance of personal service. All of the

[62](1894) 158 U. S. 564, 39 L. Ed. 1092, 15 S.C.R. 900.

[63]24 Stat. at L. 380, 383, secs. 3 and 12.

[64]Two other statutes, one providing a penalty for all conspiracies against the United States, (Revised Statutes, Sec. 5440), and the other making interference with the mails criminal, (Revised Statutes, Sec. 3995), provide grounds for the issuance of injunctions when their violation is accompanied by irreparable injury to property. Note statement made by Judge Taft in In Re Charge to the Grand Jury, (1894) 62 Fed. 828: "When an irreparable and continuing injury is threatened to private property equity will generaly enjoin on behalf of the persons whose rights are to be invaded even though an indictment in behalf of the public will also lie."

cases establishing this principle, however, draw a distinction between requiring continuance of service and requiring the discontinuance of illegal acts.[66] *Arthur v. Oakes,* the first federal case clearly to announce this principle recognized as unlawful any combination "which has for its object to cripple the property . . . and to embarrass the operation of the railroads . . ."[67] This distinction has been observed in later cases.[68] It may be said by the way of summary, then first, that as the law now stands, injunctions will not issue against a combination, the object of which is lawful; secondly, that if, in the course of a lawful strike violence or intimidation are used these unlawful acts will be enjoined,[69] and thirdly, that injunctions will issue where the combination has for its object the destruction of property, embarrassment of operation of business, or coercion of innocent third parties, or other unlawful purposes. The secondary boycott comes under this category.[70]

The Clayton Anti-Trust Act which was at first believed to limit the federal power of injunction, has really done no more

[65]Arthur v. Oakes, (1894) 63 Fed. 310, 11 C.C.A. 209, 25 L.R.A. 414, Toledo A. A. & N. M. v. Penn. Co., (1893) 54 Fed. 730, United States v. Elliott, (1894) 64 Fed. 27 and Wabash v. Hannahan, (1903) 121 Fed. 562.

[66]United States v. Elliott, (1894) 64 Fed. 27 calls attention to this distinction, and Morton Poe Fisher in a thesis on "Grounds for the Issuance of Injunctions by the United States Courts In Trade Disputes Between Employers and Employees," published in the Baltimore Daily Record, June 10-11, 1920, emphasizes this point strongly.

[67]The "embarrassment" which a peaceful strike would occasion, is not here meant for the court specifies embarrassment "either by disabling or rendering unfit for use property . . . or actually obstructing their control or management of the property by using force, intimidation or threats or other wrongful methods against the receivers or their agents or against the employees remaining in their service, or by using like methods to cause employees to quit or prevent or deter others from entering into the place of those leaving it."

[68]United States v. Elliott, (1894) 64 Fed. 27, Wabash v. Hannahan, (1903) 121 Fed. 562, and others.

[69]Picketing comes under this category. Earlier cases held that picketing was illegal and enjoinable when it went beyond the bounds of peaceful persuasion and amounted to intimidation. Goldfield Consolidated Mines Co. v. Goldfield Miners Union, (1908) 159 Fed. 500. Chief Justice Taft, however, in a recent decision, Truax et al. v. Corrigan, (1921) 258 U.S. 312, 42 S.C.R. 124, practically held in dicta that picketing which involves more than one picket per entrance is illegal. He held that "peaceful picketing was a contradiction in terms," but stated that "subject to the primary right of the employer and his employees and would-be employees to free access to his premises without obstruction by violence, intimidation, annoyance, importunity or dogging, it was lawful for ex-employees on a strike and their fellows in a labor union to have a single representative at each entrance to the plant of the employer to announce the strike and peaceably persuade the employees and would-be employees to join them in it."

[70]The whole problem of the boycott, primary and secondary, is discussed in great detail in Laidler, Boycotts and the Labor Struggle, passim.

than "codify" the rules already laid down in court decisions. Section 6, which definitely legalizes labor organizations and their legitimate activities, is merely a restatement of the principle laid down in *Arthur v. Oakes,* and section 20 does no more than place beyond the reach of the injunction those activities of labor organizations which court decisions have already recognized as legal.[71] Even the hope of labor that the Clayton Act legalized the secondary boycott was shattered by the Supreme Court in the *Duplex Printing Case.*[72] The act has, in short, not materially changed the legal position of labor.

In spite of the protections which the courts have placed about the use of the injunction, the federal equity power extends materially the field in which the government can intervene in labor disputes. This is true because it is not limited to disputes involving men in a particular industry as it is by the arbitration acts, but can reach out to any threatened interference with a federal agency, such as the mails, or an interest under federal protection such as interstate commerce.[73] Mine strikes which involve illegal acts in restraint of interstate transportation of coal are brought within the cognizance of the federal government by the injunction.

The value of the injunction as a preventive remedy depends in the last analysis, however, not so much upon the scope of its field as upon its effectiveness and upon its justice. For such a

[71]This clause, laying down the important limit that the dispute must be between employers and employees or between employees or between persons employed and persons seeking employment, states that if the dispute is concerning terms or conditions of employment and does not give rise to irreparable injury, and injunctions will not restrain such actions as terminating relation of employment, recommending or advising others so to do, or from ceasing to patronize or from recommending others so to do.

[72]Duplex Printing Co. v. Deering, (1921) 254 U.S. 443, 65 L. Ed. 349, 41 S.C.R. 172, 16 A.L.R. 196. The court in this case decided that the limiting clause that the dispute must be between employers and employees, etc., (ibid), acted to place the secondary boycott which is not between employers and their employees directly outside of the acts legalized by the Clayton Act. The dissenting opinion held that the terms employers and employees meant employing and working classes in general and did not refer to the individual employer and his employees.

[73]Note Lowe v. Lawlor, (1908) 208 U. S. 274, 53 L. Ed. 488, 28 S.C.R. 301 on the extent of the government's power to intervene in labor disputes through the equity power: "A combination may be in restraint of trade and within the meaning of the anti-trust act although the persons exercising the restraint may not themselves be engaged in interstate trade and some of the means employed may be acts within a state and individually beyond the scope of federal authority . . . but the acts must be considered as a whole and if the purposes are to prevent interstate transportation the plan is open to condemnation under the anti-trust act."

strike as the railroad strike which was threatened in 1916, which has as its only object higher wages and shorter hours, comes, under the existing rules of law, in the category of lawful strike.[74]

It is likewise an inadequate remedy for the mine strike free from violence and unlawful picketing. It can prevent the illegal acts which accompany railroad or mine strikes, but it cannot force striking railroad or mine employees, who are utilizing in a peaceful manner their recognized right to withdraw their services in an attempt to improve their working conditions, to return to work against their will.

The injunction, however, becomes a remarkably effective remedy for even the so-called legal strike when it includes in its prohibitions acts hitherto considered peaceful, and hence legal, which are vital to the successful execution of the strike. The Wilkerson order issued at the height of the recent shopmen's strike, attempts to restrain several such acts,[75] and if sustained will establish a precedent which will greatly increase the adequacy of the injunction as a weapon against the peaceful strike. Its effect will be, in fact, to illegalize every strike on interstate railroads. It should be noted at this point that the Wilkerson injunction, if sustained, will extend the power of the injunction only in the field of strikes on interstate railroads. It is based solely on the power of the government to "remove everything put upon the highways, natural or artificial, to obstruct the passage of interstate commerce or the mails," and

[74]It is only a matter of time, however, before court decisions will be altered to modify the general rule in its application to railroad strikes. An indication that a different rule will be evolved for railroad strikes is given in the case of Wilson v. New, (1917) 243 U.S. 332 61 L. Ed. 755, 37 S.C.R. 298, in which Chief Justice White said, in obiter dicta, "Whatever would be the right of an employee engaged in a private business to demand such wages as he desired and to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when the employment is accepted in a business charged with a public interest," For full discussion of this trend see infra, chapt. III. See opinion of Amidon, J. in Great Northern Ry. Co. v. Brosseau, (1923) 286 Fed. 414, with review of the cases.

[75]Labor leaders are restrained from issuing any instructions or public statements to members of their unions to induce them to do or say anything to cause any railroad employee to leave his work or to cause any person to leave the employment of the railroad." Officers of the unions are restrained from "picketing or in any other manner by letters, circulars, telephone messages, word of mouth communications or interviews, encouraging any person to leave the employ of a railroad or to refrain from entering such employ." Not only is interference by threats forbidden, but also interference by "epithets, jeers, taunts or entreaties, striking shopmen enjoined from entering on railroad property and meetings of unions for prolonging the conspiracy are forbidden.

consequently will not alter existing equity law in other fields. The wording of the injunction itself indicates clearly that the aim is to restrain only those acts which "interfere with, hinder or obstruct railroad companies in the movement and operation of passengers and property in interstate commerce or the carriage of the mails."[76]

The injunction is becoming increasingly effective in dealing with unlawful combinations, for the courts are gradually strengthening their power to compel obedience to their awards. They can bring great pressure to bear on recalcitrant unions by enjoining the officials from the payment of strike benefits; they can enjoin labor officials from calling illegal strikes.[77] Furthermore, in the *Danbury Hatters Case*[78] they established their power under the Sherman Act to assess damages against individual workmen guilty of practices amounting to unlawful restraints of trade. And the United States Supreme Court further strengthened these broad powers last June when, in reviewing the *Coronado Mine Case*,[79] it held in dicta that labor unions could be held liable for damages for illegal strikes which they had encouraged or ratified.[80]

This brief summary of the federal equity power leads to the conclusion that although the injunction is becoming increasingly effective in the field of illegal strikes it is, unless strengthened in the manner discussed above, ineffective in the field of strikes where the cessation of work is unaccompanied by illegal acts. It cannot, moreover, meet the ultimate requirement of justice. In the first place the ordinary law courts are ill-equipped to pass on the merits of labor cases; and even if they were better equipped the issues raised in these cases are not usually the fundamental issues under dispute between labor and capital but the technical legality of specific and frequently incidental acts. Thus a strike may be enjoined while the real merits of the controversy between employer and employee be completely ignored. In leaving this

[76]Sections (a) and (h)

[77]In re Charge to Grand Jury, (1894) 62 Fed. 828.

[78]Lowe v. Lawlor, (1908) 208 U.S. 274, 52 L.Ed. 488, 28 S.C.R. 301.

[79](1919) 258 Fed. 829, 169 C.C.A. 549, affirmed 42 S.C.R. 587.

[80]Dowd v. United Mine Workers of America, (1916) 235 Fed. 1, 148 C.C.A. 495 had previously held that the word "association" in the Sherman Anti-Trust act included unincorporated associations such as labor organizations and that such organizations could be sued under their names by persons injured in their business by their action in violation of the provisions of the act. United Mine Workers of America v. Coronado Coal Co., (1919) 258 Fed. 829, 169 C.C.A. 549, affirmed 42 S.C.R. 587, citing the above case held that corporations or associations are liable for the torts of their members if encouraged in the commission of them, or if ratified thereafter.

section, therefore, the final conclusion is that the injunction, to be just, should be used only as a last resort, and after free opportunity has been given for a consideration of the rights of both parties.

Personal Intervention of the President: We come now to a discussion of the personal intervention of the president as a mode of federal intervention. It is through the power of the president to mediate in strikes of national import that federal influence is brought to bear most effectively on the settlement of mine disputes. His right to act as mediator in labor controversies is purely extra-legal and rests upon his personal and official influence.[81] Theodore Roosevelt was the first executive to exercise this power,[82] and his action in intervening in the anthracite coal strike of 1902 established a precedent for future presidential action.

The strong and weak points in this method are easily discernable. Twice in notable instances personal intervention has succeeded; twice it has failed miserably. It was successful in the case of the anthracite coal strike of 1902[83] in which Roosevelt offered his services as a mediator and was finally able to persuade both sides to submit their differences to arbitration.[84] Not only

[81]The Outlook of Dec. 9, 1914, says, editorially, of this mode of intervention, "There is nothing in the constitution or laws of the United States authorizing the president to act in this way; but such action is entirely justifiable on the grounds that there is nothing in the constitution or laws of the United States forbidding him to do so and there is every reason why the man who occupies the presidency should employ every lawful means in great emergencies to exert the influence that the office gives him as the one representative of the whole people to promote order and establish justice."

[82]Roosevelt acted on what he termed the "Jackson-Lincoln" theory that "occasionally great national crises arise which call for immediate and vigorous action and that in such cases . . . the proper attitude for him to take (the president), is that he is bound to assume that he has the legal right to do whatever the need of the people demand unless the constitution or the laws explicitly forbid him to do it." Roosevelt, Autobiography, p. 504.

[83]An account of Roosevelt's action in this strike is given in the ex-president's autobiography.

[84]Had the two sides failed to arbitrate President Roosevelt planned to induce the governor of Pennsylvania to call on him for aid; he then planned to send Major-General Schofield to keep order and prevent interference with men who wanted to work. He also would instruct General Schofield to "dispossess the operators and run the mines as a receiver" until the government investigating commission could make its report and he himself could issue further orders. (Autobiography) Wilson contemplated a similar scheme in the Colorado strike but found it to be illegal. New York Times, Nov. 25, 1914.

The operators, who objected strenuously to the term "labor representative," were finally conciliated by President Roosevelt's adroitness in disguising the labor representative, E. E. Clark of the Brotherhood of Railway Conductors, under the imposing title of "eminent sociologist." (Autobiography).

was immediate peace secured by arbitration, but machinery for the peaceful settlement of disputes was set up and outlived the term of the award.

Intervention by President Wilson succeeded in 1919 in bringing miners and operators to terms after all other methods had failed. In the fall of that year a general strike was called by the United Mine Workers of America. After an unavailing attempt by the secretary of labor to avert the strike, and after an injunction directed against the leaders had failed to keep the men from quitting work, President Wilson intervened and proposed a basis of settlement which was accepted.[85]

Presidential intervention failed dismally, however, in the case of the Colorado mine strike in 1914,[86] because of the absolute refusal of the mine operators to accede to President Wilson's compromise proposals. The strike dragged on and ended, finally, in a defeat for the workmen. Presidential intervention was also unavailing in the threatened rail strike of 1916.

Presidential intervention again failed last summer in the settlement of the bituminous and anthracite coal mine strike. It failed also in the settlement of the shopmen's strike. After the unsuccessful attempts of President Harding and Secretary of Labor Davis to bring the striking miners and operators to terms, the miners and operators themselves, unassisted, settled their dispute. They did not settle it however, until after five months had elapsed and the country's coal supply had been seriously endangered. Seniority was the snag which prevented presidential mediation from ending the railroad shopmen's strike.

It is clear from the foregoing that the effectiveness of this type of intervention lies wholly in the strength of the public opinion it can call into action; its chief weakness lies in the lack of any legal power in the president to compel the disputants to come to terms. It may, however, be regarded as a moderately effective method of federal intervention considering its purely informal and extra-legal character.

The Conciliation Division of the Department of Labor: The arbitration acts, the federal equity power and the efforts of the president have opened up to federal intervention practically all of the labor fields in which the national interest is paramount. Through the conciliation division of the Department of Labor

[85]This brief discussion of the 1919 mine strike is based on accounts in the New York Times.

[86]New York Times and general periodical accounts.

the government is endeavoring to reach those other disputes which, while not strictly of national interest, are detrimental to industrial peace. By the act of 1913 establishing his department[87] the secretary of labor is instructed to act as mediator and to appoint commissioners of conciliation whenever the interests of industrial peace require it.[88] These federal officers may intervene in every serious labor dispute in the country. They may, however, do no more than attempt to bring the two contending parties together to work out the solution of their own problems.[89] The constitutional basis of this power was explained by Representative Wilson in the House. He declared that if compulsion were present the power would be in the states but said:

"In fact (the bill) only gives (the secretary) the power to act in a friendly way to bring the parties together, and I know of nothing in the constitution that would prevent any officer of the government from using his friendly offices toward bringing contending parties together in that way."[90]

The success of this method can be seen from the increasing number of disputes which have been settled by the federal mediators.[91] During the first year 28 cases were successfully adjusted; in 1915, 42 cases were dealt with; in 1916, 227; in 1917, 378; in 1918, 1,217,[92] and in 1919, 1,780. In 1920 the number fell to 802.[93] The wide distribution of these disputes is indicated in the annual report of the secretary of labor for 1917 who says:

"The cases embraced controversies . . . in 43 states together with Alaska and Porto Rico and "comprised questions affecting establishments of nearly every commercial and industrial classification."[94]

The conciliation division of the Department of Labor has done perhaps more in the interests of true industrial peace than any other agency of federal intervention. It has given collective

[87]37 Stat. at L. 736-38.

[88]37 Stat. at L. 738, sec. 8.

[89]It is interesting to note that the conciliation division has itself established the policy of refusing to intervene in disputes "so long as any successful termination of the case (is) being worked out by the employer and his employees." 1920 report of the Department of Labor, 80.

[90]Cong. Rec. 62nd Congress, second session, p. 8851.

[91]The following figures are based on the reports of the secretary of labor for the years 1913-1920.

[92]The sudden increase in the number of disputes mediated in this year was a result of the war. Both labor and capital showed a desire to settle all disputes peacefully during the the war period.

[93]The drop in 1920 is due to the return of peace and the reaction which set in upon both labor and capital.

[94]1917 report of the Department of Labor, p. 52.

bargaining an impetus which far exceeds the impetus given by arbitration or by presidential intervention,[95] and has educated labor and capital in the merits of conciliation as no other method has done.[96] The weakness of this mode of intervention, like the weakness of presidential intervention, lies in the lack of any power in the mediators either to compel labor and capital to come together, or to agree to a peaceful settlement.[97] Because of this inherent weakness it is clearly evident that the mediation of the department of labor can in no sense be regarded as a reliable method of settling rail and mine disputes.

The number of disputes actually settled by this method, however, far exceed those which are not,[98] and employers show increasing willingness to submit to mediation. The ability of the division of conciliation each year to keep the peace in a large number of industries, and its great service in stimulating collective bargaining, offsets its lack of power to enforce its awards, to a modified extent, and warrants the further development of this mode of mediation in a scheme of federal intervention in labor disputes.

It is clear from the foregoing discussion that neither in the injunction nor in the mediation, either of the president or of the secretary of labor, does the public find any absolute guaranty of freedom from a nation-wide rail or mine strike. As industrial dis-

[95]This assertion will be readily acceded to when it is pointed out that during the entire period from 1913 until 1919 mediation and arbitration were resorted to under the Newland Act only 91 times, whereas in the same period mediation and conciliation functioned 3,762 times. Personal intervention by the president has also been used very sparingly.

[96]The rapid growth in the number of disputes in which mediation is asked illustrates that the education is achieving results. The fact that in recent years strikes are in progress in only 30 per cent of the cases when the mediators are summoned, whereas early in the history of the division's work strikes were usually in progress in more than 70 per cent of the disputes before the mediators were summoned, also illustrates the point that capital and labor are being educated in the merits of mediation and conciliation.

[97]A minor weakness lies in the fact that capital regards the Department of Labor as a body especially favorable and sympathetic to labor and hence is hesitating in submitting the determination of its rights to a body which it regards as partisan.

[98]The following table shows the relationship between the number of cases settled and those in which no agreement could be arrived at:

Year	Cases Successfully Settled	Not Adjusted
1913-14	33	5
1915	42	10
1916	227	22
1917	248	47
1918	1,217	71
1919	1,780	111
1920	802	96

turbances in the transportation and mining fields increase in frequency and in seriousness, the public demand for an effective method of strike prevention, is becoming increasingly insistent. The recent phases of the railroad and mine strike problem, and the steps that are being taken to make strikes in these fields less frequent, will be discussed in the following chapter.

(*To be concluded.*)

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REAL PROPERTY—COVENANTS FOR TITLE—BROKEN COVENANTS—"NAKED COVENANTS" OR COVENANTS BY A STRANGER TO THE TITLE—RIGHT OF REMOTE GRANTEE TO SUE.—A number of states, proceeding on the theory that it is the intention of the parties and only justice that the remote grantee shall have a remedy on the covenants for title,[1] have enacted statutes which have been construed to extend to the remote grantee the advantage of all or some of the covenants.[2] Possibly

[1]While it may be true in respect to covenants that burden the land that some jurisdictions definitely assert a policy against their enforcement by other than the original covenantee, 32 Yale L. J. 123, the courts certainly do not assert such an attitude toward covenants of title which do not burden the land. See also footnote 23.

[2]Colo., Rev. Stat. 1908, sec. 678; Ga., R.C. 1911, sec. 4192; Me., R.S. 1916, c. 87, sec. 31, and see Thompson v. Richmond, (1906) 102 Me. 335,

even the broadest and most liberal of these statutes are but declaratory for in a recent Iowa decision, without the aid of a statute, a remedy was extended to the remote grantee under the most extreme circumstances.[3] What are the judicial limitations on the remote grantee's right to take advantage of the usual covenants of a warranty deed?

The usual covenants in a warranty deed are the covenants of seisin, of good right to convey,[4] against incumbrances, for quiet enjoyment, and to warrant and defend.[5] The forerunner of these covenants was the common-law general warranty.[6] With the introduction of new means of conveyancing, particularly after the statute of uses, the common-law warranty proved unsuitable, and the covenants enumerated were gradually introduced.[7] The common-law general warranty, in essence a covenant real, ran with the land. Since the five covenants now used were probably intended to extend the warranty rather than to impair it,[8] as an exception to the common-law rule that choses in action could not be assigned, it was held that these covenants ran with the land until breached.[9] In a majority of American jurisdictions, however, since the covenants of seisin, of good right to convey,

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66 Atl. 649, interpreting a similar statute; Idaho, C.S. sec. 5384, 5385 interpreted in Brinton v. Johnson, (Ida. 1922) 208 Pac. 1028.

[3]Rockafellor v. Gray et al., (Ia. 1922) 191 N.W. 107. Though the writer of the opinion is apparently confused as to what the "English" rule is, that rule has been adopted by the Iowa courts. As will be pointed out later, under the "English" view there is no breach of the covenant of seisin at the time of the conveyance and yet the Iowa court holds that the right to sue on that covenant passes to the remote grantee even though not even possession of the land was transferred between the covenantor and covenantee. Further, the court held that equities existing between the original parties could not be set up against the remote grantee.

[4]It is generally held in the United States that the covenants of seisin and of good right to convey are synonymous in so far as they are both warranties that the covenantor has good title. Rawle, Covenants, 5th ed., 53, 54, 71. See 18 Mich. L. Rev. 797. Some jurisdictions, however, hold that the covenant of seisin is but a covenant of seisin in fact and if the covenantor has possession, even though tortious, the covenant of seisin is not broken. Raymond v. Raymond, (1852) 10 Cush. (Mass.) 134; Wilson v. Widenham, (1863) 51 Me. 566. Note that Brooks v. Mohl, (1908) 104 Minn. 404, 116 N.W. 931 actually deals with the covenant of warranty and not the covenant of seisin as stated in 18 Mich. L. Rev. 797.

[5]7 R.C.L. 1126.

[6]Rawle, Covenants, 5th ed., c.l., contains an excellent brief discussion of the common law general warranty. See 32 Yale L. J. 123, 137, as to the possible limitations of this assimilation.

[7]Rawle, Covenants, 5th ed., 16. Note also that the covenants now commonly used in England are slightly different from those used in the United States.

[8]Rawle, Covenants, 5th ed., 308, 292.

[9]Rawle, Covenants, 5th ed., 301.

and against incumbrances,[10] are covenants in praesenti, it is held they are broken when made, if at all, and consequently they do not run with the land[11] and at least in the earlier decisions the remote grantee had no remedy whatsoever on these covenants.[12] The English and a few American authorities, however, evade this difficulty by holding that these covenants run with the land on the theory that, although there is a technical breach at the time the covenant is made, it is a continuing one, and the real breach does not occur until the ultimate damage is suffered.[13] This theory undoubtedly was prompted because of the difficulty involved in assigning a chose in action.[14] As a result, in England and a few American jurisdictions the remote grantee is afforded a remedy on all five covenants except in the case of naked covenants.

It is practically the universal rule that unless there is privity of estate[15] between the covenantor and the covenantee, there is nothing to carry the covenants, since they pass only as incidental to an estate; and this rule applies to all five covenants.[16] There is some conflict, however, as to what constitutes privity of estate.

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[10]It has been argued that, since the covenant against incumbrances generally appears after the covenant for quiet enjoyment, which is a covenant running with the land, it is to all intents and purposes, a covenant in futuro. Greene v. Creighton, (1861) 7 R.I. 1; Rawle, Covenants, 5th ed., 86, 316. It has also been considered as a covenant of indemnity, and therefore like the covenant of general warranty. Post v. Campau, (1879) 42 Mich. 90, 3 N.W. 272.

[11]15 C.J. 1245; Levine v. Hull, (1919) 135 Md. 444, 109 Atl. 141; Rawle, Covenants, 5th ed., 84, 301, 303. And see Newman v. Sevier, (1907) 134 Ill. App. 544.

[12]Mitchell v. Warner, (1825) 5 Conn. 498; Clark v. Swift, (1841) 3 Met. (Mass.) 390.

[13]Kingdon v. Nottle, (1815) 4 Maule & Selw. 53; Seibert v. Bergman, (1898) 91 Tex. 411, 44 S.W. 63; Martin v. Baker, (1839) 5 Blackf. (Ind.) 252; Foshay v. Shafer, (1902) 116 Ia. 302, 89 N.W. 1106; see Macklem v. Blake, (1868) 22 Wis. 472, 99 Am. Dec. 68. It would seem that this view has been discarded in England. Spoor v. Green, (1874) L.R. 9 Exch. 99; Turner v. Moon, [1901] 2 Ch. 825. In a few jurisdictions the language of the cases would lead one to believe that they hold that there is no breach at all until the ultimate damage is suffered. Stambaugh v. Smith, (1873) 23 Ohio St. 584; Scott v. Twiss, (1875) 4 Neb. 133; Webb v. Wheeler, (1908) 80 Neb. 438, 114 N.W. 636, 17 L.R.A. (N.S.) 636; Dickson & Gantt v. Desire's Adm'r, (1856) 23 Mo. 151, 66 Am. Dec. 661. The case last cited contains the strongest language to this effect, but in the later case of Egan v. Martin, (1897) 71 Mo. App. 60, it was held that an eviction was not necessary to give the covenantee a right of action, thus clearly showing that even in these jurisdictions there is a breach of some kind before the ultimate damage is suffered.

[14]Rawle, Covenants, 5th ed., 307.

[15]See the thorough discussion in 32 Yale L. J. 123, 134, to the effect that "privity" here contemplates only a contractual privity between the covenantor and the covenantee and not a "privity" by a succession of an estate in realty.

[16]7 R.C.L. 1101-04; Rawle, Covenants, 5th ed., 341.

In an early English case[17] it was held that, if there was an outstanding title paramount to that of the covenantor, no estate, sufficient to carry the covenants, passed. The rule of this decision is generally repudiated today, and, by the weight of authority, if possession passes between the covenantor and the covenantee, there is sufficient privity of estate to carry the covenants.[18] It has been held that even a tortious possession is sufficient.[19] And even though the grantor is not in possession himself, if the grantee takes possession under the deed, it has been held that there is sufficient privity to carry the covenants.[20] Where there is no privity of estate, the covenant is personal, and the remote grantee acquires no rights under it if he must depend, solely, on the doctrine that the covenants pass only because they are carried by the estate.[21] Consequently we have a situation analogous to that of broken covenants in praesenti under the American view.

The historical development suggested that it was intended that the remote grantee should have a remedy and realizing the injustice of the situation, the American courts, holding that the covenants in praesenti do not run as they are broken at once, intervened in favor of the remote grantee. The difficulty that a chose in action could not be assigned had long since ceased to exist, and the remote grantee was permitted to sue in the name of the covenantee, or in his own name where codes required the real party in interest to sue in his own name, on the theory that

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[17]Noke v. Awder, (1595) Cro. Eliz. 373, 417, 436.

[18]Beddoe v. Wadsworth, (1839) 21 Wend. (N.Y.) 120; Keys & Marshall Realty Co. v. Trustees of Canton Christian Bible College, (1911) 146 App. Div. 796, 131 N.Y.S. 527, aff'd in 205 N.Y. 593, 98 N.E. 1105; Wallace v. Pereles, (1901) 109 Wis. 316, 85 N.W. 371, 83 A.S.R. 898, 53 L.R.A. 644; Iowa Loan & Trust Co. v. Fullen, (1905) 114 Mo. App. 633, 91 S. W. 58.

[19]Slater v. Rawson, (1840) 6 Met. (Mass.) 439; Wilson v. Widenham, (1863) 51 Me. 566.

[20]Wead v. Larkin, (1870) 54 Ill. 489. In this case the court also suggests that it would not even be necessary for the covenantee to take possession because an estate by estoppel would pass to the grantee which would be sufficient to carry the covenants. This amounts to saying that it is not necessary that there be any estate at all to carry the covenants, a doctrine clearly opposed to the rule stated by the authorities. Rawle has suggested that it would be inconsistent for the plaintiff to first allege an outstanding paramount title, as he would have to do in order to maintain his action, and at the same time set up the fact that the defendant is estopped to deny this. Rawle, Covenants, 5th ed., 342. See cases in footnote 66 of 32 Yale L. J. 137. But, as insisted in 1 Neb. Law. Bul. 43, citing Northrup, Law of Real Property 390, it is not essential that the covenantor be estopped from denying title, it is sufficient that he be estopped from denying that possession passed.

[21]See the cases cited in footnotes 16-20.

the mesne conveyances operated as an implied assignment of the covenantee's chose in action.[22] It is difficult to see why this theory was not applied to naked covenants in American jurisdictions which had specifically applied the assignment theory to broken covenants in praesenti.[23] And, as a chose in action may now be assigned in any jurisdiction, the mere fact that the English view takes care of covenants in praesenti on the theory that they run with the land is no reason why the assignment theory should not be applied to naked covenants in jurisdictions accepting the English view.

In several respects, however, the assignment theory is not the equivalent of the theory that covenants run with the land, though courts have desperately attempted to make it such. Where covenants run with the land the remote grantee takes free and clear of all equities existing between the grantor and the immediate grantee.[24] On the assignment theory, however, the assignee of

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[22]Rawle, Covenants, 5th ed., 336; Newman v. Sevier, (1907) 134 Ill. App. 544; Security Bank v. Holmes, (1896) 65 Minn. 531, 68 N.W. 113, 60 A.S.R. 495; Boyd v. Belmont, (1880) 58 How. Prac. (N.Y.) 513; Tucker v. McArthur, (1898) 103 Ga. 409, 30 S.E. 203.

[23]See Keys & Marshall Realty Co. v. Trustees of Canton Christian College (1911) 146 App. Div. 796, 131 N.Y.S. 527, aff'd in 205 N.Y. 593, 98 N.E. 1105. Courts refusing to apply the assignment theory to broken covenants in praesenti of course will not apply it to naked covenants. Bull v. Beiseker, (1907) 16 N.D. 290, 113 N.W. 870, 14 L.R.A. (N.S.) 514; H.T.S.C. Company v. Whitehouse, (1916) 47 Utah 323, 154 Pac. 950, L.R.A. 1916D 611. And in Ballard v. Child, (1852) 34 Me. 355, though a statute gave the remote grantee the right to sue on covenants where he has been evicted, the court relied on the technical fact that as the plaintiff had not been in possession he had never been evicted and hence that the statute did not apply. In the case of the covenant of seisin where neither title nor possession pass, there is not only a naked covenant, but under the American view of covenants in praesenti, it is also a broken covenant and the assignment theory has been applied. Kimball v. Bryant, (1879) 25 Minn. 496. The covenants of warranty and of quiet enjoyment are not broken at once but cannot the promise, the covenant, be assigned as readily as an accrued cause of action? As Iowa adopts the English view in respect to the covenant of seisin, that it is not broken at the time of the conveyance, it would seem that the effect of the decision in Rockafellor v. Gray et al., (Ia. 1922) 191 N.W. 107 is to expressly acknowledge the assignment of the unbroken covenant. This, of course, is the same result as that arrived at under the theory of estoppel. See, footnote 20.

"Today, when ordinary choses in action are freely assignable, it is a curious spectacle to find courts treating covenants for title with less liberality and in certain cases denying them assignability in flat contradiction to their terms. American courts should hesitate to confess self-imposed limitations on their power to do justice. Neither should they abrogate the function of determining what principles are fundamental, what accidental in the law, nor dodge the difficulties of revamping or discarding ancient theories to meet modern conditions." 1 Neb. L. Bul. 1, 43.

[24]Allison v. Pitkins, (1895) 11 Tex. Civ. App. 655, 33 S.W. 293; Rawle, Covenants, 5th ed., 331; 3 Sedg., Damages 103.

the chose in action should logically get no greater rights than his assignor had.[25] Nevertheless, in the recent case of *Rockafellor v. Gray et al.*,[26] where the consideration named in the deed from the covenantor, the defendant, was $4,000, but in fact only $1,000 was paid him, the court, relying on the theory of assignment, held that although he could have introduced parol evidence to show this as against his immediate grantee, he was estopped to do so against a remote grantee.[27] As to an estoppel, it seems clear that the remote grantee had never seen the deed from the defendant and that he did not know what consideration was cited therein. And under the assignment theory a release by the covenantee while in possession for a valuable consideration would be effective, and while it might be held that such a release requires recording,[28] it is unusual to require the recording of the release of a personal chose in action. If the covenantee dies while still in possession, the land would go to his heirs but the chose in action would go to his personal representative,[29] unless here also on a subsequent conveyance by the heirs a fictitious assignment could be implied. The common-law presumption of payment[30] and the statute of limitations[31] will operate against the chose in action from the date of the conveyance whereas where the covenant runs with the land the statute does not operate until the actual breach.

The Minnesota court was among the first to apply the theory of equitable assignment to choses in action resulting from broken covenants in praesenti, and has indeed gone far in affording the remote grantee a remedy. Some of the inadequacies of this remedy have been pointed out. It is submitted that definite legislation, to the effect that the right to sue on all five covenants shall inure to a remote grantee whether or not there is privity of estate, is necessary to assure the remedy which apparently the courts desire that he shall have.

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[25]2 R.C.L. 629; Rawle, Covenants, 5th ed., 338.

[26](Ia. 1922) 191 N.W. 107.

[27]The Minnesota court has applied the same rule. Randall v. Macbeth, (1900) 81 Minn. 376, 84 N.W. 119, 83 A.S.R. 387. In the Iowa case the court seems to feel bound by stare decisis, but it did not even have this ground to stand on, for the authorities cited in support of this proposition were not cases of the assignment of a chose in action, but were cases where the covenants actually ran with the land. Shorthill v. Ferguson, (1876) 44 Ia. 249; Grenvault v. Davis, (1843) 4 Hill (N.Y.) 643.

[28]Susquehanna Coal Co. v. Quick, (1869) 61 Pa. St. 328; Rawle, Covenants, 5th ed., 332.

[29]Lowry v. Tilleny, (1884) 31 Minn. 500, 18 N.W. 542.

[30]Jenkins v. Hopkins, (1830) 9 Pick. (Mass.) 544.

[31]Durrand v. Williams, (1874) 53 Ga. 76.

BILLS AND NOTES—NEGOTIABLE INSTRUMENTS LAW—PRINCIPAL AND AGENT—SIGNATURE BY PROCURATION—INDORSEMENT WITHOUT AUTHORITY.—Section 21 of the Negotiable Instruments Law provides that: "A signature by 'procuration' operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the *actual* limits of his authority."[1] Does this section afford a principal any special protection not enjoyed where the signature bears no indication of the fact that it is signed by an agent?[2] A recent decision[3] suggests the possibility that there are two latent ambiguities in this section. First, what is a signature by "procuration?" Second, assuming a signature by "procuration" is involved, is a principal subject under this section to the defense of estoppel?[4] The question then remains, whether a signature by "procuration" is subject to the provisions of any other section in respect to defenses available to the principal.

An early Irish decision[5] definitely held that the actual words "per procuration" were essential to constitute a signature by procuration. Chalmers, however, drafter of the English Bills of Exchange Act denies the validity of any such distinction.[6] A number of text writers assert that the actual words "per procuration" have no peculiar intrinsic significance.[7] The phrase may be abbreviated "per proc"[8] or "per pro"[9] and it has been held that "for"[10] or "by"[11] are indicative of the same relationship. The

[1]G. S. Minnesota, sec. 5833; New York Neg. Inst. Law, sec. 40; English Bills of Exchange Act. (1882) sec. 25.

[2]Under section 23 of the N.I.L. a principal is expressly subjected to the defense of estoppel where an agent has signed his (the principal's) name, without authority and without any indication of the fact that it is signed by an agent.

[3]See statement of facts of this case, Imperial Garage, Inc. v. Bank of Simonville, (S.C. 1922) 114 S.E. 760, in RECENT CASES, page 507.

[4]Whether the principal is subject to this defense is a question of no small importance, for, as shown in the Imperial Garage Case, footnote 3, this question will determine whether or not the principal is entitled to a directed verdict in the ordinary case.

[5]O'Reilly v. Richardson, (1865) 17 I.C.L.R. 74 holds that "For Richardson and Son," "Thomas Popple," is not the equivalent of "per proc."

[6]Chalmers, Bills of Exchange, 6th ed., 77.

[7]Benjamin's Chalmers, Bills, 2nd Am. ed., 83; See cases in Colson's Huffcut on Neg. Inst., 2nd ed., 219, 220.

[8]Alexander v. Mackenzie, (1848) 6 C. B. 766.

[9]Stagg v. Elliott, (1862) 12 C.B.N.S. 373.

[10]The Employers' Liability Corp. v. Skipper and East, (1887) 4 T.L.R. 55.

[11]Nixon v. Palmer, (1853) 8 N.Y. 398. This case does not discuss the signature as a signature by "procuration" but cites in support of its decision Attwood v. Munnings, (1827) 7 B. & C. 278 in which the signature was by procuration. See cases cited in 6 Eng. and Empire Dig. 109.

decisions and the opinions of text writers lead to the conclusion that a signature by "procuration" is merely one that signifies on its face that the principal has acted only through an agent.[12] There is certainly nothing in the prepositions used, however, to signify that that agency is limited, special, and not general, but the act provides that such a signature "operates as notice that the agent has but a limited authority." It has been stated that there is a disposition to narrow the application of the rule of this section in the case of corporations.[13] These statements refer to the limits of the rule of this section and do not suggest that the section is inapplicable, that there are corporation signatures that are not signatures by procuration.[14] Colson would apparently maintain that this section is applicable to all cases of signatures by government officers.[15]

Assuming a signature by procuration is under consideration, is the principal "bound only in case the agent in so signing acted within the actual limits of his authority," or may he be estopped from denying the agent's authority? In *Attwood v. Munnings*,[16] where the question is considered for the first time, it was held that a person taking a bill accepted by procuration, ought to exercise due caution, and it would be only reasonable prudence to require production of the authority. This decision is cited with approval in *Alexander v. Mackenzie*,[17] where it was held that as the signature itself intimated a limited authority any purchaser of the bill was bound to see that the authority was properly exercised, for "the case is removed out of that class of cases where the extent of the authority is to be inferred from its exercise, and the mode of exercising it does not import any limitation of the authority." And in *Stagg v. Elliott*[18] it is definitely stated that payment of other bills similarly accepted is not sufficient grounds for holding the principal liable. While all of these decisions

[12]In view of the fact that there are some intimations that the words "per procuration" alone satisfy this section of the N.I.L., it is strange that no text writers attempt to define the meaning of this term. Text writers have been content with stating that a signature "by procuration" does notify one of the existence of a special agency.

[13]Chalmers, Bills of Exchange, 6th ed., 77; Benjamin's Chalmers, Bills, 2nd ed., 83.

[14]Re Land Credit Co., (1869) L.R. 4 Ch. Div. 460, 468.

[15]Colson's Huffcut, Neg. Inst. 2nd ed., 219 stating The Floyd Acceptances, (1868) 7 Wall. (U.S.) 666, 19 L. Ed. 169.

[16](1827) 7 B. & C. 278.

[17](1848) 6 C.B. 766, 775.

[18](1862) 12 C.B.N.S. 373, 381. See also Eyre v. M'Dowell, (1863) 14 I.C.L.R. 314, 332.

antedate the codification of the law on this subject in England[19] there were intimations, dicta, and at least one definite decision qualifying the rule of those decisions. In *O'Reilly v. Richardson,*[20] it was stated that the principal might be precluded from denying the agent's authority, and, where the authority of an agent was limited in respect to charter parties by the terms of a written power it was held that the principal was liable even though the signature was by procuration for the reason that in other respects the agent was a general agent.[21] Chalmers' text does not consider this conflict and in view of the fact that he specifically provided for an estoppel in the section of the English Act[22] immediately preceding the one under consideration the conclusion is persuasive that in this section he intended to eliminate the element of estoppel. In the English decisions after the adoption of the Bills of Exchange Act, however, there are intimations that the principal might be estopped[23] and in a somewhat recent decision,[24] finding evidence of ratification, the court specifically refused to decide whether a defense of estoppel was valid. The general rule as to signatures by procuration stated in *Attwood v. Munnings* was recognized in an early American decision[25] but the question of estoppel was not involved. In states where the Negotiable Instruments Law has been enacted signatures by procuration have not been discussed as such and it has been indicated that estoppel might arise.[26] Research has disclosed but one decision,[27] aside

[19]English Bills of Exchange Act of 1882.

[20](1865) 17 I.C.L.R. 74, 84. The statement is dictum, however, as the court held that the signature involved was not "by procuration." See footnote 5.

[21]Smith v. M'Guire, (1858) 3 H. & N. 554, 556.

[22]The section corresponding to section 23 of the American N.I.L.

[23]See Employers' Liability Corp v. Skipper and East, (1887) 4 T.L.R. 55, 56; Morison v. Kemp, (1912) 29 T.L.R. 70, 71.

[24]Morison v. London County and Westminster Bank Limited, (1913) 108 L.T.R. 379, stated that an estoppel might arise where the principal neglects some duty owed to a third party, where the neglect is the proximate cause of the agent's wrongful act, a neglect immediately connected with the transaction itself. It was said that there must be practically a showing that the principal caused the third party to take the checks, a fraud on such third person. This decision is reversed in Morison v. London County and Westminster Bank Limited, (1914) 111 L.T.R. 114 and recovery denied in respect to some of the checks under a special act regarding "crossed checks" and on the others on the grounds of ratification, the court refusing to discuss the question of estoppel.

[25]Nixon v. Palmer, (1853) 8 N. Y. 398. Note that in North River Bank v. Aymar, (1842) 3 Hill 262, 217 the expression "apparent authority" is used in the sense that a fair construction of the power of attorney involved actually gave the agent the authority he exercised.

[26]Simon v. Temple Lbr. Co., (Tex. Civ. App. 1915) 178 S. W. 681. N.I.L. enacted in Texas after the decision in this case. Swift & Co. v.

from the *Imperial Garage case,* in which this section of the act and this question of estoppel is discussed and it was there held that the principal may be estopped as against those who relied upon the appearance of power which he permitted, and that section 21 must be construed together with section 19,[28] which provides that "the authority of an agent may be established as in other cases of agency." In order to sustain these decisions recognizing estoppel, however, it is not only necessary to assume that it was not intended to omit the doctrine of estoppel from the section, but it must also be maintained that express words of section 21 are not to be given their literal effect. Where there is no notice of the fact that an agency is limited, a principal is estopped to deny agency where the agent has acted within the apparent scope of his authority providing the facts upon which such ostensible authority is based were known to the party dealing with the agent.[29] But where facts and circumstances give notice of a special agency, which signifies limited authority, the party dealing with the agent acts at his peril and must ascertain the extent of the actual authority of the agent.[30] And even if an agent has apparent authority, if a person dealing with him has notice of facts which would put a reasonable man on his inquiry he must at his peril ascertain whether the agent has actual authority.[31] Section 21 provides that the signature by procuration "operates as notice"

Miller, (1916) 62 Ind. App. 312, 332, 113 N.E. 447. N.I.L. adopted in 1913 in Indiana. In both these cases it was indicated that had the evidence been sufficient an estoppel might have been raised. In Chamberlain, etc., Co. v. Bank of Pleasonton, (1920) 107 Kan. 79, 190 Pac. 742 the language in several places indicates "estoppel" but possibly the decision is merely that the express power to collect cash, in the absence of an express limitation, carries with it the power to endorse checks.

[27]Crane v. Postal Teleg. Cable Co., (1918) 48 App. D.C. 54, 61. In this case, however, the signature involved was: "Postal Telegraph-Cable Company, by Henry Green, Cashier," and further, the decision shows that Green actually was a cashier. As a cashier he is prima facie a general agent in respect to transactions involving negotiable paper and therefore the case is within the qualification asserted in an early English case, footnote 21, a qualification discussed later in the text.

[28]Minn. G.S., 1913 sec. 5831; N.Y., Neg. Inst. Law, sec. 38.

[29]Columbia Mill Co. v. National Bank of Commerce, (1893) 52 Minn. 224, 229, 53 N.W. 1061; Dispatch Printing Co. v. Nat. Bank of Comm., (1911) 115 Minn. 157, 162, 132 N.W. 2; See Jackson, etc., Co. v. Commercial Nat. Bank, (1902) 199 Ill. 151, 159, 65 N.E. 136, 59 L.R.A. 657, 93 A.S.R. 113. See also, 12 A.L.R. 111, 112.

[30]Beck v. Donohue, (1899) 27 Misc. 230, 57 N.Y.S. 741, 742; Metropolitan Aluminum Co. v. Lau, (1908) 61 Misc. 105, 112 N.Y.S 1059, 1061. See also, Michael v. Eley, (1891) 61 Hun (N.Y.) 180, 15 N.Y.S. 890.

[31]Huie v. Allen, (1895) 87 Hun (N.Y.) 516, 34 N.Y.S. 577, 579; Nulsen v. Terre Haute Brewing Co., (1916) 203 Ill. App. 119; note 12 A.L.R. 111, 112.

of limited authority; so on ordinary rules of agency the principal is not bound by acts apparently within, but actually outside of the agent's authority.[32]

Do sections 19[33] or 23[34] qualify the context of section 21? In the English act, from which all of these sections are taken, sections corresponding to 19 and 23 precede the section on signatures by procuration, which would indicate that the latter qualifies the former in so far as the former in context are applicable to signatures by procuration. Further the specific treatment of signatures by procuration should limit the more general provisions. Section 23, however, which provides expressly for estoppel, purports to apply only "when a signature is forged or made without the authority of the person whose signature it purports to be," so how can this section have any application to a signature by procuration?[35] In the *Imperial Garage Case* the validity of the defense of estoppel is said to rest on this section. As the signature clearly indicated that the principal's name was signed by an agent, and the agent's name stated, it is clear that there was no "forged" signature.[36] Nor did this signature "purport to be" the signa-

[32]See Huffcut, Agency, 2nd ed., 136. Especially in decisions that did not specifically discuss the question whether the signature involved was a signature by procuration it is more reasonable to assume that they were not considered signatures by procuration, rather than to assume that an estoppel was being recognized in the face of the general rule that notice precludes the defense of estoppel. It undoubtedly is true that the prepositions by, for, etc., do not intrinsically indicate that an agency is special and the decisions under consideration may well be regarded as an indication that it is not desirable that every word indicating agency shall have the effect of charging third parties with notice, but none of these courts have denied that these signatures are signatures by procuration, and, as pointed out, they have been definitely held to be such.

[33]See footnote 28.

[34]Minn., G. S. 1913, sec. 5835; N.Y., Neg. Inst. Law, sec. 42; English, Bills of Exchange Act, (1882) sec. 24. "When a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, . . . unless the party . . . is precluded from setting up the forgery or want of authority." The word "precluded" is construed as equivalent to "estopped." Chalmers, Bills of Exchange, 6th ed., 75.

[35]Chalmers, under his discussion of section 23, Chalmers, Bills of Exchange, 6th ed., 72 cities no cases of signatures by procuration. Brannan, The Negotiable Instruments Law, 3rd ed., 82 discussing this section cites one case involving a signature by procuration but that case does not mention the N.I.L. Swift & Co. v. Miller, (1916) 62 Ind. App. 312, 113 N.E. 447. The unauthorized signature of the principal, there being no indication from the signature that it is signed by an agent, comes within the meaning of this section. Salen v. Bank of State of New York, (1906) 110 App. Div. 636, 97 N.Y.S. 361; Standard Steam Spec. Co. v. Corn Exchange Bank, (1914) 84 Misc. 445, 146 N.Y.S. 181, affirmed 220 N.Y. 478, 116 N.E. 386.

[36]12 R.C.L. 145. In Fairgate Realty Co. v. Drozda, (Mo. 1916) 181 S.W. 398 and Anglo-South American Bank v. Nat. City Bank, (1914) 161

ture of the principal, it purported to be the act of an agent designated.

Elminating dicta, it is submitted that the actual law codified by this section does not warrant the defense of estoppel based on the mere repetition of acts similar to the transaction on which suit is brought. The evidence offered must tend to show that the agent is in fact a general agent or it is incompetent. The question whether an agent is a general or special agent, however, is one of degree. It is the privilege of the principal to delegate such authority as he sees fit and he may give an agent authority to conduct an entire business except as to a single phase and limit the agent's authority in that field alone. Assuming, as was the case in *Smith v. McGuire,*[37] that the fact of such limitation is definitely proved, only estoppel protects the third party. Nevertheless the evidence essential to prove such an estoppel is entirely different from the evidence in support of an estoppel based on similar transactions. The law on the question warrants the distinction and justifies only the estoppel based on evidence of general agency. If section 21 is to apply to every signature[38] indicating the fact of agency it seems desirable that the doctrine of estoppel be recognized in all of its aspects in this particular field even though a reformation of the section is logically essential to permit it.

CORPORATIONS—DOES STOCKHOLDERS' "DOUBLE" LIABILITY EXTEND TO ULTRA VIRES DEBTS OF THE CORPORATION?—Some states have statutory or constitutional provisions imposing upon stockholders liability to creditors to an amount equal to the par value of their stock. Does such liability extend to debts of the corporation arising out of ultra vires transactions?

In the case of *Ward v. Joslin,*[1] where it was sought to hold stockholders liable upon the corporation's ultra vires guaranty of

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App. Div. 268, 146 N.Y.S. 457, aff'd 217 N.Y. 727 it is apparently assumed that the signature involved was a forgery and therefore the provisions of section 23 were applicable. The point was not contested in either case and in both the signature indicated that it purported to be the act of an agent so the dicta as to the application of section 23 is questioned. In England the Forgery Act, (1861) sec. 24, provides that a signature by procuration without authority and with intent to defraud is a forgery and the question might arise as to which section applied, such forged signature by procuration coming within the terms of both sections.

[37]See footnote 21. [38]See footnote 32.

[1](1902) 186 U.S. 142, 22 S.C.R. 807, 46 L.Ed. 1093. The question of whether stockholders would be liable for ultra vires debts to the

notes, the United States Supreme Court answered the question in the negative, adding that it was immaterial that the corporation itself might be estopped to set up the ultra vires nature of the transaction. Following this decision, it has been held in New York that stockholders are not personally liable for a deficiency judgment upon an ultra vires mortgage.[2] The same rule was applied in respect of a liability arising out of a transaction which was within the power of the corporation acting through the stockholders, but outside the authority of the board of directors who, in fact, executed the transaction.[3] In a suit against the stockholders upon an accommodation indorsement by the corporate officers, the Pennsylvania court held that the stockholders were liable, but the true basis of the decision is that the court considered the indorsement in question to be intra vires.[4] A notable limitation to the rule of *Ward v. Joslin* was laid down by the Colorado court in holding the stockholders liable on the ground that since the ultra vires business had been carried on for several years and the stockholders had received profits therefrom, they had either actual or presumptive knowledge of the transaction, and in effect had ratified it.[5] Two jurisdictions, New Hampshire and Kansas, in decisions prior to *Ward v. Joslin,* held the stockholders liable despite the fact that the liability grew out of ultra vires transactions.[6]

The question under discussion arose for the first time in Minnesota in a recent case[7] which involved a receiver's suit to enforce

extent of their unpaid stock subscriptions or for bonus stock is outside the scope of this note. In passing, it may be remarked that liability was imposed in Baines v. Babcock, (1892) 95 Cal. 581, 27 Pac. 674, 30 Pac. 776, 29 A.S.R. 158, and denied in Leighton v. Leighton Lea Ass'n, (1911) 74 Misc. 229, 131 N.Y.S. 561, 565.

[2]Leighton v. Knapp, (1904) 115 N.Y.S. 1040; Leighton v. Leighton Lea Ass'n, (1911) 74 Misc. 229, 131 N.Y.S. 561. These cases involved a statute which provided that a corporation of this kind should not borrow money for longer than two years, and the mortgage in question ran for a longer period.

[3]Assets Realization Co. v. Howard, (1911) 70 Misc. 651, 127 N.Y.S. 798, 812, aff'd on another ground in 211 N.Y. 430, 105 N.E. 680.

[4]First Nat. Bank v. Darlington, (1904) 25 Pa. Super. 438; First Nat. Bank v. Darlington, (1906) 30 Pa. Super. 302.

[5]Kipp v. Miller (1910) 47 Colo. 598, 108 Pac. 164, 135 A.S.R. 236.

[6]Connecticut Riv. Sav. Bank v. Fiske, (1880) 60 N.H. 363. The stockholders were held liable for debts contracted in excess of the statutory limitation under a statute providing that "Every stockholder . . . shall be liable for all debts and contracts of the corporation. . . ." Ball v. Reese, (1897) 58 Kan. 614, 50 Pac. 875, 62 A.S.R. 638, where it was held that the stockholders could not set up the fact that certain notes being sued on were issued without authority by the corporate officers.

[7]State ex rel. Hilton v. Mortgage Security Co., Inc., (Minn. 1923) 192 N.W. 348.

the constitutional liability of stockholders, pursuant to the provisions of article 10, section 3 of the Minnesota constitution. The articles of incorporation of the insolvent corporation, which had $600,000 capital stock outstanding, limited the amount of indebtedness to which the corporation at any time should be subject to $100,000. The proceeding showed that the corporation in fact had incurred debts exceeding $900,000, and that its assets did not exceed $200,000. The receiver contended that the stockholders were liable for an amount equal to the par value of their stock, namely, $600,000. But the court, accepting as sound the doctrine of *Ward v. Joslin*, held that the stockholders were liable for $100,000 and no more.[8]

It is interesting to note that the constitutional provisions involved in the *Ward case* and the Minnesota case are widely dissimilar. The former provided that: "Dues [construed by the court to mean 'debts'] from corporations shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder. . . ." The court in effect said that since the term "debts" connotes "contract obligations," and does not include so-called "prescribed" or "imposed by law obligations," liability arising out of ultra vires transactions are excluded. The Minnesota provision is: "Each stockholder . . . shall be liable to the amount of stock held or owned by him." It does not say "liable for debts." Hence, the decision of the *Ward Case* is not directly in point, unless the Minnesota court is reading into the Minnesota provision words that are not there.

The theory of the Minnesota case is, first, that all persons dealing with the corporation are charged with notice of the provisions of its charter; and, second, that the provision in the articles of incorporation, limiting the amount of indebtedness, is in part for the protection of the stockholders, and forms a part of the contract between them and the corporation, marking the limit of the debts which the corporation lawfully may incur. As to the first point, it should be noted that the Minnesota court previously

[8]Presumably, since under this decision stockholders are relieved of personal liability for debts of the corporation in excess of the limit set by the corporate charter, they similarly would be relieved of liability for debts arising from any other ultra vires transaction, at least, where the transaction is ultra vires in its primary sense. For a discussion of primary and secondary ultra vires acts in Minnesota, see 7 MINNESOTA LAW REVIEW 332. Ultra vires acts in its secondary sense were involved in two of the cases mentioned supra, namely, Ball v. Reese, cited in footnote 6, and Assets Realization Co. v. Howard, cited in footnote 3.

had said that parties dealing with the corporation, without knowledge of the fact that its borrowing power has been exhausted, are not bound to investigate extrinsic matters upon which that fact depends.[9] Accordingly, even though each creditor is charged with notice of the limitation upon the amount of indebtedness which the corporation may incur, yet he is not charged with notice of previous indebtedness, in the absence of which his claim would not be ultra vires. Creditors, of course, have no access to the books and records of a corporation. Generally the stockholders do have such access, and further, they may be said to have the duty to select competent men to manage the corporate affairs. As a practical matter, then, should not the loss occurring in the Minnesota case have fallen upon the stockholders rather than on the creditors? As to the second ground of the decision, the court previously has said that "When subscribing for his shares and entering into the organization, he [the stockholder] undertakes the responsibility for the result of litigation in which the corporation becomes involved, to which he is not a party, . . .;"[10] and that in the absence of fraud, collusion or mistake, a judgment against the corporation is binding on the stockholder in establishing both his constitutional liability and his liability for unpaid dues on stock.[11] Necessarily this rule is modified by the recent Minnesota decision.[12]

Some courts have allowed the stockholders to avoid personal liability by showing that the judgment against the corporation was based on a tort, the theory being that the term "debt," as used in the provisions establishing the liability, is intended to cover only indebtedness arising ex contractu, and not ex delicto.[13] The Minnesota court has not passed upon this precise question as yet, but in view of the decision now under consideration, it seems doubt-

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[9]See Kraniger v. People's Bldg. Soc., (1895) 60 Minn. 94, 97-99, 61 N.W. 904.

[10]Holland v. Duluth Iron Mining, etc., Co., (1896) 65 Minn. 324, 331, 68 N.W. 15.

[11]Hanson v. Davidson, (1898) 73 Minn. 454, 462, 76 N.W. 254. As to the conclusiveness on stockholders of judgments against the corporation, see generally 19 Yale L.J. 533; note, 97 A.S.R. 463.

[12]Ward v. Joslin similarly modified the rule set forth in Hancock Nat. Bank. v. Farnum, (1899) 176 U.S. 640, 643, 20 S.C.R. 506, 44 L.Ed. 619.

[13]Clinton Mining, etc., Co. v. Beacom, (1920) 264 Fed. 228, affirmed in 266 Fed. 621, 14 A.L.R. 263, and note, certiorari denied in 254 U.S. 637, 41 S.C.R. 9, 65, L.Ed. 450. Contra, Henley v. Myers, (1907) 76 Kan. 723, 736, 93 Pac. 168, 173, 17 L.R.A. (N.S.) 779, aff'd on another point in 215 U.S. 373, 30 S.C.R. 148, 54 L.Ed. 240. See notes, 22L.R.A. (N.S.) 256, 19 Ann. Cas. 138.

ful whether the double liability will be held to extend to liability for corporate torts.

It may be added that there are practical difficulties which will be encountered in the application of the rule laid down in the Minnesota case. First, it will be necessary for each creditor to establish that his claim is intra vires, that is, that when it arose it did not increase the then existing indebtedness beyond the limit specified in the articles. It then remains to determine in what manner the assets of the corporation will be applied and to what extent the stockholders will be liable. It is reasonable, however, to assume that, in the Minnesota case, the $200,000 corporate assets will be applied proportionately to both ultra vires and intra vires debts, thus paying two-ninths of the intra vires indebtedness of $100,000, and leaving only seven-ninths of it to be pro rated among the stockholders. Whether this is the method to be pursued is not stated by the court.[14]

A more serious objection to the holding arises in view of the following possibility. Suppose a corporation with a $100,000 debt limit, incurs debts of $200,000, later paying the $100,000 intra vires indebtedness. Since it is reasonable to assume that this payment would not divest the remaining $100,000 indebtedness of its ultra vires nature, and, while the stockholders would not be liable personally therefor, since it would still remain a debt of the corporation it follows that all debts subsequently incurred in excess of the prescribed limit necessarily are also ultra vires. Logically, under such circumstances, the stockholders would be relieved of all personal liability. Would the court go to this extreme?

Particularly significant in this connection perhaps are these words of the court: "It may not be amiss to note that laws imposing such [double] liabilities are generally regarded in other states as unsatisfactory in their results, except in cases of banks, and that few such laws now exist."[15] This statement seems to indicate a desire on the part of the court to restrict as far as possible the effect of the constitutional provision.

[14]It is to be noted, however, that the court says: "And we reach the conclusion that . . . the stockholders . . . can be held personally liable for its [the corporation's] debts to the extent of $100,000 and no more."

[15]State ex rel. Hilton v. Mortgage Security Co., Inc., (Minn. 1923) 192 N.W. 348, 351, referring to an article by Ballantine, Stockholders' Liability in Minnesota, 7 MINNESOTA LAW REVIEW 79, 98.

RECENT CASES

ACCIDENT INSURANCE—CONTRACTS—IMMEDIATE NOTICE OF ACCIDENT AND POSITIVE PROOF OF DEATH WITHIN STIPULATED TIME AS CONDITIONS PRECEDENT TO THE INSURER'S LIABILITY—IMPOSSIBILITY.—The plaintiff's intestate carried an accident insurance policy, with the defendant company. The policy provided that unless written notice of death be given within ten days and positive proof of death furnished within six months from the time of the accident, all claims for loss by death shall be invalidated. The insured disappeared and the fact that he had been accidentally killed was not and could not have been ascertained until three years thereafter, at which time his automobile was found in a river. Notice and positive proof of death was given the defendant forthwith. *Held*, two justices dissenting, that the failure to give notice within the time provided by the policy barred the action. *Hanna v. Commercial Travelers' Mut. Accident Ass'n of America*, (1922) 197 N.Y.S. 395.

The court, in the instant case, proceeded under the general rule of contracts that when a person by express contract engages absolutely to do an act, not impossible or unlawful at the time, neither inevitable accident nor other unforeseen contingency not within his control will excuse him for the reason that he might have provided against them by contract. 3 Williston, Contracts 3280; *Whiteside v. North American Acc. Ins. Co.*, (1911) 200 N.Y. 320, 93 N.E. 948. Various exceptions to the rule, however, have been definitely established, 3 Williston, Contracts 3288, especially where, as in the principal case, the result is a flat forfeiture. The New York decisions, laying down a rule that is shocking to the layman, represent a distinctly minority view, the weight of authority holding, that where, because of circumstances and conditions surrounding the transaction, the giving of notice within the time specified becomes impossible, it will be excused and held sufficient if given within a reasonable time after the removal of the obstacle. Note 18 L.R.A. (N.S.) 109; *Woodman Acc. Ass'n v. Pratt*, (1901) 62 Neb. 673, 87 N.W. 546, 55 L.R.A. 291; *Continental Cas. Co. v. Lindsay*, (1910) 111 Va. 389, 69 S.E. 344. This rule is applied where the insured is living but rendered incapable of giving the notice, 5 Joyce, Insurance, 2nd ed., 5478; see *Insurance Companies v. Boykin*, (1870) 12 Wall. (U.S.) 433, 20 L.Ed. 442; *Comstock v. Fraternal Acc. Ass'n*, (1903) 116 Wis. 382, 93 N.W. 22; *Reed v. Loyal Protective Ass'n*, (1908) 154 Mich. 161, 117 N.W. 600; *Roseberry v. American Benevolent Ass'n*, (1909) 142 Mo. App. 552, 121 S.W. 785; *Guy v. U. S. Casualty Co.*, (1909) 151 N.C. 456, 66 S.E. 437, and where the insured is dead and the beneficiary has failed to give notice either through ignorance of the existence of the policy or ignorance of the fact of death. *Pacific Mutual Life Ins. Co. v. Adams*, (1910) 27 Okla. 496, 112 Pac. 1026; *Kentzler v. American Mut. Acc. Ass'n*, (1894) 88 Wis. 589, 60 N.W. 1002; *McElroy v. John Hancock Mut. Life Ins. Co.*,

(1898) 88 Md. 137, 41 Atl. 112, 71 A.S.R. 400. Since the accident which may result in death is the contingency insured against, it could not have been the intention of the parties that the insured give notice and if it so happens that the beneficiary is ignorant of his death it could not be the intention that the beneficiary do the impossible, and give "full particulars." The purpose of the notice is to give the insurer an opportunity for prompt investigation and the earliest practicable time would answer this requirement. *Munz v. Standard Life, etc., Co.,* (1903) 26 Utah 69, 72 Pac. 182, 62 L.R.A. 485. Minn., G.S. 1913, sec. 3524(5) provides specifically that in accident insurance, "failure to give notice within the time provided in this policy shall not invalidate any claim if it shall be shown not to have been reasonably possible to give such notice and that notice was given as soon as was reasonably possible."

ADMIRALTY—WORKMEN'S COMPENSATION LAWS—CONSTITUTIONALITY OF FEDERAL ACT MAKING STATE COMPENSATION LAW EXCLUSIVE REMEDY FOR MARITIME TORTS.—In a libel in admiralty, in which a stevedore sought to recover for injuries, it was argued that the federal court was without jurisdiction, because by act of Congress, June 10th, 1922 (42 Stat. 634), amending sections 24 and 256 of the Judicial Code, it was provided in effect that the various state compensation acts were exclusively applicable to all cases involving maritime tort-injuries sustained by persons other than seamen. *Held,* that this amendment is unconstitutional, because, first, Congress cannot deprive the federal courts of their jurisdiction over maritime torts; and, second, Congress cannot authorize the states to pass compensation laws, so as to affect the uniformity of the maritime law. *Farrel v. Waterman S. S. Co. et al.,* (Dist. Ct. S. D. Ala. 1923) 286 Fed. 284.

In a somewhat analogous case, the same amendatory act mentioned above again was *held* unconstitutional, on the theory that vesting admiralty jurisdiction in the state will interfere with the proper harmony and uniformity of maritime law. *State v. W. C. Dawson & Co.,* (Wash. 1922) 211 Pac. 724, 212 Pac. 1059.

These are the first cases construing this act of Congress. For a general discussion of this interesting subject, see 7 MINNESOTA LAW REVIEW 49, where it was suggested that under the existing authorities this legislation is unconstitutional.

ATTORNEY AND CLIENT—LEGAL ETHICS—PUBLIC POLICY AGAINST CONTRACTS TO SECURE A DIVORCE—RECOVERY OF MONEY PAID UNDER ILLEGAL CONTRACT.—The plaintiff's intestate, having a good cause for divorce but fearing that her husband in some manner might successfully claim some part of property valued at $50,000 which she owned at the time of the marriage, contracted with the defendant to procure the decree, the defendant to receive one-fifth of all the property to which the intestate should have clear title on the termination of the proceeding. Suit is instituted by the administrator of the wife's estate to recover $10,000 paid over in pursuance of the contract. *Held,* that the plaintiff recover. *In re Sylvester's Estate,* (Iowa 1923) 192 N.W. 442.

While in America, under modern authority, it is commonly held that a contingent fee contract for legal services is valid and enforceable, *Graham v. Machine Works,* (1908) 138 Ia. 456, 460, 114 N.W. 619, 15 L.R.A. (N.S.) 729; *High Point Casket Co. v. Wheeler,* (1921) 182 N.C. 459, 109 S.E. 378, 19 A.L.R. 391, if the contingency is the obtaining of a divorce the contract is illegal, *Klampe v. Klampe,* (1917) 137 Minn. 227, 163 N.W. 295; *Jordan v. Westerman,* (1886) 62 Mich. 170, 28 N.W. 826, 4 A.S.R. 836, just as in the case of contracts between husband and wife that aim at, or facilitate divorce. Greenhood, Public Policy, 490; see *Edleson v. Edleson,* (1918) 179 Ky. 300, 308, 200 S.W. 625, 2 A.L.R. 689, and note at 699, 705. And in view of the illegality of the existing express promise at least one court has refused to imply a promise so as to afford a recovery on the quantum meruit. *Barngrover v. Pettigrew,* (1905) 128 Ia. 533, 104 N.W. 904, 2 L.R.A. (N.S.) 260, 111 A.S.R. 206. But see, *Watkins et al. v. Sedberry et al.,* (1923) 43 S.C.R. 411. Generally the courts rest their decisions entirely on the ground of public policy, namely, that contracts which facilitate the getting of a divorce, and which tend to prevent reconciliation, are utterly repugnant to the interest of law and society in the continuance of the marriage relationship. 2 Thornton, Attorneys at Law, 758. As an additional reason it has been suggested that since contingent fees, contrary to the English and common law rule, are only allowed because they afford protection to persons who are unable to pay a definite certain fee for the prosecution of a meritorious claim, they should not be allowed in divorce actions where that reason does not exist, the court having discretionary power to require the husband to pay the wife's expenses in the suit. *Newman v. Freitas,* (1900) 129 Cal. 283, 292, 61 Pac. 907, 50 L.R.A. 548; see also *McConnell v. McConnell,* (1911) 98 Ark. 193, 198, 136 S.W. 931, 33 L.R.A. (N.S.) 1074, and note. Obviously the latter reason applies only to contracts by the wife and even there she must rely on the favorable action of the judge.

Nor does the contingent fee contract in a divorce action come within the general rule applicable to illegal contracts, whether executory or executed, that the law will leave the parties where it finds them. As held in the instant case, the making of such a contract is so intrinsically against public policy that as a means of insuring that they shall not be made the executed contract will be set aside and recovery decreed of any money paid under such contract even if the parties are in pari delicto. See *Donaldson v. Eaton & Estes.* (1907) 136 Ia. 650, 114 N.W. 19, 14 L.R.A. (N.S.) 1168, 125 A.S.R. 275. See also *Duval v. Wellman,* (1907) 124 N.Y. 156, 26 N.E. 343 where the same reasoning is applied to a marriage brokerage contract. See 2 Pomeroy Equity Jur., 4th ed., sec. 941. As stated by the court, however, the recovery might also be allowed on the theory that the parties are not in pari delicto, 2 Pomeroy, Equity Jur., 4th ed., sec. 942, so the extension of the exception to the general rule first stated is unnecessary.

BILLS AND NOTES—NEGOTIABLE INSTRUMENTS LAW—PRINCIPAL AND AGENT—SIGNATURE BY PROCURATION—SIGNATURE WITHOUT AUTHORITY.—An employee of the plaintiff corporation endorsed a check payable to the corporation by using a rubber stamp, "Imperial Garage. By.....,"

signing his own name in the blank provided. Having cashed the check at the defendant bank he absconded. In a suit to recover the amount of the check, which was charged to the plaintiff's account, a verdict was directed for the plaintiff as the defendent failed to show the employee had authority to endorse the check. *Held,* that section 23 of the Negotiable Instruments Law (identical with Minn. G.S. 1913, sec. 5835) providing that "when a signature is forged or made without the authority of the person whose signature it purports to be, it is wholly inoperative, . . . unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority," is applicable and that therefore the verdict should not have been directed as it is a question of fact for the jury whether the plaintiff is precluded from setting up the forgery or want of authority. Two justices, dissenting, maintain that a verdict was properly directed under section 21 of the Negotiable Instruments Law (identical with Minn., G.S. 1913, sec. 5833) which provides that "a signature by 'procuration' operates as notice that the agent has but a limited authority to sign, and the principal is bound only in case the agent in so signing acted within the actual limits of his authority." *Imperial Garage, Inc. v. Bank of Simpsonville,* (S.C. 1922) 114 S.E. 760.

For discussion of principles involved, see NOTES, p. 495.

CONTRACTS—CONSIDERATION—ON REQUEST ACTUAL FORBEARANCE IS A SUFFICIENT CONSIDERATION EVEN THOUGH THERE IS NO PROMISE TO FORBEAR.—The defendants are officers of a mercantile corporation which was indebted to the plaintiff. The plaintiff's credit man appeared at the store owned by the corporation, and, after conversing with the president, left some notes to be signed. There was no express promise by the plaintiff to refrain from enforcing his claim. The notes were later signed individually by the defendants and sent to the plaintiff, who then refrained from pressing the account and waited until the notes were due before sueing. The defendants plead want of consideration for the notes. *Held,* that a request for forbearance may be inferred from the circumstances and that even though there is no express promise to forbear, the actual forbearance for a reasonable time constitutes a sufficient consideration for the notes. *McDonald Bros. Co. v. Koltes et al.,* (Minn. 1923) 192 N.W. 109.

The general principle that forbearance to pursue a claim will afford consideration, if exercised under the proper circumstances, has long been recognized. Difficulties arise, however, in determining just what circumstances are essential in order that forbearance shall constitute a valid consideration. Some of these circumstances are—nature of the claim for which there has been forbearance—parties to the new contract—request by the promisor—necessity of a promise by the promisee to forbear—actual forbearance—period of forbearance. As to the nature of the claim, see 6 MINNESOTA LAW REVIEW 159. It is generally held that the waiver of a right, or forbearance to sue, may be in respect to a liability or debt of a third person and not the promisor. 13 C.J. 347; *Bank of Montreal v. Beecher,* (1916) 133 Minn. 81, 157 N.W. 1070. There must be a request for forbearance by the promisor, either actual or implied, *Queal & Co. v. Peterson,* (1908) 138 Ia. 514, 116 N.W. 593, 19 L.R.A. (N.S.) 842; *Gilman*

v. Ferguson, (1904) 116 Ill. App. 347, and the mere fact of forbearance is not sufficient evidence of the fact that such a request was made. It would seem that the evidence in the principal case clearly warrants the finding that there was a request. As to the necessity of a bi-lateral agreement, it is clear that a number of jurisdictions strictly require an agreement, a promise to forbear, and any amount of forbearance in the absence of an agreement will not constitute consideration. *Manter v. Churchill,* (1879) 127 Mass. 31; *Moore v. McKenney,* (1890) 83 Me. 80, 86, 21 Atl. 749, 23 A.S.R. 753; *Cowan v. Browne,* (Mont. 1922) 206 Pac. 432. The promise to forbear, or as it has been called, the acceptance of the offer to assume the debt in consideration of forbearance, may be implied from the conduct of the parties and the nature of the transaction, *Edgerton v. Weaver,* (1882) 105 Ill. 43, but mere forbearance cannot be conclusive evidence of such an acceptance, or promise. *Saunders v. Bank of Mecklenburg,* (1911) 112 Va. 443, 71 S.E. 714, 27 Ann. Cas. 982. These cases evidently overlook or in this problem, discard, the doctrine of consideration in unilateral contracts. Minnesota has always held that an agreement to forbear is good consideration but in no case before the principal case has the situation required an extension of the rule. *Bank of Montreal v. Beecher,* (1916) 133 Minn. 81, 157 N.W. 1070 and authorities there cited. In many jurisdictions the strict rule has been modified and actual forbearance upon request constitutes consideration, *Strong v. Sheffield,* (1895) 144 N.Y. 392, 39 N.E. 330, and this is probably the rule adopted in the instant case, as the court cites with approval *Glegg v. Bromley,* [1912] 3 K.B. 474 which applies the modified rule. In another place in the opinion in the instant case, however, it is stated that the notes amounted to a conditional payment and this obviously includes an implied agreement to forbear pursuing the remedy on the debt for a period until the notes become due. This may indicate that the strict rule is applied. If the notes had been demand notes the court would of necessity be obliged to follow the rule of actual forbearance if they found consideration for the note.

CORPORATIONS—STOCKHOLDERS' "DOUBLE" LIABILITY DOES NOT EXTEND TO ULTRA VIRES DEBTS OF CORPORATION.—The articles of incorporation of an insolvent corporation, which had $600,000 capital stock outstanding, limited the amount of indebtedness to which the corporation at any time should be subject to $100,000. This proceeding, which was a receiver's suit to enforce the constitutional liability of stockholders, showed that the corporation was indebted for more than $900,000, and that its assets did not exceed $200,000. The receiver contended that the stockholders were liable for an amount equal to the par value of their stock, namely, $600,000. *Held,* that the stockholders were liable to the extent of $100,000 and no more. *State ex rel. Hilton v. Mortgage Security Co., Inc.,* (Minn. 1923) 192 N.W. 348.

For a discussion of the principles involved, see NOTES, p. 500.

EASEMENTS—IMPLIED FROM GRANT—EASEMENTS CREATED AGAINST AN EQUITABLE ESTATE—TITLE OF GRANTOR AT TIME OF SEVERANCE.—A owned in fee one lot on which there was a hotel, and he also had an interest in

another lot as vendee under a contract of sale. He set up a tank on the latter and installed pipe connections, thus supplying the hotel with water. On A's death the interest in the lot was sold to B, who later acquired title in fee and sold to D, the defendant in this action. At the time of the sale to B, the hotel property was sold to C, the plaintiff in this action. D attempted to cut the pipes. *Held,* that on the severance of the two estates an easement was created in favor of the hotel lot and consequently an injunction is granted. *Anania v. Serenta,* (Pa. 1923) 119 Atl. 554.

Though an owner cannot create an easement in his own land, if he owns it in fee simple he may use one part of it so as to create a servitude or quasi easement in favor of another part. And it is generally held that, when the servitude is permanent, obvious, continuous, and reasonably necessary to the enjoyment of the quasi dominant part, as in the instant case, upon severance by aliening one part, or both parts to different persons, there arises by implication of law, an easement in favor of the quasi dominant tenement on the theory that the parties are presumed to have intended to deal with the property as it existed at the time of the sale. 9 R.C.L. 754, 755, 759; Jones, Easements 115, 122; *Zell's Exrs. v. Universalist Society,* (1888) 119 Pa. St. 390, 13 Atl. 447, 4 A.S.R. 654; *Rollo v. Nelson,* (1908) 34 Utah 116, 96 Pac. 263, 26 L.R.A. (N.S.) 315, and note; note 16 A.L.R. 1074. It is not necessary that the two pieces of ground be contiguous. 19 C.J. 864; *Cady v. Springfield Water Works Co.,* (1892) 134 N.Y. 118, 31 N.E. 245. Many courts, however, distinguish between easements by implied grant and implied reservation, by applying a much stricter rule to the latter, on the theory that the grantor cannot derogate from his own grant. These authorities hold that only in cases of strict necessity will the courts find that an easement was intended to be reserved. Jones, Easements, 101, 111; *Burns v. Gallagher,* (1884) 62 Md. 462; *Wells v. Garbutt,* (1892) 132 N.Y. 430, 30 N.E. 978; and see *Toothe v. Bryce,* (1892) 50 N.J.Eq. 589, 25 Atl. 182. And this applies as well to the situation where both portions are conveyed at time of severance, because one portion would necessarily be subject to a reservation; and so, in these jurisdictions, the instant case would probably have been decided the other way. Jones, Easements 110, 115; 9 R.C.L. 765; *Johnson v. Jordan,* (1841) 2 Met. (Mass.) 234, 37 Am. Dec. 85; *Brakely v. Sharp,* (1854) 10 N.J.Eq. 206. This line of authority may also be explained in part by the fact that an easement by implication is an exception to the rule that written instruments speak for themselves, which exception the courts hesitate to extend, and that implied easements are looked on with disfavor as incumbering property. 9 R.C.L. 754; Jones, Easements 110; *Robinson v. Clapp,* (1895) 65 Conn. 365, 32 Atl. 939, 29 L.R.A. 528; *Miller v. Hoeschler,* (1905) 126 Wis. 263, 105 N.W. 790, 8 L.R.A. (N.S.) 327, and note. In all the cases discussed, however, the grantor was seized of both the legal and equitable title to both parts of the land at the time of the severance. While "ownership" has been expressly held to be a condition precedent to the creation of an easement by implication, for the reason that no grant or reservation can be implied where an express one could not be made, 9 R.C.L. 757; Jones, Easements 100; *Woodworth v. Raymond,* (1883) 51 Conn. 70; *Ellis v. Blue Mountain Ass'n,* (1898) 69 N.H. 385, 41 Atl. 856, 42 L.R.A. 570, it would seem to be immaterial that at the time of severance, the owner

had only an equitable interest in the servient estate. Of course, in case of default and the termination of the equitable estate for that reason, the easement would be terminated, because it would last no longer than the estate supporting it. Since it would be thus terminated, the security of the vendor would in no way be impaired. On the other hand, as pointed out by the court in the instant case, since the equitable interest is the whole estate except the security interest retained by the vendor in the form of legal title, upon perfection of the title through the equitable estate, the easement should continue to exist in the estate.

ELECTIONS—INELIGIBILITY OF CANDIDATE RECEIVING HIGH VOTE—EFFECT ON ELECTION.—A proposed constitutional amendment, allowing sheriffs to succeed themselves, was before the voters for ratification. At the same election, a sheriff, who the voters knew was ineligible under existing law, was a candidate for re-election. The amendment was defeated but the sheriff received a plurality of votes. The relator, who received the next highest number of votes, now seeks to establish his right to the office, on the theory that votes knowingly cast for an ineligible candidate are illegal and cannot be counted. *Held*, one justice dissenting, that it will not be presumed that the voters acted in bad faith and mere knowledge of the facts stated does not render such votes illegal, though they are ineffectual, and therefore the petition is dismissed. *State ex rel. McKeever v. Cameron*, (Wis. 1923) 192 N.W. 374.

It is the universal rule that votes cast for a candidate whose ineligibility is not known to the voters, are not mere nullities, so as to elect the person receiving the next highest number of votes. *The Queen v. Hiorns*, (1838) 7 Ad. & El. 960; *Patten v. Haselton*, (1914) 164 Ia. 645, 146 N.W. 477, 51 L.R.A. (N.S.) 226, and note; *In re Corliss*, (1876) 11 R.I. 638, 643, 23 Am. Rep. 538; *Commonwealth ex rel. McLaughlin v. Cluley*, (1867) 56 Pa. St. 270, 94 Am. Dec. 75; *Dobbs v. Mayor and Council of Buford*, (1907) 128 Ga. 483, 57 S.E. 777, 11 Ann. Cas. 117, and note. Some courts hold that if the voters knowingly vote for an ineligible candidate the next highest candidate will be elected. *The Queen v. Coaks*, (1854) 3 El. & B. 249; but see *King v. Perry*, (1811) 14 East 549; *State ex rel. Bancroft v. Frear*, (1910) 144 Wis. 79, 128 N.W. 1068, 140 A.S.R. 992; see *The People ex rel. Furman v. Clute*, (1872) 50 N.Y. 451, 10 Am. Rep. 508. "Knowingly," however, has been held not only to contemplate knowledge of the disqualifying fact, but also knowledge of the fact that a law makes the fact a disqualification, *The Queen v. Mayor of Tewkesbury*, (1868) L.R. 3 Q.B.Div. 629; but see *Beresford-Hope v. Lady Sandhurst*, (1889) L.R. 23 Q.B.Div. 79, 84, 93, though voters will be presumed to know that open bribery and intimidation by the candidate amounts to disqualification. *Trench v. Nolan*, (1879) Ir.Rep. 6 C.L. 464; but see *The People ex rel. Bush v. Thornton*, (1880) 60 How. Prac. (N.Y.) 457, 475. Ordinarily, however, knowledge of the law that disqualifies will not be imputed to the voter, *Hoy v. State, ex rel. Buchanan*, (1907) 168 Ind. 506, 81 N.E. 509; *State, ex rel. Clawson v. Bell*, (1907) 169 Ind. 61, 82 N.E. 69, 13 L.R.A. (N.S.) 1013, and note, 124 A.S.R. 203, and note, contrary to an earlier view. *The State, ex rel. Morley v. Johnson*, (1884) 100 Ind. 489; *State,*

ex rel. Morley v. Gallagher, (1882) 81 Ind. 558. The test of whether voters knew of the disqualification depends on whether the notoriety of that fact is sufficient to warrant an inference that more than enough votes to give the majority candidate a plurality were cast by persons knowing of his disqualification. *Bancroft v. Frear,* (1910) 144 Wis. 79, 128 N.W. 1068, 140 A.S.R. 992. In *Barnum v. Gilman,* (1881) 27 Minn. 466, 473, 8 N.W. 375, 38 Am. Rep. 304, however, the Minnesota court adopts a rule that excludes all practical possibility of proving that any voter has knowledge of the disqualification. It was held that the secret ballot guaranteed to each voter by the constitution "precludes the possibility of identifying his vote, and prevents any effective investigation, outside of the ballot itself, concerning the intention with which it was cast, or the knowledge" of the voter, and therefore, "every ballot cast at any election which does not disclose upon its face any fact making it void . . . must be taken as a valid and bona-fide expression of the voter's choice . . . and cannot be treated as a nullity." It would seem that there is a tendency, with which the instant case is in accord, not only to require knowledge of both the law and fact resulting in disqualification, but also to require a showing of actual bad faith, an actual intention wantonly to waste his vote; *The People ex rel, Furman v. Clute,* (1872) 50 N.Y. 451, 466, 10 Am.Rep. 508; *Sanders v. Rice,* (1918) 41 R.I. 127, 102 Atl. 914, L.R.A. 1918C 1157, and note, as for instance, as suggested by the court in the instant case, votes cast for "the man in the moon" or the celebrated "Andy Gump." Due to the fact that "it is a fundamental idea in American politics that the majority shall rule," and hence that all possibility of a minority rule shall be excluded, several jurisdictions hold that the mere fact of knowledge does not warrant an inference that the votes were intended to be "thrown away," and hence they are not illegal, which seems to support the tendency mentioned. *Woll v. Jensen,* (1917) 36 N.D. 250, 162 N.W. 403; *State of Missouri, ex rel. Herget v. Walsh,* (1879) 7 Mo. App. 142. And *Gardner v. Burke,* (1901) 61 Neb. 534, 85 N.W. 541 would seem to go the full length of saying that even bad faith is immaterial unless the candidate himself is involved in the fraud.

EVIDENCE—RES GESTAE—SPONTANEOUS UTTERANCES.—The deceased had an arm and a leg severely crushed in a railway accident. Between the time of the accident and the arrival at the hospital the deceased talked with a fellow workman and gave him messages to convey to his relatives. There was evidence that during that time he was in extreme agony. An hour and three-quarters after the accident, during most of which time the deceased was under the influence of ether, the deceased said to his sister: "Hello, Et! My leg is gone. Does Ma know it? (Answer) They got me. . . . The brake gave way and let me down." Half an hour later he made similar statements to his mother. *Held,* two justices dissenting, that the first statement was admissible as part of the res gestae and that the admission of the statement to the mother was merely cumulative and hence not reversible error. *Clark v. Davis,* (Minn. 1922) 190 N.W. 45.

The true test, as to whether a statement is part of the res gestae and hence admissible as an exception to the hearsay rule, is definitely recog-

nized by all the justices in the instant case. Where a statement is made by a person who has been subjected to a shock, relative to the manner in which the accident occurred, and made while nervous excitement may be supposed to dominate to such an extent that the statement is spontaneous, rather than studied, and in reality the "event speaking through the person making the statements," it is admissible in evidence to prove the truth of the fact it purports to relate. *Denver v. Atchison, etc., R. Co.*, (1915) 96 Kan. 154, 157, 150 Pac. 562, Ann. Cas. 1917A 1007; *Britton v. Washington Water Power Co.*, (1910) 59 Wash. 440, 442, 110 Pac. 20, 33 L.R.A. (N.S.) 109, 140 A.S.R. 858; *Greener v. General Electric Co.*, (1913) 209 N.Y. 135, 102 N.E. 527, 46 L.R.A. (N.S.) 975; 3 Wigmore, Evidence 2255. The erroneous conception that in order to be admissible the statement must be simultaneous with the happening of the accident, *Borderland Coal Co. v. Kerns*, (1915) 165 Ky. 487, 177 S.W. 266, or substantially contemporaneous with it, see *Vaughan v. St. Louis, etc., R. Co.*, (1914) 177 Mo. App. 155, 174, 164 S.W. 144, is definitely repudiated in the instant case. Obviously, in many cases, the shorter the time the *more probable* it is that the statement is the legitimate off-spring of the act itself, *Westcott v. Waterloo, etc., R. Co.*, (1915) 173 Ia. 355, 361, 155 N.W. 255, but only because it is then more probable that *nervous excitement still exists* which has prevented reflection and consideration, which element alone is the guaranty of trustworthiness that warrants the exception to the hearsay rule. See 3 Wigmore, Evidence 2250. "A Suggested Classification of the Utterances Admissible as Res Gestae" by Morgan, 31 Yale Law Jour., 229, 238. See the annotation of the principal case in 21 Mich. Law Rev. 470.

HABEAS CORPUS—CONSTITUTIONAL LAW—MOB DOMINATION OF A CRIMINAL TRIAL—DUE PROCESS.—A petition for a writ of habeas corpus, filed in a district federal court, alleged that the trial in a state court, at which petitioners were convicted of murder and sentenced to death, was held at a time when public feeling growing out of race riots was high; that previous to the trial a mob had marched on the jail to lynch the petitioners, and had refrained only when certain officials promised execution for those found guilty; that colored witnesses were tortured into testifying against the petitioners; that no juryman could have voted for acquittal with safety; that petitioners' counsel feared to defend adequately; that even if acquitted petitioners could not have escaped the mob; that the whole trial lasted but forty-five minutes. These and other allegations set forth the fact that the trial was dominated by a mob. A demurrer to the petition was sustained in the district court. *Held*, two justices dissenting, that accepting the allegations of the petition as true, the petitioners were deprived of life and liberty without due process of law in violation of the fourteenth amendment to the federal constitution. Order reversed with a direction that the district judge ascertain the truth of the allegations of the petition. *Moore et al. v. Dempsey, Keeper of Arkansas State Penitentiary*, (U.S. 1923) 43 S.C.R. 265.

This decision definitely establishes the fact that the fourteenth amendment extends the right, to litigants in a state court in cases arising

under local law, to have a free, fair and impartial state tribunal and trial. Statements to this effect were made in both the majority and minority opinions in the famous case of *Frank v. Magnum,* (1915) 237 U.S. 309, 35 S.C.R. 582, 59 L.Ed. 969. The minority opinion, by Holmes and Hughes, JJ., carrying the theory to its logical conclusion, contended that the writ should issue and the truth of the allegations of mob-domination be examined into by the federal court. The majority in that decision, however, denied the writ for the reason that the petitioner had, in his application for a writ, merely set forth the allegations of mob-domination at the trial which had been set out in the appeal to the state supreme court *and had failed to set out the opposing evidence offered by the state* on that appeal. The criticism by Henry Schofield, 10 Ill. Law Rev. 479, 502, 503, that Leo Frank was entitled to a hearing and decision on the point by the Supreme Court of the United States if this is a federal right irrespective of what the appellate tribunal of the state had decided, is difficult to meet. As he further points out, the state constitution specifically gave the defendant the right to an impartial jury, and it was on this state right that the appeal to the state supreme court was based. On the theory that this writ called for a review, a determination as to whether or not *the state law* requiring an impartial jury had been judicially and not arbitrarily enforced, a right extended by the fourteenth amendment, the decision of the court is correct, though technical, for the determination of that question comprises a review of the entire state procedure. Whatever doubt may be cast on that decision, the issue is squarely presented in the instant case, the demurrer acknowledging for present purposes the actual existence of mob-domination, and the existence of such a federal right is clearly declared. Some confusion is introduced by the dissenting justices who first recognize the existence of this federal right but hold that the demurrer should be sustained as the existence of corrective appellate process and tribunals warrants the assumption that mob-domination did not exist and this in the face of a demurrer which admits that it did in fact exist.

Undoubtedly federal courts will exercise this jurisdiction with caution and give due weight to conclusions of state appellate tribunals, 28 Harv. Law Rev. 793, 794, and the results may be more wholesome than anticipated by Schofield. 10 Ill. Law Rev. 479. The dissenting opinion in the principal case asserts a more practical objection which is that the criminal is extended one more avenue of escape and method of causing delay in justice.

REAL PROPERTY—COVENANTS FOR TITLE—BREACH OF COVENANT OF SEISIN—RIGHTS OF REMOTE GRANTEE—EQUITABLE ASSIGNMENT.—A conveyed land to B by the usual warranty deed, reciting a consideration of $4,000, although in fact, only $1,000 was paid. B conveyed to C by warranty deed. Neither A nor B were ever in possession of the land. C, who was evicted under title paramount to A's, and who had never seen A's deed to B and did not know the consideration recited therein, demands that he be allowed to recover of A for breach of the covenant

of seisin, the whole consideration recited in A's deed. *Held*, that he can recover. *Rockafellor v. Gray et al.*, (Iowa 1922) 191 N.W. 107.

For a discussion of the principles involved, see NOTES, p. 489.

TAXATION—CONSTITUTIONAL LAW—CONFLICT OF LAWS—INTERNAL REVENUE—TAXATION OF NON-RESIDENT CITIZENS ON INCOME DERIVED FROM PROPERTY PERMANENTLY SITUATED OUTSIDE OF THE TAXING COUNTRY—TAKING PROPERTY WITHOUT DUE PROCESS.—The plaintiff, a citizen of the United States, has resided in Mexico since the year 1890. His entire income is realized from realty and personalty having a permanent situs in that country. Under a federal income tax law, Revenue Act, 1921, sec. 213, a tax was assessed upon him, the first installment of which he has paid under protest. In a suit to recover the amount paid it is *held*, that the tax is valid. *Cook v. Tait*, (Dist. Ct.Md. 1923) 286 Fed. 409.

What is the basis of jurisdiction to tax in the instant case? At common law jurisdiction over the person of a domiciled inhabitant supported a personal tax, even though that personal tax was graduated on wealth, part of which comprised foreign chattels. *Bemis v. Boston*, (1867) 14 Allen (Mass.) 366; *Commonwealth v. Pennsylvania Coal Co.*, (1901) 197 Pa. St. 551, 47 Atl. 740. The true basis of jurisdiction, jurisdiction over the person, was clearly recognized, *McKeen v. Northampton*, (1865) 49 Pa. 519, but it was sometimes declared that the power rested on the fiction that movables have a situs at the domicile of the owner. *Coe v. Errol*, (1886) 116 U.S. 517, 524, 6 S.C.R. 475, 29 L.Ed. 715. Reliance on this latter ground possibly accounts for the fact that the value of foreign realty was not included. *Bittenger's Estate*, (1889) 129 Pa. St. 338, 18 Atl. 132. It has been suggested, 32 Harv. L. R. 586, 591, that the decision in *Union Transit Co. v. Kentucky*, (1905) 199 U.S. 194, 26 S.C.R. 36, 50 L.Ed. 150, 4 Ann. Cas. 493 is accounted for by the fact that the court there failed to perceive the true basis of jurisdiction for a personal tax, and, adopting the fictitious basis, refused to apply the fiction to chattels when such chattels were, for practical purposes, as much outside the jurisdiction of the taxing state as in the case of foreign realty. The language of the *Union Transit* decision will only support the rule that jurisdiction over the person does not warrant and support a *property tax* on property permanently outside of the state. The case, however, involved a *personal tax*, not a property tax, so the decision limits the common-law rule and excludes as a basis for a personal tax the value of tangible chattels permanently outside of the jurisdiction. To justify the decision in the principal case it might be argued that the limitation of the *Union Transit Case*, as expressly stated therein, is inapplicable to intangible property and hence inapplicable to a tax on income from property, as the income is entirely distinct from the property itself, which alone can be said to be permanently outside of the jurisdiction. But the *Union Transit Case* speaks of lack of jurisdiction. In that case the taxpayer was a *resident* in the taxing state. In the principal case he is not a resident, there is only the bond of allegiance, citizenship, and yet this is held to give jurisdiction, a kind of jurisdiction apparently peculiar to the federal government.

But assuming that there is jurisdiction to tax in the principal case, is it a reasonable exercise of that jurisdiction within the "due process"

clause of the fifth article of the federal constitution? In the *Union Transit Case* it was said that the tax violated the "due process" clause of the fourteenth amendment to the federal constitution, but that clause, as intimated by Holmes J., in a dissenting opinion, and as pointed out in 32 Harv. L. R. 587, 593, should have been construed in the light of the common-law rule which as shown permitted such a tax. But even though the tax involved in the *Union Transit Case* be recognized as a violation of the "due process" clause, the instant case is distinguishable, as pointed out by the court, on the ground that the plaintiff by virtue of his citizenship enjoys rights and protection from the United States which warrant the imposition of the burden. The benefits are peculiar to the international problem and not to the interstate situation presented in the *Union Transit Case.*

BOOK REVIEW

THE POSITION AND RIGHTS OF A BONA FIDE PURCHASER FOR VALUE OF GOODS IMPROPERLY OBTAINED.—(Being the Yorke Prize Essay for the year 1918). By J. Walter Jones, Cambridge University Press, London, 1921.

Rarely in these days of slapdash compilation does one find a book written with masterly craftsmanship. In this little monograph, however, is work meriting comparison with some of Ames' essays. Indeed, in its compression, in its discriminatingly selected historical background and its thorough analytical exploration it is reminiscent of the papers of that legal scholar.

Choosing a limited field he has developed it intensively. Starting with a general statement of his problem and a definition of "goods" he discusses comprehensively the question who may be considered bona fide purchasers, what is "good faith" and "purchase for value" with the subsidiary question of who has the burden of proof. The rest of the book is divided into two parts: the first taking up the position of the purchaser toward the owner; the second, his position toward others than the owner. The first problem is subdivided into three sections dealing with the acquisition of ownership by the purchaser, his liability where the property has not passed and the question of restitution. The other division treats first the position of the purchaser toward his own vendor and then his position toward third parties.

One of the most interesting and complete sections, though of little practical consequence to American readers is that on sale in market overt. He gives a clear account of the historical origin and development of the doctrine and its present status. More important are his discussions of estoppel and sale by a vendor with voidable title. Although pointing out some similarities between the legal doctrine of estoppel and the equitable doctrine of a bona fide purchaser cutting off equities as bases for protecting buyers in good faith he concludes they are quite distinct. (pp. 51, 63) *Cf.* Ballantine, Purchase for Value and Estoppel, 6 MINNESOTA LAW REVIEW, 87. In that portion dealing with property passing by satisfied judgment against the wrongful obtainer one could wish that he had linked up his discourse on the position of the purchaser from the wrongdoer with that of a second wrongful obtainer. The strict boundaries of his narrow subject did not require it, however, so its omission is cause for regret and not criticism.

University of Minnesota. GEORGE E. OSBORNE

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THE AMERICAN BAR ASSOCIATION MEETING

By JOHN W. DAVIS*

THE forty-sixth annual meeting of the American Bar Association to be held at Minneapolis on the 29th day of August promises to be one not only of interest, but of great importance to the Association and to the profession at large. Year by year, the Association has grown in membership and influence, and more and more it is coming to speak as the authentic voice of the American bar. There has followed naturally an extension of its activities and an assumption of increased duties and responsibilities. This in turn has had a natural reaction upon the feeling of the profession at large toward the Association, and has brought to it a steadily growing support and interest. It may be accepted now as an established factor in the life of the American bar and it is certain to draw into its membership as the years go by an emphatic majority of the profession throughout the land.

There are indications already that the attendance at Minneapolis will equal and possibly surpass that at San Francisco in 1922, which was the largest annual meeting in the history of the Association. Formal addresses are to be delivered by Mr. Justice Pierce Butler, Secretary of State Charles E. Hughes, and the Earl of Birkenhead, formerly Attorney General and later Lord Chancellor of Great Britain, the mere mention of whose names is sufficient of itself to give distinction to any program. In addition, the Canadian Bar Association will be represented by the Honorable Newton W. Rowell, K. C. of Toronto, one of the most distinguished figures at the Canadian Bar, long a mem-

*President of the American Bar Association.

ber of Parliament and cabinet officer of the Dominion and its delegate to the first assembly of the League of Nations. Monsieur Jean Appleton, President of the Bar Association of France, has also promised to be present if his health will permit.

The sessions of the Association will be preceded, as usual, by meetings of the various sections of the Association, the Commission on Uniform State Laws, the Conference of Bar Association Delegates, and also by a meeting of the Council of the newly-formed American Law Institute. The Commission on Uniform State Laws convenes on the 22nd in order to give an entire week to its labors; the Conference of Bar Association Delegates on the 28th, and the Council of the American Law Institute on the same day. In arranging the program for the meetings of the Association, the committee in charge has endeavored to allow as much time as possible for the discussion of the reports of the various special and standing committees. There is, of course, a limit to the amount of debate which can be indulged in a three day session, and it is often impossible to give to the recommendations of the committees the deliberate consideration which they deserve. It would be premature at this time to foreshadow the reports which will be before the meeting, but that they will present matters of the highest consequence to the profession and to the country is quite certain.

The members of the Association are looking forward with eager anticipation to meeting with their colleagues and brethren of the bar of the state of Minnesota, which has furnished so many names that ornament the rolls of the profession. For myself, I believe it impossible to exaggerate the importance of such gatherings or of the bar associations themselves. The methods by which American lawyers are produced tend to scatter rather than unite the profession, and it is only through these voluntary associations that cohesion and solidarity can be attained. It is only through them that the American lawyer can become master in his own house and assemble his united strength for the highest service to his country and his fellow men.

AMERICAN BAR ASSOCIATION

TENTATIVE PROGRAM

Wednesday morning, August 29, at 10 o'clock.

President John W. Davis of New York will preside.
Address of Welcome by the Governor of Minnesota.
Announcements.
Report of Secretary.
Report of Treasurer.
Report of Executive Committee.
Nomination and election of members.
Address by the President of the Association.
Meeting of State delegations for nomination of General Council and Vice President and Local Council for each State.

Wednesday afternoon, August 29, at 2:30 o'clock.

This will be a joint session of the American Bar Association and the Minnesota Bar Association.
William A. Lancaster, President of the Minnesota State Bar Association, will preside.
Address by Hon. Pierce Butler, Associate Justice of the United States Supreme Court.

Wednesday evening. August 29, at 8:00 o'clock.

Address by The Right Honorable the Earl of Birkenhead.
Election of General Council.
9:45 P. M. President's Reception.

Thursday morning, August 30, at 9:00 o'clock.

Reports of Sections and Committees (Schedule to be later announced.)

Thursday afternoon, August 30, at 2:00 o'clock.

Special Committee Reports as follows:
Judicial Ethics, Chief Justice Taft, Chairman.
Law Enforcement, Charles S. Whitman, Chairman.
Americanization, R. E. L. Saner, Chairman.

Thursday evening, August 30, at 8:00 o'clock.

Address by Hon. Charles Evans Hughes, Secretary of State.

Friday morning, August 31, at 10 o'clock.

Reports of Sections and Committees (continued). (Schedule to be later announced.)
Miscellaneous Business.
Election of Officers.
Statement from Council of American Law Institute by William Draper Lewis, secretary.

Friday evening, August 31, at 7:00 o'clock.

Annual Dinner of Association.
Dinner to Ladies.

Saturday, September 1.

Excursion (to be later announced).

THE AMERICAN BAR ASSOCIATION
ITS ORGANIZATION, HISTORY AND ACHIEVEMENTS

By W. Thomas Kemp*

The American Bar Association holds its forty-sixth annual meeting in Minneapolis, Minnesota, August 29-31, 1923. It is therefore appropriate that the whole bar of Minnesota, who have so courteously invited the National Association to Minneapolis this year, should know something about the organization, history and achievements of the largest and one of the oldest organizations of lawyers in the world. A considerable portion of the bar of Minnesota are already members of the National Association, and to them many of the things hereinafter stated are well known; but it is hoped that all reputable lawyers of the great state of Minnesota will be sufficiently interested in the affairs of the National Association to join its ranks, and thereby assist in the important work which the future has in store for the advancement of the profession and the welfare of the nation.

Organization

On July 1st, 1878, Benjamin H. Bristow, Kentucky; William M. Evarts, New York; George Hoadly, Ohio; Henry Hitchcock, Missouri; Carleton Hunt, Louisiana; Richard D. Hubbard, Connecticut; Alexander R. Lawton, Georgia; Richard C. McMurtrie, Pennsylvania; Stanley Mathews, Ohio; Edward J. Phelps, Vermont; John K. Porter, New York; Lyman Trumbull, Illinois; Charles R. Train, Massachusetts and J. Randolph Tucker, Virginia, issued a call for a conference to be held at Saratoga Springs, New York, August 21st, 1878, "to consider the feasibility and expediency of establishing an American Bar Association." It was then stated that "a body of delegates, representing the profession in all parts of the country, which should meet annually, for a comparison of views and friendly intercourse, might be not only a pleasant thing for those taking part in it, but of great service in helping to assimilate the laws of the different states, in extending the benefit of true reforms and in publishing the failure of unsuccessful experiments in legislation."

In pursuance of this call, seventy-five leading lawyers of the nation met at Saratoga Springs on August 21, 1878, and organized the American Bar Association, and proceeded to hold

*Of Baltimore, Maryland; Secretary of the American Bar Association.

its first annual meeting. Twenty-one states were represented, New York leading with ten lawyers, Connecticut following with nine, Massachusetts with eight, Maryland with seven, and Louisiana, Pennsylvania and Vermont with six each. The trans-Mississippi states had but a single representative, U. M. Rose of Arkansas, afterwards as President of the Association. Of these charter members of the Association, four alone survive, Simeon E. Baldwin of Connecticut, and Francis Rawle of Pennsylvania, both of whom have since served as presidents of the Association, Edward T. Merrick of Louisiana, and Alfred Hemenway of Massachusetts.

The organization meeting was presided over by Benjamin H. Bristow of Kentucky. Francis Rawle of Pennsylvania, and Isaac Grant Thompson of Albany, N. Y., were named secretaries of the conference. The constitution then adopted stated the purposes of the Association as follows:

"Its object shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout the Union, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar."

This expression of the purposes of the Association has remained without change throughout nearly a half century of its existence.

The permanent officers of the Association elected at the first annual meeting were James O. Broadhead of Missouri, President, Edward Otis Hinkley of Maryland, Secretary, and Francis Rawle of Pennsylvania, Treasurer. In addition to these officers, the Association selected in pursuance of its constitution a vice-president from each state, a Council of one member from each state, and an Executive Committee of five members, including the secretary and treasurer ex officio. Standing committees of five members each were also appointed by the president on Jurisprudence; Judicial Administration and Remedial Procedure; Legal Education and Admission to the Bar; Commercial Law; International Law; Publications and Grievances.

History

From 1878 to 1922, the Association has held forty-five successive meetings. The first eleven of these meetings were held at Saratoga Springs, New York, the maximum attendance being one-hundred and forty-nine members. In 1889, the Association

met in Chicago, Illinois, and from that year until 1903, the meetings were held in even years at Saratoga Springs, and in odd years at some other place, varying from Boston, Massachusetts, to Denver, Colorado. In 1904, the year of the World's Fair in celebration of the anniversary of the Louisiana Purchase, the meeting was held in St. Louis, in conjunction with the International Congress of Jurists and Lawyers. Thereafter, the place of meeting swung to different parts of the nation, as far East as Portland, Maine, as far West as Seattle and San Francisco, and as far South as Chattanooga, Tennessee. One meeting only has been held outside of the country. In 1913, the Association met at Montreal, Canada, where a meeting twice as large as any of its predecessors was held in the midst of the delightful hospitality of the Canadian Bar, with the Lord Chancellor of England delivering the annual address. In 1917, the Association celebrated the fortieth year of its existence by returning to Saratoga Springs. The largest meeting in the history of the Association was held in San Francisco in 1922. Four special trains were run from Chicago to the Pacific Coast, for the accommodation of the Eastern members of the Association.

The Association has always pursued the policy of electing its president for a term of one year only. The roster of former presidents includes the names of Benjamin H. Bristow, William Allen Butler, David Dudley Field, John F. Dillon, James C. Carter, Joseph H. Choate, Alton B. Parker and Elihu Root of New York, Francis Rawle, Walter George Smith and Hampton L. Carson of Pennsylvania, James O. Broadhead, James Hagerman and Frederick W. Lehmann of Missouri, Frank B. Kellogg and Cordenio A. Severance of Minnesota, Alexander P. Lawton and Peter W. Meldrim of Georgia, Thomas J. Semmes, William Wirt Howe and Edgar H. Farrar of Louisiana, Simeon E. Baldwin of Connecticut, John Randolph Tucker and Henry St. George Tucker of Virginia, Charles F. Manderson of Nebraska, George R. Peck, J. M. Dickinson, Stephen S. Gregory and George T. Page of Illinois, George Sutherland of Utah, Moorfield Storey of Massachusetts, and William H. Taft, now Chief Justice of the United States.

During the forty-six years of its existence, there have been but two treasurers of the Association, Francis Rawle of Philadelphia, Pennsylvania, from 1878 to 1902, and Frederick E. Wadhams of Albany, New York, from 1902 to the present time.

During the same period, there have been four secretaries, Edward Otis Hinkley, from 1878 to 1893, and his son, John Hinkley, from 1893 to 1909, George Whitelock, from 1909 to 1920, and his partner, W. Thomas Kemp, from 1920 to the present time, all of Baltimore, Maryland.

It is impossible, within the limits of this paper, to make more than a passing reference to the long list of addresses read at the various meetings of the Association. Usually, at each meeting, the addresses have included the president's address, the annual address and one or two other papers upon timely topics. Until 1913, the president's address each year discussed the most noteworthy changes in the statute law on points of general interest, made in the several states and by Congress during the preceding year. Thereafter, the president selected his own subject. In 1914, William Howard Taft delivered the president's address on "Some Needed Federal Legislation.' In 1916, Elihu Root spoke on "Public Service by the Bar." In 1917 George Sutherland discussed "Private Rights and Government Control." In 1920, Hampton L. Carson spoke upon "The Evolution of Representative Constitutional Government," and in 1921 (in place of the deceased president) James M. Beck read a paper on "The Spirit of Lawlessness." The last president's address was by Cordenio A. Severance on "The Constitution and Individualism."

The list of annual addresses commences in 1879 with Edward J. Phelps, who spoke on "John Marshall," and continues to 1922 when Calvin Coolidge discussed "The Limitations of the Law." During this period, annual addresses of interest and importance had been delivered by John F. Dillon, Simeon E. Baldwin, James C. Carter, William H. Taft, Lord Russell of Killowen, Joseph H. Choate, George R. Peck, John G. Carlisle, Alfred Hemenway, Alton B. Parker, Rt. Hon. James Bryce, Woodrow Wilson, William B. Hornblower, Frank B. Kellogg, Lord Chancellor Haldane, Elihu Root, Joseph W. Bailey, Albert J. Beveridge, Charles Evans Hughes, John W. Davis, and others.

In recent years, the Association has selected many of its speakers from foreign countries. Without attempting to furnish a complete list, we have had the pleasure of hearing Sir Wm. Rann Kennedy and Sir Frederick Pollock, of England, Rt. Hon. Sir Charles Fitz-Patrick, Chief Justice of the Dominion of Canada, Rt. Hon. Romulo S. Naon, Ambassador from the Argen-

tine Republic to the United States, Gaston De Leval of Belgium, Tsunejiro Miyaoka of Japan, Emilio Guglielmotti of Italy, Sir Auckland Geddes, Viscount Cave, and Sir John A. Simon, of England, Lord Shaw of Dunfermline, Scotland, and M. Henry Aubepin of Paris, France.

The Association has always closed its meetings with an annual dinner. In 1878, eighty-six members were present at Saratoga Springs; John B. H. Latrobe of Maryland presided. In 1922, ten hundred and thirty members were present at the annual dinner at San Francisco. The speakers were Beverly L. Hodghead of San Francisco, Rt. Hon. Lord Shaw of Dunfermline, M. Henry Aubepin, of Paris, John B. M. Baxter K. C. M. P., of St. John, N. B., John W. Davis of West Virginia, Senator Cornelius Cole of Los Angeles, and the Chief Justice of the United States.

A unique incident at the last annual dinner was the clear and forcible address of Senator Cole, delivered on the eve of his hundredth birthday. Coming to California with the 49'ers, Senator Cole began practicing law a year or two later in San Francisco. Some years later, he was elected to the United States Senate, and while in public service at Washington during the Civil War, traveled to Gettysburg with Abraham Lincoln, and sat on the platform with him when Lincoln delivered his immortal Gettysburg speech.

Growth of the Association

The Association commenced its existence in 1878 with 75 charter members, which was increased that year to 289. In 1888, the total membership was 752. In 1898, the number was 1496. In 1908, there were 3585 members. In 1918, there were 10,995. And in 1923, approximately 20,000 active members.

As a further indication of the growth of the activities of the Association, the treasurer's report for 1878 shows total receipts of $1,065.10, over two-thirds of which was unexpended, and carried over for the next year. In 1922, the treasurer's total receipts amounted to $120,639.94, and disbursements $117,813.81.

Publications

From the beginning, the Association has published an annual report. The first annual report is a volume of 49 pages. The last annual volume contains 1028 pages.

In 1915, the Association commenced the publication of a quarterly Journal, which was continued in this form until 1920,

when the recommendation of a special committee was adopted and a monthly periodical of much wider range was initiated under the direction of an editor-in-chief, and a board of five associate editors. Great credit is due to the foresight and sagacity of the late Stephen S. Gregory of Chicago, first editor-in-chief of the Journal, for the successful launching of this periodical, and the Association as well as the profession at large, owe a debt of gratitude to the present editor-in-chief, Edgar B. Tolman of Chicago, under whose administration, the scope and character of the monthly Journal has been extended and improved.

Committees, Sections and Allied Bodies

The American Bar Association functions largely through its executive, standing and special committees, its various sections and its allied bodies.

The executive committee now is composed of eight elected members, and five ex officio members, including the president, last retiring president, chairman of the general council, secretary and treasurer, and is vested by the constitution with full power and authority in the interval between meetings of the Association, to do all acts and perform all functions which the Association itself may do or perform, except to amend the constitution and by-laws of the Association. The last meeting of the executive committee, held at the Hot Springs, Arkansas, was in session three days, and the record shows that over fifty distinct subjects were considered and acted upon by the committee during that time. There are now standing committees on Commerce, Trade and Commercial Law, International Law, Insurance Law, Jurisprudence and Law Reform, Legal Aid, Professional Ethics and Grievances, Admiralty and Maritime Law, Publicity, Publications, Noteworthy Changes in Statute Law, Memorials and Membership. There are special committees on Uniform Judicial Procedure, Finance, Change of Date of Presidential Inauguration, Classification and Restatement of the Law, Law of Aeronautics, Removal of Government Liens on Real Estate, Federal Taxation, Law Enforcement, American Citizenship and Judicial Ethics. All of these committees conduct their work on special subjects submitted to them throughout the year, and many of them submit printed reports at each annual session of the Association.

In 1893, the Association created its first section of the subject of Legal Education. This was followed in 1895 by the section

of Patent Law, and in 1908, by the Comparative Law Bureau, in 1913, by the Judicial Section, in 1915, the section of Public Utility Law, and in 1919 the section of Criminal Law and Criminology. All of these sections hold their meetings at the same place and time, but not in conflict with the sessions of the National Association. Any member of the Association is eligible to membership in the sections, which deal respectively with the branches of law indicated by the names of the sections.

In 1915, upon the suggestion of the then president of the Association, Elihu Root, the first conference of Bar Association Delegates was held on the day preceding the meeting of the Association. To this conference each State Bar Association was invited to send three delegates, and each local Bar Association two delegates. The success of the Conference was instantaneous, and annual conferences of increasing importance have resulted. By the new constitution of the Association, adopted in 1919, the conference of Bar Association Delegates was admitted formally as a section of the Association.

All sections have a chairman and other officers as provided in the constitution. Each of them is permitted to adopt its own by-laws and to conduct its own procedure, the only limitation being that action taken by a section must be reported to and approved by the Association, before such action becomes binding on the Association.

The National Conference of Commissioners on Uniform State Laws held its first annual meeting in 1892 at Saratoga Springs, for three days immediately preceding the meeting of the Association. This conference is not a section of the Association, but its work in promoting the uniform legislation is in furtherance of one of the declared objects of the Association, and a close affiliation has always existed between the two organizations. The conference has drafted and approved thirty-eight acts, some of which have been superseded, leaving at the present a total of thirty acts which have been recommended to the states for adoption.

A summary of the proceedings of each of the sections as well as of the conference of Commissioners on Uniform State Laws, is published in each annual volume of the Association reports.

Some Recent Achievements

This article will be completed with a mere reference to some

of the more important achievements accomplished or fostered by the Association:

Canons of Ethics. The American Bar Association has formulated and promulgated the standard code of professional ethics. First adopted in 1908, the Canons of Ethics have appeared in each succeeding annual report of the Association. Many thousands of copies of the canons have been furnished to the Law Schools, Bar Associations, Law Libraries, individual lawyers and all persons applying therefor. These Canons of Ethics have been adopted by the authorities in many of the states, and they are universally recognized as the standard declaration of professional conduct on the part of the lawyers of the country.

Code of Judicial Ethics. In response to a growing demand, the Association two years ago undertook the formation of a code of judicial ethics, and for this purpose the executive committee of the Association appointed a special committee, consisting of two judges and three lawyers. The committee has adopted a preliminary draft of the code of judicial ethics, which have been published in the February, 1923, Journal, pages 73 to 76. All members of the Association have been invited to submit suggestions concerning the proposed code and it is understood that a final report from Chief Justice Taft, as Chairman of the committee, will be submitted at the Minneapolis meeting.

Judicial Recall Opposed. From 1911 to 1919, the Association, through its Special Committee to Oppose Judicial Recall, assumed a commanding position in opposition to the heresy of judicial recall and all kindred measures. By the instrumentality of this committee, the Association conducted a vigorous campaign throughout the country, and particularly in those states where the doctrine had obtained a foothold, with the result that the growing menace of an extension of this movement was completely removed. By 1919 the movement itself had been so far frustrated that with the submission of the report of the special committee at the Boston meeting in 1919, it was deemed unnecessary to continue further the activities of the committee. During the eight years of active opposition to judicial recall, Rome G. Brown of Minneapolis, Chairman of the special committee, directed the campaign in behalf of the Association.

Standards of Legal Education. In 1921 the Section of Legal Education reported to the Association, and the Association adopted with overwhelming approval, certain requirements relat-

ing to preliminary education and certain standards of legal instruction, and also provided for the publication of a list of law schools complying with such standards. The Association thereupon authorized the calling of a special conference on legal education at which the various state and local bar associations were invited to send delegates. This conference was held in Washington, D. C., February 23-24, 1922, when, after a full discussion, the standards of legal education were adopted and recommended to the authorities in the various states for appropriate legislation in support thereof.

Restatement of the Law. As above stated, the Association has a special committee on Classification and Restatement of the Law. Spirited by the activities of this committee and sponsored by the Association of American Law Schools, a voluntary committee on the Establishment of a Permanent Organization for the Improvement of the Law called together a representative gathering of the American Bar which was held in Washington, D. C., on February 23rd, 1923, to consider the report and recommendations of the voluntary committee. The conference thus called resulted in the formation and incorporation of the American Law Institute of which Elihu Root is Honorary President, George W. Wickersham, President, and William Draper Lewis, Secretary. The Institute is governed by a council of twenty-one members under whose guidance this great and important work has been undertaken. A meeting of the Council of the American Law Institute will be held at Minneapolis at the time of the meeting of the Association. The Institute is independently organized and has been liberally endowed by the Carnegie Foundation.

Law Enforcement. The alarming growth of crime and the prevalence of increased lawlessness in this country was responsible for the recent creation of a special committee on Law Enforcement, and this committee submitted a preliminary report with certain recommendations at the 1922 meeting of the Association. Since that meeting, the committee has continued its investigations in this country and the members thereof have recently left on a European trip to study conditions abroad. A special position on the program for the Minneapolis meeting will be assigned to the further report of this important committee, which will be submitted by former Governor Charles S. Whitman of New York, its present Chairman.

American Citizenship. As an antidote for the teachings of dangerous fanatics and the resulting disrespect for law, the Association has undertaken an active campaign designed to instill in the public mind an understanding of the fundamental principles of American Constitution and an appreciation of the benefits of American citizenship. This campaign has been conducted by a special committee appointed for that purpose, and the Chairman of the committee—R. E. L. Saner of Dallas, Texas —will report on the activities and accomplishments of his committee.

World Court. Upon the suggestion of James Brown Scott, chairman of the committee on International Law, the Association at its 1922 meeting, adopted resolutions favoring participation by the United States in the permanent Court of International Justice, and the committee was instructed to formulate and report to the Association at its next meeting such amendments or changes in the statute under which the said court is now constituted as may, in the judgment of the committee, make it possible for the United States to accept membership therein. In pursuance of this instruction, the Committee on International Law will submit its recommendations at the Minneapolis meeting.

The above enumeration of some of the achievements of the Association and certain of the problems still under consideration is largely by way of illustration, and is by no means complete or exclusive. Each and all of the standing and special committees and sections of the Association have performed and are now doing important work in the development and reform of American jurisprudence. The Association has grown rapidly not only in numbers but in its activities and usefulness. Without indulging in political or controversial subjects, this great working organization of American lawyers has taken its proper place on the firing line of civilization, and keeping pace with the general progress of the nation, it aims to promote and develop the science of government restrained by law.

UNIFORM FRAUDULENT CONVEYANCE ACT IN MINNESOTA[50]

By Donald E. Bridgman[51]

Section four states substantially the pre-existing law in Minnesota, as in the majority of states. It is as follows:

"Section 4. [Conveyances by Insolvent.] Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration."

A small number of states[52] still follow the doctrine of *Reade v. Livingston*,[53] that if a person has any debts, although he has sufficient assets remaining to meet his debts, and is not insolvent, yet a voluntary conveyance is constructively fraudulent; and in such states the Uniform Act will produce an important change. Under Minnesota's former statute[54] this doctrine has never been the law in this state.[55] This statute stated that fraudulent intent should be a question of fact. However, the cases have held that where a person is insolvent and makes a voluntary conveyance, the necessary effect of his act is to defraud creditors, and the debtor will be presumed to have intended this necessary effect.[56] Section 4 of the Uniform Act says that in such case the conveyance is fraudulent regardless of intent. This is a better method of reaching a similar result, since the act itself states the rule, without requiring a stretching by judicial construction. Furthermore, the decisions are in some confusion because the rule of presumptive fraud is not stated in all cases the same; and the Uniform Act introduces desirable certainty in the matter.

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[50]For first installment of the article see 7 Minnesota Law Review 453.

[51]Minneapolis, Minn. Chairman of Committee on Uniform State Laws of Minnesota Bar Association.

[52]Bigelow, Fraudulent Conveyances 207; 27 C.J. 547.

[53](1818) 3 John Ch. (N.Y.) 481.

[54]Minn., G.S. 1913 sec. 7015.

[55]Filley v. Register, (1860) 4 Minn. 391 (296).

[56]Henry v. Hinman, (1878) 25 Minn. 199; Walsh v. Byrnes, (1888) 39 Minn. 527, 40 N.W. 831; McCord v. Knowlton, (1900) 79 Minn. 299, 82 N.W. 589; Underleak v. Scott, (1912) 117 Minn. 136, 141, 134 N.W. 731; Thysell v. McDonald, (1916) 134 Minn. 400, 159 N.W. 958, Ann. Cas. 1917C 1015; Dunnell's Digest, sec. 3873.

It seems that the word "creditors" used without qualification in this section, denotes present or existing creditors, although not expressly so stated. Thus in section 5, "creditors" is used to denote present creditors as distinguished from "other persons who become creditors," and in sections 6 and 7, "future creditors" are specifically mentioned. This corresponds to the former law in Minnesota and in most states, where a voluntary conveyance by an insolvent, presumptively fraudulent as to existing creditors, is not fraudulent as to future creditors, in the absence of fraudulent intent,[57] although there is authority in some few states to the effect that subsequent creditors can also set aside such a conveyance, even without actual intent to defraud being present.[58]

Assignments for Benefit of Creditors

What about the validity as to creditors under the Uniform Act of assignments for benefit of creditors? This subject contains a number of rules of law as to what clauses in such assignments make them conclusively or presumptively fraudulent and what do not. There is no special provision in the act for these assignments for creditors; and it would therefore seem necessary to apply the general rules laid down in the various sections. Inasmuch as a debtor can easily employ an assignment for creditors to secure substantial benefits for himself, and seriously delay his creditors, the courts have been inclined to tolerate such an assignment only if it is so worded as to secure a sale of the debtor's assets without delay and a distribution of the proceeds to apply on his debts. Clauses authorizing the trustee to carry on the business,[59] permitting the debtor to remain in possession, or requiring releases from the creditors[60] (except under the insolvency act) or otherwise calculated to benefit the debtor rather than the creditors, rendered such assignments fraudulent.[61] But an assignment made in good faith by an insolvent in trust to sell the property promptly and distribute the proceeds pro rata among all the creditors was permitted,[62] since,

[57]Walsh v. Byrnes, (1888) 39 Minn. 527, 40 N.W. 831; Sovell v. Lincoln County, (1915) 129 Minn. 356, 152 N.W. 727; Coulter v. Meining, (1919) 143 Minn. 104, 172 N.W. 910; 27 C.J. 555.

[58]Bigelow, Fraudulent Conveyances 102, 103 note; 27 C.J. 524.

[59]Truitt v. Caldwell, (1859) 3 Minn. 364 (257).

[60]May v. Walker, (1886) 35 Minn. 194, 28 N.W. 252; McConnell v. Rakness, (1889) 41 Minn. 3, 42 N.W. 539.

[61]Gere v. Murray, (1861) 6 Minn. 305, (215, 221, 222.)

[62]Gere v. Murray, (1861) 6 Minn. 305 (215, 223); McClung v. Bergfeld, (1860) 4 Minn. 148 (99).

though it might delay some one creditor who was about to attach or levy execution, it was calculated to get a better price and secure a more equitable distribution of the assets, and to prove more beneficial to creditors as a class than if they commenced each one for himself to bring suit or to try and secure a preference.

It would seem that under sections 3 and 4 of the Uniform Act all assignments for benefit of creditors leaving the debtor without assets to meet his debts, would be fraudulent and could be set aside by any non-assenting creditor, because of lack of "fair consideration." There is no transfer of property, or satisfaction of antecedent debts to constitute "fair consideration" under section 3 (a) unless in connection with the assignment, sufficient creditors release their debts to constitute a fair equivalent. Nor does there seem to be "fair consideration" under section 3 (b) for an assignment in trust to sell for benefit of creditors, since the words "to secure an antecedent debt," would naturally refer to a mortgage or pledge of property, where the debtor has a beneficial interest or equity that creditors may reach. The courts are inclined to treat a conveyance in trust to sell and pay debts as something quite different from a mortgage.

If, however, it should be held that there is "fair consideration" for an assignment in trust for benefit of creditors, then the validity of such assignments would apparently turn on the existence of actual intent to defraud under section 7 of the Uniform Act, and the various clauses formerly making such assignments void would appear to be evidence or presumptive evidence of fraudulent intent because they have the effect to defraud.[63]

While the Uniform Act changes the law, if it declares assignments for benefit of creditors void as to creditors in the absence of sufficient release of debts, yet the practical importance of such a change would not seem to be very great. At present, making a general assignment for benefit of creditors is an act of bankruptcy;[64] and creditors can upset such an assignment, if they do not regard it as fair and beneficial, by throwing the debtor into bankruptcy. If such an assignment is fraudulent under the Uniform Act, it simply gives the creditors another

[63]It is possible that it might be held that the Uniform Act does not apply to assignments for benefit of creditors at all, and that the law on the subject remains unchanged.

[64]Bankruptcy Act, sec. 3 a(4).

alternative method of upsetting the assignment, the right to reach and apply on their debts the property assigned.

"Section 5. [Conveyances by Persons in Business.] Every conveyance made without fair consideration when the person making it is engaged or is about to engage in a business or transaction for which the property remaining in his hands after the conveyance is an unreasonably small capital, is fraudulent as to creditors and as to other persons who become creditors during the continuance of such business or transaction without regard to his actual intent."

This section states a case of constructive fraud against both present and future creditors. That is, the conveyance is fraudulent regardless of actual intent. It is to be noted that not all conveyances without fair consideration are fraudulent under the section when a person is engaging in a hazardous business. He may give away his property, providing he does not leave an unreasonably small capital remaining.

The section appears to state the weight of authority[65] and probably represents the former law in Minnesota, although there seem to be no cases in this state on the point. There are cases in Minnesota laying down the rule that if the effect of a conveyance is to defraud subsequent creditors it is void as to them, that intent to defraud subsequent creditors may be implied, which will serve the same as actual intent.[66] Doubtless the Minnesota court would have held that a conveyance by one in a hazardous business leaving him with too small a capital, implied an intent to defraud both present and subsequent creditors, which is the result reached in most states, and in effect the same as the Uniform Act. In regard to making such a conveyance, Jessel, M. R. said in a leading case:[67]

"The grantor virtually says: 'If I succeed in business, I make a fortune for myself. If I fail, I leave my creditors unpaid. They will bear the loss.' That is the very thing which the Statute of Elizabeth was meant to prevent."

"Section 6. [Conveyances by a Person about to Incur Debts.] Every conveyance made and every obligation incurred without fair consideration when the person making the conveyance or entering into the obligation intends or believes that he will incur

[65]Bigelow, Fraudulent Conveyances 103 note, 114, 115, 231, et seq.; Glenn, Creditors' Rights and Remedies sec. 169; 27 C.J. 522.

[66]Gallagher v. Rosenfield, (1891) 47 Minn. 507, 510, 50 N.W. 696; Fullington v. N. W. Importers' Ass'n, (1892) 48 Minn. 490, 51 N.W. 475, 31 A.S.R. 663; Williams v. Kemper, (1906) 99 Minn. 301, 109 N.W. 242.

[67]Ex parte Russell, (1882) L.R. 19 Ch. D. 588.

debts beyond his ability to pay as they mature, is fraudulent as to both present and future creditors."

It is to be noted that this section, in contrast to the two preceding sections, requires a state of mind in the debtor, but that belief that he will incur debts beyond ability to pay, makes the conveyance fraudulent as well as intent to incur debts and to convey the property so as not to pay them. There has been considerable doubt as to the law on the matter,[68] and there appear to have been no cases in Minnesota directly in point. Under this section, if a person of extravagant habits, who believes he is likely to incur debts, settles his property on members of his family so that the property may be protected from his creditors in case he does incur such debts, the settlement is fraudulent and void as to future creditors, although the primary intent of the debtor is to provide for his family against the likelihood of his incurring debts. A spendthrift may not thus put his property beyond the reach of his creditors. Indeed, the section goes further, and declares that the conveyance is fraudulent, regardless of the intent of the spendthrift in making it, if he believes he will incur debts he cannot pay. The section clears up a doubtful point, and probably makes some change in the law.

There is authority to the effect that where there is secrecy in the conveyance, and the debtor remains in apparent ownership so that future creditors would likely be misled, the conveyance is fraudulent as to future creditors, without actual intent.[69] But such a situation is not covered by the Uniform Act as a case of constructive fraud, and it would seem to be governed by section 7 on actual intent, and by the rules of estoppel under section 11.

"Section 7. [Conveyance Made with Intent to Defraud.] Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors."

This section provides that where there is actual intent to hinder, delay or defraud, etc., the conveyance is fraudulent, as distinguished from cases described in sections 4, 5, 6 and 8, where the conveyance is fraudulent without actual intent. This section is the same as the Statute of Elizabeth; and as far as it goes it

[68]27 C.J. 521, 522; Bigelow, Fraudulent Conveyances 237.

[69]Bigelow, Fraudulent Conveyances 103 note; Glenn, Creditors' Rights and Remedies sec. 170.

states the existing law. However, in all states the Statute of Elizabeth has been construed to render certain conveyances fraudulent where there was no actual fraudulent intent; and to that extent it goes beyond this section. Such conveyances, fraudulent without intent, are covered by sections 4, 5, 6 and 8. It would seem under the Uniform Act that cases of constructive fraud must be limited to conveyances covered by those four sections, and that any conveyances which are not within those sections, but which have been held in the past to be fraudulent regardless of intent, would fall within section 7, and that actual intent must be shown.

The rules as to badges of fraud,[70] and other rules of evidence[71] as to how fraudulent intent can be shown, would remain the same under this section as formerly; and it might well be that the court would continue to hold that where the necessary effect of the debtor's act is to defraud creditors, this is presumptive evidence of his fraudulent intent. But the rule that certain facts constitute conclusive and irrebuttable evidence of fraudulent intent, when such rule is really used to mean that the conveyance is fraudulent regardless of actual intent, would seem to be abolished. However, the doctrine that a man is liable for the necessary effect of his acts, and that he must be held to intend what a reasonable man under the circumstances would intend, has a strong hold on the courts; and it will be an interesting question to see whether or not a set of rules as to constructive fraud is built up under this section.

It is to be noted that it is the intent of the debtor which is referred to in this section. The protection of a purchaser for fair consideration who had no knowledge of the fraud at the time of purchase, is provided for in section 9.

The rules have already been referred to under sections 1 and 3, that a conveyance of exempt property, or a conveyance to pay a debt to one creditor operating as a preference, are not fraudulent, no matter what is the actual intent of the debtor.

In one important particular, this section changes the former law in Minnesota. Although there is an expression to the contrary in an early Minnesota case,[72] yet the subsequent cases[73]

[70]Dunnell's Digest, sec. 3914; 27 C.J. 483-497.
[71]Dunnell's Digest, sec. 3910 et seq.; 27 C.J. 785 et seq.
[72]Walsh v. Byrnes, (1888) 39 Minn. 527, 40 N.W. 831.
[73]Union National Bank v. Pray, (1890) 44 Minn. 168, 46 N.W. 304; Fullington v. N. W. Importers' Ass'n, (1892) 48 Minn. 490, 51 N.W. 475, 31 A.S.R. 663; Coulter v. Meining, (1919) 143 Minn. 104, 172 N.W. 910.

establish the rule that actual intent to defraud present or existing creditors is not sufficient to render a conveyance fraudulent as to subsequent creditors, that if the conveyance is attacked by subsequent or future creditors it is necessary to show intent to defraud subsequent creditors as distinguished from existing creditors. This is changed in the Uniform Act, which declares that intent to defraud either present or future creditors renders the conveyance fraudulent as to both. The states have been divided squarely on the point,[74] one group adopting the rule laid down in the Uniform Act, and another group the rule formerly found in Minnesota. The Act will produce uniformity on the point; and under it a conveyance is fraudulent as to a future creditor, if there was intent to defraud a present creditor. Apparently any creditor, present or future, may take advantage of an intent to hinder, delay or defraud any other creditor. There is much to be said for this rule. In nearly every case where a debtor makes a conveyance with intent to defraud one creditor, he either intends also to defraud creditors generally, or such is the necessary effect of the conveyance. The assets available for creditors have been decreased by the conveyance. Nevertheless, it is frequently very difficult or impossible by the nature of the case to secure evidence, which must be largely circumstantial, to show actual intent to defraud some particular creditor or class of creditors.

"Section 8. [Conveyance of Partnership Property.] Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred,[75]

"(a) To a partner, whether with or without a promise by him to pay partnership debts, or

"(b) To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners."

The section is to be read in connection with section 2 which defines when there is insolvency in case of a partnership.

There appear to be no cases in Minnesota on the points involved; and the cases in other states are in disagreement and confusion.[76] The section clears up the doubt on an important matter.

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[74]27 C.J. 523, 524; Bigelow, Fraudulent Conveyances, 85-117, esp. 103 note.

[75]The act as printed in Minn., Laws, 1921 ch. 415, has a period instead of a comma at this point, by some mistake.

For both this act and the Uniform Partnership Act, Prof. William Draper Lewis of the University of Pennsylvania was draftsman; and the above section is worded to harmonize with the Partnership Act, which is also in force in Minnesota.[77]

It is to be noted that the section only covers certain conveyances by a partnership which are constructively fraudulent, and that the preceding sections also apply to conveyances by a partnership.

"Section 9. [Rights of Creditors Whose Claims Have Matured.] (1) Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase, or one who has derived title immediately or mediately from such a purchaser,[78]

"(a) Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

"(b) Disregard the conveyance and attach or levy execution upon the property conveyed.

"(2) A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or obligation, may retain the property or obligation as security for repayment."

This section raises a number of important points which may perhaps best be discussed under the following headings,—what creditors may proceed to reach the property fraudulently conveyed, when may the creditor proceed for that purpose, against whom may he proceed, how may he proceed, what property may he reach, and what is the purchaser's right of reimbursement. Just as with the preceding sections, the discussion in general is to be understood as relating to the right to annul fraudulent obligations as well as to reach property fraudulently conveyed, although the annulling of obligations is not specifically mentioned. Of course, as to some matters, by their nature, such as the right of attachment, the discussion would not apply to obligations created in fraud of creditors.

Who may Proceed to Reach Property Fraudulently Conveyed? The section adopts the general rule in the United States that only creditors as to whom a conveyance is fraudulent[79] may have

[76]See discussion and notes in 28 Harv. L. Rev. 774-777, and 29 Harv. L.R. 296, 298.

[77]Minn., Laws 1921, chap. 487.

[78]There is a comma at this point in the official text of the uniform act, which by mistake is printed as a period in Minn., Laws 1921, ch. 415.

[79]Sections 4 to 8 have stated the creditors as to whom various conveyances are fraudulent.

it set aside,[80] although in England and in some states the rule seems to be that if a conveyance is fraudulent as to one creditor, any other creditor may set it aside, at least if a creditor as to whom it is fraudulent, remains unpaid.[81] In applying this section, however, section 7 must be borne in mind, which declares that a conveyance with intent to defraud existing creditors is fraudulent also as to subsequent creditors, thereby changing the former rule in Minnesota. The broad definition of "creditor" in section 1, that a creditor is any one having any legal claim, is also to be remembered.

It seems clear that assignees, personal representatives, heirs and successors of creditors have the same right to reach property fraudulently conveyed as have the original creditors, although they are not specifically mentioned in the act as they were in the Statute of Elizabeth and in the Minnesota statute.[82] The assignees etc., of creditors stand in the shoes of the original creditors and are creditors themselves. At common law they would have the rights of the original creditors to reach the property fraudulently conveyed;[83] and under section 11 the existing law continues in force in matters not covered by the act. An illustration would be where A gave his note to B and subsequently made a conveyance without fair consideration, while insolvent, fraudulent under section 4 of the act; and B thereafter endorsed the note to C. C, holder of the note, would have the same right to set aside the conveyance as B. It is obvious, however, that where a claim cannot be assigned or abates on the death of the owner, the purported assignees, or personal representatives, having no right to the claim, cannot set aside the conveyance as fraudulent.

The rights of trustees in bankruptcy, receivers, assignees for benefit of creditors, executors and administrators and other representatives of debtors, to bring action to recover back property fraudulently conveyed, for the benefit of creditors whose rights they also represent, are not within the scope of the act. This section describes the rights of creditors acting for themselves to reach property fraudulently conveyed. It does not regulate the

[80]Fullington v. N. W. Importers' Ass'n, (1892) 48 Minn. 490, 51 N.W. 475, 31 A.S.R. 663. The rule of this case, however, to the extent that it holds that a conveyance with intent to defraud existing creditors is not fraudulent as to subsequent creditors, is changed by sec. 7 of the act.

[81]Bigelow, Fraudulent Conveyances 103 note; Glenn, Creditors' Rights and Remedies, sec. 160.

[82]Minn., G.S. 1913, sec. 7014.

[83]27 C.J. 478; Bigelow, Fraudulent Conveyances 105 note.

right of the trustee in bankruptcy of the debtor or other representative of both debtor and creditors to recover back property fraudulently conveyed, either in a plenary action for the benefit of all creditors or in an action for the benefit of certain creditors. In many cases, in order to secure equality of distribution among creditors and to recover property for a trust estate, the bankruptcy trustee or other representative can secure the property for the benefit of all creditors if the conveyance is fraudulent as to any; while if the creditors bring actions as individuals, only those as to whom the conveyance is fraudulent, may reach the property under the above section. The existing statutes[84] and common law in regard to the rights of trustees in bankruptcy, receivers, assignees for creditors and others as representing the debtor and creditors,[85] are not changed by the act.

When may the Creditor Proceed? The act apparently makes an important change in this matter. Under this section the only prerequisite of the creditor's right not only to attach the property fraudulently conveyed, but also to bring action to set aside the conveyance, is that his claim shall have matured; and under the next section a creditor whose claim has not even matured may have the conveyance set aside. At common law,[86] and in Minnesota prior to the passage of this act,[87] it was necessary as a general rule for a creditor to secure judgment on the debt due him before an action would lie to set aside a fraudulent conveyance, though there were some exceptions to the rule. Such an action was regarded as one in aid of a judgment. In apparently doing away with this requirement of a judgment, and allowing the action to set aside the conveyance to be brought at any time, this section and the one succeeding, make an important change, but one

[84]For instance, sec. 70a(4) of the Bankruptcy Act, vests the trustee with title to property transferred in fraud of creditors by the bankrupt; secs. 7313 and 7314, Minn., G.S. 1913, provide, where the property of the deceased available for payment of his debts is insufficient to pay them in full, for the recovery by the executor or administrator of any property disposed of by the deceased with intent to defraud creditors, or by conveyance which for any reason is void as to them; sec. 8332 Minn., G.S. 1913, provides that the assignee in a general assignment for creditors shall represent the creditors as against all conveyances fraudulent as to them. It is to be presumed that when the question under such statutes is whether a certain conveyance is fraudulent, that the law of the state on fraudulent conveyances, found in the Uniform Act, will be applied.

[85]Dunnell's Digest, sec. 3898; Glenn, Creditors' Rights and Remedies, sec. 321-329, 339-342, 358-359, 393-395, 401, 402-404.

[86]27 C.J. 727 et seq.; Glenn, Creditors' Rights and Remedies, sec. 73 et seq.

[87]Dunnell's Digest, sec. 3923; Wadsworth v. Schisselbauer, (1884) 32 Minn. 84, 19 N.W. 390.

which has a number of advantages, in avoiding great and unnecessary delay and circuity of action.

It is argued in a review of the Uniform Act appearing in the Columbia Law Review,[88] that no sound doctrine has allowed the simple creditor to attack a conveyance as fraudulent, and that section 9, in connection with section 11, providing that "the rules of law and equity including the law merchant . . . shall govern" in cases not provided for in the act, should be construed as requiring by implication that a judgment must be obtained before the creditor may "have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim." The reviewer further states that section 10 should not be taken according to its words, as allowing a creditor of an unmatured claim to proceed generally to set aside a conveyance, but should also be construed so as to follow substantially the common law.

Under such a view of their meaning, sections 9 and 10 would produce practically no change in the law. But there are important considerations leading one to the contrary view, and to believe that the sections are to be construed according to the natural and apparent meaning of the words: first, the view that judgment on the debt must first be secured, renders section 10 meaningless; second, there are a number of important practical advantages in not requiring a judgment before the action to set aside the conveyance; third, in about one-third of the states there have been statutes in force for many years, doing away with the need of first securing judgment, and it is natural to suppose that the rule in these states was adopted in the uniform act as working better in practice; fourth, in the other states, there have been a number of important exceptions to the rule requiring judgment, so that there is nothing extraordinary or untried about bringing the action to set aside before judgment is secured. On account of the importance of the matter, these points will be discussed in more detail.

First, it is obvious that section 9, construed in connection with section 10, means that any creditor whose claim has matured, may proceed to have the conveyance set aside, and not merely a judgment creditor. Under section 10, a creditor whose claim has not matured may so proceed; and such a creditor would not have secured a judgment. What meaning can section

[88]Uniform Fraudulent Conveyance Act, 20 Col. L. Rev. 339.

10 have if it requires judgment to proceed? It is not reasonable to suppose that it was intended by section 10 to permit a creditor whose claim had not matured, to proceed without judgment, and at the same time not to permit a creditor with a matured claim to proceed under section 9, unless he had secured judgment. The two sections appear to be parallel and subject to like construction as regards the requirement of judgment.

Second, if the creditor need not wait for judgment, he can proceed at once to set aside the conveyance at the same time that he sues on the debt; and instead of waiting for two cases to be brought on and tried, one after the other, the cases would be on the calendar at the same time. The time necessary to realize on the debt would be cut in half. Probably the debt and the fraudulent conveyance would be tried in one case, with two defendants.[89] Inasmuch as debtors who convey property in fraud of creditors frequently desire to cause the creditors as much delay and expense as possible, any change of procedure which reduces the delay has a strong point in its favor. An example of the delay under the former rule is the ordinary case of a fraudulent conveyance of real property. The creditor would sue on the debt and attach the property. On recovering judgment he could sell on execution; but it would be impossible in most instances to secure a satisfactory price to satisfy his debt, since subsequent litigation is necessary to determine the question of a fraudulent transfer, and therefore title.[90] He would, therefore, commence an action to set aside the conveyance after obtaining judgment on the debt. It saves great delay and circuity of action to be able to bring and try the two actions at once. If the property was not fraudulently conveyed, it is an advantage to the owner to have the matter disposed of with less delay, since the property is tied up from the date of the original attachment.

Third, some eighteen states have realized the advantages to be gained from doing away with the requirement that judgment on the debt precede the action to set aside the conveyance, and have abolished the requirement by statute. These statutes vary considerably in form.[91]

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[89]27 C.J. 736. note 39.

[90]See Brasie v. Mpls. Brewing Co., (1902), 87 Minn. 456, 92 N.W. 340, 94 A.S.R. 709, 67 L.R.A. 865.

[91]For statement of the statutes see 14 A. & E. Encyc., 2nd. ed., 319 note, and 5 Encyc. Pl. & Pr. 475 note. See also 27 C.J. 735, 736; 12 R.C.L. 631.

Fourth, the courts of states, not having such statutes, have realized the hardship of requiring judgment, and have permitted the action to set aside fraudulent conveyances in many cases without first securing judgment.[92] Thus, where the debtor has absconded, or is a non-resident, the court does not ask that personal judgment be first secured against him on the debt, as this would require going to another state or be impossible.[93] Also, many states permit an action to set aside a fraudulent conveyance in aid of an attachment lien, without first securing judgment[94] Again, a judgment creditor may bring a creditor's bill to set aside a fraudulent conveyance in behalf also of other creditors who may join him, who have not recovered judgments;[95] and trustees, receivers, executors and others representing creditors are constantly suing to set aside conveyances, where some or all of the creditors have not recovered judgments. In England and Canada a simple creditor can bring a suit to set aside a fraudulent conveyance, thereby preventing the grantee from dealing with the property.[96]

For the above reasons it would seem that the uniform act is to be construed as permitting a creditor to sue to set aside a fraudulent conveyance, without first securing judgment, and that the argument that such procedure is so contrary to existing practice and policy that the act must at all hazards be stretched in its construction to avoid it, is unsound and not true to fact.

In case the courts construe the uniform act as not requiring the creditor to first secure judgment, there are several matters to note. Although the statutes to a similar effect above referred

[92]For discussion of the matter generally see 27 C.J. 729-734; 12 R.C.L. 629-631; 14 A. & E. Encyc., 2nd. ed., 318, 329; 1 Ann. Cas. 629 note.

[93]Overmire v. Haworth, (1892) 48 Minn. 372, 51 N.W. 121, 31 A.S.R. 660; 27 C.J. 731; 5 Encyc. Pl. & Pr. 523.

[94]27 C.J. 733; 12 R.C.L. 629; 5 Encyc. Pl. & Pr. 525; See Bruce v. Hoidal, (1912) 119 Minn. 362, 138 N.W. 313.

[95]27 C.J. 729.

[96]27 C.J. 729.

The right of the creditor to interfere with the property fraudulently conveyed before he has established his debt at law, is recognized in his right to attach. If he may attach, why may he not also sue to set aside the conveyance and save time? This is in substance the procedure in garnishment under sec. 7870, Minn., G.S. 1913. Sec. 7889, Minn., G.S. 1913, giving a creditor the right to enjoin the debtor from disposing of his property fraudulently pending the suit on the debt, is an example of a remedial statute giving a right not recognized at common law. See 5 Encyc. Pl. & Pr. 473.

Note the right in some states of the creditor having a subsequent lien by mortgage, etc., to set aside the conveyance without procuring judgment, 27 C.J. 734. One holding a junior chattel mortgage may attach a senior chattel mortgage as fraudulent without first procuring judgment.

to have been liberally construed as remedial legislation in the states where passed,[97] yet they are without effect as affecting equity procedure in the federal courts.[98] Again, if the Fraudulent Conveyance Act applies to chattel mortgages as well as section 6966 General Statutes 1913, and to conveyances to a third person, where the debtor furnishes the consideration to the grantor, as well as section 6707, General Statutes 1913, then an action can be brought under the uniform act to set aside such a mortgage or conveyance by a simple creditor before judgment has been secured, which does not appear possible under those sections.[99]

It is also important to note the effect that the uniform act would have on the statute of limitations, if it gives the right to bring action to set aside the fraudulent conveyance without first securing judgment. Formerly the statutory period of six years did not begin to run until judgment was secured and docketed in the county where the land lay, although the fraud had been discovered before, because the judgment was a prerequisite to bringing the action.[100] But now it would appear that once the creditor has a claim the statute commences to run as soon as the fraud has been discovered;[101] and it has been so held in states where by statute the action may be commenced before judgment.[102]

[97]5 Encyc. Pl. & Pr. 476; 27 C.J. 736; Jones v. Smith, (1890) 92 Ala. 455, 9 So. 179.

[98]27 C.J. 737; Scott v. Neely, (1891) 140 U.S. 106, 35 L. Ed. 358, 11 S.C.R. 712, 727.

[99]In general under section 6707, Minn., G.S. 1913, a simple creditor must secure a judgment before he can sue to establish a trust in the property; Gorton v. Massey, (1866) 12 Minn. 145, (83); 27 C.J. 730.

In regard to chattel mortgages it is important to distinguish between rules stating as to what creditors the mortgage is void or fraudulent, and rules stating when a creditor as to whom the mortgage is void, may bring action to set it aside. It is one of the former rules, which in Minnesota declares that a chattel mortgage is void because not filed only as to creditors who have secured a lien on the property. Goldberg v. Brule Timber Co., (1918) 140 Minn. 335, 337, 168 N.W. 22, and cases there cited. However, such a mortgage has been held void as to simple creditors because fraudulent, Coykendall v. Ladd, (1884) 32 Minn. 529, 21 N.W. 733; Citizens State Bank v. Brown, (1910) 110 Minn. 176, 124 N.W. 990; and under the definition of "creditor" in section 1 of the Uniform Act, there would be no distinction between simple creditors and creditors with a lien, in determining as to whom the chattel mortgage was fraudulent.

[100]Rounds v. Green, (1882) 29 Minn. 139, 12 N.W. 454.

[101]Duxbury v. Boice, (1897) 70 Minn. 113, 72 N.W. 838. Question whether the rule of Brasie v. Minneapolis Brewing Co., (1902) 87 Minn. 456, 93 N.W. 520, 97 A.S.R. 538, that statute runs from date of sale, where real property is sold on execution and ejectment suit brought to determine whether conveyance was fraudulent, would continue to apply to cases of sale on execution.

[102]Combs v. Watson, (1877) 32 Oh. St. 228; Ramsey v. Quillen,

Against Whom may the Creditor Proceed? This section in providing that the creditor may act against any person except a purchaser for fair consideration without knowledge of the fraud at the time of purchase, or one deriving title from such purchaser, follows in general the former law in Minnesota. Section 7016, General Statutes 1913, similarly protected purchasers for value without previous notice of the fraud; while it has been held that where the purchaser participated in the fraud, the conveyance could be set aside in toto.[103] The uniform act, however, appears to make some minor changes. Thus under the act, the purchaser to hold the property must give "fair consideration" as defined by section 3, or otherwise he is only entitled to reimbursement.[104] Now section 3 requires a fair equivalent to constitute a "fair consideration," and in other particulars may require more than the former rules as to a sufficient consideration. This has been already referred to under section 3. On the other hand, in the matter of what is good faith, the uniform act appears to be more favorable to the purchaser. It has been held in Minnesota that if a purchaser has knowledge of facts which would put an ordinarily prudent man on inquiry, this constitutes notice sufficient to set aside the conveyance.[105] This section seems to require that the purchaser have knowledge of the fraud, not merely notice, thus protecting the purchaser who is negligent and does not exercise the care of the ordinarily prudent man, but nevertheless acts in good faith. This corresponds to the rule as to holders in due course under the Uniform Negotiable Instruments Act.[106]

How may the Creditor Proceed? The section specifies two ways in which the creditor may proceed: (a) have the conveyance set aside, or (b) disregard it and attach or levy execution on the property. These are the methods laid down in the leading Minnesota case,[107] except, of course, that a judgment was formerly a prerequisite to bringing the action to set aside. It is

(1880) 5 Lea (Tenn.) 184; McBee v. Bearden, (1881) 7 Lea (Tenn.) 731 (contingent claim, not matured.)

[103]Thompson v. Bickford, (1872) 19 Minn. 17 (1).

[104]Sec. 9 (2).

[105]Manwaring v. O'Brien, (1899) 75 Minn. 542, 78 N.W. 1; See 27 C.J. 513, 514. In such cases where the purchaser has not been guilty of actual fraud, the courts have usually granted him reimbursement, See Leqve v. Stoppel, (1896) 64 Minn. 74, 66 N.W. 208; 27 C.J. 671-672, 674.

[106]Sec. 56, N.I.L., Minn., G.S. 1913, sec. 5868.

[107]Jackson v. Holbrook, (1887) 36 Minn. 494, 32 N.W. 852, A.S.R. 683. They are also the methods in general use in other states.

true that the court in that case, mentions three remedies, (1) to sell on execution and let the purchaser contest the validity of the title, (2) to bring action to have the conveyance removed as an obstruction to selling on execution, and then sell after decree in that action, (3) to bring action to have the conveyance adjudged void as to the judgment, and have the land sold by receiver or officer of court. It would seem, however, that (2) and (3) would both come under (a) of the uniform act, since they are both actions to set aside the conveyance, except that in one case the officer of the court sells in the same action, and in the other case the action is followed by sale on execution. It seems clear that there is no abolishing of any of the former remedies by the act, especially in view of section 11. It is remedial legislation and to be broadly construed; it is a re-statement of the law, and so to be construed; and the Minnesota rule that the equity action to set aside could be brought in aid of and preceding sale of land on execution at law, is the general one in the United States.[108]

For similar reasons it is not to be supposed that the Uniform Act abolishes garnishment as a method of reaching property fraudulently conveyed,[109] although it is not specifically mentioned. Many states do not have garnishment statutes under that name; and in a uniform act the words would naturally be broadly construed to cover the various local forms of remedies. "Attach" would seem, therefore, in this act, to include "garnish."

It has been held in Minnesota that the title of property fraudulently conveyed remains in the grantee, even after sale on execution, until the fraudulent character of the conveyance is established in legal proceedings.[110] This is contrary to the general rule that the sale on execution gives title to the purchaser at the sale.[111] In view of the words of this section which are that the creditor may "disregard" the conveyance and levy execution, and of section 12 which requires uniformity of construction in the different states enacting the law, it may well be that the court will hold that the rule on this matter has been changed by the uniform act.

The above section does not specify how the attachment is to be made, leaving that to the existing law of each state. The

[108]27 C.J. 719; Glenn, Creditors' Rights and Remedies sec. 77-79.
[109]Benton v. Snyder, (1875) 22 Minn. 247.
[110]Brasie v. Minneapolis Brewing Co., (1902) 87 Minn. 456, 92 N.W. 340, 94 A.S.R. 709, 67 L.R.A. 865.
[111]67 L.R.A. note at 865, 900; 27 C.J. 704; 16 H.L.R. 375.

attachment affidavit prescribed by statute[112] has been used in practice regularly to apply to cases of constructive fraud, where there was no actual intent to defraud; and no doubt an affidavit in the words of the statute, that the debtor has disposed of his property "with intent to delay or defraud his creditors," will be held to apply to any conveyance fraudulent under the uniform act, although it be a conveyance under section 4, 5, 6 or 8, made without actual intent to defraud. The words of the attachment statute would be words of art in that they would be construed as covering whatever conveyances the law of the state may declare are fraudulent as to creditors.

What Property may the Creditor Reach? The definition of "conveyance" in section 1 covers any form of property, and therefore any property conveyed can be reached under section 9. The act does not cover such other questions of relief, as the right of the creditor to an accounting by the transferee for rents and profits of the property, the right to personal judgment against the transferee where he has sold the property or mingled it with his own, the right of the transferee to re-imbursement for taxes paid and other expenses, incumbrances paid off, etc. On these and similar points, under section 11 the existing rules of law would apply.[113]

Purchaser's right of reimbursement. The reason for subdivision two of the section, allowing a purchaser who has given less than fair consideration for the conveyance, to retain the property as security for repayment, if he had no fraudulent intent, is obvious. Two cases present themselves, first, where the entire price is inadequate and has been paid, second, where the price is adequate, but only part has been paid by the purchaser. As to the former, the rule was in most cases, that inadequate consideration was evidence of fraud of the purchaser, but if in fact there was no fraud then the purchaser held the property at law, but equity permitted the conveyance to stand only as security, while if there was actual fraud in the purchaser, he had no right even to reimbursement.[114] Under the uniform act, if the price is inadequate, and the conveyance is otherwise fraudulent under sections 4 to 8, the purchaser without actual fraudulent intent may hold the property only as security for repayment under

[112]Minn., G. S. 1913, sec. 7846, subd. 4.

[113]See Dunnell Digest, sec 3892, 3893, 3930, 3891; also 27 C.J. 670, 668, 855, 675-7.

[114]Carson v. Hawley, (1901) 82 Minn. 204, 210, 84 N.W. 746, 27 C.J. 544, 545.

section 9 (2), while a purchaser having such fraudulent intent may not have reimbursement. This appears to involve some change in the form of stating the law, rather than in its substance, and has been referred to under section 3. In many cases before the uniform act, the same result was reached by apparently somewhat different reasoning, the conveyance being held constructively fraudulent because of the inadequate price, in which case the purchaser could hold the property as security for the inadequate price paid, which could not be done if the purchase was actually fraudulent.[115] The advantage of the act is to make the rule clear and uniform.

As to the second case, of part payment by the purchaser in good faith before discovery of the fraud, the rule under subdivision two of this section and under section 3, which defines "fair consideration" as the conveyance of property which is a fair equivalent by the purchaser, not merely a promise to pay, seems to be that in such case there is no "fair consideration," and that the purchaser may not pay the rest of the price after he discovers the fraud, but may only hold the property as security for repayment of the installments already paid. This was also apparently the former rule.[116]

"Section 10. [Rights of Creditors Whose Claims Have Not Matured.] Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,

"(a) [117]Restrain the defendant from disposing of his property,

"(b) Appoint a receiver to take charge of the property,

"(c) Set aside the conveyance or annul the obligation, or

"(d) Make any order which the circumstances of the case may require."

The change which this section and the preceding one appear to make in the rule that the creditor ordinarily must secure judgment before bringing action to set aside the conveyance, has already been discussed under section 9. The cases of creditors whose claims have not matured, securing court protection where there has been a fraudulent conveyance, are not so numerous as

[115]27 C.J. 671, 672; 21 L.R.A. (N.S.) 222, note; Griswold v. Szwanek, (1908) 82 Neb. 761, 118 N.W. 1073, 21 L.R.A. (N.S.) 222. See Leqve v. Stoppel, (1896) 64 Minn. 74, 83, 66 N.W. 208.

[116]Crockett v. Phinney, (1885) 33 Minn. 153, 22 N.W. 289; Riddell v. Munro, (1892) 49 Minn. 532, 52 N.W. 141.

[117]In Minn., Laws 1921, ch. 415, (a) is printed (2) by some mistake.

cases where the claims have matured but have not been reduced to judgment,[118] but they are not unknown.[119] Where a creditor has a note not yet due, and the debtor has conveyed his property fraudulently, the creditor may well require protection in the form of an order preventing the transferee from further dealing with the property; and lack of such an order at the time might well cause the creditor loss of ability to collect his debt when it matured, and therefore irreparable damage.[120] The words in this section, as contrasted with the preceding one, are "the court may." It is in the discretion of the court to grant the preliminary relief, the nature of which is outlined in the act.

"Section 11. [Cases Not Provided for in Act.] In any case not provided for in this Act the rules of law and equity including the law merchant, and in particular the rules relating to the law of principal and agent, and the effect of fraud, misrepresentation, duress or coercion, mistake, bankruptcy or other invalidating cause shall govern."

The section provides, what would largely be true in its absence, that the act shall be construed in relation to the common law and law merchant. Such a section is found generally in the uniform acts. Reference has already been made under the various sections to a number of doctrines and rules which probably continue in force, because not mentioned in the act, and not covered by it. Many more such rules could be enumerated.

"Section 12. [Construction of Act.] This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it."

This section is found in the various uniform acts. Judicial construction is a large part of any legislation, if not the largest part, and is especially important in applying the present act. The advantages of uniformity can only be achieved if the courts in the different states construe the act alike. Otherwise there can be just as confusing diversity in the law, as if the statute itself was worded differently in the separate states.

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[118]Statutes permitting actions to set aside without first securing judgment have been construed to apply only to matured claims. 27 C.J. 736 note 38; 5 Encyc. Pl. & Pr. 477, note 4.

[119]Thus the Tennessee code has allowed an accommodation indorser or surety to sue out an attachment against the property of the principal who has fraudulently conveyed his property, as security for his liability, whether the debt on which he is bound be due or not. McBee v. Bearden, (1881) 7 Lea (Tenn.) 731.

[120]For an instance of preliminary injunction against fraudulent conveyances being allowed, see Minn., G.S. 1913, sec. 7889.

"Section 13. [Name of Act.] This act may be cited as the Uniform Fraudulent Conveyance Act."

By taking advantage of this section to cite the act by its nationally known name, and by using the section numbers of the act in referring to its provisions, judges and lawyers will make their references easily understood anywhere in the United States. Uniformity of reference to the act and its provisions are a decided advantage in its use.

"Section 14. [Inconsistent Legislation Repealed.] Sections 7010 and 7013 of General Statutes, 1913, are hereby repealed, and all acts or parts of acts inconsistent with this Act are hereby repealed; but sections 7011, 7012, 7017 and 7018 of General Statutes, 1913, are not repealed."

The sections of the General Statutes which are superseded by the uniform act and by it expressly repealed, as well as those mentioned as not repealed, have been discussed at the beginning under the heading Scope of the Act.[121] Such sections of the statutes as are partly repealed, and not mentioned in the act, were also there referred to.

"Section 15. This act shall take effect on the first day of January, one thousand nine hundred and twenty-two."

[121]See 7 MINNESOTA LAW REVIEW 455-59.

FEDERAL INTERVENTION IN LABOR DISPUTES*

By Marjorie Jean Bonney†

III

Recent Phases of the Railroad Strike Problem

The problem of the railroad labor dispute assumed new proportions in 1916 when the four brotherhoods[96] united for the first time in a demand for higher wages and shorter hours. The revolution in congressional attitude which followed this demonstration of strength by the brotherhoods, and the resulting trend toward the adoption of drastic measures call for separate treatment in this final chapter.

Congress in 1913 had reached the peak of its policy favoring voluntary arbitration. As long as capital had stubbornly refused to arbitrate Congress had felt the need of exerting compulsion upon the railroad companies but even in the acts of 1888 and 1898 had adhered in the main to the policy of voluntary arbitration. But when in 1913 capital by its friendly attitude toward arbitration showed that compulsion was unnecessary, Congress passed the Newlands Act providing for arbitration which is entirely voluntary.[97] Congress had not conceived of the possibility that labor might repudiate arbitration.[98] When in 1916 this occurred,[99] and Congress was forced, by the fear of a nation-wide strike, to grant labor's demands by legislation, the legislative at-

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*Continued from 7 Minnesota Law Review 467.

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[96]The Brotherhoods of Locomotive Engineers, Locomotive Firemen and Enginemen, and Railroad Trainmen, and the Order of Railroad Conductors.

[97]The clauses of the Erdman Act forbidding and declaring unlawful strikes and discharges pending arbitration and for three months afterwards were omitted in the Newlands Act. These clauses had been dead letters in the Erdman Act.

[98]Labor, at the time the Newlands Act was passed, had never endangered industrial peace by refusing to submit its differences to arbitration. In the crisis which gave rise to the Newlands Act the employees were willing to arbitrate under the Erdman Act as it stood, but the carriers refused. See supra, chapter I, pages 467-78.

[99]The brotherhoods in this year "dissatisfied with the personnel and decisions of recent arbitration boards, insisted upon their demands being granted and voted to strike." The roads were willing in 1916 to arbitrate. (Bing, War-time Strikes and Their Adjustment 83.)

titude changed. Congress, which in previous years had argued heatedly in favor of voluntary arbitration,[100] in 1920 argued with equal fervor for anti-strike legislation.[101] It passed finally a measure[102] which, as interpreted, compels submission to arbitration, and which by reason of the attitude of the Department of Justice, may, in many cases, compel submission to the award.[103] The remainder of this article, apart from a brief discussion of the Adamson Act, will deal with the Transportation Act of 1920.

The Adamson Act[104] was passed by Congress to avert the rail strike of 1916 after both mediation and presidential intervention had failed. It did not provide for arbitration. It was in itself an act of intervention. Ostensibly it gave labor an eight-hour day. Actually it granted a compulsory wage increase operative for a limited period,[105] not because investigations had proved it desirable, for no investigations had been made, but because labor demanded it as an alternative to a strike.[106] Nor did the act provide for permanent machinery for dealing with labor disputes. President Wilson, in his request for the bill, had recommended that compulsory investigation be provided,[107] and Senator Under-

[100]Note what Representative Clayton had to say on compulsory arbitration in the debate over the Newlands Act: "God forbid . . . that Congress should ever enact compulsory arbitration laws. It would be in the teeth of the constitution; it would be in the teeth of the inherited rights of every free American to have any sort of law whereby any man could be compelled to render labor against the sovereign will which he carries under his own hat." (Cong. Rec., 63rd Congress, first session, p. 2434.)

[101]Senator Cummins: "Even if I were to grant that the individual right to cease employment is perfect and complete I could not grant that the right to enter into a combination or conspiracy to accomplish a purpose inimical to the welfare of society is a natural or constitutional right." Senate debate on Esch-Cummins bill Cong. Rec., Dec. 4, 1919, p. 146.

[102]41 Stat. at L. 456-499.

[103]See infra, p. 556.

[104]39 Stat. at L. 721.

[105]The president's Eight Hour commission, in making its report, as provided for in the act, said, "It is well to emphasize the fact that while the law requires eight hours to be the measure or standard of a day's work for the purpose of reckoning the compensation for train service employees, it does not limit the actual working time to eight hours." The congressmen themselves knew the bill to be a wage-fixing bill. Said Senator Sherman, "In essential analysis this is not an 8-hour day law. . . . It is a question of the increase of wages by paying ten-hour wage for eight hour service." Cong. Rec., 64th Congress, p. 13616. The law did, in actual operation, cause an eight-hour day to be instituted in the yard service, and the time of some of the train crews was shortened, but it was primarily a wages law. Eight-Hour Commission report.

[106]Note attitude Senator Underwood took toward the bill; he said: "For one I am willing to surrender my individual judgment, admit that I am legislating without knowledge, to bring peace . . . to the home of the people of the nation. (Cong. Rec., 64th Cong., first session, p. 13556.)

[107]For the six requests made by President Wilson in submitting his

wood, during the course of the debate, proposed giving to the Interstate Commerce Commission wage-fixing powers.[108] Neither provision was included in the act, however. The result therefore, was an act which did nothing more than settle an existing dispute.

The problem left unsolved by the Adamson Act was solved for a period of over two years by federal control of the railroads,[109] under which all disputes were settled by bi-partisan wage-adjustment boards. With the return of the railroads to private control the old problem reared its head and Congress bent its energies toward including in the act returning the railroads an effective section which would minimize the strike danger.

It has been noted that Congress was by this time vigorously discussing anti-strike measures. The courage openly to advocate such measures was probably gained from the judicial support given the Adamson Act in the case of *Wilson v. New.*[110] It was here held that a general railroad strike constituted such an obstruction to interstate commerce as to bring the whole subject within congressional control. The case, moreover, strongly suggested in dicta that it was within the power of Congress to pass a compulsory arbitration law,[111] and hinted that the right of railroad employees to strike could be limited. Said Chief Justice White:

"Whatever would be the right of an employee in a private business to demand such wages as he desires, to leave the employment if he does not get them, and by concert of action to agree with others to leave upon the same conditions, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest."

The Senate, using much the same line of argument,[112] passed a bill which made a conspiracy to strike punishable by a maxi-

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plea for the Adamson Act to Congress, see the Congressional record, 64th Congress, first session, p. 13361 (message to joint session).

[108]For Underwood's proposals, see ibid, p. 13611 (was amendment).

[109]Lack of space makes it impossible to discuss the relationship of the government to the labor strike problem during the war period. For a full discussion of this phase of federal intervention in labor disputes see Willoughby, Government Organization in War Time and After, and Bing, War-Time Strikes and Their Adjustment.

[110](1916) 243 U.S. 332, 61 L.Ed. 755, 37 S.C.R. 298.

[111]Said the court, "Congress had the right to adopt the act in question, (the Adamson Act) whether it be viewed as a direct fixing of wages to meet the absence of a standard on that subject . . . or as an exertion by Congress of the power which it undoubtedly possessed to provide by appropriate legislation for compulsory arbitration."

[112]Note statement by Cummins, supra p. 551 footnote 101.

mum fine of $500. A committee of wages and working conditions and three regional boards were created as "substitutes for the strike."[113] The House, however, objected to the anti-strike clause, and in conference it was stricken out. We are now ready to turn to a discussion of the labor section of the Transportation Act as it was finally passed.[114]

It is fundamental to note at the outset that this section is not operating as it was intended to operate. It seems designed primarily to stimulate conciliation and to afford machinery for voluntary arbitration only in case that fails. In practise it has stifled conciliation and elevated arbitration to a position of first importance.[115] In short, in its operation it runs counter to the lessons experience with labor disputes has taught, and has failed to render the useful service of which it is capable. Before reviewing the transformation of the act from a measure providing for conciliation as the chief functioning agent and arbitration simply as a last resort, to one nullifying conciliation and utilizing arbitration as the sole remedy, we must review briefly its main provisions.

The act provides first, that when disputes likely to interrupt commerce arise between carriers and their employees, "such disputes shall be considered and if possible decided in conference between the parties concerned."[116] It next provides that when the carriers and their employees desire, adjustment boards, authorized to settle disputes arising out of grievances, rules and working conditions may be established.[117] Clearly conciliation was here in mind. The act then provides for a Railroad Labor Board of nine, composed of three representatives of labor, three of capital and three of the public, which is charged to hear and decide wage disputes not settled in conferences, and all disputes over grievances, rules and working conditions not settled by ad-

[113]For the debate on the original Esch-Cummins bill providing for the anti-strike clause, see Cong. Rec. 6th Congress, first session, Dec. 4, 1919.

[114]Sections 300 to 315 of the Transportation Act, (41 Stat. at L. 456, 469-473, 66th Cong. 2nd session Chapt. 91). The act is very broad in its scope applying to "all carriers, their officers, employees and agents." (Sec. 301) In its breadth of scope the act is comparable to the act of 1888.

[115]Note statement made by Representative Esch in reporting the bill from the conference: "There is no compulsion in the bill. The only thing that can be done by the Railroad Labor Board is to subpoena witnesses . . . in order that a full, complete and thorough investigation can be made. . . . There is nothing in this bill regarding compulsory putting into effect the award of this railroad board." (Cong. Rec., Vol. 59, p. 3270.)

[116]41 Stat. at L. 456, 469 sec. 301.

[117]41 Stat. at L. 456, 469, sec. 302.

justment boards.[118] The awards of the Labor Board are to be published.[119] No other provision is made for their enforcement. The Labor Board is, however, given the authority to make investigations when it believes one of its awards has been violated, but it can then do no more than "make public its decisions in such manner as it may determine."[120]

Conciliation is being stifled and arbitration encouraged chiefly because the act, unlike previous arbitration acts, permits either side to inaugurate arbitration proceedings.[121] The result is that the conferences provided for by the act have become futile; for the weaker side to a dispute, fearing the results of collective bargaining, is almost always eager to rush through the conferences and push the matter to the Labor Board where it feels it may secure more satisfactory terms.[122] The first moves to correct this evil have come from the employees. Members of the craft federation, dissatisfied with the summary manner in which the railroad executives discuss disputes, have asked that the Labor Board remand to local conferences disputes which have not been fully discussed.[123] As long as either side feels that it has more to gain from the Labor Board than from the collective bargain, and can, by refusing to agree in conference, get its case to the board, conciliation under the act will continue to be ineffective and arbitration the most common means of settling disputes.

Nor are the adjustment boards provided for by the act fostering conciliation to any great extent. The transportation brother-

[118] The Labor board is established by sec. 304 of the Transportation Act. 41 Stat. at L. 456, 470. This section provides that the representatives of the labor and management groups be appointed by the president from six nominees each named by the respective groups and that the president appoint directly the three representatives of the public group. In case either side fails to nominate the president is authorized by sec. 305 to appoint directly the representatives for that side. Sec. 307 (c) provides that decisions by this board shall require the concurrence of at least 5 of the 9 members, and that in the case of wage disputes, at least one member of the public group must concur in the decision.

[119] 41 Stat. at L. 456, 470 sec. 307.

[120] 41 Stat. at L. 456, 473 sec. 313.

[121] Permission is not definitely given. The fact that the failure of conferences carries cases to the board operates to give this general effect, however.

[122] A general chairman of one of the craft organizations has assured the writer that the act does actually function in this manner. Recently the shop crafts, he stated, conferred with the executives over new rules. Out of these conferences only thirty-eight rules were jointly agreed to; the matter was then removed to the Labor Board where 186 rules were laid down.

[123] Statement by a general chairman of the Brotherhood of Railway Carmen of America.

hoods are the only organizations which have cooperated with the railroads in the formation of adjustment boards. These brotherhoods, in conjunction with fifty railroads have established a bipartisan board in each of the three regional districts. These boards, however, have a very limited jurisdiction. They are deprived by the act itself of jurisdiction over wage disputes, and they are further deprived by the agreements under which they are established, of the jurisdiction which the act aimed to give them over disputes concerning changes in rules and working conditions.[124] Conciliation is therefore functioning in the very limited field of personal grievances, and disputes arising out of the construction of rules and schedules established by the Labor Board.

While practise is thus encouraging arbitration official interpretation of the act is making that arbitration compulsory in the first instance by establishing the power of the Labor Board to compel submission of disputes for consideration. This power is based on interpretation of sections 301 and 307. The former states that all disputes not decided in conference shall be referred by the parties to the board authorized to hear and decide such disputes, and the latter states that the Labor Board shall hear and decide all disputes not settled by adjustment boards and shall receive for hearing and decide all disputes with respect to wages when such disputes are likely substantially to interrupt commerce.

When in 1921 the railroad employees were threatening to strike against the wage reduction recently recommended by the Labor Board, that body, asserting that the threatened strike was one liable to interrupt commerce, announced on October 22[125]

[124]In a general letter to "All general chairmen, local divisions and lodge members employed in the United States on railroads members of regional boards," instructions were sent out by the presidents of the four brotherhoods that "only disputes growing out of personal grievances or out of the interpretation, or application of the schedules agreements or practises now or hereafter established . . . shall be submitted to the board, (regional)," and it was specifically stated in large type that "All disputes arising out of proposed changes in rules, working conditions or rates of pay are specifically excluded from the jurisdiction of the board and under no circumstances should you attempt to submit them." General letter dated Cleveland, O., Nov. 1, 1921, and signed by W. S. Carter of the Firemen, W. S. Stone of the Engineers, L. E. Sheppard of the Conductors and W. G. Lee of the Trainmen.

[125]The public group of the board had earlier submitted a proposal for the settlement which had been rejected. The board itself had attempted mediation which had also failed. When this latter method failed it was generally thought that the Labor Board had exhausted its powers. Its action on Oct. 22 was heralded by the New York Times as a "sensational development" which "left interested leaders too astounded to comment."

that it assumed jurisdiction of the dispute, and summoned both sides to a conference which was convened October 26. It also commanded the unions to maintain the status quo pending a hearing and a decision, an order that was "tantamount to a demand that the strike order for October 30 be rescinded."[126] The act does not specifically forbid a strike pending investigation as does the Canadian Industrial Disputes Act, but sections 301 and 307 give practically the same effect as a specific prohibition. As noted above they command the parties to submit the dispute to the proper board for hearing and decision. The logical deduction, therefore, is that since the dispute is submitted for decision it is intended that no cessation of work occur prior to such decision.

The question whether or not the board possessed the actual power to prevent a change in the status quo pending investigation was not answered in 1921, since the strike vote was recalled prior to October 30. The board, nevertheless claimed this power as well as the power to compel the parties to a dispute to appear before it and present their case. After the crisis was past it laid down the general rule that:

"When any change of wages, contracts or rules previously in effect is contemplated or proposed by either party conferences must be had as directed by the Transportation Act . . . and when agreements have not been made the dispute must be brought before the board and no action taken or change made until authorized by the board."[127]

The board itself claimed no power to enforce its awards. It merely provided in a second general rule that whenever a strike should occur contrary to an award that:

"The organization so acting has forfeited its rights, and the rights of its members in and to the provisions and benefits of all contracts heretofore existing, and the employees so striking have voluntarily removed themselves from the classes entitled to appeal to this board for relief and protection."[128]

The Department of Justice, however, claims that it is within the power of the government to stop by injunction strikes on

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Even Senator Cummins had not believed that the Labor Board could take such steps as it took on Oct. 22, for a few days earlier he had said: "Of course if both sides are not willing to permit arbitration by the Railroad Board of their differences, then the railroad act becomes entirely ineffective."

[126]New York Times, Oct. 22.

[127]New York Times, Oct. 30. (Published by R. M. Barton, chairman of the board.)

[128]Ibid.

interstate railroads.[129] If this assertion can be substantiated the result will be that the award of the Labor Board, although unenforceable under the act will, in many cases, become in actual practice, compulsory upon the parties. Particularly will this be so in the case of awards granting wage reductions. In such cases the employees will find themselves obliged to accept the reduction authorized by the board, or, unless they can come to a separate agreement with the carriers face the injunction. The railroads, on the other hand, it should be noted, would have the alternative of retaining the status quo in case a wage increase was recommended by the board.[130] Let us examine this claim of the Department of Justice, made first in 1921 and later repeated indirectly in connection with the railroad shopmen's strike.

It had been hinted in the newspapers early in the history of the 1921 controversy, that a legal method of enforcing the awards of the Labor Board had been found. It was suggested that the rail strike was an "overt act" which could be enjoined on the ground that the unions were violating an order of a branch of the government.[131] When, however, on October 27 Attorney-General Daugherty announced the action the government would take if a strike occurred the Transportation Act was not mentioned. He based the right of the government to halt the strike by injunction wholly upon federal conspiracy statutes[132] and upon the case of *In re Debs*. It is difficult to see how the claim of the government that a railroad strike constituted a conspiracy against the government could have been upheld. In *In re Debs* and *Wilson v. New*,[133] however can be found seemingly clear author-

[129]A statement of the measures which the government would take if a strike were called on October 30 was issued by Attorney-General Daugherty on October 27. (Published in the New York Times of that date.)

[130]If the Department of Justice should look beyond the actual physical obstruction to the cause of such obstruction it is possible that in a case where a strike resulted because of a refusal of the roads to put in effect a wage increase recommended by the board, the roads might be enjoined from disregarding the award of the Labor Board on the ground that by so acting they were directly responsible for the strike.

[131]New York Times article, Oct. 22. (The strike was officially called in protest to the wage reduction of 1920 authorized by the board.)

[132]The chief reliance was placed on sec. 5440 of the criminal code, which makes an overt act in connection with a conspiracy against the United States punishable by a fine not to exceed $10,000, two years' imprisonment, or both. Two other sections of the federal penal code providing fines for conspiracies to deprive citizens of any constitutional rights or privileges were also mentioned.

[133](1916) 243 U.S. 332, 61 L.Ed. 755, 37 S.C.R. 298. (See supra, Chapt. II, p. 482 footnote 74 also supra, this chapter, p. 552.)

ization for governmental intervention in railroad disputes. The former sustains the right of Congress to remove any obstruction of interstate commerce; the latter holds that a strike on interstate roads constitutes such an obstruction to commerce. The only constitutional question remaining is, can this governmental intervention take the form of compulsion of personal service? The existing court decisions suggest a negative answer to this question;[134] but with the Daugherty injunction case pending in the courts of the United States, it is not revolutionary to prophesy that the Supreme Court may sooner or later squarely decide what *Wilson v. New* hinted in dicta, namely that the rights of railroad employees to quit work, in view of the public nature of the employment, can be limited.

The Daugherty injunction in enjoining acts which indisputably would be legal in private controversies[135] has definitely assumed, apparently, that the government possesses the right to place limitations on the freedom of action of those persons engaged in the movement of interstate commerce which it never, constitutionally, could place on other private individuals. If the courts of the United States uphold this injunction without modification, it seems reasonably clear that they will be obliged to base their decision on a declaration of the power of the government, under the commerce clause, to limit the freedom of action of interstate railroad employees. While such a decision might avoid a direct assertion of the power of the federal courts to compel personal service, per se, the effect would be materially the same. On the day when a decision is handed down by the courts, either directly asserting the constitutional right of the government to compel personal service, or upholding its power to so limit personal freedom that the compulsion of service is the practical result, arbitration, for the employees at least, will be, in effect at least, compulsory in every aspect.

It is interesting to note at this point that all doubt concerning the ability of the Railroad Labor Board to enforce its awards, has been dispelled by a recent decision of the United States Supreme Court.[136] This decision, which recognized the power of the Labor Board to undertake to enforce through publication, the

[134]Supra, Chapt. II.

[135]See page 479 supra, footnote 65.

[136]Pennsylvania R. Co. v. United States R. Labor Bd., (1923) 43 S.C.R. 278. For decisions in lower courts see (1922) 282 Fed. 693; (1922) 282 Fed. 701.

holding of a new election by employees of the Pennsylvania Railroad, held that the Railroad Labor Board had no power to enforce awards which, after publication, had been disregarded. The district court, which denied the jurisdiction of the Labor Board, sustained the constitutionality of the Transportation Act itself.

It is evident, therefore, that practise and official interpretation are fast transforming the Transportation Act of 1920 into a compulsory arbitration act. The carriers and their employees no longer make honest attempts to settle their disputes themselves before carrying them up to a government agency. In previous years, under the Erdman and Newlands acts the two sides were accustomed to spend months in attempts to come to an agreement between themselves; then perhaps they would request mediation, or mediation would be proffered, and more time would be spent in endeavoring to reach a settlement. In the majority of cases disputes were settled by mediation, but in any event arbitration was not sought until all efforts to reach a settlement by the collective bargain had been exhausted. But at the beginning of the rail dispute of October 1921, when representatives of the men met committees of railroad executives in the eastern, southeastern and western districts the railroads briefly "declined to make any concession or offer any solution providing for a settlement."[137] And when later executives of the labor organizations met with a committee of railroad executives, a two-hour conference, "distinctly lacking in conciliatory spirit," was sufficient to demonstrate that no agreement could be reached.[138] Therefore, after conferences lasting hours instead of weeks and months, in which no conciliatory spirit was shown, the case went to the Labor Board for decision. Likewise the railroad shopmen, who went out on strike last July and the executives of the roads scorned the conference tables. Direct action, in this instance, was substituted for arbitration.

The result, therefore, is that the disputes which were formerly settled in most cases by the parties involved are today being

[137]Statement by Warren S. Stone, president of the Brotherhood of Locomotive Engineers in New York Times, Oct. 18. The railroad employees met with eastern executives Aug. 3 with southeastern executives Aug. 16 and with western executives Aug. 17. Executives of southwestern roads did not meet with the men. At these meetings the employees asked what steps the roads planned to take on the wage situation, and the answer was in every case that the roads planned to proceed with the wage reduction. (Based on New York Times accounts.)

[138]This conference was held Oct. 14 in Chicago. (New York Times, Oct. 15.)

settled by a government board before which the parties meet "not as parties to a conference but as parties to a suit at court."[139] The settlement is being made, moreover, not by the management group and not by the men, but by the public group whose understanding of the situation is based on such summary investigations as can be made by a board which in 1921 had 1,300 cases pending.[140] And the award, if it becomes enforceable, will be enforced by a branch of the government which does not consider the merits of the case.[141]

The ineffectiveness of the Railroad Labor Board as a strike-averting body, which was partially revealed by its near-failure in the rail crisis of 1921 was emphasized by its inability to prevent or to settle the shopmen's strike last summer. The shopmen, in defiance of an award of the board authorizing the railroads to reduce the wage-rate went on strike in July and remained out until the middle of September despite all efforts of the board to effect a settlement of the dispute between them and their roads.

The first action of the Labor Board when the strike was put into effect, was to pass an "outlaw" resolution which precipitated the entire seniority dispute. Obtaining no results from this resolution, the board proposed a peace conference. The roads, however, refused to participate in this conference unless the employees recalled the strike vote. This the employees refused to do, and the proposal came to nothing. Chairman Hooper of the board then held informal conferences and a basis of negotiation which included the return of the workers with full seniority rights, was reached. The roads flatly refused to consider the restoration of seniority rights, however, and the deadlock remained unbroken. President Harding then intervened with his peace proposals which likewise proposed to protect the seniority rights of the striking shopmen, and hence were futile. Conferences between the Interstate Commerce Commission and the railway executives, and between Secretary of Labor Davis and

[139]Samuel Gompers in an article condemning the Railroad Labor Board. (New York Times.)

[140]Ibid.

[141]Said Attorney General Daugherty, commenting on the conference of state attorneys-general which was held to discuss the action the government could take in case of a rail strike, "We did not discuss the merits or the matters in dispute . . . with the merits of the controversy the Department of Justice takes the position that it has nothing to do and the merits will probably not be entered into at any time . . . many more Americans are interested in [the railroads], in seeing that they serve the public than in this controversy regardless of who is right or who is wrong." (New York Times, Oct. 25.)

the strikers, were likewise unavailing and the president's compromise which provided that the seniority issue go to the Labor Board for decision was refused by the roads. The transportation brotherhoods then intervened, but their arbitration failed likewise, the seniority issue once more blocking success. Then came the Wilkerson restraining order September 1, which was followed shortly by a partial settlement under the Baltimore agreement. Under this settlement arrangement was made for the adjustment of the seniority issues by a committee of six representatives of the railroad organizations and six representatives of the employees.

The futility of the efforts of the Railroad Labor Board to settle this strike has aroused active dissatisfaction with the Transportation Act in official as well as in unofficial circles, and the likelihood is that the coming year will see important changes in railroad labor legislation. President Harding, referring to the Transportation Act in his message to Congress last December, stated that "it is now impossible to safeguard public interest because the decrees of the board are unenforceable against either employer or employee," and declared that "public interest demands that ample power shall be conferred upon the labor tribunal . . . to require its rulings to be accepted by both parties to a disputed question." While he recognized the right to cease labor, he limited the recognition by observing that "since the government assumes to safeguard his interests, (those of the laborer) while employed in an essential public service, the security of society itself demands his retirement from service shall not be so timed and related as to effect the destruction of that service." He referred to the partisan nature of the board as one of its chief weaknesses, and proposed as a substitute a nonpartisan labor division in the Interstate Commerce Commission.

Secretary of Labor Davis has openly advocated the abolition of the Railroad Labor Board, and many of the labor organizations, equally disgusted with the board, have announced their intention of returning to direct dealings and have indicated that they would welcome the restoration of the Newlands Act.

The ineffectiveness of the Labor Board in averting strikes does lie as President Harding pointed out, in its inability to enforce its own awards. Until, however, the conciliation features of the Transportation Act are fundamentally strengthened and arbitration looked upon, not as the initial remedy but as the last

resort in the settlement of strikes, will it be in accord with justice to give to the Labor Board the power to enforce its decisions.

In moving toward a system of compulsory arbitration which offers the two sides to the dispute no adequate opportunity to come to a settlement between themselves, the government is disregarding all of the lessons its own experience has taught.[142] The Transportation Act as passed aimed primarily at conciliation and only secondarily at arbitration. Is it not possible, therefore, in the light of past experience, so to amend the act that it will achieve the results at which it aimed and which experience justifies?

Experience has taught three major lessons. It has taught, first, that the parties directly involved in a dispute are, in the majority of cases, capable of settling their own disputes through the collective bargain without recourse to arbitration, and that settlements reached in this manner are more satisfactory than settlements reached through awards of arbitration boards. It has taught, secondly, that conciliation, from the point of view of the public, functions with complete success only when it is accompanied by investigation and publicity.[143] And it has taught finally that no machinery for the settlement of labor disputes is complete which does not afford the public an opportunity to safeguard its interests. Experience, therefore recommends an act in which conciliation is the functioning agent; in which compulsory investigation is an indispensable factor, and in which the public is adequately protected from the strike which may result in spite of the opportunities afforded for a fair and just settlement of labor disputes by conciliation and compulsory investigation.

The Transportation Act already provides the machinery for the type of act which experience recommends. The entire trouble

[142]Experience in Australia seems likewise to justify conciliation rather than compulsory arbitration. Since 1910 when the Commonwealth arbitration act was amended to give the president of the labor court power to compel conferences, increasing stress has been placed on conciliation. (See 1918 report of the National Industrial Conference board.) And in 1920 an "Industrial Peace" Act was passed which "may be regarded as a sincere attempt to improve the machinery of industrial conciliation." (Unsigned article on Australia in the March, 1921, number of the Round Table.) This act makes provision for a Commonwealth council on which are six representatives elected by the employers, six elected by the workers and a chairman appointed by the Governor-General. It provides also that a district council of a similar nature may be named. Three excellent articles on the Australian court: A New Province for Law and Order, by Henry Bournes Higgins, in 29 Harv. L.R. 13, 32 Harv. L.R. 189, 34 Harv. L.R. 105, give clear accounts of the functioning of the Australia law.

[143]See supra, Chapt. I, p. 478, footnote 59.

lies in the fact that the machinery is not functioning properly. The machinery for conciliation is found in the conferences provided for in section 301 and in the adjustment boards provided for in section 307.[144] But we saw that neither conferences nor boards are actually encouraging conciliation. Compulsory investigation is also provided for by the act which in sections 308 and 310 endows the board with complete inquisitorial powers. But compulsory investigation becomes a farce in the face of a docket of 1,300 cases. And, finally, in the labor board itself is found the machinery for the protection of the public interest. The board, however, instead of functioning as a court of last resort, is overburdened with the work of a court of first instance. The question now is, how can this available machinery be remodeled and strengthened in order that the act may achieve the results at which experience aims?[145]

Conciliation can be vitalized by compelling the formation of bi-partisan regional adjustment boards. It is suggested that three adjustment boards, corresponding to adjustment boards, 1, 2 and 3 formed during the war,[146] be established in each of the three regional districts, and that these boards be charged with the duty of hearing all wage disputes as well as all disputes, arising out of the establishment of rules and working conditions. Conciliation can be further vitalized, and the public interest safe-guarded at the same time, by withdrawing from the disputants the privilege of appealing to the Labor Board and placing this privilege in the hands of two representatives of the public, who it is recommended, should attend all sessions of the adjustment boards.[147] The adjustment boards should be charged with the final determination of disputes over rules and working conditions, and only wage cases should be appealable to the Labor Board. For the problem of rules and working conditions, is, because of its extreme technicality, one that the carriers and their employees are

[144]See supra, p. 553.

[145]It will be impossible, because of the limits of space, to give any more than the bare outlines of the sort of act which the writer believes will function best in handling labor disputes.

[146]Board of Adjustment Number 1 had jurisdiction over men connected with the movement of trains. Board Number 2 dealt with railway shopmen and Board Number 3 was charged with the adjustments concerning switchmen, telegraphers and clerks. Bing, War-Time Strikes and Their Adjustment.

[147]It is added as a qualifying suggestion that these public representatives attend only those hearings which involve wage disputes. It is possible that there might be a public interest involved in a change of rules, however, and in such cases the public men should attend.

best qualified to settle; and if, moreover, the Labor Board is to function successfully in wage disputes, it should not have its calendar glutted with hundreds of technical cases. Finally, the act should specifically forbid strikes or lockouts pending the hearings before the regional boards, and should command, also, that in cases where settlements are not reached by the regional boards, the status quo be maintained pending a further hearing by the Labor Board, and a decision.

In order that investigations may be complete and thoroughgoing it is recommended that a federal officer, endowed with the power to subpoena witnesses and demand the production of books and papers, be appointed by the president for each regional district. It is further recommended that this official have the assistance of a committee on which is represented the carriers, the employees and the public.[148] This official, in the case of wage disputes, should investigate the financial condition of the railroads, the cost of living in the district, rates of pay in other industries and the special hazards, skill or training involved in railroad labor which warrant a variation from the standard rate.[149] In the case of disputes over rules and working conditions he should make a study of the technicalities giving rise to the need for new rules or working conditions. The results of these investigations should then be submitted to the regional boards, and should form the basis of a settlement.[150]

Compulsory investigation, accompanied by publicity will enable public opinion to exert a powerful force in favor of a fair settlement. In order, however, that public opinion may be even more carefully directed, it is suggested as noted above that two representatives of the public, preferably appointed by the president,[151] sit regularly on the adjustment boards. These public representatives should have no vote. Their function should be, first, to question freely in order to bring out all facts and secondly to appeal wage cases to the Labor Board, first, when deadlocks

[148]The public representatives on these investigating committees, would in all probability be appointed by the two public representatives on the regional boards.

[149]The Railroad Labor Board in the present act is charged to take into account these factors, 41 Stat. at L. 456, 470 sec. 307.

[150]The federal investigator might also be charged with the duty of investigating charges made by either side that the other side was not abiding by the settlements of the board.

[151]Men who are strongly allied in sympathy with either side should never be appointed to the positions of public representatives or regional boards. The public representatives, in order to best serve the public, should be unbiased and unprejudiced in their judgments.

occur, and secondly, when the settlement involves a compromise which places an unwarrantable burden on the public.[152] Appeals should be accompanied by the recommendations of the public group, based on the findings of the investigating committee and on the facts brought out at the conferences.

The Railroad Labor Board, under this plan of reorganization, would function as a supreme court of review in wage dispute cases. Instead of itself instituting investigations as it does today, it would accept the "records" of the "lower court," and base its decisions primarily on these records, inaugurating only such additional investigations as it deemed necessary to formulate a just award.

It is suggested that this supreme wage court be constituted of nine non-partisan men thoroughly familiar with the economics involved in the establishment of wage rates. Such a court would be distinctly superior to the present labor board on which we noted practically all decisions are made in the last analysis by the three public men who have no intimate knowledge of the technicalities involved. Labor, which opposed a non-partisan court of "public" men on the ground that in such a tribunal political considerations outweigh justice, could not raise the same objection to a non-partisan court of eminent economists drawn from professional fields. For a court of men of this calibre would be primarily interested in handing down a decision in accord with the economics of the case. It is further suggested that these technical men be appointed by the president on the advice of prominent educators of the country. This would further remove them from political influence.

It is advocated, finally, that this supreme tribunal be endowed with the power to enforce its awards. Strong as is the force of public opinion, which is the only enforcing agent in the Esch-Cummins bill, it is not sufficiently strong, experience has demonstrated, effectively to protect the public against the strike danger. Provision must be made for some more potent force which can say to the railroads, "you must accept this award," and to the railroad employees, "you must not strike," before the public can be adequately insured against transportation tieups. The writer

[152]In order to avoid deadlocks between two representatives which would prevent appeals, the act should provide that either representative could appeal a case to the Labor Board. The dissenting representative should, however, be permitted to file a "dissenting opinion" with the Labor Board in support of the decision of the regional board. The problem of the deadlock would arise of course, only in cases where a decision of a regional board was thought to be contrary to the interests of the public.

would not advocate endowing the Esch-Cummins Labor Board with the power to enforce its decisions. For labor would be justified in opposing compulsory arbitration that is not preceded by bi-partisan conferences which offer both parties adequate and well-protected opportunities to present their cases in detail and to reach a settlement between themselves. Neither labor nor capital, however, could protest on the grounds of justice compulsory arbitration which functions only after both sides to a dispute, assisted by compulsory investigation, have exhausted every effort to themselves settle their differences. If labor and capital cannot come to terms in such conferences as the writer has advocated, the public is entirely justified in demanding that the awards of the supreme court empowered to review wage disputes be enforceable in law.

Amended on the lines suggested above, the Transportation Act would be purged of its objectionable features and would be greatly strengthened as a strike-averting body. Compulsory investigation and bi-partisan conferences would become the functioning agents in the settlement of labor disputes instead of arbitration, which would be held in reserve until labor and capital had clearly demonstrated their inability to come to terms. Arbitration, when resorted to, however, would be far more effective, since in the amended act the arbitration awards would be enforceable in law. No protection now afforded to the public by the Transportation Act would be destroyed by its amendment along the lines suggested. Instead the public, enlightened by compulsory investigation and fortified by representation in the original conferences would find in its own increased strength additional assurance against strikes; and should even the increased strength of public opinion be found incapable of averting industrial disturbances, the public would find that it was fully protected in a supreme wage tribunal which was authorized to enforce its awards.

No discussion of federal intervention in labor disputes is complete which does not include a reference to the vital need for effective federal intervention in the coal mine dispute. The coal strike of 1919 closed schools, hospitals and factories; it handicapped train service and caused suffering in hundreds of homes. The mine strike inaugurated in April, 1922, which remained unsettled until September, undoubtedly would have reproduced the suffering of 1919 had it continued many more months. As it is coal prices soared to such a height, as a result of the curtailed

supply, that many families suffered from insufficient fuel in their homes last winter.

Despite the fact, however, that the entire American public has a distinct interest in the continuous production of coal, the federal government has not yet established a right to intervene in mine disputes as it has intervened in railroad disputes. Congressional agitation for the establishment of a federal coal tribunal corresponding to the Railroad Labor Board and endowed with similar powers has become increasingly persistent however, following the recent serious mine strikes.[153] The position of the congressmen who are urging a federal coal tribunal, is strengthened by a suggestion made by Attorney-General Daugherty that since fuel is indispensable to transportation, the government has the same authority to prevent interference with the production of coal as it has to prevent interference with transportation itself.[154] It is certainly possible that the commerce clause will be interpreted, before long, to sanction congressional regulation of coal mine disputes. Since the majority of serious disputes in the mine fields center about opposition to unionism and unwillingness of the operators to bargain collectively with the miners, compulsory conferences which would force the operators to recognize the union and the collective bargain should be the first aim of a federal act regulating mine disputes. Compulsory investigation, public representation in local councils and a federal coal tribunal are the other features for which a mine disputes act should provide. The awards of the federal coal tribunal, like the awards of the suggested supreme railroad wage board, should be enforceable in law.

The coal mining industry is at present under investigation by a federal coal commission.[155] This commission, which made its first report, (incorporating in it information relative to wage rates, earnings, employment, costs and profits of the industry, competition of other fuels, and coal produced by non-union mines) last January, is "seeking to promote industrial peace by ascertaining and publishing certain facts." It is interesting to note that the commission in making this report, after commenting that "the public interest in coal raises fundamental questions of the relation of this industry to the nation and of the degree to

[153]Note Senator Kenyon's proposal, New York Times, April 28.

[154]See statement by Daugherty, relative to April 1922 mine strike and the government's right to intervene. (New York Times, March 22.)

[155]This commission is composed of John Hays Hammond, Thomas Marshall, Judge Samuel Alschuler, Clark Howell, George Otis Smith, Dr. Edward T. Devine and Dr. Charles P. Neill.

which private right must yield to public welfare," observes that "it may be that both private property in an exhaustible resource and labor in a public service industry must submit to certain modifications of their private rights, receiving in return certain guarantees and privileges not accorded to purely private business or persons in private employ." A long step toward the final settlement of the mine dispute problem would be taken if congress, acting in accord with this sentiment, would recognize mining as a public service industry subject to regulation by the government, and provide for the type of collective bargain and investigation suggested above.

Summarizing the results of the foregoing investigation of the extent to which the federal government has established its right to interfere in labor disputes, it is evident that the government has, by 1923, developed extensive powers of intervention. In the Transportation Act of 1920 it has secured for itself the right to hear and decide all disputes involving interstate railroads. It has reached out into the field of local disputes through the conciliation division of the Department of Labor, and, with the injunction it is intervening in disputes which indirectly interfere with interstate commerce. The present system of federal intervention, however, is weakened by two serious defects. In the first place it is incapable of protecting the public from the mine strike, except extra-legally. In the second place it is overlooking the importance of mediation and conciliation, and is relying too completely on arbitration and the injunction, both of which are distasteful to labor. The government may correct the first defect by assuming jurisdiction of the mine dispute under the commerce clause of the constitution. The second defect may be remedied by encouraging, through an amended Transportation Act, collective bargaining instead of compulsory arbitration, which as noted above, should be retained only as a "last resort" remedy.

A system of federal intervention which extends to mine disputes as well as to railroad disputes will ensure greater industrial peace. A system of federal intervention, for both rail and mine disputes, which is based on the collective bargain, but which protects the public against the strike that may result from deadlocks in the bi-partisan conferences; a system which grants to labor and capital a full opportunity to settle their own disputes but provides for a supreme court of review to safeguard the public against the misuse of this opportunity—such a system will ensure an industrial peace which will be based on industrial justice, justice to labor, to capital, and to the public.

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BOUNDARIES — PRACTICAL LOCATION — ESTABLISHMENT BY ESTOPPEL, AGREEMENT, OR ACQUIESCENCE.—The question of how boundary lines may be established, aside from grant, becomes of ever greater importance as land values increase. Inaccurate surveys, disregard of lines, and obliteration or removal of boundary monuments, all contribute to make the true boundary lines uncertain, and resulting boundary disputes are a prolific source of litigation.[1] As a rule of repose, therefore, for quieting title and preventing litigation,[2] the courts have adopted the doctrines of "practical location," or "practical construction," by which, under

[1] 4 Cal. L. Rev. 179.

[2] George v. Thomas (1856) 16 Tex. 74, 91, 67 Am. Dec. 612, 618; Brown v. Caldwell, (1823) 10 Serg. & R. (Pa.) 114, 116; see note, 110 A.S.R. 677, 682.

certain circumstances, when the evidence is clear, positive, and unequivocal,[3] they recognize as the boundary, the line actually established by contiguous owners in possession, although such line varies from the calls of the deeds. As to the principles upon which a practical location may be established, the courts appear to be in confusion; and as a text writer has said: "It is impossible to deduce any generally accepted rules upon the subject."[4] The courts proceed, however, upon the three general rules of estoppel, agreement, and acquiescence,[5] although these rules overlap considerably in application, and many courts do not make a clear distinction between them.

First, the principle of estoppel may be applied to prevent one who has made a representation by words, acts, or conduct, upon which the other party has relied, that a certain line is the true boundary line between their adjoining tracts, from thereafter denying it, especially when improvements have been made by the other party so that depriving him of the land would result in serious injury.[6] As to whether an estoppel may arise when the party who is sought to be estopped, made the representation through ignorance or mistake, there is a conflict of authority.[7] In an early Minnesota case,[8] where a purchaser bought in reliance upon a line pointed out by an adjoining owner, the court held that to con-

[3]Markusen v. Mortenson, (1908) 105 Minn. 10, 12, 116 N.W. 1021; Roy v. Dannehr, (1914) 124 Minn. 233, 238, 144 N.W. 758.

[4]1 Tiffany, Real Property, 2nd ed., 996.

[5]4 Cal. L. Rev. 293; Beardsley v. Crane, (1893) 52 Minn. 537, 545, 54 N.W. 740; Benz v. City of St. Paul, (1903) 89 Minn. 31, 38, 93 N.W. 1038. In this case the court says that: "the practical location of a boundary line can be established in one of three ways only: (1) the location relied upon must have been acquiesced in for a sufficient length of time to bar a right of entry under the statute of limitations; (2) the line must have been expressly agreed upon between the parties claiming the land on both sides thereof, and afterwards acquiesced in; or (3) the party whose rights are to be barred, must, with knowledge of the true line, have silently looked on while the other party encroached upon it, and subjected himself to expense in regard to the land, which he would not have done had the line been in dispute."

[6]Benz v. City of St. Paul, (1903) 89 Minn. 31, 40. 93 N.W. 1038; Sumner v. Seaton, (1890) 47 N. J. Eq. 103, 121, 19 Atl. 884; Ross v. Ferree, (1895) 95 Ia. 604, 610, 64 N.W. 683; Peterson v. Sohl, (1895) 141 Ind. 466, 470, 40 N.E. 910; Joyce v. Williams, (1873) 26 Mich. 331, 337; see 1 Tiffany, Real Property, 2nd ed., 1002; 4 Cal. L. Rev. 179, 197 and 293, 296.

[7]Bona fide mistake prevents estoppel, Brewer v. Boston & Worcester Rail Road, (1843) 5 Metc. (Mass.) 478, 39 Am. Dec. 694; Cheeney v. Nebraska & C. Stone Co., (1890) 41 Fed. 740. Contra, Willis v. Schwartz, (1857) 28 Pa. 413; Ross v. Ferree, (1895) 95 Ia. 604, 610, 64 N.W. 683; Peterson v. Sohl, (1895) 141 Ind. 466, 470, 40 N.E. 910; see note, 48 L.R.A. (N.S.) 745, 751.

[8]Combs v. Cooper, (1861) 5 Minn. 254, 268, (Gil. 200, 211).

stitute estoppel in pais there must have been constructive fraud or gross neglect in regard to the subject matter claimed as an estoppel. This case seems to be borne out by dicta in subsequent cases,[9] where it is stated that a practical location may be established when, *with knowledge of the true line,* one party silently looked on while the adjoining owner encroached upon it, and subjected himself to expense in reliance upon it. In the only other Minnesota case[10] in point, the party who pointed out a line established by an erroneous survey, although acting bona fide, was estopped, but only as to the land actually occupied by the building erected by the adjoining owner in reliance thereon.[11]

Secondly, a practical location may be established by an agreement of the parties upon a boundary line, followed by possession to that line and acquiescence in it,[12] provided always, either that the true line is indefinite from the words in the deeds or from the uncertainty of the boundary marks,[13] or that the true line has not been ascertained, and its location is in dispute between the parties.[14] A few courts further require that the line be so indefinite that it can not readily be established by a survey.[15] The agreement is not binding, however, if by measurement or survey

[9]Beardsley v. Crane, (1893) 52 Minn. 537, 545, 54 N.W. 740; Benz v. City of St. Paul, (1903) 89 Minn. 31, 38, 93 N.W. 1038. See footnote 5.

[10]Benz v. City of St. Paul, (1903) 89 Minn. 31, 40, 93 N.W. 1038. It is to be noted that in this same case the court recognizes the rule of Beardsley v. Crane, that the party to be estopped must have knowledge of the true line. But the rule may well be different when, as in this case, there is an affirmative representation rather than mere silence. See 2 Pomeroy, Equity Jurisp. 4th ed., 1660.

[11]It is to be noted that the term "estoppel" is loosely used by some of the courts when they speak of agreement and acquiescence operating as an estoppel. See La Mont v. Dickinson, (1901) 189 Ill. 628, 637, 60 N.E. 40; Jones v. Pashby, (1887) 67 Mich. 459, 35 N.W. 152, 11 A.S.R. 589, 591. For full note on estoppel in pais against assertion of title or interest in real property by concealing same or representing it to be in another, see 48 L.R.A. (N.S.) 745, annotating Knauf & Tesch Co. v. Elkhart, etc., Co., (1913) 153 Wis. 306, 141 N.W. 701.

[12]County of Houston v. Burns, (1914) 126 Minn. 206, 148 N.W. 115; Nadeau v. Johnson, (1914) 125 Minn. 365, 366, 147 N.W. 241, (acquiescence continued for about ten years.) See also Einung v. Schlopkohl, (1915) 129 Minn. 9, 151 N.W. 273; 1 Tiffany, Real Property, 2nd ed., 996; 2 Page, Contracts, 2nd ed., 2381; notes in 16 Ann. Cas. 150; 22 A.S.R. 35; 3 L.R.A. (N.S.) 805; 102 A.S.R. 246.

[13]Hastings v. Stark, (1868) 36 Cal. 122.

[14]Sonnemann v. Mertz, (1906) 221 Ill. 362, 77 N.E. 550; Osteen v. Wynn, (1908) 131 Ga. 209, 62 S.E. 37, 127 A.S.R. 212; Hills v. Ludwig, (1889) 46 Ohio St. 373, 380, 24 N.E. 596; Farr v. Woolfolk, (1903) 118 Ga. 277, 279, 45 S.E. 230; Lynch v. Egan, (1903) 67 Neb. 541, 547, 93 N.W. 775; see notes, 10 L.R.A. (N.S.) 610 and 22 A.S.R. 35.

[15]Emerick v. Kohler, (1859) 29 Barb. (N.Y.) 165, 169; see also Truett v. Adams, (1884) 66 Cal. 218, 222, 5 Pac. 96; Hartung v. Witte, (1884) 59 Wis. 285, 298, 18 N.W. 175; 4 Cal. L. Rev. 179, 185, et seq.

the parties intended merely to ascertain the location of the true line;[16] and it is generally held that an agreement, based upon a mistake, is not operative.[17] Acquiescence following the agreement must continue for a considerable time, usually a period less than the limitation period.[18] It is generally considered that an agreement to establish a boundary, although oral, does not violate the statute of frauds, either upon the ground that it does not have the purpose or effect of passing title to real property, but is intended simply to ascertain the line to which the land of the respective parties extends, and hence it does not come within the statute of frauds at all; or upon the ground that possession following the agreement is such part performance as will take the case out of the statute.[19]

Lastly, provided a line or fence is recognized or acquiesced in as a partition line,[20] and not for mere purposes of convenience,[21] a practical location may be established simply by acquiescence of the contiguous owners.[22] Some courts, including the Minnesota court, by analogy to the statute of limitations,[23] hold that acquiescence must continue for the full statutory period,[24] but generally all the elements of adverse possession need not be

[16]Peters v. Reichenbach, (1902) 114 Wis. 209, 214 90 N.W. 184.

[17]Schraeder Mining Co. v. Packer, (1889) 129 U.S. 688, 698, 9 S.C.R. 385, 32 L.Ed. 760; see Ulman v. Clark, (1900) 100 Fed. 180, 192.

[18]County of Houston v. Burns, (1914) 126 Minn. 206, 148 N.W. 115; Jones v. Pashby, (1887) 67 Mich. 459, 35 N.W. 152, 11 A.S.R. 589, 591, and note; La Mont v. Dickinson, (1901) 189 Ill. 628, 637, 60 N.E. 40; see note, 8 Ann. Cas. 83.

[19]Hagey v. Detweiler, (1860) 35 Pa. St. 409, 412; 1 Tiffany, Real Property, 2nd ed., 996; see notes, 16 Ann. Cas. 150; 3 L.R.A. (N.S.) 805. The uncertainty of the boundary furnishes consideration for the agreement.

[20]1 Tiffany, Real Property, 2nd ed., 1000; Davis v. Angerman, (Iowa 1923) 192 N.W. 129; Andrews v. Meredith, (1906) 131 Ia. 716, 109 N.W. 287.

[21]Sheils v. Haley, (1882) 61 Cal. 157, 158.

[22]Bahneman v. Fritche, (1920) 147 Minn. 329, 180 N.W. 215; Thoen v. Rocke, (1894) 57 Minn. 135, 139, 58 N.W. 686, 47 A.S.R. 600; Lynch v. Northwestern Laundry, (1922) 194 Ia. 317, 324, 189 N.W. 748, 751; Bell v. Hayes, (1901) 60 App. Div. 382, 69 N.Y.S. 898, 901; Baldwin v. Brown, (1857) 16 N.Y. 359, 363; Haring v. Van Houten, (1849) 22 N.J. Law 61, 68; Sneed v. Osborn, (1864) 25 Cal. 619, 626; see notes, 27 Am. Rep. 239; 110 A.S.R. 677, 683, 5 Iowa L.Bull. 58, 59.

[23]Sneed v. Osborn, (1864) 25 Cal. 619, 626; Miller v. Mills County, (1900) 111 Ia. 654, 660, 82 N.W. 1038.

[24]Bahneman v. Fritche, (1920) 147 Minn. 329, 180 N.W. 215; Thoen v. Rocke, (1894) 57 Minn. 135, 139, 58 N.W. 686, 47 A.S.R. 600; Sneed v. Osborn, (1864) 25 Cal. 619, 626; Hellman v. Roe, (1916) 275 Ill. 158, 161, 113 N.E. 989; Hinkley v. Crouse, (1891) 125 N.Y. 730, 26 N.E. 452; see note, 27 Am. Rep. 239; see Beardsley v. Crane, (1893) 52 Minn. 537, 54 N.W. 740; Woodland v. Hodson, (1915) 28 Idaho 45, 50, 152 Pac. 205.

present.[25] In a recent Minnesota case,[26] however, there is some indication that the doctrine of acquiescence must include the elements of adverse possession, and if this be true, title by acquiescence is merely another phrase for title by adverse possession. Some courts hold that the acquiescence must continue for a considerable time, though less than the statutory period.[27] Several theories are advanced to explain the rule of acquiescence. Some courts presume or imply an agreement[28] from the long continued acts of the parties in treating the established line as the true line. If this rule be adopted, it necessarily follows that, as in the case of express agreement, mistake will prevent the operation of the rule.[29] Some courts presume a grant;[30] and others, upon the ground of public policy, hold that acquiescence affords a basis "for a direct legal inference as to the true boundary line," and that the inference may become conclusive by the lapse of time.[31] In the application of these theories, mistake of the parties in the location of the line acquiesced in, is generally considered immaterial.[32] Some courts have required that the party who loses his rights to a certain piece of land by acquiescence, must have notice or knowledge of the claims of the other party.[33] Clearly this rule would not include cases of mistake,[34] because a person could not

[25]Helmick v. Dav. etc., R. Co., (1916) 174 Ia. 558, 564, 156 N.W. 736; Miller v. Mills County, (1900) 111 Ia. 654, 82 N.W. 1038; Bradley v. Burkhart, (1908) 139 Ia. 323, 326, 115 N.W. 597, 130 A.S.R. 328; see note, 24 A.S.R. 388.

[26]Bahneman v. Fritche, (1920) 147 Minn. 329, 333, 180 N.W. 215; see also, George v. Thomas, (1856) 16 Tex. 74, 89, 67 Am. Dec. 612, 616.

[27]1 Tiffany, Real Property, 2nd ed., 1000; Brummell v. Harris, (1899) 148 Mo. 430, 442, 50 S.W. 93; see Haring v. Van Houten, (1849) 22 N.J. Law 61, 68.

[28]Keller v. Harrison, (1908) 139 Ia. 383, 116 N.W. 327; Turner v. Baker, (1876) 64 Mo. 218, 27 Am. Rep. 226; Clayton v. Feig, (1899) 179 Ill. 534, 541, 54 N.E. 149.

[29]But see Miller v. Mills County, (1900) 111 Ia. 654, 82 N.W. 1038, where it was expressly decided that title could be acquired by acquiescence, although based on a mistake.

[30]Baldwin v. Brown, (1857) 16 N.Y. 359; Bell v. Hayes, (1901) 60 App. Div. 382, 69 N.Y.S. 898, 902.

[31]Baldwin v. Brown, (1857) 16 N.Y. 359; Biggins v. Champlin, (1881) 59 Cal. 113, 116.

[32]Baldwin v. Brown, (1857) 16 N.Y. 359, 364; Sneed v. Osborn, (1864) 25 Cal. 619, 626; see 4 Cal. L. Rev. 293, 311.

[33]Davis v. Angerman (Iowa 1923) 192 N.W. 129; Dwight v. City of Des Moines, (1916) 174 Ia. 178, 183, 156 N.W. 336; Daugherty v. Manning, (Tex. Civ. App. 1920) 221 S.W. 983, 988.

[34]Dwight v. City of Des Moines, (1916) 174 Ia. 178, 183, 156 N.W. 336; Daugherty v. Manning, (Tex. Civ. App. 1920) 221 S.W. 983, 988; but see Miller v. Mills County, (1900) 111 Ia. 654, 657, 82 N.W. 1038, where the court expressly held that, although because of the mistake, title could not be acquired by adverse possession, title could be acquired by acquiescence. This decision may be explained partly by the fact that at that time

know that the adjoining owner is claiming part of his land when, because of a mistake, he thought the line acquiesced in was the true line. Some courts do not recognize acquiescence as a means of establishing a disputed boundary line, but they merely consider the fact of acquiescence as evidence,[35] which may be rebutted, that the line acquiesced in is the true line.[36]

The estoppel by which a practical location of a boundary line may be established, does not in its nature appear to be peculiar, or confined to the law of practical location, for it differs little, if at all, from ordinary estoppel in pais. Also, a practical location by agreement is worked out upon ordinary legal principles. But where the facts are not sufficient to raise an estoppel, and where there is no agreement, or where, during the long lapse of time, the evidence of an oral agreement has been lost, the courts have evolved the doctrine of practical location by acquiescence, which, as has been stated, has its closest analogy in the statute of limitations. In the cases where this doctrine is applied, even though an estoppel would not arise because the party sought to be estopped made no affirmative representation, but through ignorance or mistake, merely silently acquiesced in the established line,[37] yet such circumstances as the purchase of the land by the other party in reliance upon the established line, or improvements made in reference to it, may make it inequitable for the first party, after long acquiescence, to claim land up to the true line. To prevent such inequitable results, some states, by statute, have recognized the doctrine of acquiescence;[38] and it is submitted that in the many other states where this doctrine is recognized, its real basis is a public policy to quiet title and to discourage litigation.

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the court had not yet so definitely laid down the rule that knowledge was a necessary element of acquiescence; or it may be that the court was merely using this method to circumvent this anomalous rule regarding adverse possession, which the Iowa courts have adopted.

[35]Welton v. Povnter, (1897) 96 Wis. 346, 71 N.W. 597; Whitcomb v. Dutton, (1896) 89 Me. 212, 219, 36 Atl. 67; Hathaway v. Evans, (1871) 108 Mass. 267, 270; Cox v. Heuseman, (1919) 124 Va. 159, 166, 97 S.E. 778; 1 Tiffany, Real Property, 2nd ed., 999.

[36]It is to be noted that the title acquired by acquiescence is legal and not equitable. Sneed v. Osborn, (1864) 25 Cal. 619, 630; Turner v. Baker, (1876) 64 Mo. 218, 27 Am. Rep. 226, 234.

[37]2 Pomeroy, Equity Jurisp., 4th ed., 1660.

[38]Iowa, Code, 1919, sec. 8117; Georgia, Civil Code, 1911, sec. 3821.

CRIMINAL LAW—RIGHT TO A "SPEEDY TRIAL"—PROCEDURE —DISMISSAL AS BAR TO FURTHER PROSECUTION—MINNESOTA LAW.—Every person held on a criminal charge has the right to demand a "speedy trial." This right has been guaranteed to English people since Magna Charta and is embodied in the federal and state constitutions.[1] An analysis of this right is suggested by a recent Minnesota decision[2] which, it would seem, has extended protection under this constitutional right to an extent heretofore never supposed.

At common law a prisoner's right to a "speedy trial" was secured to him by the commission of jail delivery.[3] As the remedy suggests, the right was merely one to be free from vexatious arrests and imprisonment, a right which in no manner affected the liability of the individual to prosecution for the offense committed,[4] it gave him physical freedom only. Jail deliveries occurred at set intervals and thus defined the indeterminate meaning of "speedy." Since the abandonment of that practice legislatures have definitely fixed the time designated by that term[5] and the prisoner avails himself of his right by motion, writ of habeas corpus, or by an appeal.[6]

The Minnesota law provides that, "Whenever any person has been held to answer for a public offence, if an indictment is not found against him at the next term of court to which he is held, . . . [or] if indicted, and [not] . . . tried at the next term of court in which it is triable, the indictment shall be dismissed, unless good cause to the contrary be shown."[7] And it is further provided that if a continuance is not granted, "Whenever the action is dismissed the defendant shall be discharged from custody . . ."[8] Similar statutes have been held to merely require that the defendant be dismissed from custody and further prose-

[1]Clark Crim. Proc., 2nd ed., 476; Constitution of Minnesota, art. 1, sec. 6.

[2]State v. Artz, (Minn. 1923) 191 N.W. 605. See statement of this case in RECENT CASES, p. 588. The court also held that a dismissal on the motion of the prosecuting attorney was not a dismissal on the merits. See discussion, RECENT CASES, p. 588. The effect of this holding is, however, materially qualified by the decision of the court on the right to a "speedy trial."

[3]See 2 Hawkins, Pleas of the Crown, chap. 6; 4 Blackstone's Comm., chap. 19; In re Begerow, (1902) 136 Cal. 293, 295, 68 Pac. 773, 56 L.R.A. 528.

[4]In re Begerow, (1902) 136 Cal. 293, 295, 68 Pac. 773, 56 L.R.A. 528.

[5]State v. Webb, (1911) 155 N.C. 426, 70 S.E. 1064. Minn. G. S. 1913, sec. 8510.

[6]See notes, 85 A.S.R. 202; Ann. Cas. 1912D 1273.

[7]Minn. G. S., 1913, sec. 8510.

[8]Minn. G. S., 1913, sec. 8511.

cution on re-indictment is not barred.[9] Some jurisdictions, in lieu of the latter provision in the Minnesota law, have provided that whenever the action is dismissed for failure to find an indictment or proceed to trial as indicated in the prior section, not only shall the defendant be discharged from "custody," but also that the "offence" shall be discharged. Under such legislative enactments it has been held that the dismissal for failure to indict or try within the prescribed period bars any further prosecution whatsoever for the act for which he was confined.[10] But even in these jurisdictions it would seem that if on motion of the prosecuting attorney, there is a dismissal in good faith before the time designated by the statute, the "offence" is not dismissed and the defendant may be again indicted for the same act.[11] Where the statute neither specifies "indictment," "custody," nor "offence" it is generally construed to merely discharge the prisoner from custody.[12] Even granting that the Minnesota legislature meant

[9]In re Begerow, (1902) 136 Cal. 293, 68 Pac. 773, 56 L.R.A. 528, and note; and see in connection In re Begerow, (1902) 133 Cal. 394, 65 Pac. 828, 56 L.R.A. 513, 85 A.S.R. 178, and note; State v. Webb, (1911) 155 N.C. 426, 70 S.E. 1064; People v. Henwood, (1919) 65 Colo. 566, 174 Pac. 874, overruling Henwood v. People, (1914) 57 Colo. 544, 143 Pac. 373, Ann. Cas. 1916A 1111.

[10]State v. Keefe, (1908) 17 Wyo. 227, 98 Pac. 122, 22 L.R.A. (N.S.) 896, 17 Ann. Cas. 161; United States v. Ballard, (1844) 3 McLean (U.S. C.C.) 469; State v. Wear, (1898) 145 Mo. 162, 46 S.W. 1099; State v. Crawford, (1919) 83 W. Va. 556, 98 S.E. 615. State v. Radoicich, (1896) 66 Minn. 294, 69 N.W. 25 is incorrectly cited in 56 L.R.A. 513, 544 as holding that Minnesota follows the rule that a discharge for want of speedy trial is a bar to further prosecution, the case holding merely that it was error to set aside an order of dismissal where the defendant was not arraigned nor called upon to appear for some seven months, that is, that further prosecution could not be maintained on the original indictment.

[11]See State v. Crawford, (1919) 83 W. Va. 556, 98 S.E. 615. In this case, however, the court holds that the period provided by the statute had substantially elapsed and the court looked at the attempt to re-indict as an attempt to evade the effect of the statute. The decision warrants the conclusion that in any case where the dismissal is made for that purpose there can be no re-indictment even though the period of the statute had not substantially run. This conclusion is also supported in People ex rel. v. Heider, (1907) 225 Ill. 347, 350, 80 N.E. 291, 11 L.R.A. (N.S.) 257, and earlier Illinois cases cited therein, in all of which the defendant was retained in custody after the dismissal by the prosecuting attorney and re-indicted immediately. Obviously the dismissal was a mere subterfuge to evade the effect of the statute. The language of the court, however, warrants the construction that in any case where there is a dismissal on the motion of the prosecuting attorney, such dismissal must have the same effect as a dismissal under the "speedy trial" statutes in order to give effect to those statutes and prevent their circumvention. And in Illinois it should be noted that the "speedy trial" statutes merely say the defendant shall be "set at liberty" and not that the "offence" shall be discharged, so the decisions in context express a view similar to that declared by the Minnesota court, though the facts necessitated no such doctrine.

"offence" where it used the words "indictment" and "custody," what is the basis for the court's decision that, on a dismissal on the motion of the prosecuting attorney before the prisoner had any vested right under the section quoted, the state is bound to re-indict within a limited time even though the crime charged is murder?

The Minnesota decision apparently not only gives the defendant the right to have an indictment found after arrest within a specified time and trial on that indictment within a limited period, but also a right to have the offence speedily prosecuted and finally determined. The court said that: "No showing was made why an *earlier indictment or trial* might not have been had." The sections previously discussed, adequately define and protect the individual's interests as far as any trial on an existing indictment is concerned but the court speaks of an "earlier indictment." What power exists in the court to compel the bringing of an indictment, either in the first instance or after one indictment has been dismissed? Must the prosecuting attorney show cause why grand juries in the past have not re-indicted the defendant? The power of the prosecuting attorney to keep the original indictment alive, where the defendant has been taken in custody, is limited. He must show good cause for a continuance, or the indictment will be dismissed and the defendant discharged from custody.[13] Despite these difficulties in securing a re-indictment and although the dismissal may have been made in the interests of the state to avoid putting the prisoner in jeopardy, and hence bar a second indictment, the decision says that the running of the period for a speedy trial continues to elapse from the time of arrest, uninterrupted by the dismissal.

The conclusion of the court necessarily assumes that the legislative declaration of the limits of the constitutional right to a "speedy trial" is incomplete, that it fails entirely to mention one element of that right. But what is the definition offered by the court of this right and its limits? The court said that it had no discretionary power to deny the defendant the right to "speedy trial" but the intimation that the right is one susceptible of definite measurement is nullified by the fact that the court holds that ten years is such an "unreasonable" time that further prosecution

[12]State v. Garthwaite, (1851) 23 N.J.L. 143; State v. Deslovers, (1917) 40 R.I. 89, 100 Atl. 64. Contra People ex rel. v. Heider, (1907) 225 Ill. 347, 80 N.E. 291, 11 L.R.A. (N.S.) 257.

[13]Minn. G. S. 1913, secs. 8511, 9201.

is barred. The holding also shows that the matter is in effect entirely within the discretion of the court and eliminates the possibility that this phase of the right to a "speedy trial" is measured by the definite limitation of the legislature in respect to the other aspects of this right. As suggested by the dissenting justices, is it not a "large power" that permits the court of its own motion to acquit a person charged with murder[14] merely because it deems such dismissal "in furtherance of justice" and this in the absence of any terms giving such power, and, it would seem, in direct opposition to precedent and notwithstanding an attempt on the part of the legislature to define the right?

PRINCIPAL AND AGENT—ESTOPPEL OF UNDISCLOSED PRINCIPAL BY AGENT'S REPRESENTATIONS.—A may contract with B as principal, but, if as a matter of fact, B was acting as the authorized agent of C, A, on discovering this fact, may elect to hold C on the contract. This situation involves the so-called doctrine of "undisclosed principal,"[1] a doctrine which repeatedly has been criticized as anomalous and unwarranted, but which now is well-settled in the common-law countries, on the fictional theory of legal identification, namely, that since the mind of the agent is the mind of the principal, the contract of the agent is the contract of the principal. A phase of this doctrine is involved in the subject of this note, viz., whether or not an undisclosed principal may be estopped to assert as a defense to a suit that the agent acted beyond the limit of the authority actually conferred upon him.

A disclosed principal is, of course, liable on all authorized contracts of his agent, such liability being based on the intention of the parties that he shall be bound. But when an agent of such

[14]Minn. G. S. 1913, sec. 9150 specifically provides that an indictment for murder may be found at any time after the death of the person killed. This definitely indicates the policy of the law in respect to the crime of murder. Ill-advised or indiscreet action by a grand jury in returning an indictment when there is not sufficient evidence to convict, even though the prosecuting attorney may dismiss before the defendant is put in jeopardy, removes the case from the provisions of this section and places the matter in the discretion of the court.

[1]For general and theoretical discussions both in support of and against this doctrine, see Lewis, 9 Col. L. Rev. 116; Ames, 18 Yale L. J. 433; 2 Mechem, Agency, 2nd ed., 1312 et seq.; Wright, 5 Cal. L. Rev. 183. For exceptions to this rule, see 2 Mechem, Agency, 2nd ed., 1316 et seq.; Huffcut, Agency, 2nd ed., 167 et seq.

disclosed principal acts beyond his authority,[2] the foregoing basis of the principal's liability is absent, and, aside from ratification, the principal can be held only when the agent's act is within the scope of his "apparent" or "ostensible" authority.[3] Such liability then rests not upon the law of contract or of agency, but upon the theory of estoppel,[4] that the principal has made a representation upon which the third person has relied. But in the ordinary case where the principal is undisclosed, the third person has not relied on any representations of the principal, for there were none; so here the "estoppel" rule just stated necessarily loses its theoretical justification.

A situation where the question often arises is that involved in a leading English case,[5] where the defendant allowed his manager to appear as the owner of the business, but forbade him to buy certain goods which really were necessary to the business. The agent purchased such goods from the plaintiff, who thought that the agent was the owner of the business. Nevertheless, the defendant, upon being discovered as the true principal, was held liable.[6] The court said:

"Once it is established that the defendant was the real principal, the ordinary doctrine as to principal and agent applies—that

[2]"Authority" as here used, includes "implied" as well as "actual" authority. See in this general connection the chart in 1 Mechem, Agency, 2nd ed., 515.

[3]The courts are in conflict concerning the use and meaning of the terms "apparent" or "ostensible" authority. See 2 Mechem, Agency, 2nd ed., 509. As here used, it means a "holding out" by the principal that the agent can act for him in the particular manner. Necessarily, such authority is both in fact and in theory independent of "implied" authority, although in a given case, it may be difficult to differentiate between the two.

[4]2 Mechem, Agency, 2nd ed., 510. But see Tiffany, Agency 183, where it is said: "The liability of the principal for the acts of his agent within the 'apparent' scope of his authority rests, not upon a technical estoppel, but upon a broader doctrine of agency, that a principal is liable for acts of his agent which are within the ordinary and usual scope of the business he is employed to transact, notwithstanding undisclosed limitations upon that authority.' See also, Tiffany, Agency 236-7. Evidently, the author there uses "apparent" in the sense that "implied" is used in this note.

[5]Watteau v. Fenwick, [1893] 1 Q.B. 346. It is to be noted that the decision was not put on the basis of estoppel, but upon "implied" authority of the agent. But, an agent can not have "implied" authority to do something which he expressly was forbidden to do. It is then that the rules regarding "apparent" authority become applicable. See Bloomingdale v. Cushman, (1916) 134 Minn. 445, 450, 159 N.W. 1078.

[6]Accord, Kinahan & Co. v. Parry, [1910] 2 K.B. 389, aff'd on a different ground in [1911] 1 K.B. 459; Brooks v. Shaw, (1908) 197 Mass. 376, 84 N.E. 110; Hubbard & Co. v. Tenbrook & Co., (1889) 124 Pa. 291, 16 Atl. 817, 2 L.R.A. 823, 10 A.S.R. 585; Napa Valley Wine Co. v. Casanova, (1909) 140 Wis. 289, 122 N.W. 812; Mississippi Valley, etc., Co. v. Abeles & Co., (1908) 87 Ark. 374, 112 S.W. 894. Compare Murphy v. Barnard, (1894) 162 Mass. 72, 80, 38 N.E. 29, 44 A.S.R. 340.

the principal is liable for all the acts of the agent which are within the authority usually confided to an agent of that character, notwithstanding limitations, as between the principal and agent, put upon that authority."

This holding has been subject to much adverse criticism.[7] One writer[8] has said that since the undisclosed principal's only misrepresentation was as to the agent's ownership, he well might be estopped from denying such ownership, so that a judgment against the agent could be satisfied by levy of execution on the business property, but there can be no liability on the undisclosed principal, because he did not make the contract, nor did anyone having his authority, or the appearance thereof, make it. It has been suggested that the most tenable explanation of this rule is that the owner, in putting a general agent in charge of the business, impliedly gives him all authority usually incident to such a managerial position; and that any attempt to narrow this actual authority is, within well-settled rules, ineffective.[9]

A situation, which, at first glance, seems analogous to that involved in the foregoing, arose in a New York case,[10] where A executed a mortgage to B without consideration, with the understanding that B should sell it for A's benefit. B, representing that he was the owner and that the instrument was valid, sold it to C, who relied upon the representations. When C sought to enforce the mortgage, A pleaded its usurious nature, but it was held that he was estopped to set up the defense.[11] The court added these words:

"It seems somewhat inconsistent that he should be thus estopped, when the very statement that the mortgage was valid, was, itself, a denial that the person who made it was the agent of the defendant. For, if the mortgage was, in fact, a valid security in the hands of the mortgagee, then he was not the agent of the mortgagor to sell it. And it is generally held, that to create an

[7] 37 Sol. J. 280; 10 Col. L. Rev. 763; 9 Law Q. Rev. 111.

[8] Ewart, Estoppel 246. See also Huffcut, Agency, 2nd ed., 167, where it is said: "It appears . . . first, that an undisclosed principal is liable upon a contract made by the agent because the agent's act is the act of the principal, or the agent's name has been adopted by the principal for the purpose of the contract, and, second, that having fictionally established the privity in this fashion, the law goes on to apply the usual doctrines of agency in order to determine the extent of the agent's authority. It is obvious, however, that this is all sheer assumption and that there can be in such a case no real basis for estoppel."

[9] 2 Mechem, Agency, 2nd ed., 1345.

[10] Platt v. Newcomb, (1882) 27 Hun (N.Y.) 186.

[11] Accord, Ahern v. Goodspeed, (1878) 72 N.Y. 108; Ferguson v. Hamilton, (1861) 35 Barb. (N.Y.) 427, 442.

estoppel in pais, the person to whom the statement is made, must have relied upon it *as the statement of the person estopped.*"

It is submitted, however, that the court went to a needless extent in "estopping" the undisclosed principal, for the decision might have been placed more properly on the ground that an agent to sell, whose powers have not been restricted, has *implied* authority to do any act reasonably necessary to effect a sale, and the principal is liable on ordinary rules of agency, aside from any question of "holding out."[12]

In a recent Minnesota case, which[13] is somewhat similar to the New York case just stated, the M corporation owing the N bank about $10,000, through its president R gave to N bank mortgage X for $10,000, secured by various collaterals, which included mortgage Y also for $10,000, also executed by M corporation, securing the same indebtedness and intended as collateral to mortgage X. Subjoined to mortgage X was an authorization to the mortgagee to sell the collateral at any time without notice. Subsequently, $600 was paid on mortgage Y. R left the state, entrusting the affairs of M corporation to B. N bank realized $1,700 from the sale of some of the collateral securing mortgage X, and later started suit on mortgage X, pending which a compromise was effected, N bank agreeing to take $6,500 as payment in full. B later paid $4,000 on this settlement. He then began negotiations to induce the defendant to buy mortgage Y, R being aware of these dealings. Upon the representations of B and N bank that only $600 had been paid on mortgage Y, the defendant purchased it for less than $3,000 without knowledge of its collateral nature or of the want of consideration, or of the fact that B was acting as agent of M corporation; $2,000 of defendant's money was paid to the bank, and the bank assigned mortgage Y to B who assigned to defendant. In an action by the receiver of M corporation to cancel this mortgage, on the ground that the debt for which it was pledged as collateral was paid, it was held that, because of the representations of the corporation's agent, B, the corporation was estopped to deny that there was less than $9,400 due on mortgage Y.[14]

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[12]See generally, 2 Mechem Agency, 2nd ed., 502 et seq.

[13]Park v. Hudson, (Minn. 1923) 192 N.W. 112.

[14]Another salient fact was that in an action for foreclosure of mechanics' liens on the property subject to mortgage Y, in which action M corporation was a party, it was held that mortgage Y was a valid lien on the property in question. The court said that it was not necessary to determine whether this adjudication amounted to estoppel of M corporation by

In arriving at this decision, the Minnesota court applied the rule of estoppel apparently without regard to its underlying basis or in accordance with strict theory, but, it seems, decided in accordance with general conceptions of justice and policy. In fact, it even might be said that a court's refusal to estop an undisclosed principal as to the acts of his agent within the apparent scope of his authority would result in engrafting an exception on the general rule regarding the liability of such a principal in order to escape an anomaly which is the foundation of the rule itself.

RECENT CASES

BANKS AND BANKING—BILLS AND NOTES—INSTRUMENT ISSUED OR INDORSED TO AN IMPOSTER—FORGERY OF INDORSEMENT.—The plaintiff, having an account in the defendant's bank, drew a draft to her own order. She then indorsed it to the order of a non-existent person, being led to believe by the representations of an attorney that such non-existent person was the owner of certain land, upon which plaintiff believed she was buying a valid mortgage. The attorney in fact owned the land, had executed the mortgage in the name of the non-existent person, and then indorsed the note in the name of the purported mortgagor. The defendant bank paid the draft upon this indorsement. *Held,* two justices dissenting, that the indorsement was a forgery, and that the plaintiff may recover the amount charged to her account. *Strang v. Westchester County Nat. Bank,* (1923) 235 N.Y. 68, 138 N.E. 739.

According to the great weight of authority in this country, where a negotiable instrument is made payable or indorsed to a non-existent or fictitious person, such instrument is not payable to bearer unless the non-existence of the supposed payee is known to the drawer, or, where the named payee is an existing person, unless such payee is not intended to get the money. *Seaboard Nat. Bank v. Bank of America,* (1908) 193 N.Y. 26, 85 N.E. 829, 22 L.R.A. (N.S.) 499, and note; *Shipman v. Bank of New York,* (1891) 126 N.Y. 318, 27 N.E. 371, 12 L.R.A. 791, 22 A.S.R. 821; Crawford, Negotiable Instruments Law, 4th ed., 32, 33; Brannan, Negotiable Instruments Law, 3rd. ed., 32 et seq.; Minn. G. S., 1913, sec. 5821. As the instrument is not payable to bearer, the bank impliedly contracts to pay out the depositor's money only in accord with the express directions of the depositor. *National City Bank v. Third Nat. Bank,* (1910) 177 Fed. 136, 100 C.C.A. 556; *McNeely Co. v. Bank of North America,* (1908) 221 Pa. St. 588, 593, 70 Atl. 891, 20 L.R.A. (N.S.) 79. The negligence of the drawer, unless a proximate cause of the payment, will not relieve the bank of this contractual liability. *Jordan Marsh Co. v. National Shawmut Bank,* (1909) 201 Mass. 397, 407, 87 N.E. 740, 22

judgment. Then again, after the defendant's purchase of mortgage Y, the president of M corporation gave to the N bank a written confirmation of all transfers of collateral it had made. From this last fact, it would seem that the court might have put its decision on the basis of ratification rather than on estoppel.

L.R.A. (N.S.) 250; see also 2 Morse, Banks and Banking, 5th ed., sec. 474, p. 109. Where the payment is made by the bank to one who represented himself to the drawer as another person, the courts are in conflict as to the rule, the majority holding that the actual intent of the drawer is to govern and that the bank having paid the check to the one with whom the drawer dealt, is absolved from liability. *McHenry v. Old Citizen's Nat. Bank,* (1911) 85 Ohio St. 203, 97 N.E. 395, 38 L.R.A. (N.S.) 1111, and note; see also *Central Nat. Bank v. Nat. Metropolitan Bank,* (1908) 31 App. D. C. 391, 17 L.R.A. (N.S.) 520. A contrary view is entertained on the reasoning that the complete success of the fraud is no reason for saying that the drawer actually intended the imposter to get the money. *Tolman v. American Nat. Bank,* (1901) 22 R.I. 462, 48 Atl. 480, 52 L.R.A. 877, 84 A.S.R. 850. See *Harmon v. Old Detroit Nat. Bank,* (1908) 153 Mich. 73, 81, 116 N.W. 617, 17 L.R.A. (N.S.) 514, and note, 126 A.S.R. 467. Where, however, the check or draft is given to one who represents himself to be the agent of a non-existent or fictitious person to whom payment is to be made, the courts uniformly hold that the drawee is liable for paying the check on the forged indorsement. *German Savings Bank v. Citizens Nat. Bank,* (1897) 101 Iowa, 530, 541, 70 N.W. 769, 63 A.S.R. 399; *Russell v. First Nat. Bank,* (1911) 2 Ala. App. 342, 351, 56 So. 868; *Goodfellow v. First Nat. Bank,* (1913) 71 Wash. 554, 558, 129 Pac. 90, 44 L.R.A. (N.S.) 580; *Murphy v. Metropolitan Nat. Bank,* (1906) 191 Mass. 159, 77 N.E. 693, 114 A.S.R. 595. But see, *Hartford v. Greenwich Bank,* (1913) 157 App. Div. 448, 142 N.Y.S. 387 aff'd in 215 N.Y. 726, 109 N.E. 1077 (limited in *United Cigar Stores Co. v. Am. Raw Silk Co.,* (1918) 184 App. Div. 217, 171 N.Y.S. 480, aff'd in 222 N.Y. 532, 129 N.E. 904). The instant case seems to fall within this rule, for certainly the plaintiff did not intend to deal with the attorney, and since the check is not payable to bearer, the bank should be liable for failing to follow the express directions of the drawer as to payment. See 2 Morse, Banks and Banking, 5th ed., 108, et seq. The *Hartford Case,* unless distinguishable from the instant case and no sound basis for distinction is apparent, must be considered as wrong.

BILLS AND NOTES—BANKS AND BANKING—HOLDER IN DUE COURSE—BANK CREDITING ACCOUNT OF DEPOSITOR NOT A HOLDER FOR VALUE.—The plaintiff bank sued the defendant on a note made by the defendant and taken by the bank from the payee whose account was credited with the amount of the note. The defendant had a defense good against the payee. *Held,* that as the payee's account was never below the amount of the note, the bank was not a bona fide holder for value. *Port Washington State Bank v. Polonia Phonograph Co.,* (Wis. 1923) 192 N.W. 472.

The instant case is in accord with the great weight of authority in the United States. The English and Canadian rule, however, is that the mere giving of credit is sufficient to constitute the bank a holder for value. *Ex parte Richdale,* (1881) L.R. 19 Ch. Div. 409; *Bank of British N. Am. v. Warren & Co.,* (1909) 19 Ont. L. Rep. 257. The reason for the majority rule is that the bank in effect agrees to pay the amount credited to the depositor's account to the depositor on demand by check

or order, and parts with nothing of value, or in other words, as long as the amount remains undrawn by the depositor, the bank can return the note to the depositor and cancel the credit. *Mann v. Second National Bank,* (1883) 30 Kans. 412, 1 Pac. 579; *Union Nat. Bank v. Winsor,* (1907) 101 Minn. 470, 112 N.W. 999, 118 A.S.R. 641, 11 Ann. Cas. 204. Thus the rule was applied in the following cases where the amount of the deposit at all times exceeded the face of the note. *Citizen's State Bank v. Cowles,* (1905) 180 N.Y. 346, 73 N.E. 33, 105 A.S.R. 765; *Drovers' Nat. Bank v. Blue,* (1896) 110 Mich. 31, 67 N.W. 1105, 64 A.S.R. 327; and *Trevisal v. Fresno Fruit Growers Co.,* (Ia. 1923) 192 N.W. 517. In the instant case it does not appear whether the amount credited had ever been drawn upon but it is merely stated that the payee's account at all times exceeded the amount. Where a party has a regular account which is drawn on from day to day, to avoid the difficulty of determining whether or not the depositor has drawn all or part of the proceeds of the particular instrument, the courts have generally adopted the rule that if subsequent to the deposit of the instrument, there has been drawn out an amount equal to the balance at that time, including the proceeds of the instrument, the bank has given value, regardless of the fact that subsequent deposits may have kept the balance at all times above the amount of the instrument. This view is based on the theory that the first credits are applied to the first debits, or "first in, first out." *Fox v. Bank of Kansas City,* (1883) 30 Kans. 441, 1 Pac. 789; *Merchants' Nat. Bank v. Santa Maria Sugar Co.,* (1914) 162 App. Div. 248, 147 N.Y.S. 498; *First Nat. Bank v. McNairy,* (1913) 122 Minn. 215, 142 N.W. 139, Ann. Cas. 1914D 977.

The cases of *Security Bank v. Petruschke,* (1907) 101 Minn. 478, 112 N.W. 1000, 118 A.S.R. 644, and *First Nat. Bank v. Persall,* (1910) 110 Minn. 333, 125 N.W. 506, 136 A.S.R. 499, hold that a checking out of part of the proceeds of the instrument constitutes the bank a holder for value for the full amount, but the cases probably would not be followed in this state since the adoption of the Negotiable Instruments Law, which provides that a transferee is a holder in due course only to the extent of the amount paid before notice of any infirmity. Minn. G. S., 1913, sec. 5866. This change made by the Negotiable Instruments Law was recognized in *Nat. Bank v. Bonsor,* (1909) 38 Pa. Sup. Ct. 275, and by way of dictum in *Hodge v. Smith,* (1907) 130 Wis. 326, 335, 110 N.W. 192. See 6 A.L.R. 252, for an exhaustive note on this subject.

BOUNDARIES—PRACTICAL LOCATION—ESTABLISHMENT BY ACQUIESCENCE. —A "crooked and ragged" fence, which, the evidence showed, had been in existence many years, and which, having now disappeared, was marked only by a ditch, had separated the plaintiff's land from the defendant's lots. Before he acquired title to his lots, one of the defendants had built certain buildings, which were inside the fence, but which, in relation to the true line, extended over on the plaintiff's land. The parties had never discussed boundary lines, and the true line had been ascertained by repeated surveys. As a defence to the plaintiff's action in equity to restrain one of the defendants from occupying the strip of ground on which these buildings stood, the defendants pleaded acquiescence, estoppel, and the

establishment of a boundary by agreement. *Held,* that while adjacent landowners may, by acquiescence, establish a boundary line which varies from the true line, in this case there was not sufficient evidence of acquiescence in the fence line as a boundary. *Davis v. Angerman,* (Iowa 1923) 192 N.W. 129.

For a discussion of the principles involved, see NOTES, p 569.

CONTRACTS—PRINCIPAL AND AGENT—BROKERS—EXCLUSIVE AGENCY—OWNER'S RIGHT TO SELL—CONSIDERATION.—Under a contract giving brokers the "exclusive right to sell certain property" and further providing that the owner agreed to "pay them" (the brokers) a specified commission "in case it is sold by them or by anyone else" during a specified period, it was *held,* that the owner might sell the property without liability to the brokers for commissions on the theory that, even though an exclusive agency is given, the right of an owner to sell his own property arises by implication in every contract of agency unless the clear and unequivocal language of the contract expressly negatives such right. *Hedges Co. v. Shanahan et ux.,* (Ia. 1922) 190 N.W. 957.

Where property is simply listed with a broker for sale, the decisions are uniform in holding that the owner may sell the property without liability to the broker for commissions, provided that the broker did not procure the purchaser. *Brinson v. Davies,* (1911) 105 L.T. 134; *Ferguson v. Willard,* (1912) 196 Fed. 370, 116 C.C.A. 406; *Putnam v. How,* (1888) 39 Minn. 363, 40 N.W. 258; Ga. Code, 1911, sec. 3587. And when an exclusive agency is given with nothing more, the weight of authority allows the owner to sell without liability for commissions if the agent did not procure the sale, on the theory stated in the principal case. *Ingold v. Symonds,* (1904) 125 Ia. 82, 99 N.W. 713; *Smith v. Preiss,* (1912) 117 Minn. 392, 136 N.W. 7, 29 Ann. Cas. 820, and note; *Roberts v. Harrington,* (1918) 168 Wis. 217, 169 N.W. 603, 10 A.L.R. 810; *Davis v. Van Tassel,* (1907) 107 N.Y.S. 910. It is generally admitted, however, that a contract can be drawn under which the owner would not have the privilege of selling without incurring liability for commissions. One line of authority holds that there is such a contract if the exclusive agency is to extend over a specified period of time. *Popplewell v. Buchanan,* (Tex. 1918) 204 S.W. 874; *Blumenthal v. Bridges,* (1909) 91 Ark. 212, 120 S.W. 974, 24 L.R.A. (N.S.) 279, and note; *Norman v. Vanderberg,* (1911) 157 Mo. App. 488, 138 S.W. 47. It is difficult to see, however, why the mere fact that the agency is for a definite period should change the rule. In another line of cases, a distinction has been drawn between an *exclusive agency* and an *exclusive right to sell.* In the former case it is held that the contract prevented the owner from engaging another broker, but that the owner himself could sell without incurring liability for commissions. *Dole v. Sherwood,* (1889) 41 Minn. 535, 43 N.W. 569, 5 L.R.A. 720, 16 A.S.R. 731; *California Land Security Co. v. Ritchie,* (1919) 40 Cal. App. 246, 180 Pac. 625; *Harris v. McPherson,* (Conn. 1922) 115 Atl. 723. But where the exclusive right to sell is given, the owner is denied the right to sell without incurring liability for commissions. *Fairchild v. Rogers,* (1884) 32 Minn. 269, 20 N.W. 191; *Dain v. Loeffler,* (1917) 64 Pa. Sup. Ct. 166,

aff'd in 256 Pa. St. 319, 100 Atl. 888. The correct basis for the distinction seems to be that giving the exclusive right to sell clearly rebuts the presumption that the owner intends to retain the privilege of sale without liability for commissions. But even under this sort of a contract, as indicated by the principal case, a few courts have permitted a sale by the owner without liability for commissions, holding that the language is not clear enough to rebut the presumption. *McPike v. Siver,* (1914) 168 Ia. 149, 150 N.W. 52; *Sunnyside Land & Investment Co. v. Bernier,* (Wash. 1922) 205 Pac. 1041, 20 A.L.R. 1261, and note. In the principal case, however, there was both an exclusive agency for a specified period of time, and a clear intent to give the broker an exclusive right to sell. Under such circumstances, the owner would be held liable for commissions by the great weight of authority. *Confer Bros. v. Colbrath,* (1921) 149 Minn. 259, 183 N.W. 524; *Greene v. Minn Billiard Co.,* (1920) 170 Wis. 597, 176 N.W. 239; *Stevenson Co. v. Oppenheimer,* (1918) 91 N.J.L. 479, 104 Atl. 88.

In another recent case where the contract was practically the same as that in the principal case, the same result was reached, but the court ignored the question of whether the owner had the right to sell under the contract, and put the decision on the ground that, even though the agent would ordinarily be allowed to recover his commissions under such a contract upon sale by the owner, he cannot do so unless he has made a bona fide and reasonable effort to secure a purchaser. *Huchting v. Rahn,* (Wis. 1922) 190 N.W. 847. There is apparently little authority on this question for in the cases cited ante the agent had made a reasonable effort to sell the property. In the case of *Greene v. Minn Billiard Co.,* (1920) 170 Wis. 597, 176 N.W. 239 the court stated that the work and efforts of the agent in procuring a purchaser constitute the consideration for the agreement. Clearly, if this is true, and the agent fails or neglects to perform, there is a failure of consideration and the agent should not be allowed to recover. In many of these agency contracts, however, there is some consideration other than the work done by the agent, and in such a case there would seem to be no valid reason for denying the agent the right to recover on the ground of failure of consideration. It might be considered that since he has failed to perform his part of the contract and is therefore in default, he is in no position to recover and on this reasoning the case of *Huchting v. Rahn* might also be upheld. For discussion of similar question respecting exclusive agency for sale of goods, see 2 MINNESOTA LAW REVIEW 68.

CORPORATIONS—STOCKHOLDERS' LIABILITY—CREDITORS—WATERED STOCK —VALUATION OF PROPERTY IN PAYMENT FOR STOCK.—A complaint alleged that a mining lease was worth only about half the par value of stock for which it was exchanged. No bad faith or fraudulent intent was alleged or proved. *Held,* that the defendants are liable for the difference between the actual market value of the lease and the par value of the stock. *Hastings v. Scott,* (Mo.App. 1923) 248 S.W. 973.

Where, under an agreement between a corporation and a stockholder, capital stock is issued and falsely held out to the public as full-paid, when in fact it is not, and a creditor has dealt with the corporation on the

strength thereof, the stockholder can be compelled to pay the difference in the values of the property and stock. See 5 Fletcher, Cyc., Corp., 3589. This doctrine has been supported on the "trust fund" doctrine but more generally on the theory that the stockholder perpetrates an actual fraud on the public. Some jurisdictions have abandoned both theories and base the doctrine on legal obligation imposed by constitutional and statutory provisions. 5 Fletcher, Cyc., Corp., 5924, 5926. Where the sale of stock is for cash the application of the rule involves little difficulty. Value of property, however, is largely a matter of opinion and therefore it follows under the "fraud doctrine" that if the parties have made a bona fide estimate of the value of the property exchanged for stock, even though through mistake or error in judgment the property is over-valued, the stockholder cannot be subjected to suit for the actual difference in value. Any intentional overvaluation, however slight, imposes liability. *Coit v. Gold Amalgamating Co.*, (1886) 119 U.S. 343, 7 S.C.R. 231, 30 L.Ed. 420; *Hastings Malting Co. v. Iron Range Brewing Co.*, (1896) 65 Minn. 28, 67 N.W. 652. While an inference of fact as to intentional over-valuation may be drawn from gross discrepancies, there is no legal presumption of fraud where property was estimated at five times its value, *Young v. Erie Iron Co.*, (1887) 65 Mich, 111, 31 N.W. 314, though fraud was found as a matter of law where the property was estimated at forty times its actual value. *Elyton Land Co. v. Birmingham Warehouse and Elevator Co.*, (1890) 92 Ala. 407, 9 So. 129, 12 L.R.A. 307, 25 A.S.R. 65. A few courts, however, applying the "trust fund" doctrine or the theory of legal obligation imposed by statute permit suit for the actual difference in value despite the fact that the transaction was bona fide. As to the latter, see the principal case. Failing to perceive that the "trust fund" doctrine is not the true basis of liability, as is conceded by most of the authorities, the Washington court discarded the "good faith" rule, which had been definitely established, *Turner v. Bailey*, (1895) 12 Wash. 634, 643, 42 Pac. 115, and applied the "actual value" rule. Adopting the "trust fund" doctrine, however, the "actual value" rule would seem to be the logical test of liability. See, *Kroenert v. Johnston*, (1898) 19 Wash. 96, 104, 52 Pac. 605. The tenor of the language in *Ryerson & Son v. Beden*, (1922) 303 Ill. 171, 135 N.E. 423 gives the impression that on the basis of the "trust fund" doctrine the "actual value" rule is adopted. The case, however, involves the transfer of the property of A corporation to a new corporation, B, expressly organized for the purpose and with the understanding that stockholders in A corporation shall receive a proportion of the stock of B corporation which will maintain the status quo. There is no actual bargain and sale involving a bona fide estimate of the value of the property of A corporation. If there was the Illinois decisions clearly indicate that the "good faith" rule would be applied. *Gillett v. The Chicago Title and Trust Co.*, (1907) 230 Ill. 373, 410, 82 N.E. 891; *Sprague v. The National Bank of America*, (1898) 172 Ill. 149, 162, 50 N.E. 19, 42 L.R.A. 606, 64 A.S.R. 17. For further discussion of the subject, see Ballantine, "Stockholders' Liability in Minnesota," 7 MINNESOTA LAW REVIEW 79, 82 et seq.

CRIMINAL LAW—PROCEDURE—APPEALS—NO RIGHT OF APPEAL AFTER PLEA OF GUILTY IN ABSENCE OF COLLATERAL QUESTIONS.—The defendant pleaded guilty to a criminal charge in a justice court and was convicted. An appeal to the superior court was dismissed. *Held,* one justice dissenting, that the constitutional right given a defendant in all criminal cases to appeal is waived by a plea of guilty in the justice court on which judgment of sentence is entered, no collateral questions being raised by the appeal. *State v. Eckert,* (Wash. 1923) 212 Pac. 551.

The instant case is in accord with the general rule, 17 C.J. 32; *City of Edina v. Back,* (1891) 47 Mo.App. 234, which is founded on the theory that a judgment based on a plea of guilty is in effect a judgment by confession which operates as a release of all errors in the record and in the declaration, nothing remaining therefore for the appellate court to try. The trial in the appellate court, however, is a trial de novo, and it has been held that the plain and express terms of constitutional provisions similar to that involved in the instant case cannot be disregarded, in the situation in question, and the appeal is sustained. *Weaver v. Kimball,* (Utah 1921) 202 Pac. 9; *Ex parte Paul De Louche,* (1905) 50 Tex.Cr.Rep. 525, 100 S.W. 923. See Minn. G. S., 1913, sec. 7638 which in terms gives the right to appeal from a justice court in all criminal cases. An appeal is allowed from a judgment based on a plea of guilty where collateral questions are raised, such as the fact that the court did not satisfy itself of the voluntary character of the plea or where the question raised on appeal is the validity or sufficiency of the indictment. *Lowe v. State,* (1909) 111 Md. 1, 14, 73 Atl. 737, 24 L.R.A. (N.S.) 439, 18 Ann. Cas. 744.

CRIMINAL LAW—RIGHT TO SPEEDY TRIAL—PROCEDURE—DISMISSAL AS BAR TO FURTHER PROSECUTION.—In 1912 two indictments were returned against the defendant, charging him with the murder of Anton and Theresa Schill, respectively. The defendant pleaded not guilty to each indictment and was tried and acquitted of killing Anton. He immediately demanded trial on the other indictment and trial was set. On the date set, the indictment was dismissed on a motion by the prosecuting attorney. No reason for the dismissal was stated in the record as required by Minn. G. S., 1913, sec. 9220, though the motion was made because of insufficiency of evidence. Ten years later the grand jury returned the present indictment, which is identically the same as the one previously dismissed. *Held,* that the dismissal was not a dismissal on the merits, two justices dissenting, but that trial after such lapse of time from the original indictment was a denial of the defendant's right to a "speedy trial," two justices dissenting. *State v. Artz,* (Minn. 1923) 191 N.W. 605.

For a discussion of the principles involved in the denial of the defendant's right to a "speedy trial" see NOTES, p. 575.

Clearly, the dismissal of an indictment under statutes similar to Minn. G. S., 1913, sec. 9220, is not a judgment on the merits and is no bar to a subsequent indictment for the same offense, *State v. Main,* (1863) 31 Conn. 572; *Ex parte Warford,* (1910) 3 Okla. Cr. R. 381, 106 Pac. 559; *Commonwealth v. Winfrey,* (1916) 169 Ky. 650, 184 S.W. 1121, for the

defendant was not in jeopardy. By the weight of authority there is no double jeopardy until after the accused is put on trial before a competent tribunal, upon a sufficient indictment, and the jury is sworn and charged with the defendant's deliverance. Clark, Crim. Proc., 2nd ed., 442; *State v. Taylor,* (1903) 171 Mo. 465, 71 S.W. 1005. Even where, after a reasonable deliberation, the jury disagrees and is discharged, it has been held there is no jeopardy. *In re Begerow,* (1902) 136 Cal. 293, 68 Pac. 773, 56 L.R.A. 528; *State v. Reinhart,* (1895) 26 Ore. 466, 38 Pac. 822. But not where the accused is denied his right to be present at the dismissal of the jury. *State v. Sommers,* (1895) 60 Minn. 90, 61 N.W. 907; note 58 Univ. of Pa. L.Rev. 100; 1 MINNESOTA LAW REVIEW 90. And, as in the instant case, failure to state reasons in the order for the purpose of record should not change the rule as the motion and order should be read together and it would be an extreme technicality to hold the defective dismissal one on the merits merely because of the omission, where it would not be such but for the defect or omission. *State v. Reinhart,* (1895) 26 Ore. 466, 38 Pac. 822; see *State v. Hansen,* (1894) 10 Wash. 235, 38 Pac. 1023, but the contrary view, taken by two justices in the instant case, is supported by some authority. *People v. Disperati,* (1909) 11 Cal. App. 469, 105 Pac. 617.

EQUITY—CANCELLATION OF INSTRUMENTS—CONTRACTS—RESCISSION OF DEEDS IN CONSIDERATION OF SUPPORT—SUBSTANTIAL BREACH BY GRANTEE.—The plaintiff and his wife deeded to the defendant a tract of land upon an oral agreement by the defendant to support the plaintiff and his wife for the rest of their lives. The defendant performed for five years and then over the protest of the plaintiff, married a man disliked by the plaintiff, and the plaintiff left the home of the defendant. The plaintiff seeks to have the deed cancelled. *Held,* one justice dissenting, that the deed shall be cancelled. *Russell v. Carver,* (Ala. 1922) 94 So. 128.

Assuming that the court was justified in finding that the acts of the defendant constituted a substantial breach, the courts are in conflict as to what relief shall be given and the basis of that relief. 5 Pomeroy, Eq. Jur., 2nd ed., 4755; notes, 130 A.S.R. 1039; 43 L.R.A. (N.S.) 916. Some courts hold that an agreement to support shall be construed as a covenant, the breach of which gives rise only to a suit for damages, with no right to cancellation of the deed whether such agreement is in the deed, *Cox v. Combs,* (1908) 51 Tex. Civ. App. 346, 111 S.W. 1069; *Studdard v. Wells,* (1894) 120 Mo. 25, 25 S.W. 201; *Helms v. Helms,* (1904) 135 N.C. 164, 47 S.E. 415, aff'd in 137 N.C. 206, 49 S.E. 110, or in a separate contract. *Brand v. Power,* (1900) 110 Ga. 522, 36 S.E. 53. Other courts hold that if the grantee has failed to perform the deed shall be cancelled for failure of consideration, *Lane v. Lane,* (1899) 106 Ky. 530, 50 S.W. 857, or upon the ground that the circumstances justify the finding that the conveyance was procured by the fraud of the grantee, although no actual fraud is proved. *McClelland v. McClelland,* (1898) 176 Ill. 83, 92, 51 N.E. 559; *Spangler v. Yarborough,* (1909) 23 Okl. 806, 809, 101 Pac. 1107, 138 A.S.R. 851. Where the deed expressly provides that it shall become null and void upon the grantee's failure to support, *Walters v. Bredin,* (1871) 70

Pa. 235; *Minneapolis Threshing Machine Co. v. Hanson,* (1907) 101 Minn. 260, 112 N.W. 217, 118 A.S.R. 623; *Spaulding v. Hallenbeck,* (1862) 39 Barb. (N.Y.) 79; or where there is a defeasance clause in the parol contract, *Epperson v. Epperson,* (1908) 108 Va. 471, 62 S.E. 344, the courts generally consider the deed to be upon a condition subsequent, upon the breach of which the grantee's estate may be terminated by the grantor's re-entry. But even in the absence of such express provisions for termination of the estate, whether the agreement to support is expressed in the deed or in a separate instrument, or even though performance of such agreement is secured by a bond and mortgage, some courts in the same manner construe the agreement as a condition subsequent, *Wanner v. Wanner,* (1902) 115 Wis. 196, 91 N.W. 671; *Glocke v. Glocke,* (1902) 113 Wis. 303, 321, 89 N.W. 118; *Richter v. Richter,* (1887) 111 Ind. 456, 12 N.E. 698; *Strothers v. Woodcox,* (1909) 142 Ia. 648, 121 N.W. 51, even though the grantee had performed for several years and had paid an additional consideration. *Crie, Administrator v. Sherfy,* (1894) 138 Ind. 354, 362. But in *Danielson v. Danielson,* (1917) 165 Wis. 171, 161 N.W. 787, where the grantee performed for eight years, then committed suicide, leaving only minor children who failed to carry out the agreement to support, cancellation of the deed was refused by one of these same courts and the grantor was left to his remedy of foreclosure of the mortgage which the grantee had executed to secure performance. Still another theory is that the grantee holds the land under an implied trust, and that upon non-performance by the grantee, the land reverts to the grantor. *Grant v. Bell,* (1904) 26 R.I. 288, 58 Atl. 951; *Woolcott v. Woolcott,* (1903) 133 Mich. 643, 95 N.W. 740. A number of courts refuse cancellation of the deed, but hold that the grantor has an equitable lien upon the land to secure performance by the grantee, even though the deed does not so provide, which lien may be foreclosed in equity. *Stehle v. Stehle,* (1899) 39 App. Div 440, 57 N.Y.S. 201; *Abbott v. Sanders,* (1907) 80 Vt. 179. 66 Atl. 1032, 13 L.R.A. (N.S.) 725, 130 A.S.R. 974, and note; *Patton v. Nixon,* (1898) 33 Ore. 159, 52 Pac. 1048; *Lewis v. Wilcox,* (1906) 131 Ia. 268, 108 N.W. 536. This latter theory was adopted by the Minnesota court in *Childs v. Rue,* (1901) 84 Minn. 323, 87 N.W. 918, and *Doescher v. Spratt,* (1895) 61 Minn. 326, 63 N.W. 736, which decisions apparently overrule an earlier Minnesota case, *Peters v. Tunell,* (1890) 43 Minn. 473, which held that there could be no lien because the sum was uncertain. A few courts decree cancellation of the deed upon general equitable grounds, without relying upon any particular theory. *Penfield v. Penfield,* (1874) 41 Conn. 474; *Ried v. Burns,* (1861) 13 Oh. St. 49, 59. This appears to be the tendency of the Minnesota court in later decisions where cancellation of the deed was ordered, *Haataja v. Saarenpaa,* (1912) 118 Minn. 255, 136 N.W. 871; *Ebert v. Gildemeister,* (1908) 106 Minn. 83, 118 N.W. 155; *Bruer v. Bruer,* (1909) 109 Minn. 260, 267, 123 N.W. 813; *Johnson v. Paulson,* (1908) 103 Minn. 158, 114 N.W. 739. In two cases, where performance ceased only upon the grantee's death, several years after the conveyance, the Minnesota court refused cancellation on the ground that it would be inequitable. *McKenzie v. Dunsmoor,* (1911) 114 Minn. 477, 131 N.W. 632; *Walsh v. Walsh,* (1919) 144 Minn. 182, 174 N.W. 835.

As stated in some of the cases, a conveyance in consideration of the

support of aged grantors is sui generis. It is often-times inequitable to the grantee (see the principal case) to cancel the deed upon breach of the grantee's agreement without recompense for long continued performance, either partial or complete; and it may be equally inequitable to the grantor to refuse cancellation and compel him to resort to a personal action for damages. It is submitted, therefore, that in accordance with the general law of contracts, the courts should allow rescission of the deed when the grantee substantially breaches his agreement to support and allow the grantee such compensation for services performed, as may be equitable.

EVIDENCE—CRIMINAL LAW—INTOXICATING LIQUOR—ILLEGAL SALES—PROOF OF OFFENSES OTHER THAN THE ONE IN ISSUE—ADMISSIBILITY WHERE OTHER ACTS ARE PART OF A SYSTEM.—The defendant was convicted of unlawfully selling liquor on a certain date. An appeal was taken on the ground that evidence of subsequent sales on several occasions within four months thereafter, was received. *Held*, that the evidence was properly admitted. *State v. Clark*, (Minn. 1923) 192 N.W. 737.

It is a general rule of evidence applicable to criminal trials that the prosecution cannot introduce evidence of the commission by the accused of any crime entirely distinct from that for which he is held, *People v. Sharp*, (1887) 107 N.Y. 427, 14 N.E. 319, 1 A.S.R. 851; *State v. Fitchette*, (1902) 88 Minn. 145, 92 N.W. 527; 1 Jones, Evidence, sec. 143, for the reason that it not only is irrelevant in that it would not prove the crime charged but also that it would surprise and confuse the defense, delay the trial, and prejudice the jury. *Commonwealth v. Jackson*, (1882) 132 Mass. 16; *Shaffner v. Commonwealth*, (1872) 72 Penn. St. 60, 13 Am. Rep. 649. There are, however, certain exceptions under which such evidence is admissible regardless of the fact that it proves a separate crime, namely, when it tends to prove an essential element of the case, such as, motive, intent, absence of mistake or accident, identify the person on trial, or where it shows such a common scheme or plan for the commission of crimes so related to each other that proof of one tends to establish the others. 1 Bishop, New Crim. Proc. 696; *People v. Molineux*, (1901) 168 N.Y. 264, 61 N.E. 286, 62 L.R.A. 193, and note. It was on the last ground that the court in the instant case based its decision but the application was made the subject of a dissenting opinion. Just what constitutes a plan or system of criminal action is a question of fact on which the decisions are at variance. Furthermore it is so mingled with intent, motive, mistake, or the commission of the offense charged as to render a practical separation difficult. However, in cases similar to the principal case, although it has been held that such evidence is inadmissible, *Wilson v. State*, (1902) 136 Ala. 114, 33 So. 831; *Ware v. State*, (1893) 71 Miss. 204, 13 So. 936, the majority of courts hold it admissible under the exception in discussion. 16 C. J. 605; note 62 L.R.A. 230, 290, 325; *Wood v .State*, (1893) 9 Ind. App. 42, 36 N.E. 158; *Tatum v. Commonwealth*, (1900) 22 Ky. L. Rep. 927, 59 S.W. 32; *People v. Hicks*, (1890) 79 Mich. 457, 44 N.W. 931; *State v. Welch*, (1888) 64 N.H. 525, 15 Atl. 146. In Minnesota, aside from the liquor cases, it

seems well established that wherever the evidence offered discloses other offenses of the same class and character as that in issue, which are connected in time and appear to be part of a system or scheme of similar crimes, it is admissible as confirmatory of the evidence tending to show the commission by the defendant of the crime for which the indictment is brought. *State v. Monroe,* (1919) 142 Minn. 394, 172 N.W. 313 (stealing automobiles); *State v. Whipple,* (1919) 143 Minn. 403, 173 N.W. 801 (sale of narcotics); *State v. Friedman,* (1920) 146 Minn. 373, 178 N.W. 895 (system of swindles.)

HUSBAND AND WIFE—CONTRACTS VOID AS AGAINST PUBLIC POLICY—AGREEMENTS TO SEPARATE IN THE FUTURE VOID.—The plaintiff and her husband entered into an agreement whereby they agreed to "live separate and apart from each other during their natural lives" because of "disputes and unhappy differences between them." The husband promised to pay the wife monthly installments of money which she now seeks to recover from her husband's estate. *Held,* that, since it was a necessary inference from the terms of the contract that the parties were living together at the time the agreement was entered into, the purpose of the contract was to achieve a future separation, and consequently it was against public policy and void. *Dowie v. De Winter et al.,* (1922) 197 N.Y.S. 54.

Under the early English law, agreements for the separation of husband and wife were generally held illegal and void as against public policy. *Wilkes v. Wilkes,* (1757) Dickens 789; *Durant v. Titley,* (1819) 7 Price 577; *Warrender v. Warrender,* (1835) 2 Cl. & F. 488. But see contra *Rodney v. Chambers,* (1802) 2 East 283. But under the modern law, both in England and the United States, with the exception of New Hampshire, which follows the old English rule, *Hill v. Hill,* (1907) 74 N.H. 288, 67 Atl. 406, 12 L.R.A. (N.S.) 848, 124 A.S.R. 966, agreements for the continuance of a past separation are not per se against public policy because they do not tend to produce a breach of the marital relationship and because they are in harmony with the statutory provisions allowing a divorce from bed and board. *Hart v. Hart,* (1880) 18 Ch. Div. 670; *Bailey v. Dillon,* (1904) 186 Mass. 244, 71 N.E. 538, 66 L.R.A. 427; *Walker v. Walker's Exec.,* (1869) 9 Wall. (U.S.) 743, 19 L.Ed. 814. And the same rule and reasoning are generally applied to agreements for an immediate separation. *Besant v. Wood,* (1878) 12 Ch. Div. 605; *Gaines' Adm'x. v. Poor,* (1861) 3 Metc. (Ky) 503, 79 Am. Dec. 559; *Carey v. Mackey,* (1890) 82 Me. 516, 20 Atl. 84, 9 L.R.A. 113, 17 A.S.R. 500; *Singer's Estate,* (1911) 233 Pa. St. 55, 81 Atl. 898, 26 Ann. Cas. 1326; *Edleson v. Edleson,* (1918) 179 Ky. 300, 200 S.W. 625, 2 A.L.R. 689. The principal case is therefore contra to the majority view in applying the rule generally applied to agreements for a future separation to agreements for an immediate separation. The Minnesota court, in the case of *Roll v. Roll,* (1892) 51 Minn. 353, 53 N.W. 716, although the parties had separated prior to the time the agreement was entered into and the agreement was therefore held valid, had indicated, by citing a New York decision, that the New York rule as to immediate separations might be applied in Minnesota. However, no such case has arisen in Min-

nesota, and *Roll v. Roll* was followed in *Vanderburgh v. Vanderburgh,* (1921) 148 Minn. 120, 180 N.W. 999. In this latter case, the agreement was enforced although there were no circumstances which would have supported divorce, and is in accord with similar intimations in *Daniels v. Benedict,* (1899) 97 Fed. 367, 379, and *Emery v. Neighbour,* (1824) 7 N.J.L. 142, 145, 11 Am. Dec. 541. But by the great weight of authority, it is held that there must be some moving cause for the separation in addition to the mere volition of the parties, thus indicating a tendency to adhere to the old English rule. *Stebbins v. Morris,* (1896) 19 Mont. 115, 47 Pac. 642; *Boland v. O'Neil,* (1899) 72 Conn. 217, 220, 44 Atl. 15; *Archbell v. Archbell,* (1912) 158 N.C. 408, 74 S.E. 327, 29 Ann. Cas. 261. This tendency is further shown by the fact that agreements for a future separation are universally held void as against public policy, *Cocksedge v. Cocksedge,* (1844) 14 Sim. 244; *Gould v. Gould,* (1865) 29 How. (N.Y.) 441; *Greenwood v. Greenwood,* (1915) 113 Me. 226, 93 Atl. 360; *Speiser v. Speiser,* (1915) 188 Mo. App. 328, and also by the fact that although the courts will enforce most of the terms of the agreement, they will not compel the parties to live apart. 2 Story, Eq. Jur., 13th ed., 763; *Aspinwall v. Aspinwall,* (1892) 49 N.J.Eq. 302, 24 Atl. 926. It seems clear, however, that there is no public policy requiring that separation agreements be held void where the parties have already separated or where there is to be an immediate separation, because in these cases the marriage relationship already has been disrupted, and the contract is not the moving cause.

INJUNCTION—REPEATED TRESPASSES—EQUITY JURISDICTION—INADEQUACY OF LEGAL REMEDY.—The defendant had twice built a fence on land which the plaintiff claimed and was in possession of, and the plaintiff had twice removed it. The plaintiff now seeks an injunction to prevent further trespassing by the defendant. *Held,* two justices dissenting, that an injunction will not issue to prevent mere repeated trespasses. *Sanders v. Boone,* (Ark. 1922) 242 S.W. 66.

Equity courts were formerly disinclined to enjoin repeated trespasses. *Mogg v. Mogg,* (1786) 2 Dick. 670; *Jerome v. Ross,* (1823) 7 Johns. Ch. (N.Y.) 315, 11 Am. Dec. 484, and note. The growing tendency of the courts has been to extend equity's jurisdiction in this direction. *Hickinson v. Maisey,* [1900] 1 Q.B. 752; *De Pauw v. Oxley* (1904) 122 Wis. 656, 100 N.W. 1028, 13 L.R.A. (N.S.) 173, and note; *Boston & Maine R. Co. v. Hunt,* (1911) 210 Mass. 128, 96 N.E. 140. Generally here as elsewhere the basis of equity jurisdiction is the inadequacy of the legal remedy. *Behrend v. Buchmann,* (1919) 169 Wis. 242, 171 N.W. 958. Thus the multiplicity of suits necessary to enforce the legal right in such cases is often given as a basis for equitable relief. *Bent v. Barnes,* (1913) 72 W.Va. 161, 78 S.E. 374; *Whelpley v. Grosvold,* (1918) 249 Fed. 812. The remedy is also said to be inadequate where the amount recoverable would be disproportionate to the vexation and expense attending numerous and successive suits at law. *Cragg v. Levinson,* (1908) 238 Ill. 69, 87 N.E. 121, 21 L.R.A. (N.S.) 417, and note, 15 Ann. Cas. 1229, and note; *Keil v. Wright,* (1907) 135 Iowa 383, 112 N.W. 633, 13 L.R.A. (N.S.)

184, 14 Ann. Cas. 549, 124 A.S.R. 282. Insolvency of the defendant has been held to make the legal remedy inadequate. *Slater v. Gunn,* (1898) 170 Mass. 509, 49 N.E. 1017, 41 L.R.A. 268; but several courts now seem to hold that insolvency is immaterial, and contrary to the instant case, that any threatened repeated trespass is subject to injunction. *Moore & Co. v. Daugherty, Allen & Co.,* (1916) 146 Ga. 181, 91 S.E. 14; *Ayers v. Barnett,* (1913) 93 Neb. 350, 140 N.W. 634; *Colliton v. Oxborough,* (1902) 86 Minn. 361, 90 N.W. 793. The remedy which prevents a threatened wrong is in its essential nature better than a remedy which permits the wrong to be done, and then attempts to pay for it by damages. 4 Pomeroy, Eq. Jur., 4th ed., 3243. Some courts say the legal remedy must be as practicable and efficient as the equitable remedy, else an injunction will be issued. *Deskins et al. v. Rogers,* (Okla. 1919) 180 Pac. 691; *Stotts et ux. v. Dichdel, et al.,* (1914) 70 Ore. 86, 139 Pac. 932. The court in the principal case did not rely on the fact that the plaintiff's title was disputed, see 4 Pomeroy, Eq. Jur., 4th ed., sec. 1356, 1357, also *Wheelock v. Noonan,* (1888) 108 N.Y. 179, which fact, in some jurisdictions, would preclude equitable relief.

MORTGAGES—EVIDENCE—CONSTRUCTION OF SEPARATE WRITTEN INSTRUMENTS COMPRISING A SINGLE CONTRACT—ACCELERATION CLAUSE IN MORTGAGE AND NOT IN NOTE SECURED—EFFECT ON MATURITY OF NOTE.—The defendants executed a note secured by a mortgage, the latter containing an acceleration clause which provided that the holder might declare the whole amount of the note due if the defendants failed to pay taxes. Before the due date of the note, taxes fell in arrears, and the plaintiff foreclosed on the mortgage, and, as the amount realized did not cover the debt, asked for a deficiency decree for the balance. *Held,* that the plaintiff is not entitled to a deficiency decree. *Winne v. Lahart,* (Minn. 1923) 193 N.W. 587.

By the weight of authority an acceleration clause in a mortgage, on the happening of the contingency stiuplated, matures the note the mortgage secures so that the holder of the mortgage may not only foreclose the mortgage for the full amount of the note, *Phelps v. Mayer,* (1899) 126 Cal. 549, 58 Pac. 1048, but may sue on the notes in an ordinary action to enforce the personal liability. *Brewer v. Penn. Mut. Life Ins. Co.,* (1899) 94 Fed. 347, 36 C.C.A. 289; *Chambers v. Marks,* (1890) 93 Ala. 412, 9 So. 74; *Biedka v. Ashkenas,* (1922) 119 Misc. 647, 197 N.Y.S. 851; see note 46 L.R.A. (N.S.) 475, 480. This rule is but the result of an application of the familiar doctrine that where two instruments are executed at the same time and express but a single transaction, they are in the eye of the law regarded as one and hence construed together. The instant case expresses the minority rule which refuses the right to enforce personal liability by a suit on a note before the due date of the note, the note not containing an acceleration clause, on the theory that the provision in the mortgage relates only to foreclosure proceedings for the sole purpose of realizing on the security. *McClelland v. Bishop,* (1884) 42 Ohio St. 113; *White v. Miller,* (1893) 52 Minn. 367, 54 N.W. 736, 19 L.R.A. 673; *Owings v. McKenzie,* (1896) 133 Mo. 323,

33 S.W. 802, 40 L.R.A. 154; see *Wilson v. Reed,* (1916) 270 Mo. 401, 193 S.W. 819. While the courts supporting the minority view recognize the rule of construction that is the foundation of the majority rule, they assert that it is inapplicable here because the note and mortgage differ entirely in nature and purpose. The notes determine the personal liability and the mortgage governs the security. By limiting the effect of an acceleration clause in a mortgage to the subject matter with which the mortgage deals, both contracts can stand and be fully enforced according to the manifest intention of the parties. The court in the instant case, however, intimates that they might follow the majority rule but for the fact that the court has been definitely committed to the minority rule.

NEGLIGENCE—PERSONAL INJURY—TRESPASSER—LICENSEE—DUTY OWED BY LANDOWNER.—A child fell into an open steam pit located on the defendant's premises which were not fenced and were located in a thickly populated district. The defendant knew that children played there. *Held,* that whether the child was a mere licensee or a trespasser on private land, the duty and liability of the owner to him is the same, and that the defendant is not responsible since the cause of the injury was not a hidden trap, pitfall, concealed deathdealing instrument, or attractive nuisance. *Lewko v. Chas. Krause Milling Co.,* (Wis. 1922) 190 N.W. 924.

Frequently, as in this decision, the misleading statement is made that the owner of the land owes the same duty toward a trespasser as he does toward a licensee. See *Kleeghcrz v. Chicago, etc., R. Co.,* (1903) 90 Minn. 17, 95 N.W. 586. This is true in ordinary cases. The trespasser and the licensee take the premises subject to the attendant perils and risks, and are owed no duty by the owner except to refrain from wilful injury. *Norris v. Contracting Co.,* (1910) 206 Mass. 58, 91 N.E. 886, 31 L.R.A. (N.S.) 623, 19 Ann. Cas. 424; *Herzog v. Hemphill,* (1902) 7 Cal. App. 116, 93 Pac. 899; *Hannan v. Ehrlich,* (1921) 102 Ohio St. 176, 131 N.E. 504. But where there is a hidden danger or pitfall on the premises, known to the owner, he must warn a licensee whom he knows to be present, but he is under no obligation to act in favor of a trespasser. He need not search for pitfalls. Liability is predicated upon something in the nature of fraud. *Gautret v. Egerton,* (1867) L.R. 2 C.P. 371. But the Wisconsin court, in which the instant case arose, has further burdened the landowner by imposing a duty to use reasonable care to detect hidden pitfalls, so the owner, even though actually ignorant of the danger, is charged with the duty of warning a licensee. *Brinilson v. Chicago, etc., R. Co.,* (1911) 144 Wis. 614, 129 N.W. 664, 32 L.R.A. (N.S.) 354. Under a third class of cases, namely, where the attractive nuisance or "turntable" doctrine is applied, an active duty is imposed on a landowner to keep the premises free from dangers attractive to children, whether they are licensees or trespassers. *Keffeu v. Milwaukee, etc., R. Co.,* (1875) 21 Minn. 207, 18 Am. Rep. 393; *Flippen-Prather Realty Co. v. Mather,* (Tex. 1918) 207 S.W. 121. However, since the instant case holds that the steam pit was not an attractive nuisance or a pitfall, it is supported in its actual decision by the weight of authority.

Reardon v. Thompson, (1889) 149 Mass. 267, 21 N.E. 369; *Habina v. Twin City Gen. Elec. Co.,* (1907) 150 Mich. 41, 113 N.W. 586, 13 L.R.A. (N.S.) 1126 and note; *Fitzpatrick v. Penfield,* (1920) 267 Pa. 564, 109 Atl. 653. See note 2 MINNESOTA LAW REVIEW 530, 534.

PRINCIPAL AND AGENT—ESTOPPEL OF UNDISCLOSED PRINCIPAL BY AGENT'S REPRESENTATION.—The sale of a mortgage by the mortgagee to the defendant was negotiated by a third person, who falsely represented to the defendant that a certain amount was unpaid thereon. In a suit by the mortgagor to cancel the mortgage, on the ground that it was given as collateral to another mortgage which was paid, it was *held,* that, upon it being established that the one making the false representations was in fact the agent of the mortgagor, then, even though that fact was not known to the defendant, the mortgagor is estopped to deny the truth of the representations. *Park v. Hudson,* (Minn. 1923) 192 N.W. 112.

For a discussion of the principles involved, see NOTES, p. 578.

REAL ESTATE—EMINENT DOMAIN—RAILROADS—INCIDENTAL INJURIES TO PROPERTY—PERMANENT DAMAGES.—The plaintiff was the owner of a farm, part of which had been condemned by the defendant's grantor for a railroad bed. An embankment was constructed upon this property causing part of the plaintiff's land, which had not been condemned, to be overflowed. To alter the embankment would cost much more than the entire value of the land so flooded. In an action to recover temporary damages for the injury, it is *held,* that permanent damages should be assessed against the railroad. *Louisville & N. R. Co. v. Bennett,* (Ky. 1922) 246 S.W. 121.

Mere incidental injuries, due to the operation of trains, which unavoidably result to the owners of property adjoining a railroad, must be borne by such owners without compensation, because of the paramount interest of the public. *Richards v. Washington Terminal Co.,* (1914) 233 U.S. 546, 34 S.C.R. 654, 58 L.Ed. 1088. But a special and substantial injury to a landowner, which at common law would be a private nuisance, must be compensated for by the railroad company, *Garvey v. Long Island R. Co.,* (1889) 159 N.Y. 323, 54 N.E. 57, 70 A.S.R. 550; *Stuhl v. Great Northern R. Co.,* (1917) 136 Minn. 158, 161 N.W. 501, L.R.A. 1917D 317, because of the common constitutional provision against the taking or damaging of property without just compensation. Since that provision may be taken advantage of in actions other than condemnation proceedings, *Board of County Comm'rs v. Adler,* (1920) 69 Colo. 290, 194 Pac. 621, 20 A.L.R. 512, and note 516; *Gram Construction Co. v. Minneapolis, etc., R. Co.,* (1916) 36 N.D. 164, 161 N.W. 732; see also *Minneapolis, etc., Co. v. Searle,* (1913) 208 Fed. 122, 127 C.C.A. 89, to recover for consequential injuries to property no part of which has been actually condemned, note 20 A.L.R. 516; *Chicago v. Taylor,* (1888) 125 U.S. 161, 8 S.C.R. 820, 31 L.Ed. 638; *Brakken v. Minneapolis, etc., R. Co.,* (1881) 29 Minn. 41, 11 N.W. 124, the land owner may sue at law to recover damages even though the legislature directly authorized the act which caused the injury, except

where the legislature also provides a remedy, in which case the plaintiff is limited to it, *Saltonstall v. N. Y., etc., R. Co.*, (1921) 237 Mass. 391, 399, 130 N.E. 185, unless the injury was caused by negligence. *Moraski v. Gillispie Co.*, (1921) 239 Mass. 44, 131 N.E. 441. However, because of the public nature of the carriers' business, the plaintiff's rights are not the same as in ordinary actions for injury to property. Whether or not the structure or embankment which caused the injury is called a nuisance, note 1 L.R.A. (N.S.) 49, he ordinarily cannot abate it, but he must be content with damages. Even then, if the structure was necessarily injurious, was intended to be and is permanent in nature, and was authorized by the legislature, permanent damages must be recovered in a single suit. *Troy v. Cheshire R. Co.*, (1851) 23 N.H. 83, 55 Am. Dec. 177; *Southern R. Co. v. Fitzpatrick*, (1921) 129 Va. 246, 105 S.E. 663. If the jury finds that the injury was caused by negligent construction and maintenance, it has been held that recurring recoveries may be had as the injuries occur. *Madisonville, etc., R. Co. v. Graham*, (1912) 147 Ky. 604, 144 S.W. 737. But generally, even though the injury was caused by negligence, if the removal of the cause of the injury would mean a serious interruption of public service, *Ridley v. Seaboard & Roanoke R. Co.*, (1896) 118 N.C. 996, 1009, 24 S.E. 730, 32 L.R.A. 708, or if it could not be removed at a reasonable expense as compared with the amount of the injury, as in the instant case, see *Madisonville, etc., R. Co. v. Graham*, (1912) 147 Ky. 604, 144 S.W. 737; *Fowle v. New Haven, etc., R. Co.*, (1871) 107 Mass. 352, 358, aff'd 112 Mass. 334, 17 Am. Rep. 106, the injury is treated as permanent, and past and future damages must be recovered in a single suit. In effect, the result is practically to allow condemnation without proper proceedings.

SCHOOLS AND SCHOOL DISTRICTS—NEGLIGENCE—LIABILITY FOR INJURIES TO PUPILS.—The plaintiff, a pupil in the manual training department of a high school, was injured while operating an unguarded buzz saw as a part of his school work. *Held*, that the board of education is liable for nonfeasance in the discharge of its corporate duty to provide and maintain proper buildings and equipment. *Herman v. Board of Education*, (1922) 234 N.Y. 196, 137 N.E. 24.

The instant case is contra to the weight of American authority, but is in accord with the former decisions of the New York court. 4 Dillon, Municipal Corporations, 5th ed., sec. 1658; *Wahrman v. Board of Education*, (1907) 187 N.Y. 331, 80 N.E. 192, 10 Ann. Cas. 405, 116 A.S.R. 609; *Kelly v. Board of Education*, (1920) 180 N.Y.S. 796, 798. The weight of American authority is to the effect that a school district, or a municipality acting as a school district, is not liable for injury to pupils, resulting from the board's nonfeasance, on the ground that it acts as an agent of the state in a governmental capacity. *Hill v. City of Boston*, (1877) 122 Mass. 344, 23 Am. Rep. 332; *Bank v. Brainerd School District*, (1892) 49 Minn. 106, 51 N.W. 814; *Sullivan v. School District*, (Wis. 1923) 191 N.W. 1020. Another ground advanced for non-liability is the fact that a school district has no right to raise funds for other than strictly school purposes, and hence can not use those funds to pay judgments. *Ernst v.*

City of West Covington, (1903) 116 Ky. 850, 76, S.W. 1089, 63 L.R.A. 652, 3 Ann. Cas. 882 and note, 105 A.S.R. 241; *Finch v. Board of Education,* (1876) 30 Ohio St. 37, 27 Am. Rep. 414. In England the education authorities are held liable for nonfeasance. 104 Law Times 193, 194; *Ching v. Surrey County Council,* [1910] 1 K.B. 736; *Morris v. Carnarvon County Council,* [1910] 1 K.B. 840. The Washington court recognizes the common law rule of non-liability, but holds the school districts liable under statute. *Redfield v. School District,* (1907) 48 Wash. 85, 92 Pac. 770; *Howard v. Tacoma School District,* (1915) 88 Wash. 167, 152 Pac. 1004, Ann. Cas. 1917D 792 and note. This statutory rule has been greatly limited, however, by subsequent enactments. Laws of Washington, 1917, p. 332; Minn. G. S., 1913, sec. 2996, provides that: "An action may be brought against any school district . . . for an injury to the rights of the plaintiff arising from some act or omission of such board. . . ." The Minnesota court held in *Bank v. Brainerd School District,* (1892) 49 Minn. 106, 51 N.W. 814, that this provision, then embodied in Minn. G. S., 1878, Ch. 36, sec. 117, did not abrogate the common law rule of exemption from liability when acting in a governmental capacity, thus reaching a conclusion directly opposite to that of the Washington court in the *Redfield case* under a similar statute, and keeping Minnesota in line with the weight of authority.

TAXATION—INHERITANCE TAX—CONVEYANCE TO TAKE EFFECT IN POSSESSION ON DEATH—TIME OF TRANSFER ON RESERVATION OF LIFE ESTATE AND POWER TO REVOKE—IS THE TRANSFER OF THE RIGHT OF SUCCESSION OR THE TRANSFER OF POSSESSION TAXED?—The donor, a non-resident, by deed transferred to trustees certain securities, including shares in a New York corporation, to apply the income to the use of himself for life, and on his death, to his sons for life with power of appointment and in default of appointment, remainders over. A power of revocation was reserved to the donor. Subsequent to the execution of the deed, but prior to the donor's death, the inheritance tax law of New York was amended to apply to transfers by non-residents of shares in New York corporations. *Held,* that the transfer was taxable under the law in force at the time of the donor's death. *In re Schmidlapp's Estate,* (1922) 196 N.Y.S. 108.

It is generally held that the reservation of a life estate in the donor shows an intention that the gift is to take effect "in possession or enjoyment" at the donor's death within the meaning of the inheritance tax law. *In re Brandreth's Estate,* (1902) 169 N.Y. 437, 62 N.E. 563, 58 L.R.A. 148; *In re Garcia's Estate,* (1918) 183 App. Div. 712, 170 N.Y.S. 980; *In re Bullen,* (1910) 143 Wis. 512, 128 N.W. 109, 139 A.S.R. 1114, aff'd, 240 U.S. 625, 36 S.C.R. 473, 60 L.Ed. 830. And where there is no power of revocation reserved to the donor, the life tenant, the transfer is complete at the time of the execution of the deed and the tax on the future interest accrues at that time. *In re Mesecrole's Estate,* (1916) 98 Misc. 105, 162 N.Y.S. 414; *In re Felton's Estate,* (Cal. 1918) 169 Pac. 392; *Blodgett v. Union & New Haven Trust Co.,* (1922) 97 Conn. 405, 116 Atl. 908; see Gleason and Otis, Inheritance Tax, 3rd ed., 54 et seq. This indicates, as the cases cited before state, that the tax is on the transfer of the right

of succession and not on the act of coming into possession. See also *Matter of Swift,* (1893) 137 N.Y. 77, 88, 32 N.E. 1096; *In re Hanna's Estate,* (1922) 119 Misc. 159, 195 N.Y.S. 749. The assessment of the tax in the instant case can only be sustained on the theory that the tax is on the act of coming into possession which took place after the law was in effect, or on the theory that the right of succession did not pass on the execution of the deed but only at the time of death of the donor. The court supports its decision on the latter theory. It is held that the power of revocation coupled with the life interest in the donor renders the whole transaction testamentary in nature and, though the court does not so state, their conclusion must be that it is therefore within the provision of the statute taxing transfers by will. The court, however, first took the position that the statute applied because this was a transfer intended to take effect "in possession or enjoyment" at the donor's death. The exact context of this phrase signifies that there is a transfer of everything but possession before death. This section of the statute does not mention such a thing as a transfer by will to take effect in possession on death. Aside from this inconsistency does the mere reservation of a power of revocation in the donor life tenant warrant the fiction that this is in effect a will? The case did not call for the introduction of a fiction opposed to all rules of conveyancing in an effort to prevent an evasion of a tax statute. The transfer was made when the subject matter was not subject to a tax and so the fiction is better explained as an attempt by the court to give the amended statute retroactive effect. In identical circumstances it has been held that such a conveyance gives a named remainderman a vested estate, subject to be divested should the power of revocation be exercised, which future estate is not subject to taxation under an inheritance tax act passed after the date of the deed. *Commonwealth v. McCauley's Executor,* (1915) 166 Ky. 450, 179 S.W. 411.

As mentioned before the New York courts as well as other authorities have stated many times that it is the transfer of the right of succession that is taxed. But for this fact the decision in the instant case might be supported on the theory that "it is the vesting of the property in possession and enjoyment on the death of the grantor and after the statute took effect, that renders it liable to the tax." *Crocker v. Shaw,* (1899) 174 Mass. 266, 54 N.E. 549. The question of *what is taxed* becomes of vital importance in the situation presented in the instant case. Further, the decisions which merely involve the question of whether a power of revocation *indicates an intention* that the conveyance was to take effect in possession and enjoyment on the death of the donor within the meaning of the act, should be eliminated in considering when the right of succession was actually transferred, a fact determined by ordinary rules of property conveyancing and not by a guess as to the possible secret intentions of one who holds a power of revocation.

TORTS—NEGLIGENCE—TRESPASS—TURNTABLE OR ATTRACTIVE NUISANCE DOCTRINE.—The defendant corporation maintained an electric transmission line upon the public highway. The plaintiff, a twelve year old boy, climbed one of the defendant's poles for the purpose of recovering a kite, and was

injured by a heavy electrical charge from the defendant's wires. The pole was equipped with metal pegs to form a permanent ladder. *Held,* that the "attractive nuisance" or "turntable doctrine" is particularly applicable in such a case because the element of trespass, present when the plaintiff is injured while on private premises, is absent, and the plaintiff should recover. *Znidersich v. Minnesota Utilities Co.,* (Minn. 1923) 193 N.W. 449.

The "turntable doctrine" is invoked to impose on a landowner *a duty toward trespassers* in certain cases as an exception to the general rule that a property owner owes no duty to a trespasser except to avoid wanton and wilful injury to him, and the doctrine has always been confined within narrow limits. *Dahl v. Valley Dredging Co.,* (1914) 125 Minn. 90, 145 N.W. 796. If the court in the principal case had considered the plaintiff's act in climbing the pole as a trespass, as in the case of *Iamurri v. Saginaw City Gas Co.,* (1907) 148 Mich. 27, 111 N.W. 884, its reason for invoking the "turntable doctrine" would be apparent. But the possible element of trespass was considered unimportant, and consequently there was no opportunity to apply the turntable doctrine. The result reached in the case is undoubtedly correct, however, for the court could have found for the plaintiff on the general grounds of negligence as in *Rothenberger v. Powers, etc., Co.,* (1921) 148 Minn. 209, 181 N.W. 641, and in *Robertson v. Rockland Light & Power Co.,* (1919) 187 App. Div. 720, 176 N.Y.S. 281, where it was held that the defendant owed a common law duty to the public, in constructing and maintaining an electric line, to use care commensurate with the danger, and that the question of negligence should be submitted to the jury on the evidence that the defendant had placed steps, accessible from the ground, on the poles contrary to the general custom. In this latter case, the court also pointed out the fact that the poles were in the public highway, easily accessible, and attractive to children, is to be considered in determining whether the plaintiff is guilty of contributory negligence. And in *Kelly v. Southern, etc., Ry., Co.,* (1913) 152 Wis. 328, 140 N.W. 60, 44 L.R.A. (N.S.) 487, the turntable doctrine was not invoked, and the court held that the fact that the situation was attractive to children imposed on the defendant a higher degree of care. The mere fact that there is a situation attractive to children, then, does not form the basis for applying the turntable doctrine. *Edwards v. City of Kansas City,* (1919) 104 Kan. 684, 180 Pac. 271. For a discussion of the turntable doctrine see 1 MINNESOTA LAW REVIEW 461.

TORTS—WILFUL INJURY—MALICIOUS MOTIVE—COMPETITION AS LEGAL JUSTIFICATION OR EXCUSE.—The defendants, wealthy manufacturers, started and managed a newspaper for the sole purpose of driving the plaintiff's newspaper out of business. *Held,* one justice dissenting, that the acts of the defendants were not rendered unlawful by the malicious intent to injure the plaintiff. *Beardsley v. Kilmer, et al.,* (1922) 193 N.Y.S. 285.

The opinion in the principal case is an example of the confusion still prevalent in this field of tort law. The court bases its decision on the ground that a malicious intent or motive will not make unlawful an act which in itself is lawful, and this undoubtedly states the older law. *Passaic Print Works v. Ely, etc., Co.,* (1900) 105 Fed. 163, 44 C.C.A. 426,

62 L.R.A. 673. But this rule does not take into consideration one of the oldest doctrines of the law, that a "wilful injury to another is actionable in the absence of legal justification or excuse." *Aikens v. Wisconsin*, (1904) 195 U.S. 194, 25 S.C.R. 3, 49 L.Ed. 154; *Plant v. Woods*, (1900) 176 Mass. 492, 57 N.E. 1011, 51 L.R.A. 339, 79 A.S.R. 330; Pollock, Torts, 10th ed., 23, 24; 26 R.C.L. 761. In the latter part of its decision, the court recognizes this rule, but declares that competition is self-justification. The court cites as authority for this, *Mogul Steamship Co. v. McGregor Gow & Co.*, (1889) L.R. 23 Q.B. 598. But it should be noted that this case was decided for the defendants because their motives were solely to benefit themselves, and the court said by way of dictum, that with facts similar to the principal case the plaintiff would have a cause of action. Accepting the rule stated in the latter part of the decision in the principal case as the correct one to be applied in such a case, the question arises as to whether competition is self-justification regardless of the motive of the defendant. In *Holbrook v. Morrison*, (1913) 214 Mass. 209, 100 N.E. 1111, 44 L.R.A. (N.S.) 228, 32 Ann. Cas. 824, the court refused to allow the plaintiff to recover for the reason that the defendant's motive was, at least partially, to benefit herself, and there was, therefore, sufficient justification for her acts. But the dictum was that the plaintiff would have been allowed to recover had the defendant's motive been solely to injure the plaintiff. The Minnesota case of *Tuttle v. Buck*, (1909) 107 Minn. 145, 119 N.W. 946, 22 L.R.A. (N.S.) 599, 16 Ann. Cas. 807, 131 A.S.R. 446, is the leading authority for the proposition that if the defendant's motive is solely to injure the plaintiff, there is no justification for the defendant's act. This decision is followed in *Dunshee v. Standard Oil Co.*, (1911) 152 Ia. 618, 132 N.W. 371, 36 L.R.A. (N.S.) 263, and in *Boggs v. Duncan-Schell, etc., Co.*, (1913) 163 Ia. 106, 143 N.W. 482, L.R.A. 1915B 1196. Other courts have not been called upon to decide this question, but the Minnesota view seems correct on theory. See article by Ames in 18 H.L.R. 411. If the question of justification had been left to a jury in the principal case, as was suggested by the dissenting justice, it might easily have been found that the acts of the defendants were justified. And it is submitted that, although the Minnesota rule should be applied in cases like the instant case, any motive or intent of the defendant to further his own interests should be considered as legal justification.

BOOK REVIEWS

CASES ON TAXATION. By Joseph Henry Beale, Harvard University Press, Cambridge, Mass., 1921; pp. 527.

The last decade has witnessed significant transformations in the schemes of taxation of both the state and federal governments. The increased need for revenues, resulting from an expansion of governmental activities and the demands of a general war, has made the present tax burden a very real one. People are unavoidably concerned with things that touch their pocket nerve. Business men and lawyers today are interested in tax law. If a separate course in taxation in the law school curriculum is ever justified, the present is a time when it can take its place there without apology to courses that have acquired a sort of vested

interest therein. All that was required, if it was to be taught by what has now become the traditional method of law teaching, was a suitable case book. Professor Beale has undertaken to fill that need in his recent Cases on Taxation.

It is impossible to appraise properly any case book without considering the problems in the field the book aims to cover, selecting those that are important, weighing their relative significances, and proportioning the material devoted to each on the basis of such an evaluation. The review of a case book can not help being a critique of the author's analysis of the subject. Professor Beale has devoted somewhat more than one fourth of his book to the federal income tax. Considering its present relative importance, this is not excessive. The cases on the whole have been well selected, and deal with some of its most important aspects. No two persons would, of course, make exactly the same selection. The reviewer would certainly have selected some involving questions of invested capital, such as the *La Belle Iron Works case,* for, despite the fact that the excess profits tax has been repealed, that type of problem is decidedly important. It is by no means unlikely that an excess profits tax may again grace the statute book before there is a revision of this case book.

It is when the remainder of the case book is considered that grounds for serious criticism arise. There is an undue emphasis, amounting almost to a positive bias, on cases involving the jurisdiction to tax. No one would deny the importance of that problem, and the reviewer does not share the feeling of some that this matter is already adequately covered in the course in conflict of laws. No doubt it is in some cases, but even if it were in every instance, has the current distribution of material among courses already attained that immutability which prevents a redistribution to conform to newer needs? Questions of jurisdiction do not, however, cover the entire field. Its overemphasis has been at the expense of other subjects, some of which are touched on, others of which are left lying in the limbo of the forgotten. Corporate franchise and license taxes are neglected, except as the jurisdictional point is involved. It would not have detracted from the usefulness of the book to have touched the remedies against illegal federal taxation, on which there are some very interesting cases no more recent than some of those appearing in the book.

The shortcomings of the book are patent; its merits are nevertheless not to be overlooked. The material is organized around those problems, which Professor Beale has treated, with the consummate skill of a past-master in the art of case book writing. The more the pity that he has not treated the subject from a more inclusive point of view.

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DEMOCRACY'S INTERNATIONAL LAW. By Jackson H. Ralston, Washington, D. C. John Byrne & Co. 1922. Pp. 165.

Mr. Ralston, as is sometimes the way with lawyers, has little time for the professors, at whose door he places the blame for the "bastard" (p. 43) which today masquerades under the name of international law. The professors did not invent the law but they took it over half-baked

from the diplomatists and have perpetuated the evil thing created to feed the pride of sovereign states. His readers must accept this statement without proof as Mr. Ralston gives but one professional definition, that of Oppenheim. He mentions Grotius but, aside from failing to notice the "father's" claims to being something of a lawyer, he gives no consideration to the treatment of the law of nature found in De Jure Belli ac Pacis.

Which introduces the subject of Mr. Ralston's interesting little book. He holds that there is a true or real law as distinguished from rules of convenience and of procedure. This true law is natural law. Natural law is that universal respect for the right which the mediaeval theorists placed at the foundation of their societies. Practices that do not accord with this law are not law "whatever the professors may say." (p. 80) Natural law comes into being at the very moment society is born. The failure to observe it is responsible for the present state of international relations and only by subjecting every so-called rule to the gauge of natural right can international law be reformed sufficiently to act as the basis of a reformed society of nations.

Mark down one for the professors,—they have, at least, taught their students that, to quote a certain distinguished chief justice of the supreme court of Wisconsin, "you may as well talk of blue rights or green rights as of natural rights." International law, moreover, has been congratulating itself on the acquisition of positive sanctions; if now it is to be obliged to fall back upon the "law of nature," granted that common principles of justice could be discovered, lacking any more substantial means of enforcement notions of right will continue to give way to expediency.

Again, the charge that the professors have failed to apply themselves to the reform of international law is unwarranted. Their writings are compact with argument and analogy aimed to reveal the wide discrepancies between accepted moral standards and the practices which international law either legalizes or passes by as still outside its purview. Ambiguity is a constant danger, due to the tendency to emphasize the ideal which the law ought to attain. This is especially true of French publications.

For a publicist of the standing of Mr. Ralston to combine so much of Rousseau, Angell and Wells with so little of keen analysis of the causes and remedy for the floundering of the professors is disappointing. There is value, however, in his advice that greater imagination applied to the comparative jurisprudence of individual and international relations will be well repaid. Primarily the usefulness of the book is in the contribution of its writer's well-recognized authority to the general sentiment for internationalism.

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SUBJECT INDEX